



City of Grand Island

Tuesday, June 18, 2002

Study Session

Item -1

US Fish and Wildlife Platte River Critical Habitat Designation

The United States Fish and Wildlife Service (USF&W) has promulgated a wide ranging critical habitat designation for the Piping Plover. In Nebraska, this designation includes reaches of the Platte, Niobrara, Loup and Missouri Rivers. It also includes river reaches and lakes in North and South Dakota and Minnesota. A map of the Nebraska designation is attached.

Discussion:

This designation has the potential to greatly change the way water is used in the State, including the City's well field. The importance of the designation, and its possible affects on Nebraska water use, has been the catalyst to bring a number of organizations together as the Nebraska Habitat Conservation Coalition (NHCC). The group includes natural resource districts, power districts, irrigation districts and farm groups. This designation comes at the same time that the Platte River Cooperative Agreement (CA) is ongoing. Attached are a news article providing additional detail on the coalition, a letter on the separate but related CA from Congressman Osborne, a copy of the Mayor's comments on the USF & W's designation, and a copy of a letter from the CPNRD on the designation.

Recommendation:

It is the recommendation of the Utilities Department that the City join the coalition, funding from Fund 525, Water Enterprise Fund.

Fiscal Effects:

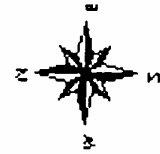
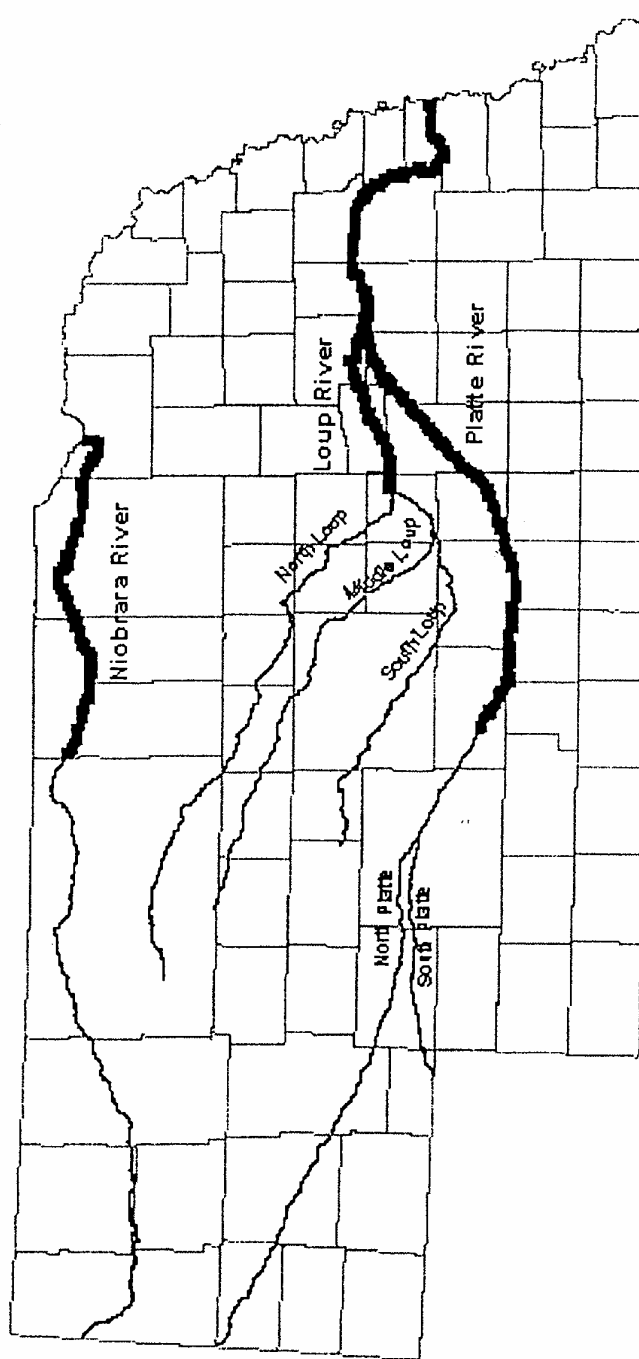
Expenditure of \$3,000.00 annually for three years from Fund 525. There are sufficient funds available.

Alternatives:

Do not participate in the coalition.

Staff Contact: Gary R. Mader

Nebraska Piping Plover Critical Habitat



■ Piping Plover Critical Habitat

Small bird has group's attention

Coalition meets to submit response to proposed piping plover habitat designation

Group to ask for extended comment time

By Carol Bryant
cbryant@theindepende.

The Nebraska Habitat Conservation Coalition met for the first time Friday to discuss the group's response to a U.S. Fish and Wildlife Service draft report analyzing potential economic impacts that would result from designation of critical habitat for the piping plover.

Twenty-three organizations are in the statewide coalition, including natural resource districts, public power districts and irrigation districts.

The Fish and Wildlife Service in June 2001 proposed designation of critical habitat for the northern Great Plains population of the piping plover on approximately 196,576 acres and 1,338 river miles in Nebraska, Minnesota, Montana, North Dakota and South Dakota.

The coalition will ask for an extension of the Jan. 28 deadline for the public to submit comments to the Fish and Wildlife Service about the draft economic report and proposed critical habitat designation. The coalition is concerned about effects the habitat designation could have on farmers, irrigation and public power, among other things.

Approximately 34 people attended the meeting at the Central Platte Natural Resources District office in Grand Island. The public portion of the meeting lasted three hours, and then the group went into a closed session to discuss strategy with its attorneys. Ron Bishop of Grand Island, Central Platte Natural Resources District manager, was elected chairman of the coalition.

The piping plover is a small, pale-colored migratory North American shorebird that doesn't spend all of its time in Nebraska.



Courtesy photo/Platte River Whooping Crane Maintenance Trust, Inc.

