

MEMORANDUM

TO THE BOARD:

SUBJECT: General's Manager Report

DATE: March 7, 2002

FROM: Steve Oltmans, General Manager

A. **INFORMATION/EDUCATION REPORT:** A copy of the I&E Report detailing Information and Education activities of the District for the month of February, 2003, is attached for your review.

B. **MISCELLANEOUS/PERSONNEL ITEMS:**

1. **Rosemary Jacobsen**, Receptionist/Secretary at the NRC, has resigned from her position as of February 27, 2003. A copy of her letter of retirement is attached. She has been diagnosed with dermatomyositis and will now concentrate on her recuperation and complete recovery. Rosemary has been a member of the P-MRNRD Team for nearly 34 years and will be greatly missed.
2. Congratulations to **Paul Woodward**, Water Resources Engineer, for passing the Association of State Floodplain Managers (ASFPM) Certification Exam to become an ASFPM Certified Floodplain Manager. A copy of a letter from the ASFPM and certificate is attached.
3. The District was one of the sponsors for the Building for the Future – Erosion & Sediment Control Seminar on February 19, 2003 at the Douglas/Sarpy Extension Office. The GM served as the Emcee of the seminar and staff member **Paul Woodward** gave a presentation on “Developing a Stormwater Manager Plan for the Papio Creek Watershed.” A copy of the agenda is attached.
4. **Lou Violi**, Executive Director of the Metropolitan Area Planning Agency, passed away on February 21, 2003 after suffering a heart attack. Lou has been with MAPA since 1974 and was a true advocate of pursuing regional solutions to issues facing the metropolitan area. He worked closely with the Papio-Missouri River NRD on the P-MRNRD Subdistrict maps, Household Hazardous Waste Collection Facility and the pedestrian bridge over the Missouri River. I have attached a copy of the release issued by MAPA. He has been a good friend over the years and we will all miss him.

- C. **REPORT ON PURCHASES – CONSTRUCTION SERVICES, PROFESSIONAL SERVICES. PERSONAL PROPERTY:** Pursuant to Board direction, attached is a report indicating construction services, professional services and personal property purchases for the month of February, 2003. Please review this report and contact me if you have any questions.
- D. **CURRENT AND ON-GOING PROJECTS – P-MRNRD LEGAL COUNSEL:** Attached is a copy of the current and on-going projects for District Legal Counsel, Paul Peters, as of February 19, 2003. I would ask each Director to review this listing. If you have any questions, please feel free to contact me.
- E. **NEBRASKA HABITAT CONSERVATION COALITION – LAWSUIT FILED:** The Nebraska Habitat Conservation Coalition filed a lawsuit against the US Fish and Wildlife Service, U.s. Secretary of the Interior Gale Norton and Steven Williams, Director of the U.S. Fish and Wildlife Service with the U.S. District Court in Nebraska. A copy of the Complaint is attached for your information.
- F. **NEWS CLIPS:**
- ❖ February 5, 2003, Omaha World Herald Editorial – A system in crisis – Drought spurs new anxieties about West’s arrangements for allocating precious water.
 - ❖ February 5, 2003, Bellevue Leader Editorial – A clear message
 - ❖ February 9, 2003, Omaha World Herald Editorial – A welcoming splash – Kiwanis Park plans an engaging Omaha entryway.
 - ❖ February 9, 2003, Omaha World Herald Article – More tests requested on MUD well field – Officials want to be sure a former munitions plan didn’t contaminate groundwater.
 - ❖ February 10, 2003, South Sioux City Star Article – New lake for Dakota County? Recreation area, economic development, jail and transportation discussed
 - ❖ February 10, 2003, Lincoln Journal Star Article – State distributes conservation grants – The funds will go to 16 projects that help conserve at-risk wildlife species.
 - ❖ February 11, 2003, Omaha World Herald Article – Low flows expected on Missouri this year
 - ❖ February 12, 2003, Omaha World Herald Article – Shrinking lake’s future is weighed – Big fishing at Big Mac
 - ❖ February 12, 2003, Omaha World Herald Article – Park Service bid goes to Kiewit, Daly
 - ❖ February 13, 2003, Omaha World Herald Article – Park Service to get showplace; county wants old building
 - ❖ February 13, 2003, Omaha World Herald Editorial – A welcome riverfront upgrade – Park service will put up a beautiful green-friendly headquarters.
 - ❖ February 15, 2003, Omaha world Herald Editorial – Bring on the lawsuit – Perhaps judge can sort out disagreements on Missouri River science.
 - ❖ February 16, 2003, Omaha World Herald Article – Coalition files lawsuit over bird protection
 - ❖ February 19, 2003, Omaha World Herald Editorial – Nebraska’s natural interests – State’s outdoor tourist trade should get equal time in coming drought debate.
 - ❖ February 19, 2003, Burt County Plaindealer Article – Offers next at NRD site (Lower Decatur Bend)
 - ❖ February 20, 2003, Omaha World Herald Article – States covet Missouri River water – Drought has created more problems for the Army Corps of Engineers.

- ❖ February 20, 2003, Omaha World Herald Article – Mayors tout pedestrian bridge
- ❖ February 22, 2003, Omaha World Herald Article – *Corps* official backs birds, dams
- ❖ February 24, 2003, Omaha World Herald Article – Protest against trail starts early – A group of residents in Omaha's Dundee area is objecting to plans that haven't been made yet, city officials say.
- ❖ February 25, 2003, Omaha World Herald Editorial – Trail blasters – Some don't need facts about a hiking/biking amenity – their minds are made **up**.
- ❖ February 25, 2003, Omaha World Herald Article – Marina to be hub on riverfront – The project, set for completion in 2004, will include a water taxi service.
- ❖ February 26, 2003, Omaha World Herald Article – You'll pay price for clean water – New rules on storm water runoff will require millions of dollars in improvements and possibly new taxes for you.
- ❖ February 27, 2003, Omaha World Herald Article – Builder's plan depend on rural water system

February 2003

Information & Education Report

Information

- Prepared and staffed booth at Omaha Sports Show at Omaha Civic Aud.
- Updated pages on Web Site.
- Continued preparations for Regional and State Envirothons.
- Published Winter 2003 SPECTRUM Newsletter.
- Attended NARD I&E Group meeting in Lincoln.
- Worked on update of Back to the River Slide Program.
- Worked with intern to begin neighborhood distribution of volunteer flier.
- Continued preparations for 2003 Earth Day event.
- Began work on 2003 Omaha Home and Garden Show booth.
- Gave Speakers Bureau presentations to South Omaha Optimists Club and Scottish Rite organization.

Education

- Started preparations for March 1st LEP workshop
- Managed 125 volunteer hours
- Presented Surface Water program to Gretna Elementary 3rd Graders
- Continued planning for Envirothon 2003
- Prepared Visitor Center Host schedule for Summer 2003
- Trained 17 pre-service teachers in Project WET
- Started preparing the District's nomination for 'District of the Year'
- Attended CFDC meeting
- Continued planning for Water Works 2003
- Prepared and sent out a fundraising letter to appropriate Nebraska PF chapters
- Presented NRD program to an all school assembly at Duchene High School
- Continued to work on NRD Wellness Program

February 27, 2003

Steve Oltmans
Papio-Missouri River Natural Resources District
8901 S. 154th Street
Omaha, Ne 68138-3621

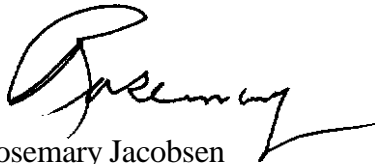
Dear Steve:

It is with my deepest regret that I must announce my retirement from the Papio-Missouri River Natural Resources District. Due to my diagnosis of "Dermatomyositis" which is not life threatening but also is not curable, I feel that I will no longer be an asset to the NRD team.

I will miss everyone and my family is hoping and praying that the disease can be put into remission or I can get some help that would give me some relief and I could actually come out and visit and maybe "volunteer" my services.

Truly believe I will miss my work and friends at the NRD. Please stop by or call at any time. I would love to hear from all of you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rosemary", with a long horizontal flourish extending to the right.

Rosemary Jacobsen



ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

2809 Fish Hatchery Road Madison, Wisconsin 53713 608-274-0123
Fax: 608-274-0696 Website: www.floods.org Email: asfpm@floods.org

February 11, 2003

Chair

George Riedel, CFM
Missouri Emergency
Management Agency
P.O. Box 116
Jefferson City, MO 65102
573-526-9141
Fax 573-526-9198
griedel@sema.state.mo.us

Vice Chair

Chad Berginnis, CFM
Ohio DNR - Division Of Water
1939 Fountain Square, Bldg. E-3
Columbus OH 43224
614-265-6715
Fax 614-447-9503
chad.berginnis@dnr.state.oh.us

Secretary

Pam Pogue
Hazards Program Mgr.
Rhode Isl. Emerg. Mgmt Agency
645 New London Ave.
Cranston, RI 02920
401-462-7114
Fax 401-944-1891
pam.pogue@ri.ngb.army.mil

Treasurer

Nicholas Winter
Metro. District Commission
Charles River Dam
250 Warren Avenue
Charlestown, MA 02129
617-727-0488
Fax 617-523-1793
nick.winter@state.ma.us

Executive Director

Larry A. Larson, P.E., CFM
Executive Director
2809 Fish Hatchery Rd Madison,
WI 53713
608-274-0123
Fax 608-274-0696
larry@floods.org

Mr. Paul W. Woodward, CFM
5804 S. 48th Ave.
Omaha, NE 68117

Dear Mr. Woodward

Congratulations! You have successfully passed the Association of State Floodplain Managers (ASFPM) Certification Exam to become an ASFPM Certified Floodplain Manager (CFM). A grade of 70% or greater is a passing grade. Your exam grade is enclosed. Your results include your category score, which shows your strengths and weaknesses.

