

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

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Pursuant to the authorities set forth in Paragraph X.D of this Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska ("Cooperative Agreement"), the signatories agree to participate in and implement certain activities 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.<sup>1</sup>

**I. PURPOSES**

The purpose of this Cooperative Agreement 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 during the term of this Cooperative Agreement:

- A. implementation of research, analysis and other measures that will benefit the target species and their associated habitats, as set forth in Attachment I, "Milestones for the Cooperative Agreement";
  - B. implementation of efforts to acquire, restore, and manage land or interests in land so as to provide and improve associated habitats for the target species, as set forth in Attachment I, "Milestones for the Cooperative Agreement";
  - C. development and implementation of certain water management, conservation and supply measures, as set forth in Attachment I, "Milestones for the Cooperative Agreement," and in Attachment II, "Water Conservation/Supply Component";
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D. development of a basin-wide program ("Program") to be implemented following evaluation of the Proposed Alternative, as defined in Paragraph III and as set forth in Attachment III, and a range of reasonable alternatives in compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4331 et seq., and the ESA, the intent of which is 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"); (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,

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

would be found by FWS to be likely to jeopardize the continued existence of the target species or adversely modify designated critical habitat; (3) help prevent the need to list more basin associated species pursuant to the ESA; and (4) 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 to the extent described in Attachment III, Appendix A; and

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

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

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

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

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

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

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

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

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

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

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

### **IV. RESEARCH AND RELATED ACTIVITIES**

Research and analysis undertaken pursuant to this Cooperative Agreement will be designed to resolve issues or fill knowledge gaps concerning actions required to induce measurable improvements to the recovery of the target species and their associated habitats. The signatories agree to undertake during the term of this Cooperative Agreement specific research, analysis, peer review and related activities as set forth in Attachment I, "Milestones for the Cooperative Agreement."

**V. HABITAT ACTIVITIES**

The signatories agree to undertake activities during the term of the Cooperative Agreement to acquire, restore, and manage land and interests in land to provide habitat as set forth in Attachment I, "Milestones for the Cooperative Agreement." Land and interests in land will be acquired from willing landowners only. The intent of the signatories is to focus activities to create the greatest biological benefit to the target species.

**VI. WATER CONSERVATION AND SUPPLY ACTIVITIES**

The signatories agree during the term of the Cooperative Agreement to undertake the water conservation and supply activities as set forth in Attachment I, "Milestones for the Cooperative Agreement," and in Attachment II, "Water Conservation/Water Supply Component."

**VII. NEPA COMPLIANCE**

A. The Department of the Interior agrees immediately to initiate steps as required by NEPA to undertake evaluation, with assistance from the other signatories, of the Proposed Alternative and of a range of reasonable alternatives which might serve the purposes of the basin-wide Program stated above in Paragraph I.D. The signatories agree that the Proposed Alternative described in Attachment III to this Cooperative Agreement will form the "proposed federal action" to be evaluated in the NEPA process. A range of reasonable alternatives will be rigorously explored and evaluated. The draft environmental impact statement should identify a preferred alternative.

B. Any activities to be implemented under the Cooperative Agreement requiring NEPA evaluation will receive such review separately.

**VIII. ESA COMPLIANCE**

A. Consistent with Paragraph X.E, implementation of the following measures is to serve as the reasonable and prudent alternative for impacts to the target species and their habitats within the Platte River Basin downstream from the confluence of the North and

South Platte Rivers, for water related activities in the Platte River Basin during the term of this Cooperative Agreement.

1. For any water related activity for which consultation on a federal action pursuant to section 7(a)(2) of the ESA has been completed prior to the effective date of this Cooperative Agreement, and for which a federal action agency has required a non-federal party to implement reasonable and prudent alternatives by engaging in certain measures designed to produce defined benefits to the target species and/or their associated habitats pending development of and participation in a basin-wide recovery implementation program, FWS agrees to seek to extend such measures, as such measures currently exist, for the term of this Cooperative Agreement. To the extent they contribute to the land acquisition and restoration purposes of a Program, payments made or measures undertaken by or on behalf of such signatories shall be credited at the inception of a Program. FWS agrees to request the federal action agency to make provision for the changed circumstances that will exist if a Program is implemented and to include the provisions of Paragraph II.B in the event a Program is not implemented or terminates and provisions of Paragraph VIII.C in the event this Cooperative Agreement terminates prematurely.

2. For water related activities in existence as of the effective date of this Cooperative Agreement, for which consultations on federal actions pursuant to section 7(a)(2) of the ESA will be completed during the term of this Cooperative Agreement, FWS agrees that it will recommend that the federal action agency engage in or require a non-federal party to engage in certain measures or make certain payments designed to produce defined benefits to the target species and/or their associated habitats during the term of this Cooperative Agreement, based on the same formula for the applicant's share of the annual streamflow shortfall and annual cost of riverine habitat required for those parties identified in Paragraph VIII.A.1. To the extent they contribute to the land acquisition and restoration purposes of a Program, payments made or measures undertaken by or on behalf of such non-federal parties shall be credited to the state in which the water related activity is occurring at the inception of a Program. FWS agrees to request the federal action agency to make provision for the changed circumstances that will exist if a Program is implemented and to include the provisions of Paragraph II.B in the event a Program is not implemented or terminates and provisions of Paragraph VIII.C in the event this Cooperative Agreement terminates prematurely.

3. For any new water related activity for which consultation on a federal action pursuant to section 7(a)(2) of the ESA will be completed during the term of this Cooperative Agreement, FWS agrees that it will recommend that the federal action agency engage in or require a non-federal party to engage in certain measures or make certain payments designed to produce defined benefits to the

target species and/or their associated habitats during the term of this Cooperative Agreement. FWS agrees to request the federal action agency to make provision for the changed circumstances that will exist if a Program is implemented and to include the provisions of Paragraph II.B in the event a Program is not implemented or terminates and provisions of Paragraph VIII.C in the event this Cooperative Agreement terminates prematurely.

a. For new water related activities with depletions greater than 25 acre feet per year, FWS agrees to recommend replacing the consumptive use below the diversion point within the state in which the depletion occurs. Timing of replacement water will be outside of the irrigation season and at a time of shortage for the species. Because the consumptive use will be replaced during the term of this Cooperative Agreement, there will be no land component in reasonable and prudent alternatives for new depletions greater than 25 acre feet.

b. For new water related activities with depletions of 25 acre feet or less annually, FWS agrees to recommend reasonable and prudent alternatives pursuant to the June 13, 1996 biological opinion on minor water depletions. To the extent they contribute to the land acquisition and restoration purposes of a Program, payments made or measures undertaken by or on behalf of such signatories shall be credited to the state in which the water related activity is occurring at the inception of a Program.

4. Notwithstanding Paragraph VIII.A.2, the ESA responsibilities for the Federal Energy Regulatory Commission ("FERC") Projects Nos. 1417 and 1835 will be those adopted by FERC in new licenses issued for such projects. The signatories agree to recommend to FERC that license conditions should be consistent with this Cooperative Agreement and a Program. Payments made or measures undertaken by such projects shall be credited to Nebraska at the inception of a Program.

5. During the term of this Cooperative Agreement, FWS agrees that for all water related activities described in Paragraphs VIII.A.1, 2, 3 and 4 the reasonable and prudent alternatives shall define the actions to be undertaken by the activity's proponent. FWS agrees to request the National Fish and Wildlife Foundation, which will administer funds paid pursuant to Paragraphs VIII.1, 2 and 3, to expend the funds for water mitigation for water related activities in the state in which such activity occurs. Reasonable and prudent alternatives also will include a recommendation to the federal action agency for the non-federal signatory to cooperate with and participate in activities undertaken under the Cooperative Agreement and any Program subsequently implemented. During the term of this Cooperative Agreement, FWS agrees to encourage agencies to rely on



measures taken pursuant to this Cooperative Agreement without waiting for completion of the Program's NEPA and ESA evaluation when considering agency actions affecting the target species.

6. Nothing in this Cooperative Agreement shall be construed to require any person or entity undertaking or proposing to undertake any water related activity to rely on the provisions of this Cooperative Agreement or to rely on any Program subsequently implemented. Reliance on this Cooperative Agreement or any subsequent Program shall be voluntary. In the event such person or entity chooses not to so rely, FWS will not consider this Cooperative Agreement or any Program subsequently implemented as providing a reasonable and prudent alternative for such water related activity. In the event such person or entity chooses to revoke its reliance on this Cooperative Agreement, FWS will reinitiate any ESA section 7(a)(2) consultation which relied upon one of the reasonable and prudent alternatives described in Paragraph VIII.A and issue a new biological opinion.

B. In coordination with NEPA compliance as provided for by this Cooperative Agreement, FWS will evaluate whether the activities under the Proposed Alternative and, if different, under the preferred alternative, can serve as a reasonable and prudent alternative under section 7(b)(3) of the ESA for water related activities in the Platte River Basin. In the event FWS determines that the Proposed Alternative cannot serve as the reasonable and prudent alternative and the signatories cannot reach an agreement on modifying the Proposed Alternative so it can so serve, the signatories are not bound to enter into an agreement to implement a Program.

C. In the event that activities under the Cooperative Agreement are not adequately completed, FWS may reinitiate all ESA section 7(a)(2) consultations which relied upon the reasonable and prudent alternatives described in Paragraph VIII.A. Before taking such action or reinitiating consultations as described in Paragraph II, FWS will notify the Governance Committee and request its assistance in resolving the situation. If the Governance Committee is unable to resolve the situation, the Committee shall notify the Secretary of the Interior and the Governors and request their assistance. If such attempts at resolution are unsuccessful, FWS believes such a situation warrants reinitiation and will reinitiate all such ESA section 7(a)(2) consultations and issue new biological opinions.

D. 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 its reliance on this Cooperative Agreement, or by virtue of its support for this Cooperative Agreement in other judicial or administrative proceedings. In developing any new reasonable and prudent alternative, FWS agrees to give credit for any contributions by the owner or operator of the water related activity made pursuant to this Cooperative Agreement.

E. Any person or entity undertaking a water related activity described in Paragraph VIII.A.1, 2, 3 or 4 must agree to inclusion of reopening authority by the federal action agency in its funding or authorization documents and must agree to request amendments by the federal action agency as needed to conform its federal authorization to any agreed upon Program. Notwithstanding Paragraph II.C.2, 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.

## **IX. GOVERNANCE STRUCTURE**

Following the execution of this Cooperative Agreement, a Governance Committee is to be established to review, direct, and provide oversight for the activities undertaken under this Cooperative Agreement except as provided by Paragraphs VII and VIII of this Cooperative Agreement.

- A. Membership.** The Governance Committee will consist of the following members:
1. one member per signatory state, to be selected by the Governor of that state;
  2. two federal members, to be selected by the Secretary of the Interior, one representing FWS and one representing the Bureau of Reclamation (“BOR”);
  3. two environmental members representing the environmental entities in the three states, to be selected by those entities;
  4. one member representing water users on the North Platte River in Wyoming and also water users in Nebraska above Lake McConaughy who have storage contracts for water in the federal reservoirs in Wyoming, to be selected by those users;
  5. one member representing water users on the South Platte River above the Western Canal diversion, to be selected by those users; and

6. one member representing water users downstream of Lake McConaughy or the Western Canal and Nebraska users upstream of Lake McConaughy who do not have federal storage contracts, to be selected by those users.

Within 15 days of execution of this Cooperative Agreement, DOI will provide notice to the appropriate constituencies or entities and request that they select their members and notify FWS of the selection within 30 days. Each entity or constituency represented may select its own methods of choosing its member(s). Each member of the Governance Committee will also have an alternate selected in the same manner as that member. Until the initial selections are made, or in the event of a vacancy, the member's seat(s) shall be considered vacant, and the voting requirements in Paragraph IX.B shall be reduced accordingly. Members of the Governance Committee serve at the sufferance of their constituents.

**B. Voting.** For the purpose of voting on any issue, a quorum consists of the member or alternate appointed by each Governor, the members representing FWS or BOR or their alternates, and two other members or alternates. The chair shall provide reasonable notice of all Governance Committee meetings and a proposed agenda to all members and alternates. Nine of the ten members of the Governance Committee, including the member or alternate appointed by each Governor and the member or alternate representing FWS, must vote in the affirmative for the Governance Committee to establish a position on policy issues. Seven of ten votes are needed for the Governance Committee to take action on non-policy issues. For purposes of this Cooperative Agreement, the term "policy issue" shall mean an issue affecting the term, scope, allocation of funding, or continued viability of this Cooperative Agreement. If a member and alternate are absent from a meeting or abstain from voting, the voting requirements will be reduced accordingly.

**C. Responsibilities.** The Governance Committee will:

1. meet on a quarterly basis for the first year of the Cooperative Agreement and semiannually thereafter except when more frequent meetings are agreed upon;
2. elect a chair annually and develop such other rules of governance, procedure and conflict resolution as it deems appropriate;
3. establish technical committees composed of persons with appropriate expertise, as appropriate, to carry out activities under the Cooperative Agreement;
4. serve as arbiter of disputed external peer reviews upon request of any technical committee;

5. agree on allocations of funds and other available resources to any technical committees for utilization consistent with the committees' responsibilities, subject to any applicable limitations on the use of federal or state funds;
6. enter into an agreement with an appropriate entity for the administration of certain funds expended pursuant to this Cooperative Agreement;
7. assess accomplishments, implement measures to correct any shortfalls, and revise milestones accordingly; and
8. develop specific milestones for implementing a Program.

Although the signatories agree to cooperatively participate in the Governance Committee, nothing in this paragraph is intended to modify the provisions of Paragraph X.E.

**D. Contributions of the Signatories.** The Department of the Interior and the States of Nebraska, Colorado, and Wyoming will provide representatives to the Governance Committee and to any technical committees established by the Governance Committee without compensation from any other signatory.

**E. Governance Structure for Any Program.** The governance structure, responsibilities and authorities described in Attachment III, Appendix C, shall be applicable to any Program developed pursuant to this Cooperative Agreement unless, after the NEPA evaluation, the signatories agree otherwise.

## **X. OTHER PROVISIONS**

**A. Geographic Scope.** This Cooperative Agreement applies only to water related activities and new water related activities occurring in the Platte River Basin upstream of the confluence of the Loup River with the Platte River.

**B. Term.** This Cooperative Agreement shall remain in effect for three years or until the signatories enter into an agreement implementing a Program following the NEPA and ESA processes, whichever comes earlier, or until terminated by the Governance Committee after notification of the Secretary of the Interior and the Governors as described in Paragraph IX.C.6. If required to complete NEPA or ESA review, the Cooperative Agreement may be extended for six months and the Governance Committee may include further activities in the Milestones which are exempt from or do not require further NEPA or ESA review. FWS will take appropriate action regarding ESA compliance for the activities described in Paragraph VIII in the event of such extension.

**C. Contributions of the Signatories.** DOI and the States of Nebraska, Colorado, and Wyoming will make certain cash and cash-equivalent contributions during the term of the Cooperative Agreement for purposes of undertaking the activities provided for by this Cooperative Agreement, as set forth in Attachment I, "Milestones for the Cooperative Agreement," and subject to the authorities and limitations described in Paragraphs X.D, E, F, G and H.

**D. Authorities and Responsibilities**

1. Federal Cooperation with States. Section 2(c)(2) of the ESA, 16 U.S.C. § 1531(c)(2), states that "the policy of Congress is that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species." Under Section 6 of the ESA, the Secretary of the Interior is directed to cooperate to the maximum extent practicable with the states in carrying out the program authorized by the ESA and to consult with the affected states before acquiring any land and water, or interest therein, for the purpose conserving listed species. Under 31 U.S.C. § 6305, an executive agency should enter a cooperative agreement when anything of value will be transferred to a state or local government to carry out a public purpose authorized by federal statute.

2. Recovery Plans and Teams. Under section 4(f) of the ESA, 16 U.S.C. § 1533(f), the Secretary of the Interior is directed to develop and implement plans for the conservation of endangered species. The Secretary of the Interior may procure the services of public and private agencies and institutions in developing and implementing such recovery plans. Advice from such agencies and institutions is not subject to the Federal Advisory Committee Act, 5 U.S.C. app.2.

3. Consultation and Regulatory Certainty. Under section 7 of the ESA, 16 U.S.C. § 1536, federal agencies shall utilize their programs and authorities in furtherance of the purposes of the ESA and ensure that their actions are not likely to jeopardize listed species or adversely modify designated critical habitat of such species. Under the Fish and Wildlife Coordination Act, 16 U.S.C. § 662, federal agencies must consult with the Service and with state wildlife agencies on the impacts to fish and wildlife resources of federal or federally licensed or permitted water projects.

4. Operation of Federal Water Projects. The Bureau of Reclamation is charged with the operation of certain federal projects in the North Platte and South Platte River Basins under applicable federal laws.

5. Applicable State Law. Subject to applicable compacts and decrees, the States of Wyoming, Nebraska, and Colorado administer water rights, including water rights for instream flows. Each of these states also has certain statutory

authorities and responsibilities to protect and manage its fish and wildlife resources. All water rights necessary to carry out activities under the Cooperative Agreement and a Program developed under its terms will be applied for by a state agency or a project operator, and granted as appropriate under the state's water law and in keeping with state authorities and responsibilities for fish and wildlife. Nothing in this Cooperative Agreement shall be construed as creating federal water rights or requiring the granting of water rights to federal entities.

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

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

**G. Legislative Approval.** Funding commitments made under this Cooperative Agreement are subject to approval and appropriations by the appropriate state and federal legislative bodies.

**H. Officials Not to Benefit.** No member of, or delegate to Congress, or resident Commissioner, shall receive any benefit that may arise from this Cooperative Agreement.

**I. No Admissions by States.** The states are entering into this Cooperative Agreement on a voluntary and cooperative basis in an effort to resolve ESA species conflicts through a negotiated and mutually agreed upon basin-wide Cooperative Agreement and Program. Nothing herein shall constitute an admission that any water related activities or new water related activities have caused or will cause adverse effects to the target species or their habitats.

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Date

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Secretary Bruce Babbitt  
Department of the Interior

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Governor E. Benjamin Nelson  
State of Nebraska

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Governor Jim Geringer  
State of Wyoming

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Governor Roy Romer  
State of Colorado

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**ATTACHMENT I**

**MILESTONES FOR THE COOPERATIVE AGREEMENT**



**COOPERATIVE AGREEMENT FOR PLATTE RIVER RESEARCH  
AND OTHER EFFORTS RELATING TO ENDANGERED SPECIES HABITATS  
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**ATTACHMENT I**

**MILESTONES FOR THE COOPERATIVE AGREEMENT**

**YEAR 1 OF THE COOPERATIVE AGREEMENT**

**Research Measures**

- R1-1            The U.S. Fish and Wildlife Service ("FWS") will document the habitat and species conditions existing in the Central Platte River region as of the effective date of the Cooperative Agreement to compare against future changes/improvements in habitat and species status.
- R2-1            A technical committee appointed by the Governance Committee will develop protocols for and initiate habitat and species monitoring and research.
- R3-1            FWS will develop procedures to determine the means of ascertaining biological response of species and habitat to mitigation measures, and the time frame required to measure such biological response.
- R4-1            A technical committee appointed by the Governance Committee will establish guidelines and procedures for peer review of the documents required in Milestones R1-1, R2-1, and R3-1. This committee will develop and implement a peer review work plan for the period of the Cooperative Agreement.

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<sup>1</sup>            Although specific parties have been assigned responsibility for completing the activities set forth in these Milestones, it is understood that such activities must be completed in cooperation with other interested parties and be reviewed and approved by the Governance Committee.