The piping plover

Public comment sought on critical habitat designation

The U.S. Fish and Wildlife Service has released for public review a draft report analyzing the potential economic impacts that would result from the designation of critical habitat for the northern Great Plains population of piping plover.

Public comment and information about the proposed designation and draft economic analysis will be accepted until Jan. 28.

Written comments should be sent to Piping Plover Comments, South Dakota Ecological Services Field Office, U.S. Fish and Wildlife Service, 420 S. Garfield Ave. No. 400, Pierre, SD 57501, or by fax to (605) 224-9974.

Copies of the economic analysis and critical habitat proposal can be requested by contacting the above address.

Copies were also supposed to be available at a Fish and Wildlife Service Web site, but U.S. Department of Interior Web sites have been shut down because of a judge's order in a lawsuit.

Piping plover: Listed as a threatened species

Continued from page 3-A

The Fish and Wildlife Service listed it as a threatened species in 1986 under the Endangered Species Act and has been court-ordered to have habitat critical to the bird designated by March 15. Critical habitat refers to areas that are essential for conservation of a threatened or endangered species and which may require special management considerations.

Mark Czaplewski, a biologist with the Central Platte NRD in Grand Island, told the coalition he was a little bit surprised at what little analytical information is included in the draft economic impact report, released Dec. 28. Bioeconomics, Inc., of Missoula, Mont., prepared the draft economic analysis for the Fish and Wildlife Service, dated November 2001. Extending the deadline to submit comments would help the coalition. A committee was appointed to prepare the coalition's response.

"Time is extremely short. We'll be scrambling to put the thing together," he said.

Attorneys Karen Budd-Falen and Marc Stimpert of Cheyenne, Wyo., whom the coalition has hired, were present Friday.

"I absolutely believe more time should be taken," Budd-Falen said. "At a minimum I would suggest 30 days."

"The Fish and Wildlife Service is required to consider these comments. We're going to represent a very strong public opinion. The more individual and the more group comments you can get, the better," Budd-Falen said.

The Endangered Species Act (1973) is starting to have more impact on Midwestern states, she said. Most people envisioned that the act would be working to protect huge national species.

"What the original act said and how it's being implemented now are 180 degrees apart," she said. "Now the act is truly a command and control issue."

A species can be listed as threatened or endangered under

Nebraska Habitat Conservation Coalition

Members of the Nebraska Habitat Conservation Coalition as of Friday:

Central Platte Natural Resources District, Nebraska Public Power District, Central Nebraska Public Power and Irrigation District, Lower Loup NRD, Loup Public Power District, Upper Big Blue NRD, North Platte NRD, Twin Platte NRD, Tri-Basin NRD, Twin Loup Reclamation, Southern Public Power District, Middle

Loup Public Power and Irrigation District, North Loup Public Power and Irrigation District, Farwell and Sargent Irrigation Districts, Dawson Public Power District, Upper Elkhorn NRD, Upper Loup NRD, South Platte NRD, Lewis and Clark NRD, Nebraska Rural Electric Association, Nebraska Farm Bureau, Nebraska Water Resources Association and Nebraska Water Users.

the act.

"Threatened species are treated exactly the same as an endangered species," Budd-Falen said.

A threatened species is one that could be endangered in the future, and an endangered species is facing extinction. Critical habitat can be potential habitat or suitable but unoccupied habitat. Changing habitat for an endangered or threatened species is enough to be a violation of the Endangered Species Act, she said. If convicted, a violator faces prison time and a \$10,000 fine per day per violation.

"We think that the economic analysis for the piping plover is deficient," the attorney said. "What will be the economic impact if we stop irrigation? ...What's going to happen if farmers can't farm any more? ...You guys have the highest property taxes I've ever seen. How is the shortfall in the property tax going to be made up?"

Two forms of mitigation are payment of money and loss of land use.

"The economic analysis doesn't talk about the cost of mitigation. What the Fish and Wildlife Service needs to do is start looking at those costs," she said.

The draft economic analysis finds that over the next 10 years, total Endangered Species Act Section 7 consultation costs associated with activities poten-

tially affecting piping plover due to designation of critical habitat would be a maximum of about \$58,000 per year, a Dec. 28 Fish and Wildlife written statement said.

"Overall, the report finds that all associated impacts would be minimal," the statement said.

Members of the Nebraska Habitat Conservation Coalition contribute at a partner or sponsor level for a three-year period. Contribution amounts per year range from \$1,000 to \$5,000. As of Friday morning, the coalition had 19 sponsors and three partner groups as members and had received \$9,500. Sponsor groups are government entities.


Bishop said county boards in Buffalo and Dawson counties have approved resolutions opposing the designated habitat for the piping plover. The Hall County Board of Supervisors will discuss the issue Tuesday. A committee will develop guidelines for coalition member agencies, and two-thirds of the members must approve any new members. Representatives discussed for about an hour Friday whether Nebraskans First should be allowed to join the coalition, but no decision was reached.

The coalition's next meeting is at 10 a.m. Feb. 20 at the Central Platte NRD office in Grand Island.

**INTEROFFICE
MEMORANDUM**



*Working Together for a
Better Tomorrow. Today.*

DATE: May 9, 2002
TO: Marlan Ferguson, City Administrator
FROM: Gary R. Mader, Utilities Director 

SUBJECT: Platte River Cooperative Agreement

There is beginning to be some recognition that USF&W's approach to Platte River species might not be the best approach. The attached letter from Tom Osborne and accompanying counter opinion to USF&W positions on species issues will hopefully bring some balance to this process.