Your official CFM Certificate, suitable for framing, is enclosed. We urge you to display it prominently and proudly. Achieving this milestone is a very important step in your career. Also enclosed is your "Certification Exam Results" broken down by topic category. If you wish to discuss the questions you missed on the exam, you may contact John Ivey, Chair of the CFM exam group, at (713) 523-7161 or email jivey@halff.com.

To maintain your CFM Certification, the following is required:

- Over the next 2 years, acquire 16 Continuing Education Credits (CECs) in the field of Floodplain Management. A maximum of 12 CECs can be acquired in one year.
- On or before the completion of the 2 years, submit an application for re-certification, furnishing a listing of the training and/or education courses you have completed. Additional information about this process will be sent to you later.

Again, congratulations on successfully completing the exam to become a Certified Floodplain Manager. We urge you to use the initials "CFM" after your name to signify this important status. The title CFM® is a registered trademark of ASFPM and available only to ASFPM approved Certified Floodplain Managers in good standing. If you have any questions, please call the ASFPM Executive Office at (608) 274-0123 or email memberhelp@floods.org.

Thank you for doing your part to improve floodplain management in the nation

Sincerely,

French Wetmore, CFM
President
ASFPM Certification Board of Regents

Enclosures (4)

"Dedicated to reducing flood losses in the nation."

**ASSOCIATION OF STATE
FLOODPLAIN MANAGERS, INC.
CERTIFICATION BOARD OF REGENTS**

HEREBY CERTIFIES THAT PURSUANT TO THE PROVISIONS OF THE CHARTER FOR THE
CERTIFIED FLOODPLAIN MANAGER PROGRAM

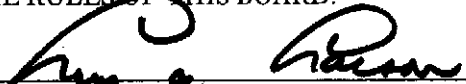
Paul W. Woodward, CFM

IS DULY REGISTERED AS AN

ASFPM CERTIFIED FLOODPLAIN MANAGER

IN TESTIMONY WHEREOF THIS CERTIFICATE HAS BEEN ISSUED BY THE AUTHORITY OF THE CERTIFICATION
BOARD OF REGENTS, CERTIFICATE NO. US-03-00649, ISSUED 1/31/2003. THIS CERTIFICATE SHALL EXPIRE
1/31/2005, UNLESS RENEWED ACCORDING TO THE RULES OF THIS BOARD.


CERTIFICATION BOARD OF REGENTS
PRESIDENT, FRENCH WETMORE, CFM


ASSOCIATION OF STATE FLOODPLAIN MANAGERS
EXECUTIVE DIRECTOR, LARRY A. LARSON



BUILDING FOR THE FUTURE

EROSION & SEDIMENT CONTROL SEMINAR



**Important Information on New
Stormwater Regulations and
Changes for Development and
Redevelopment. Be Informed
and Prepared for the Future.**

Wednesday, February 19, 2003

8:30 a.m. – 12:30 p.m.

**Douglas/Sarpy Extension Office
8015 West Center Road, Omaha**

**RSVP by Feb. 10 to Steve Tonn, D/S
Extension, 444-4237 or
stonn2@unl.edu**

PROGRAM

**Emcee: Mr. Steven Oltmans, General Manager,
Papio-Missouri River NRD**

SESSION A REGULATIONS AND CHANGES

- 8:30 a.m. Erosion/Sedimentation Control
and the Clean Water Act, Section
404—Michael Rabbe, U.S. Army
Corps of Engineers
- 9:00 a.m. 401 Water Quality Certification;
and SWANCC Wetlands—Terry
Hickman, NE Dept. of
Environmental Quality
- 9:30 a.m. Omaha Erosion & Sediment
Control Program Success &
Future Growth—Chester Black &
Geoff Goodwin, Omaha Public
Works Dept.
- 10:00 a.m. Fundamentals of the NPDES
Stormwater Construction Program
—Mike Mallory, NE Dept. of
Environmental Quality

10:30 a.m. -----Break-----

SESSION B: RESOURCES FOR CHANGE

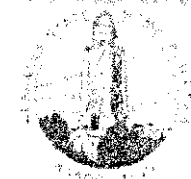
- 10:45 a.m. Understanding Soils in an
Urban Setting—Patrick Cowsert &
Mike Kucera, Natural Resources
Conservation Service
- 11:15 a.m. Developing a Stormwater
Management Plan for the
Papillion Creek Watershed—Paul
Woodward, Papio-Missouri
River Natural Resources District;
Mike Arends, Omaha Public
Works Dept.
- 11:45 a.m. Questions and Answers

Seminar Sponsors:

City of Omaha
U.S. Army Corps of Engineers
Papio-Missouri River Natural Resources District
Metro Omaha Builders Association
Natural Resources Conservation Service
Nebraska State Home Builders Association
UNL Cooperative Extension-Douglas/Sarpy
Papillion Creek Watershed Partnership
Nebraska Dept. of Environmental Quality



Douglas/Sarpy Extension Office



Program Speakers:

Mr. Michael Rabbe, State Program Manager, U.S.
Army Corps of Engineers

Ms. Terry Hickman, Program Specialist, NE Dept. of
Environmental Quality

Mr. Chester Black, Air Quality Control Manager,
Omaha Public Works Dept.

Mr. Geoff Goodwin, Grading and Erosion Control
Program Manager, Omaha Public Works Dept.

Mr. Mike Mallory, Program Specialist, NE Dept. of
Environmental Quality

Mr. Patrick Cowsert, Soil Scientist, Natural Resources
Conservation Service

Mr. Mike Kucera, Resource Conservationist, Natural
Resources Conservation Service

Mr. Paul Woodward, Water Resources Engineer, Papio-
Missouri River Natural Resources District

Mr. Mike Arends, Program Engineer, Omaha Public
Works Dept.

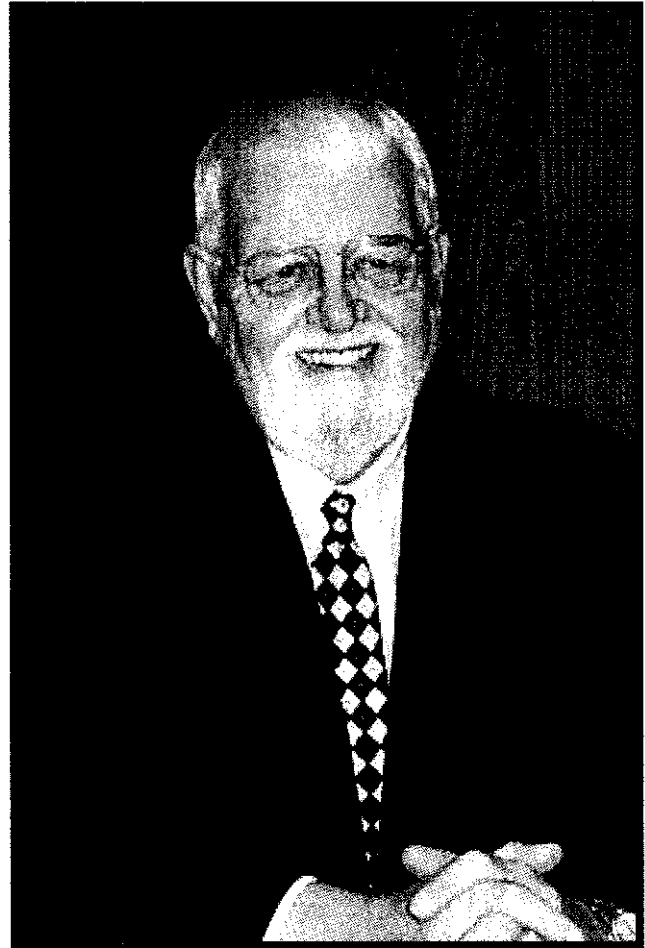
MAPA EXECUTIVE DIRECTOR DIES

Louis C. Violi, Metropolitan Area Planning Agency (MAPA) Executive Director, passed away February 21. He suffered a heart attack at home February 12 and had been in critical condition since then.

Mr. Violi began his career at MAPA in 1973 in the IGA Riverfront Program as a senior planner responsible for technical direction and coordination of land use, environment, rural resources, parks and recreation task forces and programs. He became MAPA Director of Comprehensive Planning in 1974 and remained in that position until he was named MAPA Executive Director in 1985.

Under his direction, MAPA became involved in numerous regional projects. Recently those projects included the COPS program, a regional testing program for prospective law-enforcement personnel; the Metro Area Motorist Assist Program; the siting of the Household Hazardous Waste Collection Facility; and the pedestrian bridge over the Missouri River. He served as the president of the Nebraska Economic Development Corporation (NEDCO) and recently was very involved in its reorganization.