R5-1 The Nebraska Districts will implement any research and monitoring measures required by new FERC license articles for FERC Projects Nos. 1417 and 1835.

### **Land Measures**

L1-1 The Governance Committee will establish a Land Committee with appropriate representation, including private land owners, and establish roles and responsibilities for the Committee to directly oversee land rights acquisition and management.

L2-1 The Land Committee will develop criteria and guidelines for future habitat protection, restoration and acquisition under a Program, and will develop and implement processes/mechanisms/procedures as appropriate to acquire, administer, restore, and manage any land or habitat (wet meadows, channel, etc.) provided for wildlife for incorporation into or protection under a Program. Measures will include identification and evaluation of potential habitat areas; an evaluation of past and/or ongoing habitat management practices; and identification and evaluation of potential alternative habitat management methods. The Committee will also develop a process for acquisition, oversight and continued protection of land interests, including the reversion of or protection of land interests if a Program fails.

L3-1 The Nebraska Districts will implement any habitat measures required by new FERC license articles for FERC Projects Nos. 1417 and 1835.

L4-1 The Governance Committee (or the Land Committee if so designated) will begin to identify and evaluate beneficial and adverse impacts to third parties, including net changes in tax revenue resulting from the protection of land as endangered species habitat.

L5-1 The Governance Committee will develop and implement a financial agreement for the collection and expenditure of funds collected pursuant to the Cooperative Agreement or collected pursuant to biological opinions for existing water projects and for new water depletions. The Committee will also establish and implement criteria for the expenditure of such funds for habitat protection and restoration.

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<sup>2</sup> Nebraska Districts refers to the Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District, collectively.

## **Water Measures**

- W1-1 The Governance Committee will establish the Water Management Committee and direct it to develop a Scope of Work for a Water Conservation/Supply Reconnaissance Study as outlined in Attachment II of the Cooperative Agreement. The Scope of Work will indicate that the consultant is to use the data and information developed by the Water Management Committee pursuant to Milestones W14-1 and W11-2 to conduct the analysis. Once the Scope of Work is approved by the Governance Committee, the Water Management Committee will be directed to engage the services of a competent hydrologic engineering entity through a competitive bid process, and thereby initiate the Study. The Governance Committee, acting through the Water Management Committee, will identify and initiate any demonstration water conservation/supply projects that could be pursued immediately without the benefit of further information to be derived from the study.
- W2-1 The Nebraska Districts will implement any water reregulation and water conservation measures required by new FERC license articles for FERC Projects Nos. 1417 and 1835.
- W3-1 Nebraska will develop means for protecting Program water deliveries, above the existing flow conditions, to and through the critical habitat and will, in cooperation with the other parties, select pilot projects for potential protection under Nebraska Statute 46-252.
- W4-1 Nebraska will develop means for protecting, where appropriate, existing flow conditions in Nebraska by: monitoring and documenting new water related activities in the Platte River Basin in Nebraska upstream of the confluence with the Loup River and, in coordination with the depletion impact analysis described in Milestone W14-1, identifying and beginning to evaluate optional ways to mitigate, offset for, or prevent any new depletions if a Program is initiated.
- W5-1 Colorado will develop means, if such are necessary, for protecting Program water deliveries to the Colorado-Nebraska state line and, as appropriate, the Colorado-Wyoming state line.
- W6-1 Within six months from the effective date of the Cooperative Agreement, Colorado will provide to the Governance Committee population estimates within the South Platte River Basin in Colorado (in accordance with Att. III, App. A, Tab 3B).
- W7-1 Within six months from the effective date of the Cooperative Agreement, Colorado will provide to the Governance Committee an estimate of the expected population increase within the South Platte River Basin in Colorado for the period

ending five years from the effective date of the Cooperative Agreement (in accordance with Att. III, App. A, Tab 3B).

- W8-1 Within six months from the effective date of the Cooperative Agreement, Colorado will recommend to the Governance Committee assumptions concerning the monthly distribution of the accretive/depletive effects of sources of supply in accordance with Att. III, App. A, Tab 3B. The Governance Committee will review and verify assumptions concerning the monthly distribution of the accretive/depletive effects of the sources of supply at the end of the first reporting period as provided for in Att. III, App. A, Tab 3B.
- W9-1 Within six months from the date the Water Management Committee completes the "Tracking/Accounting Procedure" described in Milestone W14-1, Colorado will provide to the Governance Committee a calculation of the average monthly distribution of the cumulative effect at the state line for anticipated water related activities in the South Platte River Basin in Colorado for the period ending five years from the effective date of the Cooperative Agreement (in accordance with Att. III, App. A, Tab 3B).
- W10-1 Colorado will monitor population increase and net change, location and mix of water sources in the South Platte River Basin in Colorado and, within one year of the effective date of the Cooperative Agreement, report such information to the Governance Committee (in accordance with Att. III, App. A, Tab 3B).
- W11-1 Colorado will elect which option it will undertake for new water related activities in the North Platte River Basin in Colorado as provided in Att. III, App. A, Tab 3B.
- W12-1 Wyoming will develop means, if such are necessary, for protecting Program water deliveries to the Wyoming-Nebraska state line.
- W13-1 Wyoming will develop means for protecting existing flow conditions in Wyoming by: monitoring and annually reporting new water related activities in the North Platte River Basin in Wyoming within its boundaries; and, using the procedures and methodologies developed pursuant to Milestone W14-1, analyzing means of offsetting such depletions if a Program is implemented.
- W14-1 The Governance Committee (or the Water Management Committee if so designated) will begin developing a "Tracking/Accounting Procedure for Determining Depletion/Accretion Impacts for the Three Program Water Projects and New Water Related Activities, Including Water Conservation/Supply Projects." This procedure will include:

- C determination of existing flow conditions in the associated habitats and at the Colorado-Nebraska, Wyoming-Nebraska, and Colorado-Wyoming state lines (hereinafter "the state lines");
- C determination of lag and gain/loss factors, and an associated verification monitoring network, for use in determining how the distance of depletions from and accretions to the river affect flow conditions in the associated habitats and at the state lines;
- C definition of hydrologically connected groundwater for the purpose of determining the effects of wells on flow conditions in the associated habitats;
- C using existing flow conditions, lag and loss/gain factors, and the definition of hydrologically connected groundwater, determination of opportunities for additional water development, including conservation/supply projects, that will not adversely affect relevant flow characteristics at the state lines and in the associated habitats; and
- C development of an accounting system, including water accounting procedures and supporting data requirements, for tracking water contributions to the Program and the net depletive or accretive effects of new water related activities, including new wells in Nebraska and Wyoming and water conservation/supply projects as may be identified by the water conservation/supply consultant. Unless Nebraska or Wyoming proposes, and the signatories accept, a surrogate process for determining and preventing new water related activities from increasing shortages to target flows, the data requirements for the accounting system will include information on new and expanded wells in Nebraska and Wyoming above and through the associated habitats that are determined to be hydrologically connected, in accordance with this milestone, to the Platte River. Information will include: location (quarter section, township, range); pumping rate/capacity; type of application (flood, sprinkler or other); acres irrigated by the well; total annual amount of water pumped; use of the water (irrigation/crops grown, municipal, industrial, other); and the date of commencement of the new water related activity. This information is to be provided no later than the third year of the Cooperative Agreement period and, if a Program is implemented, continuing on an annual basis thereafter.

- W15-1 A technical committee appointed by the Governance Committee will establish guidelines and procedures for peer review of the procedures and methodologies developed pursuant to Milestone W14-1. This committee will develop and implement a peer review work plan for the period of the Cooperative Agreement.
- W16-1 The Governance Committee (or the Water Management Committee if so designated) will work with individual signatories to identify institutional constraints, if any, on making water available to the Program, and develop a plan with each state as necessary that sets forth how the state will address the identified constraints under state law.
- W17-1 As set forth in Paragraph VIII.A.5 of the Cooperative Agreement, the FWS will request the National Fish and Wildlife Foundation ("Foundation") to expend funds collected and held by the Foundation for flow augmentation pursuant to biological opinions for existing water related activities and new small depletions in the state in which such activity occurs. The Governance Committee will establish and implement any other appropriate criteria for the expenditure of such funds.

### **Program Development Measures**

- P1-1 Department of the Interior ("DOI") will initiate programmatic NEPA compliance for a basin-wide Program as contemplated by the Cooperative Agreement.
- P2-1 FWS in cooperation with the Governance Committee will begin efforts to assess if activities to enhance flow conditions in the Big Bend reach of the Platte River undertaken under the proposed Program alternative will increase the likelihood for recovery of the pallid sturgeon in lower reaches of the Platte River.
- P3-1 The Governance Committee will identify, after receiving recommendations from FWS, milestones for the first increment of the proposed alternative, which will be used to determine if the proposed alternative is serving as the reasonable and prudent alternative.
- P4-1 DOI, in consultation with the Governance Committee, will develop a plan for conducting NEPA review including a detailed description of the data and information needs required from all parties and a detailed schedule for implementation, and will implement the process.
- P5-1 The signatories will provide information and data identified in Milestone P4-1 as necessary to implement the NEPA analysis.

### **Administration**

- A1-1 The Governance Committee will be formed within 45 days of the execution of the Cooperative Agreement and will in turn establish and implement the administrative processes necessary for carrying out the provisions of the Cooperative Agreement, including: establishing required committees and task forces; entering into a financial agreement for administration of funds; and, if necessary, selecting an executive director.
- A2-1 The Governance Committee will develop a plan and program to involve the public and local governments in activities under this Cooperative Agreement.
- A3-1 Colorado, Wyoming and Nebraska will each contribute \$100,000 each year to fund the water conservation/supply activities to be undertaken during the term of the Cooperative Agreement. In addition, the signatories will provide cash contributions (or, as agreed to by the Governance Committee, cash equivalents), subject to appropriations, to fund the cost of various projects and programs undertaken during the term of the Cooperative Agreement as follows:

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<sup>3</sup> Contributions by DOI will include the direct costs of conducting a programmatic environmental impact statement and ESA consultation on the Program. Estimated cost including reviews and revisions is between \$3.0 and \$5.0 million. Contributions by the states will include their costs in providing information and data requested by DOI for NEPA review and ESA consultation. The remaining state and federal funds will be available for implementation of research, analysis, and other measures that will benefit the target species and the associated

	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>
Colorado	\$200,000	\$200,000	\$200,000
Wyoming	\$100,000	\$100,000	\$100,000
Nebraska	\$100,000	\$150,000	\$150,000
DOI	\$2,500,000	\$2,500,000	\$2,500,000

A4-1 At year end, the Governance Committee will assess accomplishments, implement measures to correct any shortfalls, and evaluate and adjust future year milestones accordingly.

## **YEAR 2 OF THE COOPERATIVE AGREEMENT**

### **Research Measures**

- R1-2 A technical committee will continue monitoring to document, relative to the habitat and species conditions that existed as of the effective date of the Cooperative Agreement, habitat and species responses to activities undertaken pursuant to the Cooperative Agreement.
- R2-2 A technical committee will continue to develop and implement procedures for peer review of habitat and species monitoring and research.
- R3-2 The Nebraska Districts will continue to implement any research and monitoring measures required by new FERC license articles for FERC Projects No. 1417 and 1835.

### **Land Measures**

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habitats, as set forth in these Milestones for the Cooperative Agreement. It is anticipated that the combined cash and non-cash contributions from the non-federal parties will be equal to the DOI share for all three years.



- L1-2 The Nebraska Districts will continue to implement any habitat measures required by new FERC license articles for FERC Projects No. 1417 and 1835.
- L2-2 The Governance Committee (or the Land Committee if so designated) will continue to identify and evaluate methods for acquiring, restoring and protecting lands and will continue to identify and evaluate beneficial and adverse impacts to third parties, including net changes in tax revenue resulting from the protection of land as endangered species habitat.
- L3-2 The Land Committee will develop: a strategy for acquiring and protecting land in habitat complexes in conjunction with other managed lands; a protocol for determining existing conditions for land or land rights acquired for management; a protocol for developing management plans; and a protocol for monitoring habitat values on managed lands.

**Water Measures**

- W1-2 The consultant will complete the Water Conservation/Supply Reconnaissance Study and submit it to the Governance Committee and Water Management Committee for evaluation. With guidance from the Governance Committee, the Water Management Committee will determine and initiate a process for the development of the Water Conservation/Supply Action Plan to be incorporated in the proposed alternative.
- W2-2 The Nebraska Districts will continue to implement any water reregulation and water conservation measures required by new FERC license articles for FERC Projects Nos. 1417 and 1835.
- W3-2 Nebraska will continue to develop means for protecting Program water deliveries, above the existing flow conditions, to and through the critical habitat and will, in cooperation with the other parties, process application(s) for selected Nebraska Statute 46-252 pilot projects.
- W4-2 Nebraska will continue to develop means for protecting, where appropriate, existing flow conditions by: continuing monitoring and reporting as outlined in Year 1; continuing evaluation of optional ways to mitigate, offset or prevent new depletions if a Program is initiated; and assessing the effectiveness of then current instream flow appropriations in protecting existing flow conditions.
- W5-2 Colorado will continue to develop means, if such are necessary, for protecting Program water deliveries to the Colorado-Nebraska state line and, as appropriate, the Colorado-Wyoming state line.

- W6-2 Colorado will continue to monitor population increase and collect other related water use information in the South Platte River Basin in Colorado and report such information to the Governance Committee (in accordance with Att. III, App. A, Tab 3B).
- W7-2 Colorado will initiate processes necessary to develop reregulation projects within Colorado as necessary to shift water flows from periods of net accretion to periods of net depletion (in accordance with Att. III, App. A, Tab 3B).
- W8-2 If Colorado elects to include new water related activities in the North Platte River Basin in Colorado in the Program, Colorado will complete a proposal to mitigate the net depletive effects of such new water related activities in accordance with the option elected pursuant to Milestone W11-1, including the protection of water deliveries to the Colorado-Wyoming, Colorado-Nebraska, or Wyoming-Nebraska state line, as appropriate.
- W9-2 Wyoming will continue to develop means, if such are necessary, for protecting Program water deliveries to the Wyoming-Nebraska state line.
- W10-2 Wyoming will continue to develop means for protecting existing flow conditions by: continuing to monitor and annually report on new water and related activities in the Platte River Basin in Wyoming within its borders; and continuing to analyze means of offsetting such depletions if the Program is implemented.
- W11-2 The Governance Committee (or the Water Management Committee if so designated) will complete the "Tracking/Accounting Procedure" described in Milestone W14-1. The Committee will also take steps as necessary to ensure consistency, as appropriate in light of Att. III, App. A, Tabs 1, 2 and 3, in the application of the information, data, and methodologies in all relevant aspects of Program development and implementation, including the Water Conservation/Supply Reconnaissance Study and various actions by each state to provide and account for water to meet Program goals.
- W12-2 The states, through the Governance Committee, will continue to identify and take action to resolve institutional constraints on making water available to the Program.

### **Program Development Measures**

- P1-2 DOI will continue NEPA compliance for the Program and will issue a draft environmental impact statement with preferred alternative by the end of year 2 of the Cooperative Agreement.

- P2-2 FWS will continue efforts to assess if activities to enhance flow conditions in the Big Bend reach of the Platte River undertaken under the proposed alternative will increase the likelihood for recovery of the pallid sturgeon in lower reaches of the Platte River.
- P3-2 The signatories will continue to provide information and data identified in Milestone P4-1 as necessary to implement the NEPA analysis.

**Administration**

- A1-2 The Governance Committee will continue to involve the public and local governments in activities under the Cooperative Agreement.
- A2-2 Colorado, Wyoming and Nebraska will each contribute \$100,000 each year to fund the water conservation/supply activities to be undertaken during the term of the Cooperative Agreement. In addition, the signatories will provide cash contributions (or, as agreed to by the Governance Committee, cash equivalents), subject to appropriations, to fund the cost of various projects and programs undertaken during the term of the Cooperative Agreement as follows:

	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>
Colorado	\$200,000	\$200,000	\$200,000
Wyoming	\$100,000	\$100,000	\$100,000
Nebraska	\$100,000	\$150,000	\$150,000
DOI	\$2,500,000	\$2,500,000	\$2,500,000

- A3-2 At year end, the Governance Committee will assess accomplishments, implement measures to correct any shortfalls, and evaluate and adjust future year milestones accordingly.

**YEAR 3 OF THE COOPERATIVE AGREEMENT**

**Research Measures**

- R1-3 A technical committee will continue monitoring to document, relative to the habitat and species conditions that existed as of the effective date of the Cooperative Agreement, habitat and species response to activities undertaken pursuant to the Cooperative Agreement.

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<sup>4</sup> See footnote to Milestone A3-1.

- R2-3 Peer review of habitat and species monitoring and research conducted pursuant to Milestones R1-1, R2-1 and R3-1 will be completed and the results reported to the Governance Committee.
- R3-3 The Nebraska Districts will continue to implement any research and monitoring measures required by new FERC license articles for FERC Projects Nos. 1417 and 1835.

### **Land Measures**

- L1-3 The Nebraska Districts will continue to implement any habitat measures required by new FERC license articles for FERC Projects Nos. 1417 and 1835.
- L2-3 The Governance Committee, after receiving recommendations from the Land Committee, will select methods for acquiring, restoring and protecting lands and, as may be deemed appropriate as a result of the analysis conducted pursuant to Milestones L4-1 and L2-2, for mitigating adverse impacts to third parties, including net changes in tax revenue resulting from the protection of land as endangered species habitat. Nebraska will prepare related legislation as necessary for introduction if the Program is initiated.

### **Water Measures**

- W1-3 The consultant or other entity selected by the Water Management Committee will complete the Water Conservation/Supply Action Plan consistent with the Program identified in the NEPA process as the preferred alternative.
- W2-3 Nebraska will continue to develop means for protecting Program water deliveries, above the existing flow conditions, to and through the critical habitat and will, in cooperation with the other parties, assess the effectiveness of Nebraska Statute 46-252 in protecting water deliveries and identify any legislative refinements necessary if a Program is initiated.
- W3-3 Nebraska will continue to develop means for protecting, where appropriate, existing flow conditions by: continuing monitoring and reporting as outlined in Year 1; and selecting methods for mitigating, offsetting or preventing new depletions if a Program is initiated and prepare legislation for introduction.
- W4-3 The Nebraska Districts will continue to implement any water reregulation and water conservation measures required by new FERC license articles for FERC Projects Nos. 1417 and 1835.

- W5-3 Colorado will continue to develop means, if such are necessary, for protecting Program water deliveries to the Colorado-Nebraska state line and, as appropriate, the Colorado-Wyoming state line.
- W6-3 Colorado will continue to monitor population increase and collect other related water use information in the South Platte River Basin in Colorado and report such information to the Governance Committee (in accordance with Att. III, App. A, Tab 3B).
- W7-3 Colorado will continue to pursue processes necessary to develop reregulation projects within Colorado as necessary to shift water flows from periods of net accretion to periods of net depletion (in accordance with Att. III, App. A, Tab 3B).
- W8-3 If Colorado elects to include new water related activities in the North Platte River Basin in Colorado in the Program, Colorado will initiate the processes necessary to implement the proposal developed pursuant to Milestone W8-2.
- W9-3 Wyoming will continue to develop means, if such are necessary, for protecting Program water deliveries to the Wyoming-Nebraska state line.
- W10-3 Wyoming will continue to develop means for protecting existing flow conditions by: continuing to monitor and annually report on new water related activities in the Platte River Basin in Wyoming within its borders; and continuing to analyze means of offsetting such depletions if a Program is implemented.
- W11-3 At the direction of the Governance Committee, the states, the water conservation/supply consultant, and the Water Management Committee, as appropriate, will continue to apply the "Tracking/Accounting Procedure" described in Milestone W14-1.
- W12-3 The Governance Committee (or the Water Management Committee if so designated) will implement monitoring networks and procedures for tracking water deliveries and determining existing flow conditions.
- W13-3 Peer review of the depletion impact analysis and water monitoring measures under the Cooperative Agreement will be completed and the results reported by the Water Management Committee to the Governance Committee.
- W14-3 The states will identify steps as necessary under state law to address institutional constraints on making water available to the preferred alternative, if the signatories agree to this alternative. The states (and if appropriate DOI) will prepare any necessary legislation for introduction if required under the preferred alternative, if the signatories agree to this alternative.