GRM/pag

FEB-26-2002 TUE 12:09 PM CING. TOM OSBORNE

FAX NO. 2022261385

P. 02

TOM OSBORNE
3rd DISTRICT, NEBRASKA

COMMITTEE ON AGRICULTURE

COMMITTEE ON EDUCATION
AND THE WORKFORCE

COMMITTEE ON RESOURCES



Congress of the United States House of Representatives

Washington, DC 20515-2703

February 26, 2002

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WASHINGTON, DC 20541
(202) 725-6435
FAX: (202) 226-1330

DISTRICT OFFICE

819 N. DIXIE AVE., SUITE 100
GRAND ISLAND, NE 68801
(308) 381-6855
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SEASIDE, NE 68138
(308) 632-3347
FAX: (308) 635-3040

The Honorable Gale Norton
Secretary of the Interior
United States Department of the Interior
1849 C Street NW
Washington, DC 20240

Dear Secretary Norton:

As we discussed during a meeting in the fall of 2001 and as was evident at a recent Resources Committee hearing in my district, the people of Nebraska's Third Congressional District are justifiably concerned about the potential impact of the Platte River Cooperative Agreement on their lives and livelihoods. Since being elected to represent these people, I have devoted a significant amount of time to reviewing the history of the agreement and the process that has brought all of the stakeholders to the point at which they find themselves today.

What I have learned about the agreement often raises more questions than are answered, and the questions date back to the designation of critical habitat for the whooping crane. For example, it seems questionable to propose to attempt to manage instream flows, for the benefit of a species, through the operation of Kingsley Dam when the dam is over 100 miles from the beginning and over 175 miles from the end of the critical habitat for the species. Further, it takes 5 days for water to travel from the dam to the beginning of the critical habitat area and 7 days for it to travel to the end of the habitat area. Additionally, rainfall events often occur along the river below the dam but above the habitat area. That rain certainly affects the instream flows of the river, and is not retained by the Kingsley Dam. This leaves many to wonder about the value of setting instream flows that are regulated so distant from the critical habitat reach.

Another issue of concern is the proposed pulse flows for the Platte River. The Fish and Wildlife Service has determined that pulse flows of 10,000 to 12,000 cubic feet per second are needed to protect the species in question. However, the likely result of these pulse flows will be low-land flooding, particularly when coupled with a rainfall event, and the elimination of sediment. It is my understanding that the expected sediment loss has been the cause of much concern for the Fish and Wildlife Service. I have been informed that, in order to replace the sediment that would be washed away by the government-mandated pulse flows, the Service had previously considered hauling sediment by truck from other parts of Nebraska to dump into the Platte River. Another idea, which has reportedly been considered by the Service as a means of addressing the sediment issue, is to move sediment from an island into the river. From the viewpoint of many Nebraskans, the wisdom of these proposals is dubious at best, especially when evidence indicates that high instream flow requirements actually decrease whooping crane habitat rather than improve it.

The proposed critical habitat designation for the piping plover has also been questioned. According to research of which I am aware, both the piping plover and the least tern fare well

living on sandpits and lakeshores. However, neither sandpits nor lakeshores are included in the proposed critical habitat designation. Although I do not advocate including either the sandpits or the lake shores in the proposed designation, many throughout my district wonder why the Fish and Wildlife Service does not choose to enhance existing habitat rather than trying to change the river habitat to suit a desired result. In addition, the piping plover and the least tern had no successful reproduction on the Middle Platte River during the 1990s, according to information provided in the enclosed letter from the Platte Watershed Program Coordinator to the Fish and Wildlife Service on March 22, 2000, as comments on the Fish and Wildlife Service's Draft Milestones R3-1 Document.

In light of the questions that I, and my constituents, have about the scientific basis for the whooping crane critical habitat designation, the Platte River Cooperative Agreement, and the proposed piping plover critical habitat designation, I request that the National Academy of Sciences or a similar independent qualified entity conduct a scientific evaluation of the biological opinions on endangered and threatened species in the Platte River basin. Given the testimony at the field hearing and other information that I have received, it is time to evaluate the appropriateness of the current critical habitat designation for whooping cranes on the Platte River. Available information suggests that the whooping cranes rarely utilize this reach of the river and only in the spring, which may indicate that the designation has had little if anything to do with conserving the species. Information about the whooping cranes' use of the Platte River is provided in the enclosed letter from the Platte Watershed Program Coordinator.

I, along with other Nebraskans, am committed to the preservation of endangered species. The preservation of these species will best be served if decisions are based on accurate data rather than faulty assumptions. It is vital to the future of Nebraska that any decisions affecting the use and allocation of water be firmly based on adequate data and the reasonable interpretation of the data. The people of the Third District deserve nothing less than to know with certainty that science and the reasonable interpretation and application of data, not politics or philosophies, is the foundation upon which the Department of the Interior bases its decisions.

Thank you for your attention to this very important matter.

Best Wishes,



TOM OSBORNE
Member of Congress

Enclosure



**Cooperative
Extension
Ft. Kearny Extension Programming Unit**



**Institute of Agriculture and
Natural Resources**

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22 March 2000

Sharon Whitmore
Acting Nebraska Field Supervisor
U.S. Fish & Wildlife Service
203 W 2nd St
Grand Island NE 68801

Dear Sharon,

This is in response to your letter dated 6 March 2000 requesting comments on your Draft Milestones R3-1 Document. I offer the following comments.

Whooping Crane

Off-river roost sites should be included in your list of suitable habitat if, in fact, an adaptive resource management approach is taken. The data is overwhelming in that whooping cranes are birds of palustrine and lacustrine wetlands NOT riverine habitat. While whooping cranes do use the Platte River for roosting, it may be that the loss of wetlands bordering the river has had a greater impact on use. During 1940 through 1985 there were 534 confirmed sightings in the lower 48 states. Only 10 or 1.2% were on the Platte River. This percentage would be even less if Canadian sightings were included.

From 1970 through 1998, 38% of the years exhibited no confirmed whooping crane sightings along the Platte River. On average, less than 1% of the population was confirmed in the Platte Valley during the same time frame (0-3% in any given year). The number of confirmed sightings on riverine habitat anywhere within the migration corridor is less than 3% of the total. Anecdotal evidence along the Platte suggests that whooping cranes were attracted to the vast wetlands in the late 1940s and early 1950s before extensive drainage occurred (Currier et. al, 1985, Migratory Bird Habitat on Platte and North Platte Rivers in Nebraska, p.29).