Violi was very active in the National Association of Regional Councils (NARC) and served on the Executive Directors Committee. He encouraged MAPA participation in this national organization because of his firm belief in regionalism. During his tenure, several elected officials from the region served as officers of NARC, including Paul Koneck, who served as NARC president. In 2001, NARC held its national annual conference in Omaha, based largely on Violi's and MAPA's participation in NARC. He was a great advocate for a regional approach to solving problems when it was in the best interest of the region and the region will miss his dedication.



Louis C. Violi
1937 - 2003

A native of Baltimore, Maryland, Violi graduated from Loyola College in 1958 followed by service in the U.S. Army until 1964. He received a masters degree in Regional and City Planning from the University of Oklahoma in 1966. Before coming to MAPA, he worked for the Tennessee State Planning Commission, the Tennessee State Office of Civil Defense, and the Oklahoma Office of Community Affairs and Planning.

Violi and his wife, Barbara, would have been married 40 years in June. They have three sons, Dr. Louis, Peter, and Ronald. Peter and his wife, Sue, have three children, Erin, Anthony and Louis. Violi was a dedicated family man and devoted to his three grandchildren.

Report On Purchases

Construction Services, Professional Services, Personal Property

February, 2003

[illegible]

**PAPIO-MISSOURI RIVER
NATURAL
RESOURCES
DISTRICT**



8901 S 154TH ST.
OMAHA, NE 68138-3621
(402) 444-6222
FAX (402) 895-6543

“Confidential”

**Current and On-Going Projects
P-MRNRD Legal Counsel**

- ★ = Top Priority
- F = Future Work – No Assignment
- N = New Assignment
- O = Others Handling
- W = Work in Progress
- C = Completed
- P = PFP’s Portion Completed

- **Big Papió Channel Project - West Center Road to West Dodge Road (Woodward):**
 - Subordination Paperwork for Happy Hollow (W)
- **Little Papió:** (Cleveland)
- **Big Papió :** (Cleveland)
 - Whitted Creek Easements to Vacanti (W)
- **West Branch** (Cleveland):
 - ★ Twin Creek deeds (W)
 - Land Exchange with Sarpy Co. (96th St.) (F)
 - Land Exchange with Gollehon (96th St.) (F)
 - ★ Sloderbeck ROW Agreements (W)
- **Western Sarpy Dike** (Sklenar, Cleveland):
 - ★ Condemnation on Jansen Parcel (O)– (Roger Schiffermiller)
 - Closing with Bundy’s (potentially modify ROW/offer) (F)
 - Complete easements – three dikes and one drainage ditch (F)
 - Interlocal Agreement with Army National Guard (P)
 - Amended drainage ditch easement on Hickey (First National Property) (N)
 - Preview Corps draft scope of services (N)
- **Floodway Purchase Program** (Woodward):
 - Elbow Bend Purchase Agreements as needed (F)

(Over)

- **Trail Projects** (Bowen):
 - Western Douglas County Trail Agreement (N)
 - Brawner Liability Suit (Platte River Connection) (O)
- **Missouri River Corridor Project** (Becic):
 - ★ California Bend – Final settlement with tenant (Wright's) (W)
 - ★ Lower Decatur Bend – Appraisal Review, prepare ROW purchase agreement documents, public hearing notice/letters, etc. (W)
- **USDA P.L. 566 Projects and Silver Creek Watershed** (Puls/Petermann/Cleveland):
 - Papio Site S-30 –development agreements (F)
 - Silver Creek Site Easements – **as** needed (W)
 - Release of Site S-7 Easement (W)
- **Papio Watershed Dam Sites:**
 - **Dam** Site 19 agreement (Petermann) (W)
 - Candlewood Easements (Chris Curzon) (O)
 - **Dam** Site 13 Agreement (Petermann) (F)
- **Papio Creek Watershed Partnership (Stormwater)** (Woodward):
 - Storm water Utility Legislation (P)
- **Rural Water Projects:** (Sklenar)
 - ~~Dakota~~ County Rural Water – South Sioux City sale agreement (F)
- **Other:**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NEBRASKA HABITAT CONSERVATION
COALITION Plaintiff,

v.

UNITED STATES FISH and WILDLIFE
SERVICE, an Agency of the United States
Department of the Interior; GALE NORTON,
Secretary of the Interior, STEVEN WILLIAMS,
Director of the U.S. Fish and Wildlife Service,

Defendants.

Case No. _____

COMPLAINT

COMES NOW Plaintiff, Nebraska Habitat Conservation Coalition (“NHCC”), and hereby
complains and **alleges** as follows:

JURISDICTION AND VENUE

1. Jurisdiction in this Court is based upon 28 U.S.C. § 1331, 2201, 2202; 5 U.S.C. §§ 701 et
seq.; and 16 U.S.C. § 1540, in that this action is civil in nature and requests relief in the
forms of declaratory judgment and injunctive relief.

2. The NHCC alleges that Defendants Norton and Williams, acting in their official capacities, and the employees, officers and agents of the United States Fish and Wildlife Service (“FWS”), violated Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 551 et seq., and the National Environmental Policy Act (“NEPA”), 32 U.S.C. §§ 4331 et seq., in the course of performing their duties under these laws, with regard to the designation of critical habitat (“CH”) for the Northern Great Plains breeding population of the piping plover (“piping plover”). 67 FR 57638.
3. Venue is proper in the United States District Court for the District of Nebraska, based upon 28 U.S.C. § 1391(e), in that a substantial part of the property (CH) which is the subject of this complaint is located within the State of Nebraska.
4. Pursuant to 16 U.S.C. § 1540, on October 25, 2002, the NHCC issued a notice of intent to sue to the FWS regarding the complaints and allegations contained herein. Plaintiffs, therefore, have fully complied with the 60 day notice requirement of 16 U.S.C. § 1540.
5. Designation of CH for the piping plover is a final agency action subject to judicial review. 67 FR 57638. The NHCC’s members and constituents will be impacted by said CH designation. Accordingly, this controversy is ripe for review before this Court.

PARTIES

6. Plaintiff NHCC is a nonprofit coalition of organizations which are political subdivisions of the State of Nebraska, and associations of interested parties, whose constituents have an interest in conservation, agriculture, water use and power production in Nebraska. The

NHCC was formed pursuant to the laws of the State of Nebraska by the signing of an Interlocal Cooperation Agreement. Members and partners of the NHCC include the: Central Platte Natural Resources District; Lower Loup Natural Resources District; Upper Big Blue Natural Resources District; Twin Platte Natural Resources District; North Platte Natural Resources District; Tri-Basin Natural Resources District; Upper Elkhorn Natural Resources District; Upper Loup Natural Resources District; South Platte Natural Resources District; Lewis and Clark Natural Resources District; Loup Public Power District; Nebraska Public Power District; Southern Public Power District; Dawson County Public Power District; The Central Nebraska Public Power and Irrigation District; Middle Loup Public Power and Irrigation District; North Loup Public Power and Irrigation District; Twin Loups Reclamation District; Farwell Irrigation District; Sargent Irrigation District; Lower Elkhorn Natural Resources District; Lower Platte North Natural Resources District; Papio-Missouri River Natural Resources District; City of Lexington; City of Grand Island; Nebraska Farm Bureau Federation; Nebraska Rural Electric Association; Nebraska Water Resources Association; Nebraska Water Users, Inc.; Nebraska Association of Resources Districts; Nebraska Airboaters Association; Nebraska Cattlemen; Nebraska Corn Growers; and the Nebraska Off Highway Vehicle Association.

The purposes of the NHCC include representation of the interests of the NHCC's members concerning or effecting the designation of CH for piping plovers in Nebraska, any alternatives to critical habitat designation, and general efforts to conserve the species.

The NHCC is also charged with the duty to inform and educate the public concerning the

designation and the effects and impacts of piping plover CH designation on the people and resources of the State of Nebraska.

7. Members of the NHCC live and work in areas within the geographic area designated as CH for the piping plover. For example, many members of the NHCC manage natural resources within the CH area, thus the designation of CH in these areas will adversely impact the ability of these members to efficiently manage those natural resources.
8. The NHCC's policies regarding the ESA and CH designation reflect the interests of its members. The NHCC can effectively represent the interests of its members in connection with this litigation. The NHCC has been authorized to participate as a plaintiff in this litigation by its Board of Directors.
9. Defendant Gale Norton is the Secretary of the Department of the Interior. As Secretary, she is responsible for the direction and supervision of all operations and activities of the department, including those of the FWS. In that capacity, she and her agents and employees are charged with implementing the statutory and regulatory requirements of the ESA, NEPA and APA.
10. Defendant Steven Williams is the Director of the FWS. As Director, he is responsible for the direction and supervision of all operations and activities of the FWS. In that capacity, he and his agents and employees are charged with implementing the statutory and regulatory requirements of the ESA, NEPA and APA.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

I. THE PROCEDURAL DESIGNATION OF CRITICAL HABITAT FOR THE PIPING PLOVER

11. On June 12, 2001, the FWS published its proposed rule regarding the designation of CH for the piping plover. 66 FR 31760.
12. On January 25, 2002, the NHCC submitted comments regarding this proposed rule. On May 17, 2002, the NHCC supplemented its initial comments. The NHCC's comments put the FWS on notice of the numerous legal violations made by the FWS in its proposed CH designation.
13. On September 11, 2002, the FWS issued its final rule designating critical habitat for the piping plover. 67 FR 57638. The final rule is substantively similar to the proposed rule, and does nothing to correct the legal and biological deficiencies noted in the NHCC's comments.
14. Included within the CH designation are portions of the Platte, Loup, Missouri and Niobrara Rivers in and adjacent to Nebraska. The FWS considers these areas to be "occupied" by the piping plover because piping plovers have been known to nest on sand bars within these rivers.
15. On October 25, 2002, pursuant to 16 U.S.C. § 1540(g)(1)(C), the NHCC filed with the FWS its 60 day notice of intent to sue. The notice articulated the same legal and factual deficiencies noted by the NHCC in its comments. The present complaint is based upon that 60 day notice and comments.