**Program Development Measures**

- P1-3            DOI will complete programmatic section 7 consultation and NEPA compliance for the Program. FWS will develop a biological opinion on the proposed alternative, and if different on the preferred alternative, by the middle of year 3.
  
- P2-3            DOI will issue a Record of Decision and, along with the states, execute an agreement to implement a Program if agreement is reached following the NEPA process.
  
- P3-3            FWS will complete the assessment of the expectation of the preferred alternative to enhance recovery of the pallid sturgeon in lower reaches of the Platte River. If assessment shows a likelihood of direct benefits to the pallid sturgeon, incorporate the pallid sturgeon as a target species for the preferred alternative.
  
- P4-3            If the preferred alternative is different than the proposed alternative, FWS will recommend, for the concurrence of the Governance Committee, revised milestones for determining whether the preferred NEPA alternative is serving as the reasonable and prudent alternative.

**Administration**

- A1-3            The Governance Committee will continue to involve the public and local governments in activities under the Cooperative Agreement, and will develop a plan to involve the public and local governments in activities of the preferred alternative.
  
- A2-3            Colorado, Wyoming and Nebraska will each contribute \$100,000 each year to fund the water conservation/supply activities to be undertaken during the term of the Cooperative Agreement. In addition, the signatories will provide cash contributions (or, as agreed to by the Governance Committee, cash equivalents), subject to appropriations, to fund the cost of various projects and programs undertaken during the term of the Cooperative Agreement as follows:

	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>
Colorado	\$200,000	\$200,000	\$200,000
Wyoming	\$100,000	\$100,000	\$100,000
Nebraska	\$100,000	\$150,000	\$150,000

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<sup>5</sup> At year end, the Governance Committee will assess accomplishments, implement measures to correct any shortfalls, and evaluate and adjust future year milestones accordingly.

DOI	\$2,500,000	\$2,500,000	\$2,500,000
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A3-3	At year end, the Governance Committee will assess accomplishments, implement measures to correct any shortfalls, and evaluate and adjust future year milestones accordingly.		
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**COOPERATIVE AGREEMENT  
FOR PLATTE RIVER RESEARCH AND OTHER EFFORTS RELATING  
TO ENDANGERED SPECIES HABITATS  
ALONG THE CENTRAL PLATTE RIVER, NEBRASKA**

**ATTACHMENT II**

**WATER CONSERVATION/SUPPLY COMPONENT**



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

**ATTACHMENT II**

**WATER CONSERVATION/SUPPLY COMPONENT**

**I. GENERAL**

To assist in meeting the instream flow objectives of a basin-wide Program and in keeping with the Milestones for the Cooperative Agreement, an incentive-based water conservation/supply component will be developed over the three-year period of the Cooperative Agreement for implementation in a Program. Such a water conservation/supply component will require a plan that clearly identifies goals and time lines to conserve and supply water that would result in a quantifiable net water benefit for the target species (net reduction in shortage to target flows) to be applied to the overall water goals of the Program. Acceptable water conservation/supply practices, priorities and economic incentives will be developed by the Water Management Committee with approval of the Governance Committee and implemented in compliance with the applicable provisions of federal and state law as part of a Program.

The opportunities for water conservation/supply vary widely throughout the Platte River Basin depending on physical, legal, and institutional factors. For some regions, extensive information is already available on the effects of water conservation/supply alternatives on streamflows. In other areas, this information is being developed by state and local entities. The existing expertise of the states, and the fact that the implementation of water conservation/supply alternatives will require the cooperation of the states, make it appropriate for the signatories to the Cooperative Agreement to rely to the extent possible on information provided by the states and by DOI as water conservation/supply alternatives are identified and assessed for potential inclusion within a Program. This approach will ensure that available resources are used most efficiently and not wasted on the pursuit of alternatives that have little or no chance of success.

**II. OBJECTIVES AND TARGETS**

The overall objective of developing and implementing a water conservation/supply component for a Program, or the first increment of the proposed Program, is to produce annually on average at least 60,000 acre-feet of net hydrologic benefits in the associated habitats for the benefit of the target species.

**III. ELEMENTS OF THE WATER CONSERVATION/SUPPLY COMPONENT**

**A. Reconnaissance Study**

The Governance Committee will direct the Water Management Committee to develop a Scope of Work within a specified time period. The Scope of Work will guide the work of a hydrologic engineering consulting firm, which will conduct, in cooperation with the states and the Water Management Committee, a basin-wide reconnaissance study in the Platte River Basin to assess the potential for and make recommendations regarding the inclusion of water conservation and supply projects within the Program. Concurrent with development of the Scope of Work, each state and DOI will be invited to compile and assess any available information which may be helpful to the consultant in targeting its assessment to promising water conservation/supply opportunities in the basin. This information, to the degree it is made available to the Water Management Committee in a timely fashion, could also be used in focusing the Scope of Work on specific, unanswered questions regarding promising water conservation/supply opportunities in the basin. Once the Scope of Work is approved by the Governance Committee, the Water Management Committee will be directed to engage the services of a competent hydrologic engineering consulting firm through a competitive bid process.

The Reconnaissance Study, which will be completed in 12 to 18 months after execution of the Cooperative Agreement, will assess the opportunities for and the feasibility of incorporation of water conservation/supply alternatives within each of three regions in the Platte River Basin: the South Platte River Basin upstream from the Western Canal Diversion; the North Platte River Basin above Lake McConaughy; and the region below the Western Canal Diversion on the South Platte River and from Lake McConaughy to Grand Island in the North Platte and Platte River Basins. These assessments shall include cost-benefit analyses, analyses of impacts on groundwater and return flow, analyses of the gross amount of water conserved or supplied, and analyses of net water benefits provided at the associated habitats. Each assessment shall include a process that provides an opportunity for involvement by each state, the consultant, the public, and water conservation task forces as appropriate. Finally, the assessments of water conservation/supply alternatives shall consider the physical, legal, and institutional feasibility of the alternatives. The following alternative types of water conservation/supply projects shall be assessed:

- potential modifications to surface water storage and delivery systems, taking into account seepage and any impacts to groundwater levels and return flows in the Platte River Basin;
- incentives available to both surface and groundwater irrigators to improve on-farm efficiency of water use through such measures as improved

measurement instrumentation, irrigation scheduling, and more efficient on-farm delivery systems;

- incremental pricing and conservation credit for agricultural and municipal users;
- education and information programs;
- incentives for municipal conservation by individual water users;
- reduction or retirement of consumptive uses on a willing-participant basis with compensation made to local governmental entities for third party and external impacts;
- dry year leasing of water supplies from consumptive uses to a Program;
- conjunctive management of surface and groundwater that achieves sustainable use of groundwater;
- identification of demonstration projects;
- additional surface water and/or groundwater reregulation opportunities involving reductions in diversion or pumping; and
- incentives available to hydropower producers to provide water to a Program.

The assessment in each region shall result in recommendations regarding the inclusion of each of these alternative types of water conservation/supply projects, or other alternative types as may be identified for that region within a Program. Other assessments of or recommendations for water conservation/supply alternatives may be included for further consideration if and to the extent the Water Management Committee determines that a regional assessment has not adequately considered feasible alternatives.

In addition, the consultant shall develop as part of the Reconnaissance Study and in cooperation with the states and the Water Management Committee, a water budget for each region for use in helping to evaluate how other water related activities, including new accretions and depletions to the system, will affect streamflows down to and through the associated habitats. Further, the water budget should have the capacity for use in helping to evaluate how any proposed water conservation/supply measure influences the amount and timing of flows throughout the Platte River Basin. The budget should also have the capacity for use in helping to design and evaluate more specific methods of quantifying the net

amount of water that will be saved or provided to the associated habitats by each proposed water conservation/supply measure. This information should be useable in any feasibility analyses that might be conducted on water conservation/supply measures and recommendations that emerge from the Reconnaissance Study.

Upon completion, the study will be submitted to the Governance Committee and Water Management Committee for evaluation. With guidance from the Governance Committee, the Water Management Committee will determine a process for the development of a Water Conservation/Supply Action Plan. This process may involve the use of the consulting firm retained to conduct the Reconnaissance Study, the initiation of a new competitive bid process to select another consulting firm, or other advisable measures.

**B. Water Conservation/Supply Action Plan**

Within 30 months of the signing of the Cooperative Agreement, the consultant will provide to the Governance Committee and the Water Management Committee a recommendation for a Water Conservation/Supply Action Plan incorporating water conservation/supply alternatives identified in the Reconnaissance Study which are feasible and consistent with attainment of the goals of the program. Measures included in the plan will be economically feasible and environmentally sound.

The Action Plan shall, at a minimum, identify:

- specific projects and timetables for implementation of projects designed to achieve Program objectives. The recommended action plan will include a reasonable timetable for implementation of the alternatives necessary to achieve the objectives of the first increment of the proposed Program or any other agreed to Program. If that recommended timetable for project and program implementation would not be complete within the first nine years of a Program, the consultant shall explain why a longer time frame is needed. The Governance Committee will establish the timetable for implementation after reviewing such recommendations and after consulting with the Water Management Committee. The parties realize and agree that the benefits of the projects may not materialize until several years after implementation is initiated and completed;
- monitoring and accounting methods to be used to assess the effectiveness of programs as they are implemented;
- funding requirements;
- institutional requirements/changes;

- the rules concerning disposition of conserved water as it moves through the hydrologic system; and
- methods, as appropriate, to compensate for any adverse impacts of Program water conservation/supply activities. It is agreed that payment of power interference charges is a potentially acceptable way of compensating for impacts to power generation.

**C. Demonstration Projects**

During the term of the Cooperative Agreement, demonstration projects such as those proposed by the Central Nebraska Regional Water Conservation Task Force may be implemented, with the water designated for wildlife benefits. Net reductions in shortage to target flows achieved during the term of the Cooperative Agreement by such demonstration projects shall be credited to the water conservation/supply objectives of the Program.

**D. Storage of Conserved Water in the Environmental Account**

Quantifiable net conserved water that is storable in Lake McConaughy or other storage facilities approved by the Governance Committee may be stored in any Environmental Account created pursuant to new licenses issued for FERC Projects Nos. 1417 and 1835 in Nebraska. Storable net conserved water is that portion of the quantifiable net water conserved which can be controlled such that it may be stored consistent with legal, regulatory and public safety restrictions.

It is an operational goal to coordinate upstream conservation activities so as to increase storage in the Environmental Account. It is recognized, however, that not all water conserved for environmental purposes will be storable in the Environmental Account, and that water need not be stored or storable to contribute toward Program objectives. The Water Management Committee, with the approval of the Governance Committee, shall develop protocols for determining what quantities of water are to be credited to the Environmental Account, and programs to verify that such water is actually storable.

**E. Water Conservation/Supply Funding**

During the period of the Cooperative Agreement, the signatories and other parties will fund conservation and water supply activities called for under the Milestones for the Cooperative Agreement, and any other such activities approved by the Governance Committee.

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

**ATTACHMENT III**

**PROPOSED PLATTE RIVER RECOVERY  
IMPLEMENTATION PROGRAM**

**(PROPOSED ALTERNATIVE)**

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

**ATTACHMENT III**

**PROPOSED PLATTE RIVER RECOVERY  
IMPLEMENTATION PROGRAM**

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

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<sup>6</sup> For purposes of this Program document and its appendices, the term "associated habitats" means, with respect to the interior least tern, whooping crane, and piping plover, the Platte River Valley beginning at the junction of U.S. Highway 283 and Interstate 80 near Lexington, Nebraska, and extending eastward to Chapman, Nebraska, including designated critical habitat for the whooping crane. With respect to the pallid sturgeon, the term "associated habitat" means the Lower Platte River between its confluence with the Elkhorn River and its confluence with the Missouri River. “Associated habitats” shall include critical habitat in the Platte River Basin which may be subsequently designated by the U.S. Fish and Wildlife Service for the target species. The Governance Committee may, through the adaptive management process, agree to undertake, fund or give credit for activities outside the associated habitats with the intent to focus activities to create the greatest biological benefit to the target species.

contributions from the states and the federal government to be conducted during incremental time periods as described below.

The signatories proposing this Program are also parties to Nebraska v. Wyoming, No. 108 Original, expected to go to trial during the term of the Cooperative Agreement. Certain matters in that proceeding may overlap with issues addressed by the Program, and it is possible that a final decision will not have been issued by the end of the term of the Cooperative Agreement. In such circumstances, the signatories may agree that the Program be implemented while the proceeding is pending, but each signatory reserves the right to reconsider its participation in the Program based upon the outcome of Nebraska v. Wyoming, whether by settlement or decision. Such reconsideration shall, without restriction, include the right to require modification of the respective obligations and undertakings proposed to be assumed by the signatories in the Program to equitably account for the outcome of Nebraska v. Wyoming, and, in the absence of an acceptable modification, the right to withdraw from the Program. Notwithstanding Paragraph IV.F below, if a signatory withdraws from the Program because an acceptable modification is not adopted, the U.S. Fish and Wildlife Service (“FWS”) believes such situations would warrant reinitiation. Therefore, it will reinitiate all ESA section 7(a)(2) consultations referenced in Paragraph IV below which relied upon the Program as a component of their reasonable and prudent alternatives, and which are subject to reinitiation pursuant to 50 C.F.R. § 402.16.

## **I. PROGRAM PURPOSES**

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

1. securing defined benefits for the target species and their associated habitats to assist in their conservation and recovery through a basin-wide cooperative approach that can be agreed to by the three states and DOI;
2. serving as the reasonable and prudent alternative to offset the effects of existing and new water related activities in the Platte River Basin that, in the

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



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;

3. helping prevent the need to list more basin associated species pursuant to the ESA;

4. mitigating 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 be implemented in the state where the new water related activity occurs to the extent described in Appendix A hereto "Water Component"; and

5. establishing and maintaining a governance structure that will ensure appropriate state government and stakeholder involvement in the implementation of the Program, if adopted, or any alternative basin-wide program.

B. Where possible, the Program will adaptively manage the associated habitats to benefit non-target, listed species as well as target species. To the extent the habitat of non-listed species is commensurate with that of listed species, the Program will also manage habitat of non-listed species of concern to reduce the likelihood of future listings. When feasible, the Program will provide regulatory certainty with respect to those non-target species.

## **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 it is possible to improve habitat for the pallid sturgeon by managing flow in the Central Platte River that may also affect the pallid sturgeon's Lower Platte River habitat.

## **III. PROGRAM ELEMENTS**

### **A. General Description**

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projects and expansion of existing projects, both those subject to and not subject to section 7(a)(2) of the ESA, which may affect the quantity or timing of water reaching the associated habitats and which are implemented after the effective date of the Cooperative Agreement.

1. Elements. DOI and the states propose a Program with three elements: (1) increasing instream flows 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) creating protocols to permit 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 shall begin with the signing of an agreement by DOI and the three states to implement the Program, and shall continue for ten to approximately thirteen years from that date. The Governance Committee is to agree upon the specific duration of the first increment prior to completion of National Environmental Policy Act (“NEPA”) and ESA compliance, but after studies during the early stages of the Cooperative Agreement have provided additional information regarding a feasible schedule and budget to achieve water conservation/supply goals for the first increment, and the time needed to see a biological response to mitigation measures.

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 Paragraph II above by reregulation and water conservation/ supply projects;

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

The objectives in this section are subject to the provisions of Paragraph III.B.7.

b. First Increment. DOI and the states commit to achieving the following goals by the end of the first increment of the Program:

(1) improving the occurrence of Platte River flows in the associated habitats relative to the present occurrence of target flows (hereinafter referred to as “reducing shortages to the target

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<sup>3</sup> See FWS, Instream Flow Recommendations for the Central Platte River (May 23, 1994) and FWS, Pulse Flow Requirements for the Central Platte River (August 3, 1994) for flow targets. The states have not agreed that these target flows are biologically or hydrologically

flows”) by an average of 130,000 to 150,000 acre-feet per year as measured at Grand Island, through reregulation and water conservation/supply projects. DOI and the states agree that FWS’ target flows are subject to adaptive management and peer review and may be modified by FWS accordingly. DOI and the states have agreed, however, that during the first increment, target flows may 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 and, where appropriate, restoring at least 10,000 acres of habitat in the Central Platte River area in habitat complexes located between Lexington and Chapman, Nebraska. The Governance Committee may, through the adaptive management process, agree to undertake, fund or give credit for activities outside this area with the intent to focus activities to create the greatest biological benefit to the target species.

c. Subsequent Increments. Consistent with Paragraph VI.E, DOI and the states agree that the objectives of subsequent program increments will be defined by the DOI and the states through the Governance Committee prior to the conclusion of the first increment.

4. Progress toward Meeting Objectives. Subject to the provisions of Paragraph VI.E below, DOI and the states intend that during the first increment, progress toward the Program objectives and for ESA compliance purposes will be measured through the achievement of milestones developed by the Governance Committee. Milestones for the first increment will be developed during the term of the Cooperative Agreement, and any milestones for subsequent increments will be developed prior to the beginning of such increments. All milestones may be revised as a result of the adaptive management process, subject to the provisions of Paragraph VI.E below.

**B. Adaptive Management.** The Program will be administered using an incremental and adaptive management approach. By this approach, the Governance Committee will monitor and evaluate the impacts of the activities implemented in the first increment of the Program on the associated habitats and the response of the target species to those impacts. The Program will use monitoring and evaluation protocols developed during the term of the Cooperative Agreement and peer reviewed and modified as appropriate. Based on the monitoring and evaluation results, additional actions and/or adjustments to

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necessary to benefit or recover the target species.

existing actions will be identified and implemented, consistent with the purposes of the Program. The adaptive management process will include:

1. Habitat Baseline Documentation. The Program will be built upon a habitat platform consisting of the existing, or baseline, quantity and quality of habitat for target species, along with the landscape features of the Central Platte River Valley.
2. Monitoring protocol. Adaptive management requires monitoring of the target species and the associated habitats to observe their response to the different Program activities. Each Program activity shall be periodically evaluated by the Governance Committee to assess its success in meeting Program goals relative to other Program activities. Evaluations will: (1) assess whether the Program activity being examined is working as originally envisioned; (2) recommend modifications if necessary; (3) determine whether there are other or better uses for the resources committed to this activity; and (4) assess whether success or failure could be determined by monitoring over the time period evaluated. Evaluations will include independent peer review by experts selected by the Governance Committee. This information will be used to direct resources to the most beneficial activities.
3. Objectives and timetables. A schedule for the implementation of adaptive management (including monitoring and evaluation) will be developed by the Governance Committee. That schedule will incorporate reviews of the overall goals and directions, and periodic reviews to assure that the Program is proceeding in accordance with the provisions of this Agreement and that resources are effectively allocated. The schedule may be modified by the Governance Committee.
4. Specific milestones and research activities. Specific milestones for land and water management and other activities during the first increment will have been developed by the Governance Committee during the term of the Cooperative Agreement. The Governance Committee will identify milestones in subsequent Program increments following evaluation of the first Program increment through the adaptive management process. Research activities will be designed to provide information useful in habitat management and evaluation consistent with the adaptive management approach of the Program. Independent peer review will be used as appropriate to review pertinent scientific data relating to the selection or implementation of specialized recovery tasks or the development of technical milestones.
5. Evaluation of habitat and species responses. Systematic observation and evaluation of the habitat and population responses of the target species and other species of concern will occur on an ongoing basis. This effort will be of

sufficient duration to assess the effects of land and water management improvements undertaken by the Program. Opinions of independent peer reviewers will be compiled and summarized in the evaluation process.