During the 1981-1984 radio-tracking study of whooping cranes, 18 whoopers were tracked on 3 southbound and 2 northbound migrations. None of them used the Platte River (see Marshall Howe's 1989 FWS Technical Report of this study). In fact, I became part of the ground-tracking crew in the spring of 1984 after 2 subadult whoopers spent 22 days near Hershey along the North Platte River and the original tracking crew had to attend to other obligations. These birds never used the river for roosting, rather they used the same palustrine wetlands that the sandhill cranes use in that particular staging area.

I co-authored a paper on whooping crane migration ecology in Nebraska (Lingle, et.al, 1987. Migration ecology of whooping cranes in Nebraska. Proc International

Crane Workshop, China) that describes habitat use. Once again, wetlands were the predominant habitat type for roosting. Also, refer to Amy Reichert's 1999 Ph.D dissertation on whooping crane habitat use from the University of Nebraska.

Development of wetlands in the Platte Valley by The Nature Conservancy and other conservation groups has resulted in use by whooping cranes as well. Even at Bosque Del Apache NWR in New Mexico, the cross-fostered whoopers roost in the highly regulated water impoundments adjacent to the Rio Grande River unless the impoundments freeze. Only then will they roost in the river.

My point is that off-river roost sites must be included not only for biological but also for economic reasons as well. NPPD's Cottonwood Ranch is a case in point. As you know, the FWS intends to clearcut a gallery forest and engineer a channel which meets the definition of roost habitat. The purple loosestrife problem, the sediment concerns, and the ongoing disking necessary to maintain the open river channel will be a costly experiment. This does not even consider the loss of biological diversity resulting from the clearcutting efforts currently underway. It may be less costly and more beneficial to whoopers to create wetlands in the former wet meadows there. By restoring marginal croplands to prairie and wetlands, the same benefits to whoopers may be attained. If not, the more intensive clearcutting route can be taken.

It is interesting to note that since the completion of the Kingsley Dam in 1941, the whooping crane population has increased 13-fold. My point here is that use or population size may not necessarily prove a cause and effect relationship. I wonder if the Platte River would even be considered if the FWS was charged with designating critical habitat today. Whooping crane experts that I have visited with would be hard pressed to consider the Platte River given our current state of knowledge. Certainly none would be willing to state on a witness stand that the continued existence of the species would be in jeopardy if the Platte River were to disappear. That aside, the development of off-river roost sites will not diminish the need to maintain instream flows due to the direct positive relationship of river stage to groundwater levels in the adjacent aquifer.

On page 4 of the Draft R3-1 Document states "In February and March, rising ground water levels thaw the soil and initiate biological responses of soil organisms." What specific studies on what soil organisms were used as a basis for this statement? I am not aware of such studies yet I know this argument has been used as a basis for instream flow requests and other legal proceedings. If there are any, you should include them in this document with supporting evidence.

Least Terns and Piping Plovers

At the February Monitoring and Research Workshop held at the Trust offices, it was interesting to note that the species experts did not think it wise to create permanent nesting habitat due to the problems associated with predation. That the central Platte River does not offer any naturally occurring nesting habitat for these species is amply demonstrated by fact that there were no tern or plover chicks were known to fledge on any natural river sandbar during the entire decade of the 1990's. A 50-60 day window of flows less than about 1500 cfs during late May through mid July is necessary to allow for nesting and subsequent fledging. This did not happen in the 1990s. Nests and/or young were flooded out. The efforts exhibited by conservation groups to provide nesting habitat

for these birds can only be characterized as a dismal failure. The habitat simply does not exist under current conditions.

My study of the nesting ecology of both species from Chapman to Lexington during 1985-1991 chronicles the situation (see annual reports submitted to FWS dated 1985, 1986, 1987, 1988, 1989, 1990). My nesting habitat data and population estimates during those years do not agree with Tables 1-2 and 1-3 (op cited, Lingle 1993. Causes of nest failure and mortality of least terns and piping plovers along the central Platte River. Pages 130-134 in Proc. Missouri River and its tributaries: piping plover and least tern symposium). River use was greatest in 1985 following back-to-back 100-year flood events during the summers of 1983 and 1984. This stochastic event created plentiful sandbars along the river which were used by both species. The shift to sandpits occurred during the subsequent years to the extent that sandpits or dredge islands are the only places where young have fledged in recent years.

This begs the question as to whether it is in the best interest of the species' long term well-being to attract them to an area where they are likely to be flooded or eaten by predators. The best production occurs at Lake McConaughy and the lower Platte River but the Cooperative Agreement does not allow for those areas to be considered. Clearly stochastic flood events provide the necessary requirements for these species to nest throughout their range and it is this ephemeral nature of that type of habitat with which these species evolved. It is unrealistic to think we can replicate these types of flood events through releases from the Environmental Account stored in Lake McConaughy. The birds will nest at sandpits and one way to insure their success is to hire tern and plover wardens to guard each nest/young 24 hours a day through the nesting season. One other way to provide habitat is to ensure instream flows do not exceed 800 cfs during the nesting season.

Pallid Sturgeon

How you can monitor the impact of flow releases on a fish species that may or may not exist 200+ miles downstream is beyond my comprehension. Fortunately, I do not have to deal with that problem.

Other Species of Concern

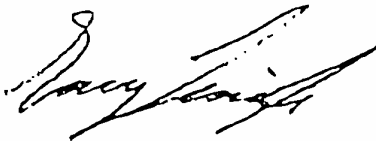
The institutionalized clearcutting of riparian forests that is currently underway under the guise of endangered species habitat augmentation can only be characterized as dendrophobic (dendrophobia is the irrational fear or hatred of trees). No one knows what is being lost since there are no thorough inventories being done prior to treatment. The avifauna associated with these riparian zones is rich with neotropical migrants (e.g. willow flycatcher and Bell's vireo) that are experiencing serious population declines elsewhere in their range. Riparian cottonwood forests are perhaps the most endangered habitat type in the West and Southwest yet here they are treated like musk thistles.