A. The Critical Habitat's Boundaries

16. Piping plovers nest in a variety of habitats throughout the Northern Great Plains. These habitats may include sand bars within the Platte, Loup, Missouri and Niobrara Rivers in Nebraska.

17. Piping plover census data shows that in any given year, the species utilizes only a portion of these sand bars. Some areas are used with some frequently, while other areas are almost never used.
18. These sand bars are not permanent. Natural factors such as water flow and ice movement periodically create and destroy these sand bars.
19. Only a portion of the Platte, Loup, Missouri and Niobrara Rivers in Nebraska contains sand bars suitable for nesting by piping plovers.
20. Sand bars are considered by the FWS to be “ephemeral” in nature, and cannot be designated as CH. 50 C.F.R. § 424.12(c).
21. Upon listing the piping plover in 1985, the FWS correctly noted that it could not designate sandbars as CH. According to the FWS, the designation of CH for the piping plover “would not be prudent because of the often ephemeral nature of the plover’s nesting habitat.” 49 FR 44714; 50 FR 50731.
22. Despite the plain language of its regulation stated in ¶ 20 of this Complaint, the FWS has now elected to designate sand bars as CH.
23. The proposed CH designation also included hundreds of river miles with no sand bars, plus many thousands of acres of land adjacent to the rivers, which included homes, buildings, farm land, roads, bridges and mines as CH, the NHCC comments complained that not only was the inclusion of ephemeral sand bars in violation of the ESA, but that the FWS could also not designate these additional thousands of river miles as CH.
24. In its final rule, the FWS adjusted its approach. Although the FWS delineated the same “critical habitat boundaries” as in its proposed decision, then stated that areas within such

boundaries which do not contain primary constituent elements are not critical habitat. 67 FR 57644, 57648, 57657. For example, the FWS notes that it designated the entire length of Missouri River reservoirs even though portions do not and “may never contain the primary constituent elements.” 67 FR 57645.

25. The FWS claims “budget limitations” as justification for this approach. 67 FR 57645.

B. Processes and Potential Habitat

26. The FWS CH designation also 1) characterizes ephemeral “processes” as “primary constituent elements;” and 2) designates potential habitat. 67 FR 57643-4, 57660.
27. The FWS characterizes plover habitat (sandbars) on Nebraska rivers as a “physical” primary constituent element. *Id.*
28. In contrast, it characterizes the processes that create sand bars as a “biological” primary constituent element or “dynamic ecological process.” *Id.* The primary process identified by the FWS as creating, destroying and maintaining plover habitat on Nebraska rivers is hydrology, more specifically the natural wet and dry cycles and flood and icing events which influence river flow which, in turn, creates and destroys sand bars over time. *Id.* “On rivers, one site becomes flooded and erodes away as another is created.” *Id.*
29. Based on this process, the FWS designated potential habitat (river segments without sand bars) because “these areas are part of a riverine system with documented nesting” as CH. *Id.*
30. In response to the comment that the FWS does not know if a given portion of potential river habitat is even capable of ever becoming actual habitat, the FWS responds that it has “insufficient knowledge of the characteristics of most rivers and the effects of our actions over the years that alter their form and function” to predict future habitat suitability. *Id.*

31. According to the FWS, there is considerable variability inherent in the designation of processes. “The annual, seasonal, daily, and even hourly availability of the habitat patches is dependent upon local weather, hydrological conditions and cycles, and geological processes.”

Id.

32. At a given moment in time, any area within “critical habitat boundaries” which impacts these processes is considered to be CH. The FWS explains that “[a]ny activity that results in changes in the hydrology of the [CH] unit . . . including . . . hydropower, irrigation . . .” may be subject to section 7 consultation and adversely modify critical habitat. 67 FR 57655.

Similarly “[a]ny activity that results in development or alteration of the landscape with or immediately adjacent to a hydrologic component of the unit including . . . construction . . . agricultural activities . . . e.g. plowing . . .” or “[a]ny activity that significantly and detrimentally alters water quality . . . [or] the inputs of sediment and nutrients . . .” may be subject to section 7 consultation and adversely modify critical habitat. Id.

33. Thus, because both sand bars and the processes which shape them are always changing, CH within a “critical habitat boundary” is likewise in a constant state of **flux**.

II. THE ENVIRONMENTAL IMPACTS OF CRITICAL HABITAT DESIGNATION FOR THE PIPING PLOVER

34. Pursuant to the NEPA, the FWS issued an environmental assessment (“EA”) for the designation of CH for the piping plovers. The EA concludes that the proposed designation will have no significant impact and, thus, an environmental impact statement (“EIS”) is not warranted.

35. The FWS explains: “Given the similarity of these definitions [of adverse modification and jeopardy], activities that would likely destroy or adversely modify critical habitat would

almost always result in jeopardy to the species . . . therefore, implementation of the Proposed Action would result in no different environmental consequences when compared to the No Action Alternative.” **EA** at 29.

- 36.** The FWS’s notes that the only possible benefit of designating CH in this case is a greater understanding of plover habitat. **67 FR 57654, 57665**. After stating that the designation of CH for the plover will not directly benefit the species, the FWS states that “designation of critical habitat can help focus conservation and recovery activities . . . by identifying areas essential to conserve the species. Designation of critical habitat also alerts the public, as well as land-managing agencies, to the importance of these areas.” *Id*-
- 37.** However, the FWS then explains “that the plover has been listed as a species since 1985. This relatively long tenure as a listed species has ensured that there is wide awareness within the plover habitat of the species, and of concerns related to habitat. The designation of critical habitat for the species, therefore, will not likely lead to increased consultations due to a new awareness of the need to consult on activities potentially impacting the species. This is consistent with the primary finding of this analysis that the economic impacts associated with designation of critical habitat for the piping plover (above those impacts associated with the listing of the species) will be relatively insignificant.” Addendum to Economic Analysis of Critical Habitat Designation for the Northern Great Plains Breeding Population of the Piping Plover (“Addendum”) at **6**.
- 38.** Thus, the FWS believes that the designation of CH for the plover will have little or no environmental impact and will provide little or no benefit the species. Based upon this conclusion, the FWS decided not to complete an EIS.

III. THE ECONOMIC AND OTHER IMPACTS OF CRITICAL HABITAT DESIGNATION FOR THE PIPING PLOVER

39. The FWS lists a number of activities which may be deemed to adversely modify proposed CH for the plover, including any activity which could alter the quantity or quality of water within designated rivers or which could in any way alter the structure of potential plover habitat. 66 FR at 31774. Such activities include dam construction, operation or maintenance, irrigation from either diversion or groundwater pumping, agriculture, mining, and construction or maintenance of roads, bridges, buildings or factories. Id.
40. Upon the FWS's determination that any such activity destroys or adversely modifies piping plover CH, mitigation measures "can vary from slight project modifications to extensive redesign or relocation of the project." Id. The cost of any such mitigation will be similarly variable. Id.
41. On December 28, 2001, the FWS released for comment its Draft Economic Analysis of Critical Habitat Designation for the Northern Great Plains Breeding Population of the Piping Plover ("DA"). The DA uses two "baselines" for analysis, one addressing the impacts of CH designation co-extensive with listing, and one addressing only those impacts in addition to listing. DA at P-2.
42. The DA notes that there are two primary types of costs incurred upon designation of CH: 1) direct costs incurred from section 7 consultation; and 2) indirect costs incurred from section 7 consultation associated with project design or operation modification and/or mitigation measures. DA at 3-1; 3-25, 3-28.
43. Direct costs of consultation include the administrative and analytical costs to the FWS, the federal action agency, and the private applicant. DA at 3-2. The FWS estimates that a total

of five formal and 38 informal consultations involving plover CH will occur annually on Nebraska rivers (not including the Missouri River), and one formal and 97 informal for the Missouri River in South Dakota and Nebraska. DA at ES-5. The FWS estimates that the cost of these consultations will be approximately \$1,500 for informal and \$16,300 for formal. DA at ES-6. The FWS admits that private applicants bear a portion of these costs, but does not attempt to estimate the magnitude of such costs. DA at 3-2. In addition, the FWS admits that private applicants will incur project delay costs associated with consultation, but fails to estimate those costs. Id.