6. Evaluation of program effectiveness. If one Program activity is having a beneficial response and another is not, resources may be redirected by the Governance Committee to the more beneficial activity. If an activity can be improved, changes will be made as soon as possible. If a program activity clearly is not having beneficial impact, it may be curtailed or suspended by the Governance Committee. Modifications to planned activities and their implementation schedule should be peer reviewed prior to action by the Governance Committee.

7. Review of goals and objectives. The adaptive management approach requires evaluation of information gained through the monitoring and research activities, plus the judgment of habitat managers and field biologists, to periodically examine whether habitat management practices and Program goals and objectives should be modified or should continue unchanged. Such evaluations will need to occur before the scheduled completion of each increment of the Program.

### C. Land

Program objectives for habitat will be met through a program of land acquisition, restoration, maintenance and perpetual protection. Progress toward Program objectives will be measured by reference to Program milestones. 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.

#### 1. Acquisition of Land

a. The Land Committee will identify and select suitable lands using technical criteria and other guidelines developed during the term of the Cooperative Agreement and modified as appropriate. The initial focus will be on obtaining and protecting wet meadow and channel habitat within blocks of land between Lexington and Chapman, Nebraska which are suitable for development into habitat complexes as described by the Platte River Management Joint Study.

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<sup>4</sup> Platte River Management Joint Study, Platte River Habitat Conservation Program (Draft May 17, 1993).

b. Because local support will be essential to the success of the land component, the Land Committee will follow plans or programs developed under the term of the Cooperative Agreement and modified as appropriate to assure that local opinions are heard, that acquisition and development are coordinated with local landowners, and that information on acquisitions and on development plans is disseminated to the local communities. Where applicable, the expertise of the University of Nebraska and other local organizations and individuals will be used. The Land Committee will develop incentive programs as needed to encourage participation in the Program.

c. Acquisition of land interests may be in the form of, but not limited to, fee simple acquisition, acquisition of suitable conservation easements, purchase or transfer of development rights, donation of lands appropriate for Program purposes, and the dedication of the use of lands acquired by the States, private or public entities or conservation entities to the Program. The Governance Committee, with the advice of the Land Committee, shall determine the type of interest in land appropriate to particular situations, subject to any applicable limitations on ownership of land purchased by federal/state funds. The Program is to avoid shifting tax burdens to adjacent landowners or communities.

d. The Governance Committee will designate an entity or entities which may, on behalf of the Program, hold title or other interests in land acquired by or contributed to the Program. 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 interest or 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. The Governance Committee, through the Land Committee and the executive director of the Program, will be responsible for restoring and maintaining lands obtained through the Program. Plans for developing and maintaining each block of land as a habitat complex will be prepared at the direction of the Land Committee. Plans are initially expected to include identifying the habitat baseline for the block of land in question, adapting the recommendations of the Platte River Management Joint Study to the specific geography of the block of land, and developing site-specific monitoring and maintenance requirements. Habitat management practices will be evaluated as part of the adaptive management regime used by the Program.

3. Credit Toward Program Objectives

a. Land currently protected and managed 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 Central Platte River Valley 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 managing entity.

b. Land acquired by or on behalf of existing water related activities completing section 7 consultation prior to or during the term of the Cooperative Agreement (as described in Paragraph VIII of that Agreement) will be credited to both the Program's long-term objective set forth in Paragraph III.A.3 and the objective for the first Program increment.

**D. Water**

Program objectives for reducing shortages to target flows will be met through a combination of reregulation and water conservation/supply projects (see Appendix A: Tab 1A, "An Environmental Account for Storage Reservoirs on the Platte River System in Nebraska"; Tab 2A, "Wyoming's Pathfinder Modification Project"; Tab 3A, "Colorado's Tamarack Plan"; and Tab 4, "Water Conservation/Supply Component"). During the first increment, progress toward Program objectives will be measured by reference to milestones.

1. Water Projects. A portion of the instream flow objectives will be met through reregulation of flows by three new and existing water projects.

a. Inclusion in the Program. The three water projects to be included initially are: 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 (Appendix A, Tab 1A); the Pathfinder Modification Project to expand the Pathfinder Reservoir in Wyoming (Appendix A, Tab 2A); and the Tamarack Plan in Colorado (Appendix A, Tab 3A). If implemented and operated as described, these three projects together will provide an average contribution of 70,000 acre-feet toward the first increment objective of reducing shortages to target flows by an average of 130,000-150,000 acre-feet per year.

b. Operation of Program Water Projects. The operations of the three water projects shall be coordinated with the Program's Environmental Account Manager and with other Program water project operators. The Environmental Account Manager, in consultation with the states, will each

year discuss an annual operations plan for all Program reregulation activities by the three water projects and any reregulation facilities later included pursuant to Paragraph III.D.2 below. The annual operating plan will be consistent with the flow-related goals of the Program and provide for coordinated operation of all reregulation facilities and the individual state operations described in Appendix A, Tabs 1A, 2A and 3A. Any disputes relating to development or implementation of the annual operating plan that cannot be resolved among the operating parties will be resolved through the Governance Committee.

It is an operational goal to coordinate upstream Program activities so as to increase storage water in the Environmental Account for Storage Reservoirs on the Platte River System in Nebraska. It is recognized, however, that not all water reregulated for environmental purposes will be storable in that Environmental Account, and that water need not be stored or storable to contribute toward Program objectives. The Water Management Committee, with the approval of the Governance Committee, shall develop protocols for determining what quantities of water are to be credited to the Environmental Account.

c. Verification. The Water Management Committee, with the approval of the Governance Committee, will establish monitoring programs and protocols for verifying that the three reregulation projects have the intended and modeled effects on instream flows.

2. Water Conservation/Supply Activities. A portion of the instream flow objectives will be met through a program of incentive-based water conservation and water supply activities (see Appendix A, Tab 4). New reregulation projects may be considered for inclusion as part of the Program Water Conservation/Supply Component, subject to the operational, verification and mitigation provisions described below.

a. Inclusion in the Program. Subject to modification as additional information becomes available, the Water Conservation/Supply Action Plan developed and approved during the term of the Cooperative Agreement will be considered a component of the Program. Consistent with that Action Plan, the Governance Committee, with the advice of the Water Management Committee, shall determine whether any specific proposed reregulation project, water supply project or conservation project or program shall be funded by and included in the Program, and to what extent any reregulated or conserved water can be credited toward Program objectives of reducing shortages to the target flows. During the first increment, the goal will be to provide at least 60,000 acre-feet per year on



average of net hydrologic benefit through water conservation/supply projects.

The Governance Committee shall consider cost-benefit analysis, impacts on groundwater and return flow, gross amount of water conserved or supplied, net water provided at the habitat, and other factors identified in Appendix C, "Program Water Conservation/ Supply Component." Only projects which yield a quantifiable net water benefit toward Program objectives may be funded. The Governance Committee shall also consider the effects of the proposed water conservation/supply project on shortages in instream flows at the associated habitats and on the operation of other reregulation projects and water conservation/water supply projects. If adverse effects cannot be avoided, the Governance Committee may nevertheless include a conservation, reregulation or water supply activity in the Program if its adverse effects are offset, mitigated or compensated concurrently.

b. Operation of Program Water Conservation/Supply Projects. The operations of any Governance Committee-approved water conservation, reregulation or supply program will be coordinated with other activities in the Program through the Water Management Committee and, where applicable, through the Environmental Account Manager, to manage water stored for environmental purposes. Operation of reregulation projects will be coordinated with other Program reregulation projects through the planning process described in Paragraph III.D.1.b.

It is an operational goal to coordinate upstream Program conservation activities so as to increase storage water in the Environmental Account for Storage Reservoirs on the Platte River System in Nebraska. It is recognized, however, that not all water conserved for environmental purposes will be storable in the Environmental Account, and that water need not be stored or storable to contribute toward Program objectives. Consistent with Paragraph VI.E, the Water Management Committee, with the approval of the Governance Committee, shall develop protocols for determining what quantities of water are to be credited to the Environmental Account and toward Program objectives.

c. Verification. The Water Management Committee, with the approval of the Governance Committee, will establish monitoring programs and protocols for verifying that water conservation/ supply projects have the intended effects on instream flows.

**E. Institutional Protections/New Water Related Activities**

DOI and the states intend that flow characteristics in the associated habitats which are determined by the process described in the Milestones for the Cooperative Agreement to be relevant shall be protected from adverse change. Any water dedicated to environmental use as a result of the three Program water projects and any new water conservation/supply projects must be protected to and through the associated habitats, subject to conveyance losses. Any impacts of Program water conservation/supply projects (including Program projects addressing new depletions not mitigated under Appendix A, Tab 3B) on flow characteristics relied upon by other Program reregulation facilities should be avoided, if possible, or offset, mitigated or compensated. New water related activities should be permitted consistent with applicable state laws, decrees and compacts, provided that such activities are monitored and mitigated as set forth in Appendix A, Tabs 1B, 2B, and 3B.

1. Mitigation Measures. Consistent with the principle that activities in one state should not increase the mitigation burden of another, adverse effects of new water related activities on the associated habitats during the term of the Cooperative Agreement are to be mitigated, compensated or offset by the operator of the new water related activity or its state under the future depletions component of the Program. Mitigation for impacts on flows in the associated habitats shall be water related. The states' plans to develop and implement programs to mitigate the impacts of new water related activities consistent with Program goals are described Appendix A, Tabs 1B, 2B and 3B, "Plan[s] for Future Depletions" for the respective states. DOI and the states intend to work within the Governance Committee to develop criteria as may be necessary to help the states identify acceptable measures to mitigate the impacts of new water related activities consistent with the depletion impact analysis developed during the terms of the Cooperative Agreement. Water conservation/supply projects implemented to mitigate new water related activities will not be counted against the Program's goal of reducing shortages to target flows, as these contributions are mitigation for new water related activities, not existing ones.

2. Mitigation Banking. Any state's program to address new water related activities may include mitigation water banking to assure that non-Program conservation programs are encouraged and efficiencies are not compromised when a program yields more water than is immediately needed for mitigation purposes. A mitigation water bank will not be counted against the Program's goal of reducing shortages to target flows, as it is held in reserve for future mitigation of new water related activities, not existing ones. In implementing water conservation/supply projects, the Program will first meet its water supply goals for existing water related activities. Mitigation water banking of such waters will not be credited if use for that purpose impedes the timely completion of water conservation/supply goals to mitigate existing depletions (Appendix A, Tab 4).

3. Verification. The Water Management Committee, with the approval of the Governance Committee, shall establish monitoring programs and protocols for verifying that the effects of new water related activities are adequately mitigated as described above by water conservation/supply programs carried out for those purposes.

4. Institutional Protections. Each state shall take whatever steps are necessary to provide institutional protections 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 methodologies shall be provided to the Water Management Committee.

#### **IV. REGULATORY CERTAINTY**

DOI and the states intend that this Program, if implemented, provide regulatory certainty under the ESA to existing water related activities and to certain new water related activities subject to review under section 7 of the ESA. DOI and the states anticipate that the Program, as it may be modified after NEPA and ESA evaluation and over time, will serve as the reasonable and prudent alternative under section 7 for existing water related activities and covered new water related activities during the term of the Program. Notwithstanding that Program activities described below will generally be focused on the geographic area defined herein as “associated habitats,” the implementation of such activities is to serve as the reasonable and prudent alternative for impacts to the target species and their habitats within the Platte River Basin downstream from the confluence of the North and South Platte Rivers. Regulatory certainty will be provided by the following mechanisms:

A. For water related activities existing as of the effective date of the Cooperative Agreement, FWS intends that the reasonable and prudent alternative during the term of the Program shall be the activities carried out by or on behalf of those water related activities through the Program, as described above and as set forth in Appendix B, “Contributions of the Parties During the First Increment,” and as may be set forth in the future for subsequent Program increments. For water related activities existing as of the effective date of the Cooperative Agreement for which consultation pursuant to section 7 was completed prior to or during the term of the Cooperative Agreement (covered by Cooperative Agreement Paragraphs VIII.A.1, 2 and 4), payments made or measures undertaken by or on behalf of these water related activities during the term of the Cooperative Agreement shall be credited against the payments and measures set forth in Appendix B to the extent they contribute to the land acquisition and restoration purposes of the Program.

B. For new water related activities subject to section 7(a)(2) of the ESA, FWS intends that the reasonable and prudent alternative during the term of the Program shall be the activities carried out by or on behalf of those water related activities through the

Program, as described below and as set forth in Appendix A, Tabs 1B, 2B, 3B, "Plan[s] for Future Depletions" for the respective states. For such water related activities for which consultation pursuant to section 7 was completed during the term of the Cooperative Agreement (covered by Cooperative Agreement Paragraph VIII.A.3), payments made or measures undertaken by or on behalf of such water related activities during the term of the Cooperative Agreement shall be credited against the payments and measures set forth in Appendix A, Tabs 1B, 2B and 3B, to the extent they contribute to the acquisition and restoration purposes of a Program. Payments made or measures undertaken by or on behalf of such water related activities shall not be credited against the payments and measures shown in Appendix B, "Contributions of the Parties During the First Increment," or any future contributions identified in subsequent Program increments to mitigate the impacts of existing water related activities.

C. For water related activities covered in Paragraphs 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 function as a reasonable and prudent alternative for so long as the Program is attaining its goals and milestones. Regulatory certainty for the first increment of the Program will depend on timely attainment of the first increment objectives described above as measured by the achievement of specific milestones.

E. If the Program is not meeting its milestones during the first increment or its objectives during subsequent increments, and FWS makes a preliminary determination that the Program is not serving as a reasonable and prudent alternative, the basis for that determination shall be articulated to the Governance Committee. As required in Appendix C, "Governance Agreement," the Governance Committee will work with FWS to evaluate the situation and to develop an appropriate response, if necessary, to restore the ability of the Program to serve as the reasonable and prudent alternative. If the Governance Committee is unable to identify or implement appropriate measures, pursuant to the Governance Agreement, FWS and the Governance Committee shall refer the matter to the Secretary of the Interior and the three Governors ("Oversight Committee"). FWS agrees that it will not make a final determination that the Program is not serving as the reasonable and prudent alternative until it meets with the Oversight Committee. FWS agrees not to seek to reinitiate section 7 consultation on any of the water related activities covered by the Program until such a final determination is made.

F. After the result in Nebraska v. Wyoming is final and agreement to continue the Program has been reached, if: (1) this Program is subsequently terminated or expires, or (2) activities under the Program are not adequately completed, FWS may reinitiate ESA section 7(a)(2) consultations which relied upon the Program as a component of their reasonable and prudent alternatives and which are subject to reinitiation pursuant to 50 C.F.R. § 402.16. Before taking such action, FWS will notify the Governance Committee

and request its assistance in resolving the situation. If the Governance Committee is unable to resolve the situation, the Committee shall notify the Oversight Committee and request its assistance. If such attempts at resolution are unsuccessful, and if FWS believes that such a situation would warrant reinitiation of section 7(a)(2) consultation for any water related activity which relied upon the Program as a component of its reasonable and prudent alternative and which is subject to reinitiation pursuant to 50 C.F.R. § 402.16, FWS would request reinitiation of section 7(a)(2) consultation for all such water related activities. FWS agrees that it will not request reinitiation of section 7(a)(2) consultation for any water related activity which relied upon the Program as a component of its reasonable and prudent alternative and which is subject to reinitiation pursuant to 50 C.F.R. § 402.16, unless it requests 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 reasonable and prudent alternatives, that it will expeditiously pursue all available means to amend or modify the agency authorizations. If a state continues to carry out its responsibilities under the Program, there is a presumption that such actions are sufficient to avoid violation of the ESA with respect to all water related activities in that state pending completion of any reinitiated consultations. When a state continues to carry out its responsibilities 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 reasonable and prudent alternative 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.

G. When reinitiating section 7 consultation for a particular water related activity upon cancellation or termination of the Program, FWS agrees to consider the cause of the cancellation or termination of the Program, as appropriate. In developing any new reasonable and prudent alternative to meet the requirements of the ESA, FWS agrees to give credit for any contributions made to this Program by the relevant state or the owner or operator of the water related activity under the Cooperative Agreement and/or the Program, and the degree to which the relevant state or owner or operator met its obligations under the Cooperative Agreement or the Program.

H. 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 a reasonable and prudent alternative 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.

I. 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 the Cooperative Agreement or this Program, or by virtue of its support for the Cooperative Agreement or this Program in other judicial or administrative proceedings.

## V. FAIR SHARE

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 the basis of "fair share." 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. DOI and the states have agreed that their contributions in the first Program increment will include credit for certain contributions made during the term of the Cooperative Agreement, and will be shared among them as reflected in Appendix B hereto. Specific contributions by the states take into account the value of both water provided through that state's water projects and cash or cash equivalent contributions to other components of the Program. By accepting this distribution of "fair share" for the first Program increment, the states do not intend to suggest that such distribution accurately reflects how responsibility should be assigned in any process other than for the first Program increment or that it is appropriate for the long term. What constitutes "fair share" will be renegotiated for subsequent Program increments. Contributions addressing new water related activities pursuant to the "Plan[s] for Future Depletions" elements of the Program are separately determined based on the impacts of those activities, and will not be credited toward a state's "fair share" contributions toward the remainder of the Program.

## VI. OTHER PROVISIONS

A. **State Responsibilities.** Each state shall efficiently manage costs in implementing Program activities and encourage habitat protection by local authorities.

B. **Section 7 Consultation.** As described in Paragraph IV, "Regulatory Certainty," DOI and the states have proposed this Program to serve as the reasonable and prudent alternative for existing and certain new water related activities. Pursuant to section 7 of the ESA, FWS will make determinations as to whether the Program can serve or can continue to serve in such capacity. Consistent with Appendix C, "Governance Agreement," and Paragraph IV.E above, FWS has agreed to meet with the Governance Committee and the Oversight Committee to offer the opportunity to modify the Program,

if necessary, before making a final determination that the Program cannot serve as the reasonable and prudent alternative.

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

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

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

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

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

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

of any person or entity undertaking a water related activity to withdraw from the Program pursuant to Paragraph IV.H.



**PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM  
APPENDIX A, WATER COMPONENT**

**TAB 1A**

**AN ENVIRONMENTAL ACCOUNT FOR STORAGE RESERVOIRS  
ON THE PLATTE RIVER SYSTEM IN NEBRASKA**

**I. INTRODUCTION**

**A. Definitions**

1. “MOA” means the Memorandum of Agreement among the states of Colorado, Nebraska, Wyoming and the Department of the Interior dated June 1994, the Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska (Cooperative Agreement) developed pursuant to that Memorandum of Agreement, and any Platte River Recovery Implementation Program (Program) implemented following that Cooperative Agreement.
2. “Governance Committee” means the committee designated in the Cooperative Agreement, or its successor governance body as it may be structured under the Program.
3. “Central” means the Central Nebraska Public Power and Irrigation District.
4. “NPPD” means the Nebraska Public Power District.
5. “Districts” means Central and NPPD.
6. “FERC” means the Federal Energy Regulatory Commission.
7. “Projects” means FERC Project 1417 and FERC Project 1835.
8. “NEDWR” means the Nebraska Department of Water Resources.
9. “Approved Storage Facilities” means a District facility or facilities proposed for EA storage in Nebraska by the Districts and approved by the Governance Committee and NEDWR.