The arbitrary and capricious nature of the Cooperative Agreement is best revealed by the fact that the federally endangered Bald Eagle was not included in the list of target species. This was done despite the fact that the central Platte River hosts one of the largest wintering concentrations in the lower 48 states and has an increasing number of

nesting eagles. I realize they will be delisted in July but the signatories of the agreement did not know this in July 1997. How can one federally listed species be ignored while others are not?

In conclusion, the Platte River and its associated wildlife is a national treasure that needs to be protected for what it is. We are not going to remove the dams, plug the diversions, and take out the bridges so that the river can act as it did prior to European development. The forces of nature acting on the system now are vastly and permanently different than they were historically. Maintaining a base flow in the summer to prevent fish kills, converting marginal cropland back to wet meadows, and protecting greenways along the riparian corridor will go a long way towards providing benefits not only to the target species but to the larger biotic community as well. The fatal flaw in this process may be trying to prop the protection of the Platte using the ESA as a foundation. Once again, the Platte needs to be protected for what it is; a resource serving the agricultural, municipal, biological, and spiritual needs of the region. Aldo Leopold once said that the first step to wise ecological tinkering is to keep all of the cogs of the wheel. We would be well served to heed his advice and proceed with a holistic and reasoned concept of how best to protect the river and its unique wildlife. Let us use adaptive resource management in its broadest sense and proceed cautiously and carefully.

Sincerely,



Platte Watershed Program Coordinator

- cc. Tom Franti
- Dale Strickland
- Curt Brown



Working Together for a
Better Tomorrow. Today.

August 17, 2001

Piping Plover Comments
South Dakota Ecological Services Field Office
U.S. Fish and Wildlife Service
420 South Garfield Ave., Suite 400
Pierre, SD 57501

Dear Sir or Madam:

The City of Grand Island has reviewed the U.S. Fish and Wildlife Service's June 12, 2001 Public Notice of Intent to designate a large reach of the Platte River in Nebraska as critical habitat for the piping plover. In reviewing this proposed rule we are concerned that this designation is based upon only marginal information and that the Service has not completed the required detailed analyses to make this designation.

In reviewing the *Federal Register*, we note that the Service indicates that it;

- Does not have sufficient data to precisely designate critical habitat.
 - Has not completed the required economic analysis.
 - Has not properly mapped the areas to be designated.
- and,
- Has not properly considered ongoing conservation and habitat maintenance programs in Nebraska.

We also believe that it has not allowed adequate time for comment.

The Platte River is very important to Grand Island and all of Nebraska. Grand Island and many other cities in the state have wells near the river. Impacts to water availability have far reaching impacts on Nebraska and its citizens. Evaluation of this designation requires detailed and precise information to assure that all potential affected parties have the information needed. Without complete, detailed reports as required for this designation, the public comment process is thwarted and affected parties are unable to respond as completely as possible.

Page 2
Piping Plover Comments
August 17, 2001

The current proposal also states that as more of the detailed analyses for land, economics, and other components are completed, each will be made available. We believe this is not a proper approach. The completion of all components, in detail, must be available as a whole and evaluated as a whole since one may affect the other.

The City of Grand Island requests that this habitat designation be postponed until such time that the Service is able to complete all of the required pieces of its designation process. At that time, given the magnitude of this designation, a minimum of 120 days would be required to properly review, evaluate and comment on it.

This designation appears to be premature. The Service has not met its obligations to provide detailed information on the biological science, economic impacts, consideration of ongoing projects, or even maps that would allow precise location of the designated areas. Without these, the City is unable to properly consider and evaluate the proposal.

Sincerely,



Ken Gnadt, Mayor
City of Grand Island

KG/pg

pc: Senator Chuck Hagel
Senator Ben Nelson
Representative Tom Osborne

also to: Jerry Oberist, Manager
Lincoln Water

August 10, 2001

Via Facsimile Transmission: (605) 224-9974

Via e-mail: FW6_Piping Plover @ FWS.gov

Piping Plover Comments
South Dakota Ecological Services Field Office
U.S. Fish & Wildlife Service
420 South Garfield Ave.
Suite 400
Pierre, South Dakota 57501

Subject: Comments on Proposed Designation of Critical Habitat for the Northern Great Plains Breeding Population of the Piping Plover

To Whom It May Concern:

In response to the U.S. Fish and Wildlife Service's June 12, 2001, public notice of its proposed designation of critical habitat for the northern Great Plains breeding population of the piping plover (66 Fed. Reg. 31760), Central Platte Natural Resources District submits the following comments, requests and questions.

1. Background

Central Platte Natural Resources District (CPNRD) is a Nebraska political subdivision responsible for, among other things, the development and execution of plans, facilities, works and programs relating to the development and management of fish and wildlife habitat. CPNRD is the holder of instream flow water rights on the central Platte River, including an instream flow to provide habitat for forage fish and aquatic macroinvertebrates which serve as food items for interior least terns and piping plovers respectively (Nebraska Department of Natural Resources Appropriation No. A-17004).

CPNRD is an active participant in the activities under the "Cooperative Agreement for Platte River Research and Other Efforts Relating to Endangered Species Habitats on the Central Platte River in Nebraska (July 1997)" (Cooperative Agreement). Under the Cooperative Agreement, the signatories to the Agreement and other participants, including CPNRD, are participating in and implementing certain activities relating to four target species, including the piping plover. One of the purposes of the Cooperative

Agreement is to implement certain aspects of the U.S. Fish and Wildlife Service's (Service) recovery plan for the piping plover by implementation of efforts to acquire, restore and manage land or interests in land to provide and improve associated habitats for the piping plover. Associated habitats means, with respect to the 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. Under the terms of the Cooperative Agreement, CPNRD and the signatories are undertaking activities to acquire, restore and manage land and interests in land to provide habitat for the piping plover and other target species. The intent of the Cooperative Agreement is to focus activities on creating "the greatest biological benefit to the target species", including the piping plover.