44. Indirect costs of consultation include any modification of a proposed action, modification of the operation of an existing action, or mitigation measures imposed on federal, state, or private entities by the FWS. With respect to Nebraska, such costs may result from impacts to dam construction, maintenance and operation, power generation and distribution, commercial navigation on rivers, state and municipal infrastructure construction, maintenance and operation, including well fields, roads, bridges and levees, recreation, mining, residential development, and agricultural activities (including, but not limited to, irrigation from both river diversion and wells). DA at ES-7; 3-12; 3-31.
45. In addition to costs incurred from direct modification of these activities, costs will be incurred from mandatory mitigation measures. Id. The FWS also notes that designation of CH may provide some economic benefits. DA at ES-8, 9. While the FWS admits that these costs and benefits may be significant, it fails to analyze or quantify any of them because the “extent of such costs. . . is unknown” and that estimating “such benefits is beyond the scope of this report.” Id.

46. In its comments, the NHCC explained a number of legal and factual failings in the FWS's DA, including the DA's failure to adequately address the direct, indirect, and cumulative costs which may result from the designation of CH for the piping plover.
47. Appurtenant to publishing its final rule, the FWS published an addendum to its **DA**. The addendum does not cure the legal and factual failings in the FWS's DA, as articulated in the NHCC's comments. The DA and its addendum constitute the FWS's economic and other impact analysis for the piping plover.

IV. CURRENT MANAGEMENT OF THE PIPING PLOVER

48. There are currently many management efforts being made by federal, state, local and private entities which directly or indirectly benefit the piping plover. Many of these management actions are being made by members of the NHCC.
49. For example, the Central Platte Natural Resources District has secured water rights in the Platte River specifically to provide for the needs of piping plovers. See NHCC Supplemental Comments at ¶ 5. These water rights were determined upon adjudication by the Nebraska Department of Natural Resources and are water rights maintained in perpetuity, provided the benefit to piping plover remains. Nebraska law provides for review of such water rights every 15 years to determine if the beneficial use is still being met. Thus, the District's water right has been deemed to benefit the species and has specific legal protections which assure that the benefit will be implemented and will continue to benefit the species.
50. Likewise, the Nebraska Public Power District and Central Nebraska Public Power and Irrigation District are required by their Federal Energy Regulatory Commission ("FERC") licences to create an "Environmental Account" reserving 10% of the storable non-irrigation

season inflows into Lake McConaughy for downstream release, at the discretion of the FWS, for the benefit of endangered species, including the piping plover. The Districts are also required by their FERC licences to actively develop and manage reproductive habitat for piping plovers in the Platte River.

51. The FWS excluded Lake McConaughy from CH designation “due to the existence of two draft conservation management plans.” 67 FR 57646. According to the FWS, to qualify for exclusion based on other conservation measures, management plans must “(1) provide a benefit to the species; (2) include implementation assurances; and (3) include features, such as an adaptive management plan, that will assure effectiveness.” Id.
52. In its comments, the NHCC pointed out many conservation and management efforts which meet the above three criteria, including the two above noted examples. The FWS refused to exclude CH on the basis of these efforts, stating that they do not provide assurances that they will be implemented. 67 FR 57670.
53. For example, the FWS claims that the Lake McConaughy management plan provides implementation assurances because it is part of the Central Nebraska Public Power and Irrigation District’s FERC licence. 67 FR 57646. However, the FWS then decided that the water releases required by the exact same FERC licence do not provide similar implementation assurances. 67 FR 57670. The FWS does not provide an explanation for accepting one part of a FERC licence as an adequate implementation assurance while rejecting another part of the same FERC licence.

APPLICABLE LAW

I. CRITICAL HABITAT

54. Pursuant to section 4 of the ESA, the FWS must “determine whether any species is an endangered species or threatened species . . .” 16 U.S.C. § 1533(a)(1).
55. In addition to this mandate, the FWS must “by regulation . . . and to the maximum extent prudent and determinable (A) concurrently with making a determination under paragraph (1) that a species is an endangered or threatened species, designate any habitat of such species which is then considered to be critical habitat.” Id. at § 1533(a)(3).
56. Critical habitat must be limited to “specific areas.” 16 U.S.C. § 1532(5)(A).
57. Critical habitat must be “defined **by** specific limits using reference points and lines found on standard topographic maps of the area.” 50 C.F.R. § 424.12(c); see also § 424.16 (CH must be delineated on a map).
58. “Ephemeral reference points (e.g., trees, sand bars) shall not be used in defining critical habitat.” 50 C.F.R. § 424.12(c).
59. For “specific areas within the geographical area occupied by the [listed] species,” the FWS may designate CH, provided such habitat includes 1) “physical or biological features;” 2) which are “essential to **the** conservation of the species;” and 3) “which may **require** special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. § 424.12(b).
60. “Physical and biological features” includes the requirements of species, such as space, food, cover, shelter and areas specifically necessary for survival. 50 C.F.R. § 424.12(b).
61. The physical or biological elements which make up “physical and biological features” are known as “primary constituent elements.” 50 C.F.R. § 424.12(b).

62. “Primary constituent elements” include nesting sites, feedings sites and water quantity or quality. 50 C.F.R. § 424.12(b).
63. “Special management considerations or protection” can include “any methods or procedures useful in protecting physical or biological features of the environment for the conservation of the listed species.” 50 C.F.R. 424.02(j).
64. The designation of CH must be “beneficial to the species.” 50 C.F.R. § 424.12(A)(1)(ii).
65. Critical habitat must be limited in scope only to that which is necessary. As stated by the Federal District Court for Washington: “even though more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention.” Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 623 (W.D. Wash. 1991).
66. Critical habitat can only be designated “on the basis of the best scientific data available.” 16 U.S.C. § 1533(b)(2).
67. The FWS must evaluate all economic and other impacts of proposed CH designation, and must weigh those impacts against the benefits of CH designation. 16 U.S.C. § 1533(b)(2); New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001). Upon said evaluation, the FWS must consider reducing or eliminating CH on the basis that the benefits of CH designation are outweighed by the impacts caused thereby. Id.
68. Critical habitat may not be designated when “[i]nformation sufficient to perform required analysis of the impacts of the designation is lacking” 50 C.F.R. § 424.12(a)(2).

69. Critical habitat may not be designated when “the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.” 50 C.F.R. § 424.12(a)(2).

II. NATIONAL ENVIRONMENTAL POLICY ACT

70. Consistent with the requirement that all relevant impacts be evaluated and weighed, the FWS must comply with the NEPA prior to designating CH. Catron County Board of Commissioners. New Mexico v. United States Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996).
71. The NEPA requires that for every major federal action that significantly affects the quality of human environment, the federal government shall provide an environmental impact statement (“EIS”). 42 U.S.C. § 4332(c)(1)-(v); 40 C.F.R. § 1508.11. The purpose of an EIS is to provide a “full and fair discussion” of significant potential environmental impacts of the proposed action, in order to facilitate informed decision making.” See Catron County Board of Commissioners. New Mexico v. United States Fish and Wildlife Service, 75 F.3d 1429, 1434 (10th Cir. 1996); Vermont Yankee Nuclear Power Corp. v. N.R.D.C. Inc., 435 U.S. 519, 558 (1978) 40 C.F.R. § 1502.1.
72. Although the requirements of NEPA are procedural in nature, agencies are required to fully and strictly comply with them and a violation of the requirements can constitute a tangible injury-in-fact. Id. A NEPA analysis must include all information which is relevant and essential to a reasoned choice among alternatives, including the “no action” alternative. Robertson v. Methow Valley Citizens: 490 U.S. 332 (1989); 40 C.F.R. § 1502.14.

73. For an agency to justify its failure to prepare an EIS, it must prepare an EA and issue a finding of no significant impact which explains why the proposed action is not a major federal action which will significantly affect the environment. 40 C.F.R. §§ 1501.4, 1508.9, 1508.13.

III. ADMINISTRATIVE PROCEDURE ACT

74. The Administrative Procedure Act (“APA”) guides judicial review of agency actions. Upon reviewing an agency action, this Court must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law . . .” 5 U.S.C. § 706(2)(A). “In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . .” 5 U.S.C. § 706(2). “The duty of a court reviewing agency action under the “arbitrary and capricious” standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.” Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560, 1574 (10th Cir. 1994).
75. “In reviewing the agency’s explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment.” Id. Agency actions will be set aside if the agency “entirely failed to consider an important aspect of the problem” or if the decision “runs counter to the evidence before the agency.” Id., quoting Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). Furthermore, any such agency action must be supported by “substantial evidence.” Olenhouse at 1575; 5 U.S.C. § 706(2)(E).

76. An agency must have taken a “hard look” at the issues, articulated and considered all relevant data, and engaged in genuine, “reasoned decision-making.” Greater Boston Television Corp., et al. v. Federal Communications Commission, 444 F.2d 841, 851 (D.C. Cir. 1970).