10. "EA" means Environmental Account, an annual account of water in Lake McConaughy, or other Approved Storage Facilities, available for release for environmental purposes during the October 1 to September 30 water year.

11. "Current Regime of the River" means the flow characteristics of the North Platte, South Platte and Platte River drainage which are available under existing conditions, as defined by the Governance Committee, determined in accordance with procedures to be adopted pursuant to the MOA. The principal purpose will be to serve as a reference point for determining whether and how relevant flow characteristics are changed by the MOA or future developments.

12. "EA Manager" means an individual designated by the Regional Director of the U.S. Fish and Wildlife Service ("FWS") to manage and coordinate operations of the EA and to be responsible for calling for releases from the EA pursuant to such contracts as may be executed to meet the objectives of the MOA.

13. "New Water" means water which is not included in the Current Regime of the River, but which is the result of the management and operation of the MOA and is available for storage in the EA.

B. The EA makes storage in, and water from, Lake McConaughy or other Approved Storage Facilities available for instream flow releases and allows the manager of the EA the flexibility to make releases that are most efficient for accomplishing the goals set by the Governance Committee.

C. This document describes how water contributed becomes part of the EA. Contributions to the EA, defined in Paragraph II.B, may be from Colorado, Wyoming, Nebraska and/or from water conservation/supply activities carried out under the MOA, or from other sources approved by the Governance Committee.

D. Nothing in this document shall preclude any entity from exercising its state water rights to ensure those water rights are not reduced, relinquished or extinguished by failure to use.

E. Consistent with the guidelines below, and to the extent possible, water released from the EA should be used for as many beneficial uses as possible.

## II. ENVIRONMENTAL ACCOUNT

### A. General Description

1. Water contributed to the EA, regardless of its source, loses any separate identity upon entering Lake McConaughy or other Approved Storage Facility, and simply becomes part of the EA.
2. Water remaining in the EA after September 30 of each year may be carried over and added to the following year's contributions to the EA, subject to the limitations of Paragraphs II.A.3 through II.A.6 below.
3. The total quantity of water in the EA in Lake McConaughy may never exceed 200,000 acre-feet (af) at any time during the water year.
4. Whenever Lake McConaughy fills to regulatory capacity as defined by FERC's dam safety requirements for Project No. 1417 and the EA is less than 100,000 af, the Districts shall contribute additional water to increase the EA to 100,000 af regardless of the quantity of EA water already released during that water year.
5. At any time that Lake McConaughy reaches regulatory capacity as defined by FERC's dam safety requirements for Project No. 1417 and the EA exceeds 100,000 af, the EA shall be reduced to 100,000 af regardless of the sum of the contributions from the states and from Conservation Activities, or the quantity of carryover from a prior year.
6. Storage losses for Lake McConaughy and other Approved Storage Facilities shall be calculated by the NEDWR and assigned monthly to the EA using the following formula: ((average monthly storage in the EA) divided by the (average monthly storage in total)) times the total losses for the storage facility for that month, or by another mutually agreed upon formula.
7. Transportation losses for EA water shall be calculated by the NEDWR in the same manner as the NEDWR calculates such losses for other water in the North Platte and Platte Rivers.
8. Contributions to the EA shall be protected by the NEDWR from groundwater or surface water depletion from the state line or the source of contribution from within Nebraska to Lake McConaughy or other Approved Storage Facilities.

**B. EA Contributions**

1. Nebraska's Contributions

a. Central and NPPD

(1) The EA contribution by the Districts, and the water users served by them, is based upon the understanding that the flows available at Lewellen on the North Platte River and at the Korty Diversion on the South Platte River remain representative of the Current Regime of the River except for changes to the Current Regime of the River which are compensated, mitigated, or offset at Lewellen or the Korty Diversion pursuant to the MOA. A system will also be established to resolve disputes on detrimental impacts and appropriate compensation, mitigation or offsetting measures, including disputes arising after the Program has been implemented.

(2) Storable Natural Inflows are those North Platte River waters entering Lake McConaughy that are measured at the Lewellen gauge and that may be stored consistent with legal, regulatory or public safety restrictions. Flows which are not considered to be Storable Natural Inflows include: a) environmental contributions from Wyoming, Colorado, MOA Conservation Activities or other entities; b) transfers of storage water from upstream facilities; and c) demands based upon senior non-hydropower natural flow water rights.

(3) At the end of each month from October through April, the EA shall be credited with an amount equal to 10% of the Storable Natural Inflows to Lake McConaughy for that month, as determined by the NEDWR based upon the real-time gauge data available from the NEDWR for the Lewellen gauge, up to an annual limit of 100,000 af. The 100,000 af limit shall not be construed to affect the adjustment of the contents of the EA to 100,000 af when the reservoir fills, as described in Paragraphs II.A.4 and II.A.5.

b. Other Nebraska Contributions

Other Nebraska water contributions may be provided to the EA by the state or other water users through plans or programs that are approved by the Governance Committee provided that: (1) the Districts are assured that as a result of a contribution, inflows into

Lake McConaughy and flows at the Korty Diversion remain representative of the Current Regime of the River, except for changes to the Current Regime of the River impacting the Districts' operations which are compensated, mitigated, or offset pursuant to the MOA; and (2) these new contributions may be characterized by the NEDWR as New Water; and (3) those contributions may be stored in Lake McConaughy or other Approved Storage Facilities.

2. Wyoming's Contributions

a. New Water attributable to the State of Wyoming may be contributed to the EA through its "Pathfinder Modification Project" or other plans or programs that are approved by the Governance Committee.

b. It is anticipated that the Governance Committee in cooperation with the Wyoming State Engineer and the NEDWR will develop an accounting system for the purpose of defining and determining the amount of New Water at the state line attributable to the State of Wyoming under its Pathfinder Modification Plan or under any other plan which may be approved by the Governance Committee. The accounting system to be developed will include a system for resolving any disputes that may arise relative to the determination of the amount of New Water provided by the State of Wyoming to the EA.

c. Wyoming's contribution to the EA shall be the quantity delivered at the state line for MOA purposes, as defined in Paragraph II.B.2.b, less losses to the Lewellen gauge on the North Platte River as determined by the NEDWR.

3. Colorado's Contributions

a. New Water attributable to the State of Colorado may be stored in the EA under procedures developed by the Districts and Colorado and approved by the Governance Committee.

b. It is anticipated that the Governance Committee in cooperation with the Colorado State Engineer and the NEDWR will develop an accounting system for New Water attributable to the State of Colorado and delivered to the state line which, under the procedures developed pursuant to Paragraph II.B.3.a above, is available to be stored in the EA under the Program. The accounting system to be developed will include a system for resolving any disputes that may arise relative to storage of New Water in the EA attributable to the State of Colorado.

4. Conservation Water

a. Activities carried out under the Program Water Conservation/ Supply Component may contribute to the EA any quantifiable net conserved water, as defined and accounted for in the Water Conservation/Supply Action Plan, which can be controlled and credited to storage in Lake McConaughy or other Approved Storage Facilities.

b. The Governance Committee in consultation with the appropriate state water entity will develop an accounting system for the EA contributions developed by water conservation/supply activities, to include operational agreements with owners of the facilities in which these contributions will be stored. The accounting system developed will include a system for resolving any disputes that arise relative to the accounting process.

C. EA Operations

1. EA Committee and EA Manager

a. The EA Manager shall possess the authority to request releases from the EA pursuant to the terms of a contract with Central in the case of Lake McConaughy or with the appropriate District in connection with releases from other Approved Storage Facilities.

b. An EA Committee (“EAC”) shall be organized by the EA Manager to work with and provide guidance to the EA Manager. The EA Manager shall invite representatives from Central, NPPD, U.S. Bureau of Reclamation (“BOR”), FWS, NEDWR, the Nebraska Game and Parks Commission, Colorado, Wyoming, the Audubon Society and the Platte River Whooping Crane Critical Habitat Maintenance Trust to participate in the EAC. The EA Manager shall meet with the EAC at least twice a year, in October and March, and more frequently at the discretion of the EA Manager.

c. Central shall release EA water from Lake McConaughy as requested by the EA Manager as it would for any other customer, and will coordinate with NPPD and the NEDWR regarding such releases. Procedures and protocol will be developed as necessary to facilitate coordination of operations with EA releases.

d. In October of each year, in consultation with the EAC, the EA Manager shall establish flow targets and an annual operating plan for the

EA based on predicted water supplies, the status of the species of concern and the goals set by the Governance Committee. Consistent with the FWS priority recommendations described in “Instream Flow Recommendations for the Central Platte River, Nebraska” and attached to “The Department of the Interior’s Amended Comments under Section 10j of the Federal Power Act” dated August 11, 1994, a priority will be given to the use of EA water to maintain flows throughout the summer. Adjustments throughout the year to the operating plan would be expected to reflect prevailing conditions and increased knowledge of species needs.

e. To protect the EA water stored in and released from Lake McConaughy to and through the habitat area, and for Central to have the authority to contract with the EA Manager to make releases as directed, Central will use best efforts to seek and, if granted, to maintain storage use permits and other regulatory authorities as necessary. For other Approved Storage Facilities, the appropriate District shall likewise seek and, if granted, maintain storage use permits and other regulatory authorities as necessary. The Districts will not abandon or take any action which will reduce, relinquish or extinguish the storage use permit for the EA.

f. The EA Manager shall coordinate with the NEDWR and the Districts as necessary for NEDWR to perform accounting functions related to the storage and release of the EA.

## 2. General Rules for EA Operations

a. EA releases may be temporarily reduced or suspended if events occur which limit or prevent the Districts' ability to provide them. The types of events which would limit or prevent EA releases include but are not limited to inspections of facilities, maintenance or repair of structures, failure of a structure, or existence of an emergency condition which is not otherwise predicted. Weather related events such as icing conditions, regional or localized rain or snowstorms, flooding events and high wind conditions may also require the alteration or suspension of EA releases. No alteration or suspension of releases for these or similar types of occurrences will be deemed to be a lack of compliance. The Districts will coordinate all planned safety and maintenance activities with the EA Manager, and will notify the EA Manager of all events which lead to reduction or suspension of releases. The Districts will maintain appropriate records of such events.

b. If an emergency situation occurs such that water must be evacuated (in whole or part) from Lake McConaughy, the EA shall be

reduced in proportion to the ratio of the total quantity of water evacuated and total storage prior to the evacuation.

c. The EA Manager may not request releases from the EA when the Platte or North Platte River at Keystone, North Platte, Brady, Cozad, Kearney or Grand Island is at or above flood stage as defined for those locations by the National Weather Service (“NWS”). If the EA Manager requests a release of EA water that the Districts believe would cause the Platte or North Platte River to rise above flood stage, the request for release may be denied. However, the EA Manager may appeal the denial by requesting the NWS to make a determination as to whether or not the requested release would cause either of the rivers to rise above flood stage at any of the previously listed sites. If the NWS determines the requested release would cause either of the rivers to rise above flood stage, the denial would stand. If the NWS determines the requested release would not cause either of the rivers to rise above flood stage, the requested releases will be made.

### **III. OPERATING RULES FOR PROJECT NO. 1417 AND PROJECT NO. 1835**

#### **A. General Rules for Project Operations**

1. The operating rules for the Projects are based upon the understanding that flows available to the Districts in the North Platte and South Platte Rivers remain representative of the Current Regime of the River except for changes to the Current Regime of the River impacting the Districts' operations which are compensated, mitigated, or offset pursuant to the MOA. Procedures and processes developed in consultation with NEDWR and adopted by the Governance Committee shall be used to verify that such flows are not altered in a manner which causes impacts to either of the Districts' operations which are not compensated, mitigated, or offset pursuant to the MOA. Under the MOA, notwithstanding the foregoing, the obligations of Colorado and Wyoming are fully set forth in the Cooperative Agreement and the Proposed Program, and nothing in this EA document is intended to impose any additional or independent obligations, requirements, or restrictions of any sort on Colorado or Wyoming. For as long as there is a Program, if Colorado and Wyoming reregulate flows in accordance with their proposed Tamarack Plan (Appendix A, Tab 3A) and Pathfinder Modification Plan (Appendix A, Tab 2A) and their respective new depletions proposals (Appendix A, Tabs 2B, 3B), existing and new water-related activities in Colorado and Wyoming will be included in the Current Regime of the River.

2. Operations plans for the Projects which include monthly release and storage goals shall be developed annually in October and modified as necessary



by the Districts through the water year after communicating with the EA as described in Paragraph IV.D.

3. Neither release requirements, nor allocation of water to the EA, nor any other provision in this document is intended to relieve the Districts or their successors or assigns from complying with the terms of the May 21, 1954 Water Storage Agreement between Central and the Platte Valley Public Power and Irrigation District (NPPD's predecessor), and amendments thereto, except to the extent that this document is in direct conflict with the terms of the agreement. Additionally, the provisions of this document are not intended to prevent the Districts or their successors or assigns from further amending such agreement, provided such amendments are not inconsistent with this document. These operating rules are not intended to favor one District or the other.

4. The Districts shall have responsibility for determining predicted Storable Natural Inflows as referenced in Paragraphs III.B.1, III.C.1, III.D.1, and III.E.1 for the purposes of determining whether very wet, wet, transitional or dry conditions exist. Predicted Storable Natural Inflows, and the category of conditions anticipated, should be determined by October 15 of each water year and may be adjusted and refined by the Districts.

5. The Districts will use South Platte flows to the extent possible.

6. Whenever the use of surface water for irrigation in the Platte River valley ends before September 30, operational flows for Central and NPPD for the remainder of the water year shall be in the range specified for the preceding November 16 to February 14 time period.

7. Operational rules may be temporarily suspended if events occur which prevent operations in the manner prescribed. The types of events which would require suspension of the operating rules include, but are not limited to, inspections of facilities, maintenance or repair of structures, failure of a structure, hydraulic limitations of facilities or existence of an emergency condition which is not otherwise predicted. Weather related events such as icing conditions, regional or localized rain or snowstorms, flooding events and high wind conditions may also require suspension of the operating rules. No alteration or suspension of the operating rules for these or similar types of occurrences will be deemed to be a lack of compliance. The Districts will coordinate all planned safety and maintenance activities with the EA Manager, and will notify the EA Manager of all events which lead to reduction or suspension of the operational rules. The Districts will maintain appropriate records of such events.

8. Releases from Lake McConaughy may be made as needed to supplement flows and river gains to meet irrigation requirements.

9. All EA water or other water made available to the Program for environmental purposes which must be released from or passed through Lake McConaughy or other Approved Storage Facilities may be diverted by the Districts, at their discretion, into Project facilities. The diverting District shall return the diverted environmental water to the river and shall replace any losses of water in excess of those which the NEDWR determined otherwise would occur if that water had been transported via the Platte River system. Although such water released or passed through may be used for as many beneficial uses as possible, neither EA releases nor pass through of environmental water are restricted by canal capacity or hydropower generation constraints.

10. Notwithstanding Paragraph III.A.9, if the total flow in the Platte River at Brady (currently measured by USGS gauge number 06766000) at any time in March or April of a very wet, wet or transitional year as defined below is less than 200 cubic feet per second (cfs), the EA Manager may request Central to route enough EA water through its Jeffrey Return such that the quantity released from the Jeffrey return plus the Platte River at Brady totals up to 200 cfs. The total volume of EA water released in this manner shall not exceed 3000 af in any one water year unless agreed to by Central.

11. The Districts shall pass through or release waters from Lake McConaughy as needed to supplement river flows and river gains to provide at least the lowest operational flows described in Paragraphs III.B through III.F, without taking into account and in addition to any releases being made from the EA. Such operational flows may be diverted by the Districts, at their discretion, into Project facilities.

12. Throughout the water year, the combined flow from the Keystone Diversion and the Korty Diversion shall provide an average of at least 400 cfs inflow to the Sutherland Reservoir and maintain an elevation of at least 3,045 feet in Sutherland Reservoir.

13. Diversions at the Korty Diversion Dam may be up to canal capacity.

14. The rules for the Projects' operations require the Districts to accept constraints on the use of a portion of their respective water rights. These rules were specifically based upon current upstream project operations and river conditions, and the Districts' contribution to the EA. The Districts shall have no obligation to accept further constraints on the use of their respective water rights for these operational rules if the reservoir contents of Lake McConaughy are subject to greater or more frequent fluctuations as a result of, or to accommodate, contributions to the EA from others. The Districts may take any dispute regarding additional constraints to the Governance Committee for resolution.

**B. Very Wet Conditions**

1. Very Wet conditions are defined as those circumstances when the total Lake McConaughy contents as of October 1, including the EA, plus the predicted Storable Natural Inflows from October 1 to March 31, exceed 2.1 million acre feet (maf).
2. Releases from Lake McConaughy in the non-irrigation season for diversion at the Keystone Diversion Dam should be at least 700 cfs and average at least 875 cfs.
3. Non-irrigation season releases from Lake McConaughy shall supplement river flows and river gains to provide for a minimum diversion at the Central Diversion Dam of 1000 cfs and an average diversion of at least 1600 cfs from October 1 through November 15, a minimum diversion of 800 cfs and an average diversion of at least 1000 cfs from November 16 through February 14, and a minimum diversion of 1100 cfs and an average diversion of at least 1400 cfs from February 15 through the beginning of irrigation season (use of surface water for irrigation below Lake McConaughy or Korty Diversion).
4. Requirements in Paragraphs III.B.2 and 3 are independent of each other and each must be met.
5. There shall be no upper limit on outflows from Lake McConaughy other than meeting the standards of safety and beneficial use.

**C. Wet Conditions**

1. Wet conditions are defined as those circumstances when the total Lake McConaughy contents, including the EA, equal or exceed 1.50 maf as of October 1, or the total Lake McConaughy contents level as of October 1 plus the predicted Storable Natural Inflows from October 1 to March 31 is between 1.85 maf and 2.1 maf.
2. Releases from Lake McConaughy in the non-irrigation season for diversion at the Keystone Diversion Dam should be at least 700 cfs. If the October 1 lake level is less than 1.25 maf, diversions at the Keystone diversion in October may be at a reduced rate, but not less than 450 cfs.
3. Non-irrigation season releases from Lake McConaughy shall supplement river flows and river gains to provide for a minimum diversion at the Central Diversion Dam of 900 cfs and an average diversion of at least 1200 cfs from October 1 through November 15, and a minimum diversion of 800 cfs and an

average diversion of at least 1000 cfs from November 16 through February 14, and a minimum diversion of at least 1000 cfs and an average diversion of at least 1240 cfs from February 15 through the beginning of irrigation season.

4. Requirements in Paragraphs III.C.2 and 3 are independent of each other and each must be met.

5. There shall be no upper limit on outflows from Lake McConaughy other than meeting the standards of safety and beneficial use.

6. Releases should be managed to allow Lake McConaughy to fill to approximately 1.5 maf by March 31 and to fill to licensed or authorized capacity thereafter. Filling to less than 1.5 maf by March 31 will be permitted if inflows expected after that date would cause reservoir spills or flooding downstream. After consultation with the EA Manager by the Districts as described in Paragraph IV.4, releases for diversion at the Central Diversion Dam may be reduced to the rates required in transitional conditions (Paragraph III.D.3) if necessary to allow Lake McConaughy to fill as provided in this paragraph.

**D. Transitional Conditions**

1. Transitional conditions are defined as those circumstances that exist between wet and dry conditions as they are defined in this document.

2. Non-irrigation season releases from Lake McConaughy for diversion at the Keystone Diversion Dam should be at least 450 cfs and average no more than 900 cfs (exclusive of EA releases) except as otherwise permitted herein.