In furtherance of the goals and purposes of the Cooperative Agreement, CPNRD has participated, along with the signatories and other parties, in the following activities relating specifically to the piping plover:

- Monitoring of piping plover use of the Platte River and associated habitats
- Development of a habitat protection plan for piping plover habitat
- Development of additional monitoring and research activities associated with piping plover habitat along the central Platte River

2. Extension of Comment Deadline

CPNRD requests that the deadline for comments on the piping plover critical habitat designation proposal be extended from August 13, 2001, to 120 days after all necessary documents required by the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) have been completed and distributed by the Service. These documents include the Service's complete alternatives analysis, economic impact analysis (in accordance with Section 4(b)(2) of the ESA) and detailed maps and descriptions of the proposed critical habitat areas sufficient to allow the public to determine precisely the lands to be included in the proposed area. Further, the public is entitled to an appropriate opportunity to review, evaluate and comment on these yet undisclosed documents prior to a final Service decision.

- A. No economic analysis. 16 USC Section 1533(b)(2) states the critical habitat can only be designated after "taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat". The Service has not provided any information concerning the economic impact analysis conducted by it, which must underlie the designation of the critical habitat. Further, prior to the Secretary's determination to list critical habitat the public is entitled to review, evaluate and comment on the economic analysis.
- B. Use of inaccurate and nonqualifying maps. The regulations are replete with the descriptions of the maps which must describe the area that is to be designated as critical habitat, see, e.g., 50 CFR 424.16(b); 50 CFR 17.94.

Given the magnitude of the enforcement powers which inure to the Service upon the designation of critical habitat to curtail or cease “adverse modification of critical habitat” it is essential that the critical habitat particularly and accurately described in the notice of the proposed rule.

- (1) The Service’s proposal states that “due to time constraints and the use of TRS boundaries” the Service was “unable to exclude developed areas such as mainstream dam structures, buildings, marinas, boat ramps, bank stabilization and breakwater structures, row cropped or plowed agricultural areas, mines, roads and other lands (e.g., high bank bluffs along the Missouri River reservoirs) unlikely to contain primary constituent elements essential for northern Great Plains piping plover conservation”. The Service needs to produce and make available the detailed maps or legal boundary descriptions of critical habitat areas required by the ESA and regulations.
- (2) The Service is required to develop boundary maps and descriptions that exclude areas known not to contain primary constituent elements of critical habitat. Such boundary definitions are essential to local governments and private property owners, to clarify precisely the land intended to be designated and to permit such meet the legal and scientific standards for critical habitat required under the ESA.
- (3) The Service must develop a more complete definition of the facilities and land uses that it classifies as not meeting the test of primary constituent elements (e.g., pasturelands, grasslands, farmyards, livestock confinements, riparian forests, shrubland, waterbodies, etc.) which are not currently included in the Service’s list of “exclusions”. For example, a cattle feedlot would not specifically be excluded from designation as critical habitat on the Service’s list on page 31768. Conversely, a sandpit that is specifically excluded from being critical habitat (since it is a gravel “mine”) may well contain the primary constituent elements of critical habitat noted by the Service and provide nesting habitat for breeding plovers.

3. Adverse Economic Impacts

The proposed critical habitat designation constitutes a significant threat to the present and future economic well being of many central Platte River valley communities. The Service’s proposal notes a variety of activities (both public and private) which, if undertaken, may adversely modify critical habitat. Service documents distributed in association with the critical habitat designation proposal (e.g., “Questions and Answers About Proposed Critical Habitat and the Northern Great Plains Population of Piping Plover”) note that activities that may result in adverse modification of critical habitat

include such common and necessary practices as road and bridge construction and maintenance, operation and maintenance of dams, bank stabilization projects, dredging operations, and construction of dwellings (also reference Table 3 66 Fed. Reg. 31777). Most disturbing, the Service specifically note that “water development projects such as ground water withdrawal for water supply and other river depletions” could comprise an adverse modification of critical habitat and taking under ESA. Central Platte River regional economies are critically tied to municipal, agricultural, industrial and domestic water supplies provided by and associated with the Platte River. The designation of critical habitat will adversely affect the economic and social health of the region and must be fully evaluated in the presently incomplete and undisclosed economic impact analysis of the Service. Such designation by the Service could have a significant adverse impact on entities requiring federal permits to undertake various activities along the Platte River and those entities receiving federal funding for activities such as programs administered by the Natural Resources Conservation Service.

- A. Regulatory uncertainty and adverse economic impacts. The Service’s definition of what constitutes adverse modification of critical habitat is unclear and will result in the use of varying interpretations and standards under the Section 7 consultation process, as well as separate analyses under the jeopardy standard definition. The Service should more clearly define adverse modification and more completely and specifically advise citizens as to what programs may be affected by critical habitat designation. This may be particularly important on river systems in Nebraska where designated critical habitat would likely be unoccupied by piping plovers during most (if not all) years.
- B. Negative impact on property values. Designation of critical habitat may cause private property values to drop and will adversely affect regional business (e.g., gravel mining, agricultural land values, etc.). Even the perception of legal and institutional constraints caused by critical habitat designation can lead to lower property values for affected private properties.