CLAIMS FOR RELIEF

I. THE FWS’S “CRITICAL HABITAT BOUNDARIES” APPROACH IS ILLEGAL

77. The NHCC hereby re-alleges and incorporates paragraphs 76 as if fully stated herein.
78. In its final rule, the FWS designated “critical habitat boundaries.” However the vast majority of the geographic area within these boundaries is not used by piping plovers for nesting, such as river reaches devoid of sand bars, as well as crop fields, pastures, buildings, roads, bridges and mines. The FWS claims that only the areas within the “critical habitat boundaries” which contain “primary constituent elements” are critical habitat. However, the FWS also admits that such CH areas are constantly changing because dynamic processes are considered to be “primary constituent elements.”
79. It is clear that the FWS designated “critical habitat boundaries” in an attempt to satisfy the requirement that CH be limited to “specific areas” “defined by specific reference points and lines found on standard topographic maps of the area.” 16 U.S.C. § 1532(5)(A); 50 C.F.R. § 424.12(c).
80. It is equally apparent that the FWS limited CH to those areas within the “critical habitat boundaries” which contain “primary constituent elements” in order to satisfy the requirement that CH be occupied by the species and include “physical and biological features” which are “essential to conservation of the species” and which are “beneficial” to the species. 16 U.S.C. § 1532(5)(A); 50 C.F.R. § 424.12.

81. In trying to satisfy all of these legal requirements, the FWS has satisfied none of them.
82. The FWS's designation of CH can only be characterized in one of two ways.
83. If "critical habitat boundaries" are considered to be the "defined" boundaries of CH, then the majority of CH designated by the FWS is not occupied by the species and does not include "physical and biological features" which are "essential to conservation of the species" and which are "beneficial" to the species. Farm fields, buildings, and roads clearly do not fit these criteria.
84. On the other hand, if the FWS's CH designation is limited to areas within the "critical habitat boundaries" which do meet these requirements, then the FWS has failed to designate "specific areas" "defined by specific reference points and lines found on standard topographic maps of the area." Indeed, the sand bars and "processes" which create and destroy them are continual moving targets which defy specific delineation. In this characterization, "critical habitat boundaries" are specious.
85. With either characterization, the FWS's designation of CH violates the **ESA**.
86. The FWS's "critical habitat boundaries" approach also violates the **APA**. The FWS clearly and correctly stated at the time of listing that it could not legally designate CH on Nebraska rivers because such habitat is made of ephemeral sand bars. The FWS has failed to provide a rational explanation for abandoning its legally correct policy. The FWS's decision is arbitrary and capricious.

II. THE FWS'S DELINEATION OF CH WITH "PROCESSES" IS ILLEGAL

87. The NHCC hereby re-alleges and incorporate paragraphs 86 as if fully stated herein.
88. In designating CH for the piping plover, the FWS considered the processes which create and destroy sand bars as "primary constituent elements." Any area within "critical habitat boundaries" which influences any such process is CH.
89. For example, the withdraw of water for irrigation from the Platte River or from an adjacent well may impact the quantity of water remaining in the river. Likewise, the plowing of vegetation adjacent to the river may impact the quantity of water in the river. The FWS considers the quantity of water in the river as a principal "process" which influences the creation and destruction of sand bars. Because the farmer's irrigation and plowing is within the "critical habitat boundary" and is a part of the "process" which influences sand bars, the farmer's land is CH for so long as the activity continues.
90. In addition, natural factors such as rainfall influence whether and to what degree the farmer's activities influence the quantity of water in the river.
91. The processes which shape sand bars are complex and ever changing. These processes are deemed by the FWS to be "primary constituent elements." Critical habitat is defined as any area within the "critical habitat area" which has "primary constituent elements." Thus, by definition, in this case CH is complex and ever changing.
92. The FWS's designation of CH based on processes violates applicable law.
93. The FWS's regulations do allow the FWS to include elements such as "water quantity and quality" as "primary constituent elements." 50 C.F.R. § 424.12(b)(5). However, critical habitat must be limited to "specific areas" precisely delineated, and cannot defined in terms

of ephemeral reference points. 16 U.S.C. § 1532(5); 50 C.F.R. §§ 424.12, 424.16. The FWS failed to reconcile these requirements.

94. Additionally, “specific areas” precisely delineated does not mean rainfall, wind, plowing, irrigation, or any other process which can change at a moments’ notice. These are, by definition, “ephemeral” reference points which the FWS must avoid when designating the boundaries of CH. Thus, the FWS cannot delineate CH in terms of these highly variable processes for the same reason the FWS cannot directly designate sand bars; both reference points are in a constant state of flux, defying clear delineation. The ESA and its implementing regulations state that CH must be defined and delineated on a map in manner which places the public on notice as to what is and what is not CH. The FWS failed in this case.

95. Moreover, even if processes could be used to delineate CH, the FWS’s decision in this case would still be inappropriate. The FWS’s assumptions regarding the “processes” which shape sand bars are based largely upon speculation. For the FWS to designate processes as CH, it must have sufficient scientific evidence regarding such processes in Nebraska; for example, the impact of hydrology on sand bar distribution, quantity and quality. The FWS does not have such evidence. Because of these failures, the FWS’s final decision is arbitrary and capricious, in violation of the APA.

III. THE FWS’S DESIGNATION OF POTENTIAL HABITAT IS ILLEGAL

96. The NHCC hereby re-alleges and incorporates paragraphs 95 as if fully stated herein.

97. The FWS has designated over 500 miles of Nebraska rivers as CH. Only a small fraction of these rivers actually contain sand bars which are suitable habitat for piping plover nesting.

Moreover, use of the available sand bar habitat by piping plovers is highly variable, and only a portion of the available sand bars are used in a given year. Thus, the FWS has designated hundreds of miles of Nebraska rivers with no suitable sand bar habitat, based solely on the potential for these areas to become habitat.

98. The FWS fails to provide any evidence that any given reach of this potential habitat will ever actually become suitable for nesting. The FWS cites the general concept that rivers change. However, the fact that rivers change does not prove that any given location within vast reaches of potential habitat will ever become suitable habitat, much less critical habitat.
99. Moreover, the FWS does not describe the relative potential of a given river reaches' potential for suitability. The physical and hydrological characteristics of potential habitat varies widely by location. Some locations may be likely to develop suitable habitat in the foreseeable future, while others may not.
100. The FWS admits that the FWS currently has insufficient knowledge to accurately predict whether a given portion of potential habitat will ever become suitable for nesting by plovers.
101. To properly designate potential habitat, the FWS must define the spectrum of factors which increase the likelihood that such habitat will become suitable in the foreseeable future, and then exclude portions which do not meet such criteria.
102. Critical habitat must be limited to "specific areas" precisely delineated, cannot be ephemeral in nature, must have "physical and biological features" "essential for conservation of the species," and must benefit the species. 16 U.S.C. § 1532(5); 50 C.F.R. §§ 424.12, 424.16. The FWS's designation of potential habitat in this case violates these requirements.

103. The FWS has not provided a rational basis for designating river reaches without piping plover habitat, based merely on the speculation that someday these areas may become suitable for nesting and other uses. The FWS's designation of potential habitat is arbitrary and capricious, in violation of the APA.

IV. THE FWS'S DESIGNATION OF CH WHICH DOES NOT BENEFIT THE SPECIES IS ILLEGAL

104. The NHCC hereby re-alleges and incorporates paragraphs 103 as if fully stated herein.
105. The FWS can only designate CH when it is "essential for conservation of the species" and, therefore, is "beneficial" to the species. 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. § 424.12(a)(1)(ii).
106. The FWS claims that there will be little to no environmental impacts or benefits resulting from the designation of CH for the piping plover.
107. Consistent with the FWS's assumption is the fact that not all of the suitable habitat (sand bars) on Nebraska rivers is used by piping plovers in a given year. The presence of suitable but unused habitat suggests that habitat on Nebraska rivers is not currently a limiting factor in piping plover abundance, otherwise all available habitat would be utilized by piping plovers.
108. The FWS does suggest that the designation of CH for the piping plover may provide educational benefits to the species by identifying areas important to its recovery. Such educational benefits may be a legitimate benefit provided by CH. See Conservation Council for Hawaii v. Babbitt, 2 F.Supp.2d 1280, 1284 (D. Hawaii 1998).
109. However, the FWS cannot claim this benefit in the present case. The FWS's own listing document identifies and discusses the role and importance of sand bar habitat in Nebraska

rivers to piping plover nesting. In the 17 years since, the piping plover and its habitat has been extensively discussed and managed. The FWS failed to explain in its final rule how the designation of these areas adds anything to the base of knowledge regarding piping plover habitat, thereby benefitting the species.

110. Moreover, even if the designation of sand bars as CH were to benefit piping plovers, the majority of piping plover CH is merely potential habitat which may or may not ever become suitable or beneficial. For potential habitat, the benefits of designation are speculative.
111. Based upon the FWS's own statements and admissions, the designation of CH for the piping plover will not benefit the plover.
112. The designation of CH which does not benefit the species is illegal under the **ESA** and implementing regulations.
113. The FWS has provided no rational basis for designation of CH which does not benefit the species. The FWS's action is arbitrary and capricious, in violation of the **APA**.

V. THE FWS'S FAILURE TO EXCLUDE CRITICAL HABITAT ON THE BASIS THAT PRESENT MANAGEMENT OF NEBRASKA RIVERS IS ADEQUATE TO PROTECT THE PIPING PLOVER IS ILLEGAL

114. The NHCC hereby re-alleges and incorporates paragraphs 113 as if fully stated herein.
115. To designate CH, the habitat in question must require special management considerations or protection. 16 U.S.C. § 1532(5)(A)(I). Special management considerations or protection can include "any methods or procedures useful in protecting physical or biological features of the environment for the conservation of the listed species." 50 C.F.R. 424.020). The FWS's designation in this case does not meet these requirements.