3. Non-irrigation season releases from Lake McConaughy shall supplement river flows and river gains to provide for a minimum diversion at the Central Diversion Dam of 900 cfs and an average diversion of at least 1000 cfs from October 1 through November 15, and a minimum diversion of 800 cfs and an average diversion of at least 950 cfs from November 16 February 14, and a minimum of diversion of at least 850 cfs and an average diversion of at least 1100 cfs from February 15 through the beginning of irrigation season.

4. Requirements in Paragraphs III.D.2 and 3 are independent of each other and each must be met.

5. There shall be no upper limit on outflows from Lake McConaughy other than meeting the standards of safety and beneficial use.

6. Releases should be managed to allow Lake McConaughy to fill to between 1.27 and 1.5 maf by March 31 with the goal to optimize reservoir storage taking

into account whether the transition is from wet to dry or from dry to wet. After consultation with the EA Manager by the Districts as described in Paragraph IV.D, releases for diversion at the Central Diversion Dam may be reduced to the rates required in dry conditions (Paragraph III.E.3) if necessary to allow Lake McConaughy to fill as provided in this paragraph.

**E. Dry Conditions**

1. Dry conditions are defined as those circumstances when either the total Lake McConaughy contents, including the EA, as of October 1 plus the predicted Storable Natural Inflows from October 1 to March 31 is less than 1.55 maf, or the October 1 total Lake McConaughy content is less than 800 thousand acre-feet (kaf), but excluding those conditions defined as very dry in Paragraph III.F.1.
2. Non-irrigation season releases from Lake McConaughy for diversion at the Keystone Diversion Dam should average between 250 cfs and 700 cfs (exclusive of EA releases).
3. Non-irrigation season releases from Lake McConaughy shall supplement river flows and river gains to provide a minimum diversion at the Central Diversion Dam of 700 cfs and an average diversion of at least 900 cfs from October 1 through November 15, and a minimum diversion of 700 cfs and an average diversion of at least 850 cfs from November 16 through February 14, and a minimum diversion of at least 800 cfs and an average diversion of at least 960 cfs from February 15 through the beginning of irrigation season.
4. Requirements in Paragraphs III.E.2 and 3 are independent of each other and each must be met.
5. There shall be no upper limit on outflows from Lake McConaughy other than meeting the standards of safety and beneficial use.
6. Releases should be managed to impound between 250 kaf and 550 kaf during the non-irrigation season with a goal to optimize reservoir storage. After consultation with the EA Manager by the Districts, releases for diversion at the Central Diversion Dam may be at rates less than the average but not below the minimums specified in Paragraph III.E.3 if necessary to allow Lake McConaughy to fill as provided in this paragraph.

**F. Very Dry Conditions**

1. Very dry conditions are defined as those circumstances when the total Lake McConaughy content, including the EA, as of October 1 is less than 650 kaf.

2. Non-irrigation season releases from Lake McConaughy for diversion at the Keystone Diversion Dam should average between 250 cfs and 700 cfs (exclusive of EA releases).

3. Non-irrigation season releases beyond those required in Paragraph III.F.2 above shall be planned in consultation with the EA Manager and other customers to maximize multiple use of water and to share the effects of shortages. It is anticipated that irrigation season releases will be adjusted by the Districts and their customers consistent with existing policies and contracts to reduce water use to preserve future drought protection.

#### **G. Compliance Measurement**

1. Compliance with release requirements for diversion at the Keystone Diversion Dam shall be accomplished if the real-time mean daily average or non-irrigation season average gauge readings meet or exceed the requirements.

2. Central shall plan its operations to target mean daily flows at its diversion which meet or exceed minimum diversion requirements. In recognition of the distance involved and potential intervening factors affecting flows, compliance with release for minimum diversion requirements at the Central Diversion Dam shall be accomplished if either: 1) the real-time mean daily gauge reading less EA flows at that location meets or exceeds the required minimum minus 5 percent; or 2) the seven-day running average of the real-time mean daily gauge readings less EA flows meets or exceeds the required minimum. Compliance with releases for average diversion requirements at the Central Diversion Dam shall be accomplished within each period provided the average for the period of real-time mean daily gauge readings less EA flows conforms with the required average. Neither the seven-day running average nor the period average shall be calculated including any day during which the operational rules were suspended pursuant to Paragraph III.A.7.

3. Details of measurement and accounting protocols to verify compliance will be developed by the Districts, the EAC and NEDWR.

#### **IV. COORDINATING RESERVOIR MANAGEMENT**

A. A Reservoir Coordination Committee ("RCC") shall be established to provide a forum to coordinate annual operation plans. This committee shall consist of one representative each from Central, NPPD, the EA Manager, BOR, Colorado, Wyoming and NEDWR. The RCC will coordinate operations plans and review reservoir accounting, inflow projections, storage and release goals and river monitoring methodologies.

B. The RCC shall meet at least annually and as often thereafter during the water year as is necessary to coordinate Central's and NPPD's water operations with the EA Manager's operation of the EA.

C. The RCC is for coordination purposes only. The Districts and the EA Manager retain the authority to develop their individual operations plans.

D. Central, as the operator of Lake McConaughy, and NPPD as the operator of the Sutherland project, shall communicate with the EA Manager in the manner the Districts communicate with other water users to facilitate effective day to day coordination. Central, NPPD and the EA Manager shall communicate as necessary to effectively coordinate their respective plans as they are implemented. The EA Manager shall be informed and provided background data if the Districts conclude it is appropriate to change the designation of the type of year before the plan is changed and related changes are made in required releases for diversion. The EA Manager also shall be informed as expeditiously as possible under the circumstances, should contingencies arise such as those described in Paragraphs II.C.2.a and b and Paragraph III.A.7. Increases or decreases in releases of operational flows or the EA shall be coordinated to ensure impacts to the hydraulic systems are minimized and beneficial uses maximized.

**PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM  
APPENDIX A, WATER COMPONENT**

**TAB 1B**

**NEBRASKA'S PLAN FOR FUTURE DEPLETIONS**

**I. DURING THE TERM OF THE COOPERATIVE AGREEMENT**

As detailed in the Milestones for the Cooperative Agreement, Nebraska, during the term of the Cooperative Agreement, will monitor and annually report new water related activities, as defined in that Agreement. Nebraska will work with the other signatories to complete the "Tracking/ Accounting Procedure for Determining Depletion/Accretion Impacts for the Three Program Water Projects and New Water Related Activities, Including Water Conservation/Supply Projects," as detailed in the Milestones for the Cooperative Agreement, so that by the end of the term of the Cooperative Agreement decisions can be made by the Governance Committee about which new water related activities cause a sufficient depletion in the flows in the habitat area to require mitigation. This analysis will result in a determination about which groundwater is to be considered hydrologically connected and therefore subject to mitigation requirements.

Nebraska will also use the term of the Cooperative Agreement to decide how to meet its obligations to mitigate or offset for any new water related activities which adversely affect the target flows and which occur during the term of the Cooperative Agreement. During the same time, Nebraska will decide how to prevent or mitigate for water related activities which cause adverse effects on such flows after the initiation of a Program. Options to accomplish both those objectives will be selected and will be readied for implementation if a Program is in fact initiated. For both time periods, the possible options include instream flow appropriations, water right conversions, and management of hydrologically connected ground water.

**II. PROPOSED PROGRAM**

If a Program is initiated, Nebraska will, with the concurrence of the Governance Committee, implement the measures selected by it during the term of the Cooperative Agreement to mitigate or offset for the adverse impacts of any new water related activities which occur during the term of that Agreement. Nebraska will also implement measures selected to prevent or mitigate for any new water related activities which are proposed or occur after a Program begins and would adversely affect target flows in the habitat area. For both objectives, any legislation necessary will be introduced in the first



year after a Program is initiated, and will be enacted no later than the end of the second year, and will be implemented by the end of the third year.

**PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM  
APPENDIX A, WATER COMPONENT**

**TAB 2A**

**WYOMING'S PATHFINDER MODIFICATION PROJECT**

**I. PROJECT DESCRIPTION**

A. The Pathfinder Modification Project would increase the capacity of the existing Pathfinder Reservoir by approximately 54,000 acre feet to recapture storage space lost to sediment. The modification would be accomplished by raising the elevation of the existing spillway by approximately 2.39 feet with the installation of an inflatable dam or some other means. The recaptured storage space would store water under the existing 1904 storage right for Pathfinder Reservoir and would enjoy the same entitlements as other uses in the reservoir with the exception that the recaptured storage space could not place regulatory calls on existing water rights upstream of Pathfinder Reservoir other than the rights pertaining to Seminoe Reservoir.

B. Approximately 34,000 acre feet of the proposed 54,000 acre foot modification would be accounted for in an environmental account and operated for the benefit of endangered species and habitat in Central Nebraska.

1. Water would accrue to the environmental account on an equal priority with other reservoir uses. The 34,000 acre foot account is approximately 3.18% ( $34,000/1,070,000$ ) of the active capacity of Pathfinder Reservoir. Therefore, the account would accrue 3.18% of the inflow that is storable under the 1904 storage right.

2. The environmental account could not contain more than 34,000 acre feet at any one time and will be administered under Wyoming water law. For example, if at the end of a water year, which is defined as October 1 to September 30, 10,000 acre feet of water was in the account, the account could only accrue 24,000 acre feet under its priority fill during the forthcoming water year.

3. The environmental account would be assessed its proportionate share of evaporation losses based on the storage water in the account.

4. The environmental account would be operated, under contract with the Bureau of Reclamation, by the same manager that would manage the

environmental account in Lake McConaughy, in a manner consistent with Wyoming water law and the North Platte Decree.

C. The State of Wyoming would retain, under contract with the Bureau of Reclamation, the remaining 20,000 acre feet of the modification capacity to provide municipal water to North Platte communities in Wyoming through contracts between the municipalities and the State of Wyoming.

1. Water would accrue to the municipal account on an equal priority with other reservoir uses. The 20,000 account is 1.87% (20,000/1,070,000) of the active capacity of Pathfinder Reservoir. Therefore, the account would accrue 1.87% of the inflow that is storable under the 1904 storage right.

2. The municipal account could not contain more than 20,000 acre feet at any one time and will be administered under Wyoming water law. For example, if at the end of a water year, which is defined as October 1 to September 30, 5,000 acre feet of water was in the account, the account could only accrue 15,000 acre feet under its priority fill during the forthcoming water year.

3. The municipal account would be assessed its proportionate share of evaporation losses based on the storage water in the account.

4. The storage water would be used to supplement Wyoming municipalities' water rights. If the surface or hydrologically connected ground water rights of a municipality, or a portion thereof, are regulated due to a priority call, that community, subject to state law, could continue to divert to meet its municipal demands and its depletions would be replaced from its contracted portion of the municipal account subject to the following conditions:

a. The municipality must have the capabilities of measuring its diversions and its return flows in a manner approved by the Wyoming State Engineer in order to accurately measure the resulting depletions. If the return flows cannot be measured in a manner acceptable to the Wyoming State Engineer, the entire amount diverted will be considered a depletion and will be debited from the respective municipalities' account.

b. Contracts for water from the Pathfinder Modification Project with the State of Wyoming will stipulate that the contracting municipality can only serve new individual demands less than 100 acre feet of water per year.

c. If the City of Casper contracts for water in the municipal account, water in its portion of the account must be depleted before it can exercise its contract for water from Seminoe Reservoir. This condition serves to alleviate project impacts on Seminoe Reservoir.

5. The Bureau of Reclamation, under contract with the State of Wyoming, will operate the 20,000 acre foot municipal storage account to insure an annual estimated firm yield of 9,600 acre feet. In any year that the municipal demand is less than 9,600 acre feet, the remaining balance of the annual firm yield may be contributed by Wyoming for release to the benefit of the endangered species and the critical habitat in Central Nebraska. Any such water contributed must be released from storage before the end of the water year. Such contributions are secondary to the purpose of providing municipal water to North Platte communities in Wyoming and do not constitute a permanent right.

D. Reactivation of the storage will affect the users and contractors for water from Glendo, Pathfinder and Seminoe Reservoirs in Wyoming. Therefore, in order to address these effects, Wyoming has agreed to pay the Wyoming and Nebraska federal storage water contractors' share of the Safety of Dams Modifications to the federal reservoirs to be implemented by the Bureau of Reclamation in the near future. In addition, as Seminoe Reservoir is the project most affected by the enlargement, Wyoming has also agreed to assist the Casper Alcova Irrigation District, the federal contractor for Seminoe water, with the resolution of existing selenium issues that are impacting its existing operation.

E. Existing Wyoming and Nebraska federal storage water contractors will not be held responsible for costs assigned to the Pathfinder Modification Project.

F. The storage and delivery of water for environmental purposes would serve as a Wyoming contribution to the water component of the Program on behalf of Wyoming's existing water users, including the federal storage water contractors located in Wyoming and Nebraska to the extent the activities of such contractors are related to the delivery of storage water from the federal reservoirs in Wyoming.

G. Subject to the appropriate approvals and conveyance losses, Wyoming, in accordance with its water law, will assure delivery of the storage water from the Pathfinder Modification Project herein designated for downstream environmental purposes to the Wyoming/Nebraska state line. A permit will be secured under Nebraska water law for the environmental account to conduct the quantities of water thus delivered at the state line, subject to appropriate conveyance losses,

to specified locations between the state line and Chapman, Nebraska. The environmental releases will begin subsequent to the completion of the project and issuance of the permits by Nebraska. Beyond the state line, Nebraska will assure delivery of the water in accordance with the terms of any such permit granted and with other applicable Nebraska law.

H. Upon completion of the construction of the Pathfinder Modification Project, Wyoming will release the 404 permit and the water rights for the Deer Creek Project, a proposed and permitted reservoir with a capacity of approximately 66,000 acre feet. Further, Wyoming would provide, at no cost, fee simple title to the 470 acres of habitat its owns in the critical habitat area in Central Nebraska to the USFWS or other entities as deemed appropriate by the USFWS. Nothing herein is intended to affect the agreement, dated November 3, 1988, between the USFWS, Department of Interior, and the Wyoming Water Development Commission.

## II. **PROJECT STATUS**

The project concept was brought to the Wyoming Water Development Commission (WWDC) by the Goshen Irrigation District in the fall/winter of 1994. The concept was discussed and expanded in meetings with other North Platte federal contractors and state officials. In June, 1995, the WWDC contracted with the Bureau of Reclamation to perform a preliminary technical review of the proposal. The effort was jointly funded with each entity providing \$37,000. The resulting report entitled, "Draft, North Platte River Basin Initiative" was completed in October, 1995. The report provided technical and hydrologic information and concluded that the project was technically feasible.

During the 1996 Legislative Session, based on the recommendation of the WWDC, the Wyoming Legislature amended the statutes authorizing and funding the Deer Creek Project to include the following spending authorization to the WWDC: "Upon review by the select water committee and approval of the governor, the commission may use not to exceed one million dollars (\$1,000,000.00) of the project appropriation to pursue alternatives to the project which provide equivalent municipal water supply benefits, assist the Casper Alcova Irrigation District in the resolution of selenium issues, assist the federal contractors of North Platte storage in the resolution of safety of dam issues, and seek long term solutions to endangered species issues in the Platte River basin."

In June, 1996, the necessary approvals were secured from the Governor and the Wyoming Legislature's Select Water Committee for the WWDC to utilize up to \$400,000 for the following purposes:

A. The WWDC contracted with the Bureau of Reclamation to provide a detailed evaluation of the social, economic and environmental effects of the

project. This effort will be performed at a level of detail which could be used as part of a NEPA document. However, the study will not evaluate the project relative to other alternatives, and the report will not constitute a NEPA document. However, it is anticipated the findings of the study will be incorporated into a NEPA compliance document at a future date. The contract amount is \$165,000. The study will be completed in January, 1998.

B. The WWDC contracted with the Casper Alcova Irrigation District to retain the professional services necessary to develop detailed designs and cost estimates for the facilities necessary to implement selenium remediation. The contract amount is \$140,000. The work will be phased and completed in December, 1999.

### III. **FUTURE WORK ITEMS**

A. Technical Tasks-The following work items will be completed during the term of the Cooperative Agreement.

1. The detailed designs for the selenium remediation must be completed. This work is presently underway.
2. The Bureau must finalize the plans and cost estimates for the safety of dam modifications. The schedule for this work should be established so the appropriate state funding can be arranged accordingly.
3. The plans and specifications for the modifications to the emergency spillway at Pathfinder Dam must be developed and construction cost estimates must be finalized.
4. A contract between the State of Wyoming and the Bureau of Reclamation relative to the operation of the municipal account must be completed. A contract between the State of Wyoming, the Governance Committee and the Bureau of Reclamation relative to the operation of the environmental account must be drafted, with final approval depending on an approved Program.

B. NEPA/ESA Review/Federal Permitting-Presently, it is anticipated that the NEPA/ESA review of the Proposed Platte River Recovery Implementation Program (Proposed Alternative) will include the necessary NEPA/ESA review for the project in sufficient detail to secure the necessary federal approvals to implement the project. As a 404 permit under the Clean Water Act will be required, the input of the U.S. Army Corps of Engineers will be needed.

C. Protection of Project Water-The following work items will be initiated, in sequence, immediately after the federal 404 permit is issued and the Proposed Program has been approved by the DOI and the three states. While every effort will be made to complete this work as soon as possible, it will likely take two years to secure the following clearances.

1. The federal authorization of Pathfinder Reservoir will be amended, if necessary, to include municipal and environmental purposes. These purposes must be institutionally recognized in order to achieve parity with the agricultural water supply and power production. This issue must be resolved in a manner that meets the federal requirements and will provide the certainty the Proposed Program and the State of Wyoming need to pursue the project.

2. The 1904 Wyoming water right for Pathfinder Reservoir must undergo a partial change of use under Wyoming water law to allow the uses of the environmental and municipal accounts contemplated by the project. The Wyoming Board of Control must authorize the partial change of use. The Board of Control will require technical and hydrologic information in its decision making process. The change of use is necessary to capture the water and to allow the Wyoming State Engineer to protect the water released from the environmental and municipal storage accounts from other appropriators.

3. In order to provide institutional certainty that the project environmental releases can be protected and will reach the Wyoming/Nebraska state line, an export of water is necessary. In order to achieve an approved export, the Wyoming State Engineer must make recommendations to the Wyoming Legislature and the Wyoming Legislature must approve the export. A permit under Nebraska water law is needed to conduct the quantities of water delivered to the state line to specified locations between the state line and Chapman, Nebraska.

4. Procedures must be developed through the Program's Environmental Account Manager and the Governance Committee involving representatives of the Bureau of Reclamation, Wyoming, Nebraska, and the Nebraska Districts to coordinate operations with those of the Nebraska Environmental Account.

D. Project Construction/Implementation-Project construction should be completed in one year. The project accounts would hopefully fill the following spring and water should be available for project/program purposes during the summer/fall.

**IV. MILESTONES PERTAINING TO THE PATHFINDER MODIFICATION PROJECT**

- A. Year 1-Initiate the following activities in sequence:
1. Seek amendment to the federal authorization of Pathfinder Reservoir to include municipal and environmental purposes, if necessary.
  2. Seek a partial change of use for the water right for Pathfinder Reservoir under Wyoming water law to allow the uses of the environmental and municipal accounts contemplated by the project.
  3. Seek approval from the Wyoming Legislature for the export of water for downstream environmental uses and seek a permit under Nebraska water law to conduct project environmental releases delivered to the state line to specified locations between the state line and Chapman, Nebraska. Deliveries of water would be subject to appropriate conveyance losses in both states.
- B. Year 2-Secure the permits/clearances sought in Year 1.
- C. Year 3-Initiate and complete project construction.
- D. Year 4-Begin the storage and release of project water.