4. Absence of Scientific Support for the Designation

In the proposal for listing the piping plover under the ESA in 1984, the Service stated that critical habitat designation “would not be prudent because of the often ephemeral nature of the plover’s nesting habitat” (November 8, 1984, Federal Register p.44714). In the same document, the Service stated “(t)he plover’s breeding and wintering habitats are spreading over a large geographic area. Alluvial islands in rivers appear, disappear, and reappear depending upon water conditions. Beaches and interior wetlands may or may not be used each year because of varying water levels or changes in beach characteristics. Accordingly, *it is not possible* to designate areas which, if given protection, would be used by the plover in the future and whose protection would advance the plover’s conservation.”(emphasis added). The Service restated this position in 1985 when it produced its final rule on the status of the piping plover (December 11, 1985, Federal Register p.50731). No new scientific evidence has been cited or offered by the Service to warrant any change in position regarding the need for critical habitat in the Platte River from Cozad, Nebraska to the mouth of the Platte.

- A. June 12, 2001 Federal Register statements. Service statements in the June 12, 2001, Federal Register continue to support the fact that “(c)onditions for nesting are highly variable” and “habitat use by piping plovers is dynamic and that the habitat necessary to support the northern Great Plains population is diverse” (p. 31762). Further, the Service refers to studies that note the piping plover has “varying rates of site fidelity” and “need a variety of available nest sites” (p. 31763). “Sites used in 1 year may not be used in subsequent years” (p. 31763). The ephemeral nature of piping plover nesting habitat and the birds use of that habitat have not changed.
- B. No new scientific data or support for designation of critical habitat on the Platte River. The “best scientific and commercial data available” in 1985 established that “the designation of critical habitat was not determinable” (p. 31763). The Service has disclosed no facts, studies or findings, which have come into existence after 1985 to support a different conclusion now for the Platte River. The Service merely states that such designation is necessary to address a court order in the *Defenders of Wildlife v. Babbitt* (Case No. 97V000777) (Court Order). No part of the February 7, 2000, Court Order entered in Civil Action No. 96-2695 or Civil Action No. 97-0777 in the cases of *Defenders of Wildlife, et al. v. Bruce Babbitt, et al.*, requires a designation of critical habitat on the Platte River.
- C. Lack of valid rationale for Platte River critical habitat designation. Illogically, some of the very same facts that lead to the Service’s 1985 decision that critical habitat designation was not prudent, now appear to be part of the basis for the presently proposed designation, e.g., “...portions of the Platte River that are included in the proposed critical habitat designation may not be occupied [by piping plovers] in a given year, but designation is necessary *because* of the dynamic nature of the river. Sandbar habitats migrate up an down the rivers resulting in shifts in the location of primary constituent elements” p. 31767 (emphasis added). If the Service’s initial rationale for not designating critical habitat remains scientifically sound and if the nature of piping plover has not changed, then the need to designate such habitat now is unfounded. Further if the “best scientific and commercial data available” still does not support the designation, the designation cannot be applied to the Platte River and the Court Order must be complied with by explaining the designation of critical habitat on the Platte is not ripe. Such a determination is permissible under the terms of the Court Order as part of the designation of the “appropriate” habitat in the “region”. The Court Order does not require the Service to designate habitat in every river in the region.
- D. Inappropriate designation of unused habitat. Unoccupied habitats and areas never documented to have been occupied by piping plovers are being proposed for designation as critical habitat. Without reference to any new data, the Service has designated areas, which have never been documented to have been occupied by piping plover. What data and what criteria were used to designate unoccupied habitat? For example, what rationale and data were used to move the upstream end of the critical habitat on Platte River from

Highway 283 at Lexington, Nebraska (in the current Recovery Plan) to a location near Cozad in this proposal? The Platte River in this reach is not historically known to support piping plovers. Similar apparent inconsistencies occur in other Platte River reaches. Reaches of the Platte River that have no history of substantial use and that have not recently supported piping plover use are included in the Service's proposal (e.g., Kearney to Odessa, Nebraska and Central City to Clarks, Nebraska).

- E. Lack of analogous support for designation. Even if the Service were allowed to make critical habitat designations by use of analogy instead of data or studies, it does not appear that analogy was relied upon. For example, according to the Service's draft Environmental Assessment, portions of the Missouri River (i.e., Ft. Peck to Milk River) were excluded from designation as critical habitat because the river in this area is "highly degraded and contains few sandbars" due to upstream trapped sediment, rendering it unlikely "to develop the primary constituents needed for piping plover survival and recovery in the near future". Other areas known to occasionally be used by plovers are excluded from critical habitat designation by the Service and yet they propose critical habitat on reaches of the Platte River that do not consistently support the species – river reaches that the Service themselves has characterized as degraded and sediment starved. The Service is inconsistent in including and excluding areas as critical habitat that do not contain the primary constituent elements of habitat. The Service need to provide the detailed data and analysis used in making its proposal.

5. Lack of Legal or Scientific Support for Definition of Critical Habitat

The Service has included hydrologic and geomorphic processes within the elements of critical habitat. The ESA does not provide for including physical processes with the geographic bounds of critical habitat. The Service, the States of Colorado, Nebraska and Wyoming, the U.S. Geological Survey and the Bureau of Reclamation are currently engaged in high-level scientific studies to understand the complex and variable nature of sediment transport and hydrology of the Platte River as a component of the Cooperative Agreement. Experts in the field do not agree on the nature and magnitude of influence of these processes on the river, much less how they might affect piping plover habitat or conservation. The critical habitat designation cannot include such poorly understood information. To remain consistent with the elements of habitat provided for in ESA, the Service must delete those elements from its designation and its scientific "rationale" used to develop the designation.

6. Lack of Consideration of Alternative Habitat Management and Conservation Efforts

The Service is required to consider other alternatives to designation of critical habitat on the Platte River. Existing programs and conservation efforts in development on the Platte constitute habitat conservation plans directed to help recover piping plovers. The Service is a key player in the Cooperative Agreement working toward a proposed Platte River Recovery Implementation Program that involves conservation efforts directed at the piping plover. CPNRD, the Least Tern and Piping Plover Protection Program (Tern and Plover Conservation Partnership), some of Nebraska's electric utilities, and others are

working toward piping plover conservation. Just as the Service has eliminated other areas of piping plover use from its critical habitat proposal based on the existence of conservation efforts, the entire Platte River system should be eliminated or delayed from designation at this time because of these habitat conservation efforts. In addition, the Service should work with the state of Nebraska to develop a cooperative effort to conserve and manage the species, with or without a Platte River Program under the Cooperative Agreement. Similar conservation plans for black-tailed prairie dogs and pallid sturgeon have met with some success.