116. First, the FWS claims that the designation of CH for the piping plover would not impact the environment and would not benefit the species. If this is true, then there can be no special management or protection added by CH to the management or protection already enjoyed by the piping plover. If the designation of habitat as CH would not benefit the management or protection of the species, then such habitat cannot as a matter of law be designated.
117. Second, the FWS has failed to explain why the host of other piping plover management efforts currently underway in Nebraska are insufficient.
118. The FWS recognized when it excluded Lake McConaughy for designation that if habitat is already sufficiently managed, then the designation of such habitat as CH is not required. 64 FR 57646. According to the FWS, to qualify for such an exclusion, management plans must “(1) Provide a benefit to the species; (2) include implementation assurances; and (3) include features, such as ~~an~~ adaptive management plan, that will assure effectiveness.” Id. Lake McConaughy was excluded because it met these criteria. Id.
119. The NHCC has pointed out the many management efforts in Nebraska which currently benefit piping plovers. The FWS refused to exclude any CH based on these management efforts, claiming that they do not provide implementation assurances. 67 FR 57670.
120. The FWS’s test in this case is arbitrary, capricious, and not in accord with the **ESA**. The FWS applies the test to each individual management plan, not to the collective management efforts for a given area. In contrast, the **ESA** states that a “specific” area of CH must have physical or biological features essential for conservation “which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(I). By examining each individual management action separately, the FWS fails to ascertain whether the collective

management efforts for a given specific area of CH are actually in need of additional management or protection.

121. Moreover, even if this test were valid, **the** FWS has failed to explain why the management actions identified by the NHCC do not meet this test. For instance, the FWS claims that the Lake McConaughy management plan provides implementation assurances because it will be made apart of the Central Nebraska Public Power and Irrigation District's FERC license. 67 FR 57646. However, the Central Nebraska Public Power and Irrigation District is also required by its FERC license to provide storage water from *Lake McConaughy* to benefit the species. 67 FR 57670. Yet, the FWS has stated that this action does not provide implementation assurances. It is arbitrary and capricious for **the** FWS to state that one FERC requirement provides implementation assurances, but then assume that another equally mandatory requirement does not.

122. The FWS's failure to exclude CH on Nebraska rivers in light of the current management regime violates the ESA, and is arbitrary and capricious in violation of the **APA**.

VI. THE FWS'S ENDANGERED SPECIES ACT IMPACT ANALYSIS IS INADEQUATE

123. The NHCC hereby re-alleges and incorporates paragraph 122 as if fully stated herein.

124. The FWS must evaluate all economic and other impacts of proposed CH designation, and must weigh those impacts against the benefits of CH designation. 16 U.S.C. § 1533(b)(2); *New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). The FWS must consider excluding CH on the basis if the impacts are outweighed by the benefits. Id. Critical habitat may not be designated when "[i]nformation

sufficient to perform required analysis of the impacts of the designation is lacking . . .” 50 C.F.R. § 424.12(a)(2).

A. The FWS’s “Baseline” Approach Is Invalid

125. The DA attempts to incorporate two “baselines,” one evaluating the economic impact of CH designation co-extensive with listing, and one evaluating the economic impact in addition to listing. DA at P-1-2. Neither “baseline” is appropriate under the plain language of the **ESA**.
126. The ESA requires that CH may only be designated “after taking into consideration the economic impact, and other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2). Moreover, the FWS “may exclude any area from critical habitat” if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” Id.
127. The ESA is clear. Congress intended a full impact analysis of both the benefits and detriments of CH designation, followed by an evaluation regarding whether or not specific areas of CH should be excluded on the basis that the detriment of designation would outweigh the benefit. The 10th Circuit Court of Appeals recognized this fact when it stated “we conclude that Congress intended that the FWS conduct a full analysis of all of the economic impacts of critical habitat designation, regardless of whether those impacts are co-extensive to other causes.” New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service, 248 F.3d 1277, 1285 (10th Cir. 2001).
128. The FWS’s present approach to impact analysis is not in accord with the plain language of the ESA or the 10th Circuit’s ruling. First, the FWS only attempts to evaluate economic impacts of CH designation. Second, the FWS’s first “baseline” only purports to evaluate the

impacts attributable co-extensively to listing. However, both the ESA and the 10th Circuit require a full analysis of all impacts co-extensive to any other cause, not just those co-extensive with listing.

129. The FWS's duty under the ESA is simple. The FWS must conduct a complete and meaningful analysis of all impacts which will flow from the designation of CH, regardless of whether they are co-extensive with any other cause, and must use this analysis to balance the relative good versus the relative harm of CH designation. The FWS's double "baseline" approach fails this duty.

B. The FWS's Impact Analysis Is Inadequate

130. The FWS also fails to complete a meaningful impact analysis which meets the standards required by the ESA.
131. Other Relevant Impacts. As noted above, the FWS is required by the ESA to provide analysis regarding both the economic and "any other relevant impact." The FWS's DA only attempts to evaluate the economic impacts of CH designation. To meet the requirements of the ESA, the FWS must evaluate all impacts of designation.
132. Consultation Costs. The FWS admits that 1) private parties will bear some of the direct administrative costs of consultation; and 2) that private parties will bear costs related to project delays due to consultation. DA at 3-2. However, the FWS fails to analyze and quantify these costs, either directly to the applicant, indirectly to the economy, or cumulatively.
133. Project Modification and Mitigation Costs. The FWS has admitted that a host of important federal, state, local and private actions may suffer costs from design operation modification

and mitigation measures required by ESA section 7 consultation. With respect to project design and modification, the FWS repeatedly notes that “serious” impacts may accrue to vital Nebraska industries, such as agriculture and power generation. However, the FWS makes absolutely no attempt to explain or quantify with any level of precision what those impacts will be. This failure violates the law.

134. For example, the FWS claims that irrigation has resulted in a reduction and modification of water flows in the Platte River, which is in turn responsible for degradation of plover habitat. The FWS then recognizes that “[f]ederal **farm** payments to farmers might constitute a nexus and be restricted under plover critical habitat.” Addendum at 7. However, the FWS then avoids its duty to conduct impact analysis by stating that only the USDA “would fully understand whether their actions” would be subject to section 7 consultation, and that the USDA “does not anticipate any such consultations.” Id.
135. The FWS cannot avoid its duty to conduct a full impact analysis by merely speculating that **an** impact may not happen. The federal nexus between irrigation, **farm** subsidies and section 7 analysis is not mere speculation but a proven reality. See Sierra Club v. Glickman, 156 F.3d 606 (5th Cir. 1998). Moreover, there is no rational basis for the FWS to avoid analysis on the basis that the acting agency (USDA) would better understand section 7 consultation. It is the FWS’s responsibility to evaluate federal action under section 7, not the acting agency.
136. The FWS’s analysis is equally deficient with respect to potential mitigation measures. The FWS does present a few examples of possible mitigation. DA at 3-28-32. However, these cursory examples fall far short of a complete impact analysis. For example, the FWS notes

that mitigation costs for water users for “minor” withdrawals (25 acre feet or less) from the Platte River typically run from \$500-\$4000. DA at 3-29. However, the DA does not go on to state what the economic impact of such mitigation is on small businesses, the associated impact on local economies, or the cumulative impacts. Even more importantly, the **DA** is completely silent regarding the potential mitigation required of water users who withdraw more than 25 acre feet per year. Thus, while the FWS acknowledges that water users will suffer mitigation costs, it completely fails to analyze the extent and economic impact of such mitigation.

137. Even more egregious is the FWS failure to analyze and include the indirect costs of section 7 consultation which comes in the form of project modification, elimination or implementation of mitigation measures. These impacts must be analyzed under the **ESA**.
138. Cumulative Costs. Cumulative effects are those effects on future state or private activities that are “reasonably certain to occur” within the area of the federal action subject to consultation. 50 C.F.R. §402.02. In this case, the FWS has failed to even acknowledge, let alone evaluate the cumulative impacts of CH designation.
139. For instance, the FWS predicts that small water users will suffer a \$500 to \$4,000 mitigation cost. However to fully evaluate both the direct and cumulative impacts of this result, the FWS must 1) identify the number and type of entities which will suffer this impact; 2) evaluate the direct economic impact to those entities; 3) evaluate the subsequent impact on local economies; and 4) evaluate the cumulative impact on the regional, state and national economy.

140. Economic modeling illustrates this point. For instance, in Merrick County, Nebraska, every dollar reduction in agricultural output would reduce total county output by over a dollar fifty, not including a proportionate reduction in jobs, property values, and taxes. Similarly, for Dawson County, Nebraska, every dollar reduction in the food processing industry would reduce total county output by over a dollar seventy.
141. In sum, impacts which appear to be relatively minor individually can become significant once multiplied out and added together. Absent cumulative impact analysis, the FWS cannot fully and fairly evaluate the economic and other impacts of CH designation.
142. Perceived Costs. The FWS states that “We recognize a perception may exist within some segments of the public that . . . [designating CH] will severely limit property rights” and “There may be a perceived loss of income by local businesses due to decreased visitation from perceived restrictions.” EA at 25-26. In so stating, the FWS recognizes the fact that people’s perceptions impact their economic choices.
143. Moreover, the public’s fears may be grounded in truth. For example, the use of private property (with a federal nexus) can in fact be hindered once CH is designated, proportionately diminishing the value of such property.
144. Regardless of whether diminished property values are a real or merely a perceived risk, the economic impact remains. The FWS must evaluate these impacts in order to fully and fairly evaluate the total impact of CH designation in a given area. The FWS has failed to do so.
145. Underestimated Number of New Consultations. The FWS predicts that very few new section 7 consultations will result from the designation of CH for the plover. The FWS’s analysis is flawed due to its failure to correctly interpret its own regulations.