**PROPOSED PLATTE RIVER RECOVERY  
IMPLEMENTATION PROGRAM**

**APPENDIX A, WATER COMPONENT**

**TAB 2B**

**WYOMING'S PLAN FOR FUTURE DEPLETIONS**

**PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM  
APPENDIX A, WATER COMPONENT**

**TAB 2B**

**WYOMING'S PLAN FOR FUTURE DEPLETIONS**

**I. DURING THE TERM OF THE COOPERATIVE AGREEMENT**

Wyoming will monitor and annually report new water related activities within the Platte River Basin and within its boundaries during the term of the Cooperative Agreement. The report will include new water related activities, whether or not those new water related activities could adversely affect the quantity or timing of flows reaching the associated habitats in the central Platte. Wyoming will work with the other signatories to complete the "Tracking/Accounting Procedure for Determining Depletion/Accretion Impacts for the Three Program Water Projects and New Water Related Activities, Including Water Conservation/Supply Projects" ("Depletion Impact Analysis"), as detailed in the Milestones for the Cooperative Agreement, so that by the end of the term of the Cooperative Agreement, decisions can be made by the Governance Committee about which new water related activities cause such a depletion in the flows in the habitat area as to require mitigation. This Depletion Impact Analysis will include a determination about which ground water is to be considered hydrologically connected and therefore subject to mitigation requirements.

Wyoming will also use the term of the Cooperative Agreement to decide how to meet its obligations to mitigate or offset the impacts at the Wyoming/Nebraska state line of any new water-related activities which adversely affect the target

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<sup>1</sup> New water related activities are new surface water or hydrologically connected ground water activities including both new projects and expansion of existing projects, excluding the Pathfinder Modification Project, both those subject to and not subject to Section 7(a)2 of the ESA, which could affect the quantity or timing of water reaching the "associated habitats," as defined by the Cooperative Agreement, and that are implemented after the effective date of the Cooperative Agreement.

flows and which occur during the term of the Cooperative Agreement. During the same time, Wyoming will decide how to prevent or mitigate the impact of new water related activities which cause adverse effects on such flows after the initiation of the Program. Options to accomplish both these objectives will be selected and will be readied for implementation if a Program is initiated. For both objectives, the possible options include, without limitation, depletion fees for de minimis uses, water right transfers, ground water recharge projects, release of water from existing reservoirs, or other means specific to each new water related activity.

## **II. PROPOSED PROGRAM**

If a Program is initiated, Wyoming will implement the measures selected by it during the term of the Cooperative Agreement to mitigate or offset the impacts at the Wyoming/Nebraska state line of any new water related activities which occur during the term of that agreement. Wyoming will also implement measures selected and concurred in by the Governance Committee to prevent or mitigate for any new water related activities that are proposed or occur after a Program begins, to the extent that such new water related activities would adversely affect target flows in the habitat area. For both objectives, any legislation necessary will be introduced in the first year after a Program is initiated, will be enacted no later than the end of the second year, and will be implemented no later than the end of the third year.

## **III. MILESTONES PERTAINING TO WYOMING'S PLAN FOR FUTURE DEPLETIONS**

### **A. Year 1**

1. Implement the measures selected during the term of the Cooperative Agreement to mitigate or offset the impacts at the Wyoming/Nebraska state line of any new water related activities which occur during the term of that agreement. Introduce legislation if necessary.
2. Implement measures selected to prevent or mitigate for any new water related activities which are proposed or occur after a Program begins and would adversely affect target flows in the habitat area. Introduce legislation if necessary.

### **B. Year 2. Enact approved legislation that may be necessary to accomplish the objectives noted in Year 1.**

### **C. Year 3. Implement approved legislation that may be necessary to accomplish the objectives noted in Year 1.**

**PROPOSED PLATTE RIVER RECOVERY  
IMPLEMENTATION PROGRAM**

**APPENDIX A, WATER COMPONENT**

**TAB 3A**

**COLORADO'S TAMARACK PLAN**

**PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM  
APPENDIX A, WATER COMPONENT**

**TAB 3A**

**COLORADO'S TAMARACK PLAN**

**I. PROJECT DESCRIPTION**

The Tamarack Plan involves the use of participating existing and future wells and other water facilities in Colorado to reregulate flows that are in excess of legal rights to and physical demands for water in Colorado in a manner that is consistent with the flow-related goals of the Platte River Recovery Implementation Program. As a result of the geographic location of the Tamarack Plan near the state line, groundwater recharge that results from the Tamarack Plan is estimated to increase flows at the Julesburg gage during the period of April through September by an average of approximately 10,000 acre-feet over the flows that would otherwise occur during that period. As stated in the Program description, all signatories have agreed that the combined operations of the Tamarack Plan and the other reregulating projects in the Proposed Program shall score and be credited with reducing flow shortages by 70,000 acre-feet. Water rights for the operation of the components of the Tamarack Plan will be obtained and exercised under Colorado law for beneficial uses in Colorado.

Participating wells, ditches or other facilities, and associated water rights, may also be operated for purposes other than those associated with the Program, for example but not by way of limitation, augmentation purposes and protection and enhancement of native species and wildlife. Such operations are not part of the Tamarack Plan, and references to this Plan do not include such operations.

The components of the Tamarack Plan will be developed within the 40 miles above the state line beginning at about the Tamarack Ranch State Wildlife Area owned by the Colorado Division of Wildlife near Crook, Colorado. These facilities will include wells located adjacent to the South Platte River that divert groundwater from the alluvial aquifer and canals that divert water from the South Platte River. Water that percolates into the groundwater alluvium from these facilities will return to the South Platte River at a later time. Inflows to canals and recharge basins will be identified as for Program or other purposes, and inflows for Program purposes will be measured and recharge or seepage will be computed as inflows minus evaporation. Evaporation in acre-feet will be determined by using available weather station data and the surface areas of the recharge sites. Recharge basins are typically located in sandy upland areas with high infiltration rates such that free water surface areas are minimal, resulting in low evaporation

amounts. The evaporation computed for existing recharge projects in the lower South Platte River Basin in Colorado is typically less than one percent of gross flows.

By selecting the correct location of recharge basins with respect to their distance from the river, the return flows occurring in the summer can be optimized. The Stream Depletion Factor (“SDF”) method developed by the U.S. Geologic Survey (“USGS”) is a standardized procedure used for analyzing the timing of well depletions and recharge accretions to the river. USGS SDF maps give SDF factors for recharge basins and canal reaches along the South Platte River in Colorado. These SDF factors have units of days and represent the lag time for recharge to return to the river. From the mathematical solution of the SDF method, the SDF factor in days represents the time when 28 percent of the amount recharged has returned to the river. The remaining 72 percent of the recharge returns to the river in the time following the SDF day period. Figure 1 is a USGS map of SDF factors for the lowest reach of the South Platte River in Colorado. The SDF values for canal systems and recharge basins in the lower South Platte River Basin in Colorado range from 60 days to 1,500 days. Observation wells will be located between the recharge basins and the river so that groundwater gradients and return flows to the river from the recharge basins’ seepage can be monitored. Estimates of return flows to the river from the operation of the Tamarack Plan may be reviewed by the Governance Committee during the term of the Cooperative Agreement.

## **II. HISTORICAL ANALYSIS**

Colorado has analyzed how the Tamarack Plan would have operated during the period 1943-1994. For the purpose of this historic analysis, periods and amounts of excess flows for diversion by the Tamarack Plan to recharge facilities in Colorado were assumed to occur when the following two conditions were satisfied: (1) South Platte River Compact requirements were satisfied and (2) flows exceeded the Fish and Wildlife Service (“FWS”) year round target flows at the Grand Island gage on the Platte River in Nebraska. Existing target flows for every month were used in this analysis and the monthly target values varied with hydrologic conditions of wet, average, and dry.

This analysis assumed that pumping of new groundwater wells located next to the river to recharge basins could occur during the winter because wells can operate during freezing periods due to warmer groundwater temperatures. This analysis also assumed pumping to recharge basins that reflects potential operations at the 10,000 acre Colorado Division of Wildlife’s Tamarack Ranch State Wildlife Area. Colorado plans to install approximately twenty new large capacity wells and associated pipelines and construct necessary recharge basins and related monitoring features. The SDF values of the new recharge basins which the wells pump into will vary from 60 days to 270 days. For the 1943-1994 study period, the average annual diversion by the wells for recharge in the Tamarack Plan would have been 22,950 acre-feet.

Recharge from canal systems is accomplished during periods when there is unused canal capacity. These periods occur in the fall after the irrigation season until freeze-up, typically through the month of November, and during spring runoff when there are excess river flows. The average annual diversion for the 1943-1994 study period by canals for recharge in the Tamarack Plan Project would have been 6,690 acre-feet for a total of 29,640 acre-feet by both wells and canals.

Tables 1 and 2 list the reregulation results of the Tamarack Plan operations for this historical analysis of the 1943-1994 period. Table 1 lists the monthly additions or increases that would have occurred to the historic Julesburg gage flows as a result of the accretions or return flows to the river caused by the groundwater recharge of the Tamarack Plan. These are net values and occurred for months when river accretions exceeded the diversions to the recharge basins. Table 2 lists the monthly net depletions which would have occurred for months when the diversions to the recharge basins exceeded the accretions in that month. From Table 1, the average annual net addition or accretion is 16.1 thousand acre-feet ("kaf") while the average annual net addition for the April through September period is 10.0 kaf. From Table 2, the average annual net depletion is 20.0 kaf. The difference between the average annual accretion of 16.1 kaf and the average annual depletion of 20.0 kaf is due to evaporation and some of the accretions to the river not being accounted for because they would have occurred after 1994, which is the last year of the modeled period.

### **III. CRITERIA FOR OPERATION OF THE TAMARACK PLAN**

A. The components of the Tamarack Plan include participating existing and future wells or other water facilities which are operated to increase flows at the Julesburg gage during the period of April through September by an average of approximately 10,000 acre-feet over the flows that would otherwise occur during that period. All such facilities will be operated by Colorado and its water users in compliance with the requirements of the South Platte River Compact.

B. Colorado will also operate the Tamarack Plan, after consultation with the manager of the Environmental Account in Kingsley Reservoir, in a manner that does not cause an increase in target flow shortages at the critical habitat unless requested otherwise by the Environmental Account Manager, as measured at the Grand Island gage and using FWS target flows which are then in effect, so long as (a) any target flow shortage is not related to the operation of the Environmental Account in Kingsley Reservoir outside of the scope of the Annual Operations Plan for the Environmental Account adopted by the signatories, (b) the use of wells within Nebraska which are in existence at the date of the Cooperative Agreement is not expanded or enlarged, or modified in any manner that will cause an increase in target flow shortages, and (c) wells in Nebraska that are constructed, enlarged, improved, or placed into use in whole or in part after the date of the Cooperative Agreement are operated in a manner that does not cause an increase in target flow shortages at the critical habitat. Any replacement of

depletions in Nebraska to flows at the critical habitat that is required to comply with (b) and (c) above shall be from water that is in excess to target flows and shall not rely upon flows that occur at the Colorado-Nebraska state line resulting from the operation of the Tamarack Plan or other reregulation facilities for the benefit of the target species, or from accretions attributable to Colorado's new water related activities. The analysis of the impacts from wells in Nebraska to flows at the critical habitat that is required by (b) and (c) above and, as provided in Milestone 14-1 of Attachment I to the Cooperative Agreement, shall be provided to the Governance Committee and shall be based on scientifically sound assumptions and data which are independently verifiable and made available to all signatories. If the depletions from these wells have been quantified as provided for above but are not fully replaced, Colorado will add these depletions back into Grand Island gage flows for purposes of determining when it may operate the Tamarack Plan without causing an increase in target flow shortages at the critical habitat.

Any party may request that a dispute regarding the acceptability of information regarding these wells be resolved by a majority of a panel of three experts in groundwater hydrology, one member to be appointed by the State of Colorado, one member to be appointed by the State of Nebraska, and one member to be appointed by the Department of the Interior ("DOI") who is an employee of the USGS. Pending completion of the dispute resolution process regarding the acceptability of information concerning these wells, Colorado, in coordination with FWS, will continue to operate the Tamarack Plan consistent with and for the purpose of meeting Colorado's commitment under the Program, subject only to the requirements of state law and the South Platte River Compact. Such continued operation shall be considered adequate for meeting any Program milestones associated with the Tamarack Plan.

C. Components of the Tamarack Plan may also be operated to reregulate flows for the purpose of providing Colorado's contribution to the Program for new depletions as is described in Appendix A, Tab 3B, of the Proposed Alternative. Participating wells or other water facilities which may contribute to the Tamarack Plan may also be operated for purposes other than the Program, consistent with Colorado's commitment under the Program and subject only to requirements of state law and the South Platte River Compact.

For the purpose of these criteria, an "increase in target flow shortages" is measured against the flow conditions which exist as of the date of the Cooperative Agreement. The Grand Island gage will be compared to routed amounts of water that would be diverted by the Tamarack Plan. This routed diversion will utilize the lag and loss factors that will be developed by the Water Technical Committee during the Cooperative Agreement. The routed amount shrunk by the loss factors will be subtracted from the expected (i.e., based on trends and scheduled operational releases from Lake McConaughy) Grand Island gage flow occurring for the number of days of lag in the future and if this computed Grand Island gage flow is still above a desired target then, assuming that the provisions of Paragraph III B. above regarding the replacement of depletions have been



satisfied, diversions for the Tamarack Plan will take place to the extent that Grand Island gage flows do not drop below targets.

**PROPOSED PLATTE RIVER RECOVERY  
IMPLEMENTATION PROGRAM**

**APPENDIX A, WATER COMPONENT**

**TAB 3B**

**COLORADO'S PLAN FOR FUTURE DEPLETIONS**

**PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM  
APPENDIX A, WATER COMPONENT**

**TAB 3B**

**COLORADO'S PLAN FOR FUTURE DEPLETIONS**

Colorado will be responsible for mitigating the impacts of new water related activities in Colorado on the associated habitats, in the manner described below. As part of the proposed Program, the mitigation described below shall constitute the exclusive means for mitigating new water related activities in Colorado, except for water related activities pursued by entities electing not to participate in the Program. Subject to the planned NEPA and ESA reviews, the Department of the Interior ("DOI") agrees that Colorado's Future Depletions Proposal is a sufficient contribution by Colorado to offset the impacts of new water related activities in the South Platte River Basin in Colorado. If Colorado implements the mitigation program described below, new water related activities in Colorado will not adversely affect the "Current Regime of the River," as that term is used in the document entitled "An Environmental Account for Storage Reservoirs in the Platte River System in Nebraska," Appendix A, Tab 1A. For purposes of this document, "new water related activities" shall be used as that term is defined in the Proposed

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<sup>1</sup> Colorado offers this agreement as part of its efforts to resolve endangered species conflicts through a negotiated and mutually agreed upon basin-wide cooperative agreement and recovery program. Nothing in this agreement constitutes an admission by Colorado that any depletions to the North or South Platte Rivers or their tributaries in Colorado that have occurred or may in the future occur adversely affect or reduce state line flows. Similarly, Colorado does not admit that any changes in the amount or timing of flows at the Colorado-Nebraska or Colorado-Wyoming state lines that have occurred or may in the future occur reach or adversely affect endangered species habitat in Nebraska. This agreement is not intended, and should not be construed, to amend or modify the South Platte River Compact or any interstate decree, or to waive any rights thereunder.

Platte River Recovery Implementation Program ("Program") document, Attachment III to the Cooperative Agreement.

## **I. SOUTH PLATTE RIVER BASIN**

**A. Population Estimates.** Within six months from the effective date of the Cooperative Agreement, Colorado will provide to the Governance Committee an estimate by the Colorado State Demographer of the population of those portions of the following Colorado counties located within the South Platte River Basin, as of the effective date of the Cooperative Agreement, in the following regions:

1. Northern Region -- Boulder, Weld, Larimer, Washington, Morgan, Sedgewick, Logan, Phillips
2. Central Region -- Denver, Jefferson, Adams, Clear Creek, Gilpin, Park
3. Southern Region -- Arapahoe, Douglas, Elbert

Said estimate will be the "Population Baseline." Within six months from the effective date of the Cooperative Agreement, Colorado will also provide to the Governance Committee an estimate by the Colorado State Demographer of the amount by which the population of each region is expected to increase over the Population Baseline by the end of the initial reporting period. Such increase will be the projected "Population Increase."

At the end of each reporting period, Colorado will provide to the Governance Committee an estimate by the Colorado State Demographer of the actual population in each region (which shall be the Population Baseline for the next succeeding reporting period), and an estimate of the projected Population Increase for the next succeeding reporting period.

**B. Water Use and Effect Assumptions.** Assumptions concerning per capita water use, supply source mix by region, and accretive/depletive effects of each supply source (including monthly distributions of said effects), set forth in this paragraph and the table below, represent reasonable estimates at the outset of the program, and may be modified by the Governance Committee based on information made available to that Committee by Colorado or others. The gross per capita water requirement in the South Platte River Basin in Colorado will be assumed to be 0.25 af/yr, with 35% consumptive use assumed for all municipal purposes, and 45% consumptive use assumed for agricultural irrigation purposes. It is anticipated that new water related activities within the three regions will be from six sources of supply to serve the Population Increase, each with a different depletive or accretive effect on flows in the South Platte River. The three regions will develop the six sources of supply in different combinations. It will be initially assumed that the sources of supply for new water related activities will be developed in the combinations and will have the accretive or depletive effect shown below:

Source	Northern Region	Central Region	Southern Region	Accretive or (Depletive) Effect
New Transbasin Imports	40%	30%	20%	64%
Nontributary Groundwater	0%	10%	50%	68%
Ag. to Urban Conversion	35%	5%	0%	10%
Conservation	5%	15%	10%	0%
Wastewater Exchange/Reuse	10%	25%	10%	(41%)
Native South Platte Flows	10%	15%	10%	(27%)

Within six months from the effective date of the Cooperative Agreement, Colorado will provide recommendations to the Governance Committee, and will ask the Governance Committee to adopt, assumptions concerning the monthly distribution of the accretive/depletive effect of the development of each source of supply, taking into consideration the accretive/depletive effect shown above, the weighted contribution to meeting total water demand, and the anticipated monthly return flow pattern based on municipal water use patterns. The assumptions shown herein or as may be modified by the Governance Committee shall be as measured at or near the point of use.

**C. Transit Loss Assumptions.** Colorado's commitment to offset the cumulative accretive/depletive effect of new water related activities in the three regions (hereinafter referred to as "Cumulative Effect") will be as measured at or reasonably near the Colorado-Nebraska state line. The Cumulative Effect will be influenced by natural river gains and losses, and water uses and return flows downstream from the points of use. Unless amended by the Governance Committee based upon the results of the "Tracking/Accounting Procedure for Determining Depletion/Accretion Impacts for the Three Program Water Projects and New Water Related Activities, Including Water Conservation/Supply Projects," for the purposes of routing both accretions and depletions from the Kersey gauge to a point at or reasonably near the Colorado-Nebraska state line, the Program will assume the following monthly transit loss factors apply on a per-mile basis:

jan	feb	mar	apr	may	jun	jul	aug	sep	oct	nov	dec
.02%	.02%	.05%	.1%	.3%	.45%	.5%	.5%	.5%	.4%	.1%	.02%

**D. Reporting Periods.** The Initial Reporting Period will be two years from the initiation of a Program (approximately five years from the effective date of the Cooperative Agreement). Subsequent Reporting Periods will be each five years thereafter, for so long as the Program is in effect. At the close of each reporting period, Colorado will report:

1. any adjustments in the projected Population Increase for the past reporting period;
2. any new information relevant to the continued use or modification of assumptions set forth herein for:
  - a) gross per capita water requirements, including assumptions regarding the relationship among municipal, industrial and agricultural use of water,
  - b) the accretive/depletive effect of each source of supply, and
  - c) the cumulative effect at the state line;
3. the operations and effects of projects to mitigate new depletive effects;
4. an estimate of Population Increase for the next reporting period;
5. estimates of the net accretive/depletive effects and Cumulative Effect for the next reporting period; and
6. net changes in irrigated agricultural acreage, using readily available data.