- A. 16 U.S.C. Section 1533(b)(2) provides for exclusion of areas from critical habitat designation. The Secretary of the Department of Interior may exclude any area from critical habitat if the Secretary determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. The Secretary may do this unless the Secretary determines, based upon the best scientific and commercial data available, that the failure to designate such an area as critical habitat will result in the extinction of the species concerned. Since there is no scientific or commercial data available to establish that the failure to designate the Platte River as critical habitat will result in the extinction of the species, the Secretary is permitted to exclude the Platte River from the critical habitat designation. The June 12, 2001 Notice contains no analysis of the benefits of such exclusion and the benefits of specifying the area. Further, based upon the adverse economic and social impacts that will most likely accrue by virtue of the designation, it would appear that the benefits of specifying the area as part of the critical habitat are outweighed by the benefits of excluding the Platte River from the designation.
- B. The Service has too narrowly defined "acceptable" conservation management plans. At page 31767 of the June 12, 2001 Notice, the Service described the "criteria" which would allow an area to be excluded as being covered by a conservation management plan. The three criteria listed are not based upon the ESA, nor are they based upon the Code of Federal Regulations, but instead are policy and guidelines applied by the Service in interpreting Title 16 U.S.C., Section 1533(b)(2). This narrow interpretation of conservation management plans is not legally binding upon the Secretary. The test as outlined in 16 U.S.C., Section 1533(b)(2) is whether the benefits of excluding an area are greater than the benefits specifying an area as critical habitat.
- C. Existing alternative habitat management and conservation efforts warrant the exclusion of the Platte River from the designation. The entire Platte River system should be eliminated or delayed from designation at this time because of habitat conservation efforts that are currently ongoing, including:
 - a. The Department of Interior and the States of Nebraska, Colorado and Wyoming are currently working on the Platte River Cooperative Agreement which, among other things, is designed to develop a Program to secure defined benefits for the piping plover and their

associated habitats and to assist in their conservation recovery through a basin-wide cooperative approach. Under the terms of the Cooperative Agreement, the program is to “adaptively manage” reproductive habitat for piping plovers. The Cooperative Agreement provides numerous activities previously mentioned in this letter which the three States, the Department of Interior and many other parties, including CPNRD, are actively pursuing to develop, manage and preserve habitat for piping plover on the Platte River in Nebraska. CPNRD, in cooperation with the Service, The Central Nebraska Public Power and Irrigation District, and Nebraska Public Power District, are currently involved in piping plover monitoring efforts directed towards gathering the best possible scientific data and evidence concerning the habitat used by the piping plover on the central Platte River.

- b. The Least Tern and Piping Plover Protection Program, also known as the Tern and Plover Conservation Partnership, is a joint effort between the University of Nebraska, Nebraska Game and parks Commission, National Fish and Wildlife Foundation and regional sand and gravel mining companies by which the cooperating entities are working toward piping plover conservation.
- c. CPNRD is the holder of an instream flow water right (DNR Appropriation No. A-17004) which protects instream flows to provide habitat for macroinvertebrates that serve as food items for the piping plover.
- d. Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District are actively developing and managing reproductive habitat for piping plovers along the Platte River in accordance with their Federal Energy Regulatory Commission licenses (Project Nos. 1835 and 1417)

In light of these efforts, and others which are not specifically mentioned herein, the Service should consider that alternative habitat management and conservation efforts presently in place are sufficient to protect the species and the species habitat and to avoid the designation of any areas on the Platte River as critical habitat.

7. Lack of Appropriate Evaluation of Social Impacts

The Service’s June 2001, Draft Environmental Assessment “Proposal of Critical Habitat for Northern Great Plains Breeding population of Piping Plovers (*Charadrius melodus*)” (relied upon for the critical habitat designation) fails to adequately evaluate social impacts to Nebraska landowners. The impacts of the Service’s proposal on Nebraska are primarily borne by private landowners while impacts in other states primarily affect government properties. Of the 463 miles of river that are proposed for designation in Nebraska, 450 miles (97.2%) are privately owned (reference Table 1, 66 Fed. Reg. 31771). This disproportionate impact on private landowners in Nebraska compares to impacts in Montana that principally occur on federal lands (94.1%) and Missouri and Minnesota where virtually 100% of the lands impacted are either federally or state

owned. Table 1 indicates that none of the impacted lands in Nebraska are federally owned and only 2.8% are state owned.

8. Notice of Intent to Seek Exemption

CPNRD gives notice of its intention, if the proposed rule designated the critical habitat on the Platte River is finally approved, to request from the Service, a hardship exemption for surface and ground water users (including agricultural, municipal, domestic and industrial users) within our jurisdictional boundaries under Section 10(b) of the ESA for the continued lawful withdrawal of surface water from the Platte River and its tributaries and for ground water pumping which may deplete flows to the Platte and its tributaries deemed by the Service to constitute a taking under Section 9 of the ESA. The exemption will be requested because substantial restriction on or elimination of such water use would constitute undue economic hardship to the area.

9. Request for Document Referenced in the June 12, 2001 Notice

CPNRD requests copies of Service documents requesting independent expert peer review of the proposed critical habitat designation and any response to those requests from peer reviewers in accordance with processes noted in the *Peer Review* section of the Federal Register proposal (p.31776).

CPNRD reserves the right to submit additional comments on the proposed designation of critical habitat for piping plovers after the Service releases the economic analysis, maps and other information mentioned above.

Sincerely,

Mark M. Czaplowski
Biologist

cc: Rep. Tom Osborne
Sen. Chuck Hagel
Sen. Ben Nelson
Mr. Roger Patterson