

**PLATTE RIVER
RECOVERY IMPLEMENTATION PROGRAM
COOPERATIVE AGREEMENT**

**PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM
COOPERATIVE AGREEMENT
October 24, 2006**

Pursuant to the authorities set forth in Paragraph I below, the signatories hereby agree to participate in and implement the attached “Platte River Recovery Implementation Program” (“Program”). This Agreement succeeds and replaces the July 1, 1997 Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats Along the Central Platte River, Nebraska (“July 1997 Cooperative Agreement”) under which the Program was developed.

The signatories agree to participate in the Governance Committee which is hereby established pursuant to Section 4 of the Endangered Species Act (“ESA”) (16 U.S.C. 1531 *et seq.*) to oversee implementation of the Program. The Program implements certain aspects of the U.S. Fish and Wildlife Service’s recovery plans for four target species (interior least tern, whooping crane, piping plover and pallid sturgeon) listed as threatened or endangered pursuant to the ESA. The Program provides for a range of measures relating to the four target species in their associated habitats as defined in the Program.

I. AUTHORITIES AND RESPONSIBILITIES

A. 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 (16 U.S.C. § 1535), 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 of 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.

B. 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, individuals and institutions in developing and implementing the recovery plans. Advice from these agencies, individuals, and institutions is not subject to the Federal Advisory Committee Act, 5 U.S.C. app.2.

C. Consultation and Regulatory Certainty. Under Section 7 of the ESA, 16 U.S.C. § 1536, federal agencies shall use 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.

D. 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.

E. 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 the Program will be applied for by a state agency or other project sponsor, 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 Program Agreement shall be construed as creating federal water rights or requiring the granting of water rights to federal entities.

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

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

II. OTHER PROVISIONS

A. Applicability. This Program Agreement addresses ESA compliance for 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. Date of Agreement. The date of this Agreement shall be the date of signing by the final signatory.

C. Term of Program. The Program shall commence January 1, 2007 and remain in effect for the First Increment as defined in the Program Document unless terminated earlier pursuant to Section E. below.

D. Amendment. This Program Agreement may be extended or amended by the written agreement of all the signatories.


- E. Withdrawal of a Signatory and Termination.** Only the Secretary of the Interior, after a meeting with the three Governors, can determine that the Department of the Interior (DOI) will withdraw from the Program. Only a Governor of a state can determine, after a meeting with the Secretary of the Interior and the Governors of the other two states that his or her state will withdraw from the Program. If a signatory determines to withdraw from the Program, the reasons for withdrawal are to be provided in writing to the other signatories and made public. This Program Agreement terminates upon the withdrawal of a signatory or by mutual agreement of the signatories. Following a withdrawal by any one of the signatories, the other signatories are to determine whether and under what circumstances the Program could continue under a new cooperative agreement. Upon Program termination, whether or not some signatories seek to develop a successor Program, the signatories agree to resolve the then-existing legal obligations under contracts and arrange for disposition of Program assets.
- F. Consistency with Applicable Law.** This Program Agreement is subject to and is intended to be consistent with all applicable federal and state laws and interstate compacts and decrees. Nothing in this Agreement or in any of the Program documents attached hereto shall be in any way construed as a modification of an interstate compact or decree or an abrogation or waiver by any state of rights under any such compact or decree.
- G. Legislative Approval.** Government funding commitments made in this Program 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 shall receive any benefit that may arise from this Program Agreement.
- I. Avoidance of Future Litigation.** Each state agrees that during the term of the Program, it shall not, except to further Program purposes, in any judicial or administrative proceeding: (1) assert a position adverse to either of the other states 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 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 the participation in the proceeding or to the assertion made. In addition, if a signatory has concerns that a Program-approved activity is being implemented or operated in violation of an interstate water compact or decree with another signatory, attempts will be made within the context of the Program to resolve such concerns before any compact or decree enforcement action relating to that concern is taken before the United States Supreme Court or other appropriate judicial body. This provision reflects

the commitment of the parties to resolve differences, if any, within the context of the Program.


J. No Admissions by States. The states are entering into this Program Agreement on a voluntary and cooperative basis in an effort to resolve ESA species conflicts through a negotiated and mutually agreed upon basin-wide 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.

K. Third-Party Beneficiary Rights. The signatories do not intend to create in any other individual or entity the status of third party beneficiary, and this Agreement shall not be construed so as to create such status. The rights, duties, and obligations contained in this Agreement shall operate only between the signatories to this Agreement, and shall inure solely to the benefit of the signatories to this Agreement.


L. Sovereign Immunity. The signatories to this Agreement do not waive sovereign immunity by entering into this Agreement and specifically retain immunity and all defenses available to them as sovereigns pursuant to state and federal law.


Secretary DIRK KEMPTHORNE
Department of the Interior


DEC 06 2006
Date


Governor DAVE FREUDENTHAL
State of Wyoming

11/27/06
Date


Governor DAVE HEINEMAN
State of Nebraska

10-30-06
Date


Governor BILL OWENS
State of Colorado

10/26/06
Date