Colorado will also submit annual information reports to the Governance Committee estimating population increase in each of the three regions, and describing water sources used to supply new water related activities including type of water source, works used and water quantities supplied. Colorado will promptly report to the Governance Committee any new information which significantly affects assumptions relied upon in this Program.

**E. Determination of Cumulative Effect -- Initial Reporting Period.** Within six months from the effective date of the Cooperative Agreement, Colorado will provide to

the Governance Committee a calculation of the average monthly distribution of the Cumulative Effect for anticipated water related activities in the South Platte River Basin in Colorado for the Initial Reporting Period. The calculation will be based on the projected Population Increase for that period, and the water use and transit loss assumptions described above or as may be modified by the Governance Committee. The Cumulative Effect as approved by the Governance Committee will determine the mitigation measures that will be undertaken by Colorado during the Initial Reporting Period.

**F. Determination of Cumulative Effect -- Subsequent Reporting Periods.**

Colorado will monitor actual water use and development in the South Platte River Basin in Colorado from the effective date of the Cooperative Agreement. At the end of the Initial Reporting Period, and at the end of each Subsequent Reporting Period, Colorado will report to the Governance Committee for its review and approval any adjustments in the Population Increase and in the Cumulative Effect for that period. Such adjustments will serve as the basis for calculations for the next succeeding Reporting Period. Any resulting increase or decrease in Cumulative Effect will be added to or subtracted from the Cumulative Effect to be mitigated in the next succeeding Reporting Period.

G. **Mitigation of Cumulative Effect.** The signatories assume that the Cumulative Effect for any annual period is expected to be a mix of net accretions during the fall, winter and spring period, and net depletions in the late-spring to mid-summer period, resulting in an estimated total seasonal net depletive effect on an order of magnitude of less than 1800 af/yr for each 100,000 additional people in the South Platte River Basin in Colorado. Based on these assumptions, Colorado will, in each Reporting Period, undertake such reregulation projects within Colorado as are necessary to shift water flows at a point upstream from the Colorado-Nebraska state line and downstream from the last diversion in Colorado, from periods of net accretion to periods of net depletion. Colorado's commitment to reregulate flows in any Reporting Period shall equal the total depletive effect by month for those months in which a net depletive effect will occur. To the extent that Colorado constructs projects or obtains the ability to reregulate water in excess of the total depletive effect for those months in which a net depletive effect will occur, such capacity will be available for use in the next succeeding Reporting Period. Should total annual net depletive effects exceed the assumptions set forth above, Colorado reserves the option of reconsidering different measures to mitigate those effects under the Program.

**H. ESA Compliance.** ESA compliance for future depletions in Colorado will conform to the Program document, Attachment III to the Cooperative Agreement.

**III. NORTH PLATTE RIVER BASIN**

**A. Cooperative Agreement.** During the term of the Cooperative Agreement, Colorado will elect whether to include new water related activities in the Program. Colorado will consider four options:

1. mitigating the impacts of new water related activities at the Colorado-Wyoming state line;
2. mitigating the impacts of new water related activities at the Colorado-Nebraska state line;
3. mitigating the impacts of new water related activities at the Wyoming-Nebraska state line; or
4. not including new water related activities in the Program and having new water related activities that will result in annual water depletions greater than 25 acre-feet and that are subject to Section 7(a)(2) of the ESA consult individually.

Colorado will provide proposed options for mitigating new water related activities in the North Platte River Basin in Colorado to the Governance Committee for review and concurrence by the other signatories to the Cooperative Agreement and for incorporation into the Program, unless Colorado elects not to rely on the Program to mitigate new water related activities in the North Platte River Basin.

**B. ESA Compliance.** If Colorado elects to include new water related activities in the North Platte River Basin of Colorado in the Program, ESA compliance for future depletions in Colorado will conform to the Program document, Attachment III to the Cooperative Agreement.



**PROPOSED PLATTE RIVER RECOVERY  
IMPLEMENTATION PROGRAM**

**APPENDIX A, WATER COMPONENT**

**TAB 4**

**PROGRAM WATER CONSERVATION/SUPPLY COMPONENT**

**PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM  
APPENDIX A, WATER COMPONENT**

**TAB 4**

**PROGRAM WATER CONSERVATION/SUPPLY COMPONENT**

**I. GENERAL**

Once the Program has been initiated, the Water Management Committee, with approval of the Governance Committee, will begin implementation of the action plan approved during the term of the Cooperative Agreement (see Attachment II to the Cooperative Agreement). Resources made available for conservation/supply projects and incentive programs will be used at the direction of the Governance Committee to maximize net water benefits in the Platte River Basin while considering economic impacts. All net water conserved or developed with Program funds, as adequately quantified and verified under protocols and procedures developed through the activities below, will be dedicated to instream use in the associated habitats to the full extent permitted under state water law. To the extent that water conservation/supply measures which produce a quantifiable net water benefit are implemented through cost sharing with parties using non-Program funds, that portion of net water conserved or developed with non-Program funds may be used to provide potential drought protection for agriculture or to provide for potential additional beneficial uses of water.

**II. STORAGE OF CONSERVED WATER IN THE ENVIRONMENTAL ACCOUNT**

Quantifiable net conserved water that is storable in Lake McConaughy or other storage facilities approved by the Governance Committee may be stored in any Environmental Account created pursuant to new licenses issued for FERC Projects Nos. 1417 and 1835 in Nebraska, anticipated to be the water plan described in Appendix A, Tab 1A. Storable net conserved water is that portion of the quantifiable net water conserved which can be controlled such that it may be stored consistent with legal, regulatory or public safety restrictions.

It is an operational goal to coordinate upstream conservation activities so as to increase storage in the Environmental Account. It is recognized, however, that not all water conserved for environmental purposes will be storable in the Environmental Account, and that water need not be stored or storable to contribute toward Program objectives. The Water Management Committee, with the approval of the Governance Committee, shall develop protocols for determining what quantities of water are to be credited to the Environmental Account, and programs to verify that such water is actually storable.

### **III. WATER CONSERVATION/SUPPLY FUNDING**

Activities approved by the Governance Committee under the Conservation/Water Supply Action Plan will be funded through the Program.

### **IV. OPERATION OF PROGRAM CONSERVATION PROJECTS**

The operations of any Governance Committee-approved water conservation or supply programs or projects shall be coordinated with the Program's Water Management Committee and, where applicable, the Environmental Account Manager.

# PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM

## APPENDIX B

### CONTRIBUTIONS OF THE STATES AND OF THE DEPARTMENT OF THE INTERIOR DURING THE FIRST INCREMENT

When the Program is initiated, the activities undertaken during the term of the Cooperative Agreement will be fully credited to the appropriate state or the federal government as contributions to the Program. During the first increment, DOI and the states will make the following additional contributions to the Program:

#### I. FIRST THREE YEARS (PROGRAM START UP)

##### A. Contributions

1. Project Operations. As soon as possible, Wyoming shall complete the Pathfinder Modification Project (Appendix A, Tab 2A) and Colorado shall complete the Tamarack Project (Appendix A, Tab 3A). Operation shall begin immediately after project completion. Central and NPPD will continue operation of the Environmental Account for Storage Reservoirs on the Platte River System in Nebraska (Appendix A, Tab 1A). All parties agree that these three projects will provide the Program with average annual reductions in shortages in target flows of approximately 70,000 acre feet. That water has significant economic value to the Program that can be quantified and supported in a number of ways. It can be established by comparing it to the projected costs of acquiring other Program water (estimated at \$500/acre feet) or to the market value of the water being made available by these three projects if it were to be marketed. Another potential way to establish the value is to estimate the economic impacts these projects will have on the Project operators. Those economic impacts include: (1) out-of-pocket costs; (2) O&M costs directly attributable to their operation; and (3) revenue losses and replacement power purchases also directly attributable to their operation. Recognizing that each method for quantifying the economic value has merit, DOI and the states agree that the states should receive credit for the water being provided by the three projects, and that for the combined terms of the Cooperative Agreement and the first Program increment, that credit should be in the amounts shown in Table 1.

2. Cash. Cash and cash equivalent contributions totaling \$3.325M will be provided by the states in this three-year period to be used for habitat acquisition and development, water conservation/supply, monitoring or other Program

activities approved by the Governance Committee. Such contributions will be provided by the states with payments divided as shown in the attached Table 1. It is understood that state legislative approval may be necessary to secure some or all of these cash contributions. Nebraska will make no cash or cash equivalent contributions in this time period or in the remainder of the first program increment because of the up-front contribution of Cottonwood Ranch and cash during the term of the Cooperative Agreement.

3. Institutional Protections of Water/Future Water Development. The states will complete any activities required and begun during the term of the Cooperative Agreement which were not already completed, and will implement institutional protections defined under the Program.

**B. Federal Contributions**

The federal government will continue to provide \$2.5M per year for Program purposes. It is understood that Congressional approval is necessary to secure these funds. The states will work with DOI to achieve the necessary Congressional approvals. However, if the federal contributions are not approved or are reduced, state contributions to the Program may also be suspended or reduced proportionately.

**II. YEAR 4 THROUGH END OF FIRST PROGRAM INCREMENT**

**A. State Contributions**

1. Project Operations. The Tamarack Project, Pathfinder Modification Project, and Environmental Account Program will continue to be operated. The value of the water provided to the Program is as described in Paragraph I.A.1 and as shown on Table 1 attached.

2. Cash. The states will contribute a total of \$9.975M cash and cash equivalents to the Program in the remaining part of the first Program increment for expenditures as approved by Governance Committee. Such contributions will be provided by the states with payments divided as shown in the attached Table 1. It is understood that state legislative approval may be necessary to secure some or all of these cash contributions.

3. Institutional Protections of Water/Future Water Development. The states will complete any activities required and begun during the Program start-up (years 1 - 3) which were not already completed, and will continue to implement institutional protections defined under the Program.

**B. Federal Contribution**

The federal government will continue to provide \$2.5M per year for Program purposes. It is understood that Congressional approval is necessary to secure these funds. The states will continue to work with DOI to achieve the necessary Congressional approvals. However, if the federal contributions are not approved, state payments to the Program may also be suspended or reduced proportionately.

**TABLE 1**

**Program Contributions, Cooperative Agreement Through First Program Increment  
(values in millions of 1997 dollars)**

**CASH AND CASH EQUIVALENTS**

	<b>CO</b>	<b>WY</b>	<b>NE</b>	<b>States' Total</b>	<b>Federal</b>	<b>Total</b>
<b><u>Term of Cooperative Agreement</u></b> (3 years anticipated)						
Conservation Study	0.3	0.3	0.3	0.9	0.0	0.9
Habitat (Cash Equiv.)	0.0	0.0	5.3	5.3	0.0	5.3
Other Cash	0.6	0.3	0.4	1.3	7.5	8.8
Total	0.9	0.6	6.0	7.5	7.5	15.0
<b><u>First Program Increment/Years 1-3</u></b>						
Cash and Cash Equiv.	2.475	0.85	0.0	3.325	7.5	10.825
<b><u>First Program Increment/Years 4 to End</u></b>						
Cash and Cash Equiv.	7.425	2.55	0.0	9.975	22.5	32.475
<b>TOTALS OF CASH AND CASH EQUIVALENTS DURING THE COOPERATIVE AGREEMENT AND THE FIRST PROGRAM INCREMENT</b>						
	10.8	4.0	6.0	20.8	37.5	58.3
<b>CONTRIBUTED VALUE OF WATER PROJECTS DURING THE COOPERATIVE AGREEMENT AND THE FIRST PROGRAM INCREMENT</b>						
	4.2	3.5	9.0	16.7	0.0	16.7
<b>PROGRAM TOTALS THROUGH THE FIRST INCREMENT</b>						
	15.0	7.5	15.0	37.5	37.5	75.0

<sup>7</sup> Individual signatories may propose to the Governance Committee that certain interim measures undertaken prior to the execution of the Cooperative Agreement may be credited to their cash or cash equivalent contributions.

<sup>8</sup> Contributions made during the term of the Cooperative Agreement will be credited to the appropriate parties at the inception of the first Program increment.

**PROPOSED PLATTE RIVER RECOVERY  
IMPLEMENTATION PROGRAM**

**APPENDIX C**

**GOVERNANCE AGREEMENT  
FOR ACTIVITIES CONDUCTED UNDER  
A PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM**



# **PROPOSED PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM**

## **APPENDIX C**

### **GOVERNANCE AGREEMENT FOR ACTIVITIES CONDUCTED UNDER A PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM**

#### **I. PURPOSES**

This Governance Attachment is to prescribe a governance structure, and to identify the responsibilities and authorities of each component of that governance structure for making decisions and carrying out activities related to any Program developed pursuant to the Cooperative Agreement.

Although this agreement sets forth a cooperative process, the signatories recognize that they have statutory responsibilities that cannot be delegated, and that this agreement does not and is not intended to abrogate any of their statutory responsibilities.

#### **II. OVERSIGHT COMMITTEE**

Following the execution of an agreement to implement a Program, an Oversight Committee will be established consisting of the Secretary of the Interior and the Governors of the States of Colorado, Nebraska and Wyoming.

A. The Oversight Committee is to meet whenever a request for such a meeting is made by any state or federal member of the Governance Committee because the Governance Committee is unable to resolve problems relating to (1) a preliminary determination by the U.S. Fish and Wildlife Service ("FWS") that the program is not continuing to serve as a reasonable and prudent alternative, (2) a proposal by the Department of the Interior ("DOI") or any state to withdraw from the Program, or (3) lack of funding by Congress or any state to fulfill its responsibilities set forth in any subsequent agreement implementing the Program. Neither a final determination that the Program is not continuing to serve as a reasonable and prudent alternative nor withdrawal of a party from the Program may occur prior to a meeting of the Oversight Committee to discuss such proposed actions and to identify any steps the signatories could take to avoid it.

B. If FWS makes a preliminary determination that the Program is not serving as a reasonable and prudent alternative, it will notify the Governance Committee. The Governance Committee and FWS will work together to evaluate the situation and to develop an appropriate response to restore the ability of the Program to serve as a reasonable and prudent alternative. If this effort is not successful, FWS will communicate this problem to the Secretary of the Interior and request appropriate

assistance. Only the Secretary of the Interior can determine, after a meeting of the Oversight Committee, that DOI will withdraw from the Program.

C. For purposes of this Program, only the Governor of a state can determine, after a meeting of the Oversight Committee, that his or her state will withdraw from the Program.

D. In the event that FWS determines the Program is not serving as a reasonable and prudent alternative, that the Secretary of the Interior determines that DOI will withdraw from the Program, or that a Governor determines that his or her state will withdraw from the Program, the reasons for such action are to be provided in writing to the other signatories and made public. Following a withdrawal by any one of the signatories, the others are to determine whether and under what circumstances the Program could continue.

### **III. GOVERNANCE COMMITTEE**

Following the execution of an agreement to implement a Program, a Governance Committee is to be established.

A. The Governance Committee will consist of the following members:

1. one member per signatory state, to be selected by the Governor of that state;

2. two federal members, to be selected by the Secretary of the Interior, one representing FWS and one representing the Bureau of Reclamation ("BOR");

3. two environmental members representing the environmental entities in the three states, to be selected by those entities;

4. one member representing water users on the North Platte River in Wyoming and also water users in Nebraska above Lake McConaughy who have storage contracts for water in the federal reservoirs in Wyoming, to be selected by those users;

5. one member representing water users on the South Platte River above the Western Canal diversion, to be selected by those users; and

6. one member representing water users downstream of Lake McConaughy or the Western Canal and Nebraska users upstream of Lake McConaughy who do not have federal storage contracts, to be selected by those users.

B. Within 15 days of execution of an agreement to implement the Program, DOI will provide notice to the appropriate constituencies or entities and request that they select their members and notify FWS of the selection within 30 days. Each member of the

Governance Committee will also have an alternate selected in the same manner as that member. Each entity or constituency represented may select its own methods of choosing its member(s). Until all the initial selections are made or in the event of a vacancy, the member's seat(s) shall be considered vacant, and the voting requirements in Paragraph III B. shall be reduced accordingly. Members of the Governance Committee serve at the sufferance of their constituents.

C. For the purpose of voting on any issue, a quorum consists of the members or alternates appointed by each Governor, the members or alternates representing FWS and BOR and two other members or alternates. The chair shall provide reasonable notice of all Governance Committee meetings and a proposed agenda to all members and alternates. Nine of the ten members of the Governance Committee, including the member or alternate appointed by each Governor and the member or alternate representing FWS, must vote in the affirmative for the Governance Committee to establish a position on policy issues. Seven of ten votes are needed for the Governance Committee to take action on non-policy issues. For purposes of this agreement, the term "policy issue" shall mean an issue affecting the term, scope, allocation of funding, or continuing viability of the Program. If a member and alternate are absent from a meeting or abstain from voting, the voting requirements will be reduced accordingly.

D. The Governance Committee will:

- 1.meet on a quarterly basis for the first year of the Program and biannually thereafter except when more frequent meetings are agreed upon;
- 2.elect a chair annually and develop other rules of governance, procedure and conflict resolution as it deems appropriate;
- 3.select an executive director;
- 4.establish Land and Water Management Committees, and additional technical committees, composed of persons with appropriate technical expertise, as it deems appropriate to carry out activities under the Program;
- 5.request Program funds or financing, pursuant to applicable federal and state procedure and subject to the availability of appropriated funds, and approve budgets recommended by the Land and Water Management Committees and any other committees established by the Governance Committee;
- 6.approve, review and revise action plans with recommendations from the Executive Director and the Land and Water Management Committees and any other committees established by the Governance Committee;
- 7.approve Program objectives and monitoring and evaluation protocols;

8. serve as arbiter of disputed external peer reviews upon request of any technical committee;

9. enter into an agreement with an appropriate entity for the administration of certain funds expended pursuant to the Program; and

10. assess accomplishments annually, implement measures to correct any shortfalls, and revise milestones for future increments accordingly; and

11. develop milestones for future increments as appropriate, to insure that the Program can serve as the reasonable and prudent alternative for new and existing water related activities.

#### **IV. EXECUTIVE DIRECTOR**

The Governance Committee will agree on an executive director, who is to report to the Governance Committee. The executive director shall:

A. carry out the direction of the Governance Committee and the committees, including implementation of any action plan;

B. facilitate day-to-day communications among Program participants;

C. co-chair the Land and Water Management Committees;

D. communicate with local governments, the public, the media and, where appropriate, with Congress and federal and state agencies;

E. communicate with FWS as well as other appropriate federal and state regulatory and resource management agencies to ensure overall consistency;

F. coordinate preparation of budgets by committees for approval by the Governance Committee; and

G. perform such other functions as requested by the Governance Committee.

#### **V. CONTRIBUTIONS OF THE SIGNATORIES**

DOI and the States of Nebraska, Colorado and Wyoming will provide representatives to the Oversight Committee and Governance Committee and to any technical committees established by the Governance Committee without compensation from any other signatory. The executive director and those providing assistance to the executive director, or any committee established by the Governance Committee may be

compensated using Program funds if and to the extent approved by the Governance Committee.