146. The FWS's regulations define "jeopardy" as an action which would "reduce appreciably the likelihood of both the survival and recovery of the species," while "adverse modification" means "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both survival and recovery of the species." 50 C.F.R. § 402.02.
147. According to the plain language of the regulation, "adverse modification" occurs whenever an action appreciably diminishes the value of habitat, principally the relevant physical or biological features which comprise such habitat, to contribute toward the survival and recovery of a species. In contrast, "jeopardy" occurs whenever an action appreciably diminishes the likelihood of survival and recovery of the species as a whole. See Sierra Club v U.S. Fish and Wildlife Service, 245 F.3d 434,441 (5th Cir. 2001)
148. According to these regulations, the impact of CH is broader than for listing alone. For example, a small, isolated sandbar in the Platte River may infrequently be used for nesting by plovers. Certainly, an action which destroys this sandbar cannot be said to appreciably diminish the likelihood of survival and recovery of the entire species because if used the sand bar makes, at best, a small contribution to the plover population as a whole. In contrast, if said sandbar is designated as CH, then its destruction may very well be deemed to appreciably diminish (destroy, in fact) the value of the sand bar in contributing to the recovery of the species. Again, the former focuses on the impact to the species, while the latter focuses on the impact to the habitat.
149. The FWS claims that CH designation has little or no impact beyond that for listing and, thus, predicts that CH designation will result in roughly the same number of consultations with the

same impacts. This assumption, however, runs afoul of the FWS's own regulations. Accordingly, FWS has underestimated the impact of CH designation.

150. Flood Control. The FWS does not acknowledge or consider the impacts which modification of dam operation may have on flood control. While infrequent, severe floods can have a devastating impact on landowners and communities within the flood plain. The FWS should evaluate such impacts.
151. Other Impact Analysis. The FWS has completed other CH impact analyses which are far more complete and consistent with applicable law. For instance, the FWS evaluated the impact of CH designation for wintering habitat for the plover. See Economic Analysis of Critical Habitat Designation for the Piping Plover: Wintering Habitat, April 2000. In that analysis, the FWS identified and evaluated the socioeconomic profile of the affected counties, the cost scenarios associated with housing developments, the county minority and poverty levels, etc. It is arbitrary and capricious for the FWS to designate CH for nesting plovers on the basis of an impact analysis which is grossly inadequate compared to that completed for wintering plovers.
152. Population Trends. The FWS bases much of its analysis on the assumption that the population growth and economy of the impact area is similarly stagnant. DA at **ES-4**. Before presenting this information, the FWS should 1) report the data base for making this claim; 2) evaluate population and economic growth on a regional, state, and county basis; and 3) evaluate the degree to which the listing of the plover 16 years prior may have contributed to any population and economic decline.

153. Elements of an Adequate Impact Analysis. In addition to the above, an adequate impact analysis should include the following elements: 1) direct, indirect, and induced economic activities (output, employment and employee compensation; 2) changes in property values (state, federal and private); 3) property takings; **4) water rights impacts**; 5) business activity and potential economic growth; 6) commercial values; 7) county and state tax bases, **8) public works project impacts**; 9) disproportionate economic burdens on society sections; 10) impacts to custom and culture; 11) impacts to other endangered species; 12) environmental impacts to other types of wildlife; and 13) any other relevant impact.

C. The Impacts Of CH Designation In Nebraska Outweigh The Benefits

154. The FWS must evaluate all economic and other impacts of proposed CH designation, and must weigh those impacts against the benefits of CH designation. **16 U.S.C. § 1533(b)(2)**; *New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service*, **248 F.3d 1277** (10th Cir. 2001). Upon said evaluation, the FWS must consider reducing or eliminating CH on the basis that the benefits of CH designation are outweighed by the impacts caused thereby. *Id.* The FWS has failed to evaluate the economic and other impacts of CH designation sufficient to perform its required balancing test.
155. The benefit of designating CH for the plover on Nebraska rivers is far less than the detriment. The FWS has grossly underestimated the impact of designating CH. However, even if the FWS's estimate is accurate, the benefit is still substantially less than the impacts. The FWS admits that the only benefit of CH designation is education, which is dubious at best considering the "wide awareness within the plover habitat of the species, and of concerns related to its habitat." 67 FR 57654, 57665; Addendum at 6. In contrast, the FWS estimates

the economic impact of CH designation may reach nearly 6 million dollars over the next ten years. Addendum at 22. The FWS has failed to explain why it did not exclude CH on this basis.

156. Based on the evidence currently before the FWS, the benefit of CH designation to the plover is significantly outweighed by the detriment to Nebraska's economy. Designating CH in this circumstance would be imprudent, arbitrary and capricious, in violation of the ESA and APA.

D. Critical Habitat Cannot Be Designated Without Sufficient Impact Analysis

157. The FWS's regulations expressly state that CH is "not determinable" and, thus, may not be designated when "[i]nformation sufficient to perform required analysis of the impacts of the designation is lacking" 50 C.F.R. § 424.12(a)(2).
158. Throughout its economic impact analysis, the FWS continually attempts to justify its failures by stating that the appropriate level of analysis is not possible due to a lack of data.
159. However, the FWS's regulations are clear that a lack of such data precludes, CH designation.
160. If the FWS cannot adequately perform its statutory duty to fully and fairly evaluate economic and other impacts and weigh those against benefits to the species, then it cannot designate CH.

VII. THE FWS FAILED TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

161. The NHCC hereby re-alleges and incorporates paragraphs 160 as if fully stated herein
162. The FWS elected not to prepare an Environmental Impact Statement for the designation of CH. The FWS made this decision based on the assumption that the designation of CH would have no impact. EA at 29.

163. The courts have rejected the idea that jeopardy and adverse modification are identical. See Sierra Club v. United States Fish and Wildlife Service, 245 F.3d 434 (5th Cir. 2001); New Mexico Cattle Growers Assoc. v United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001); Catron County Board of Comm., New Mexico v. United States Fish and Wildlife Service, 75 F.3d 1429(10th Cir. 1996). The FWS's position in this case is in direct conflict with these court decisions and is in violation of the NEPA.
164. The FWS also failed to consider an adequate range of alternatives. For instance, the record indicates that most of the CH designated in Nebraska is either unsuitable or potential habitat for the plover, and is not essential for conservation of the species. The FWS should consider as an alternative excluding areas of unsuitable and potential habitat and, thus, designate only habitat which is currently known to benefit the species.
165. The designation of CH can and will have significant impacts. The FWS's position to the contrary is arbitrary and capricious. The FWS failed to adequately evaluate the environmental and human impacts of CH designation, and a full range of alternatives thereto. The FWS's failure to prepare an Environmental Impact Statement with an adequate range of alternatives constitutes a violation of the NEPA and the **APA**.

VIII. PIPING PLOVER CH IS NOT ESSENTIAL FOR CONSERVATION OF THE SPECIES

166. The NHCC hereby re-alleges and incorporates paragraphs 165 as if fully stated herein.
167. Critical habitat must be "essential for conservation of the species." 16 U.S.C. § 1532(5)(A)(I).
168. The FWS has failed to explain why over 500 miles of Nebraska's rivers are "essential for conservation of the species."

169. First, as noted above, the FWS has provided no evidence that any given area of potential habitat will ever become suitable. If potential habitat will not become suitable habitat in the foreseeable future, then it certainly cannot be deemed to be "essential." Likewise, unsuitable habitat which will never become suitable cannot be "essential."
170. Second, as noted above, the piping plover and its habitat are currently the subject of a host of management efforts. The FWS has failed to explain why these management efforts are insufficient. If other management efforts are sufficient for a given portion of habitat to aid recovery of the species, then proposed CH cannot be considered "essential."
171. Third, applicable data suggests that plovers utilize very little of the habitat in question. For example, plover census data from 1982 to 1999 documents plover use within an 80 mile portion of the Platte River, from Lexington to Chapman, Nebraska. & Nebraska Game and Parks Comm. Census Data, 1982-1999 (unpublished). This data shows that less than 25% of designated river reaches are used by plovers in a given year, that in some years no plovers used any river reach in the entire 80 mile segment, and that many reaches were never used in the entire 16 year period.
172. Use and nesting data for the remainder of the Platte River paints a similar picture. See Nebraska Game and Parks Comm. Census Data, 1986-1994 (unpublished). The average annual number of plovers observed in a given ten mile reach varied from 0 to only 15 birds per year. For most reaches, no plovers were observed in a given year. In fact absolutely no plovers were documented in 70 of the 270 miles of the Platte for the entire eight year census period.

173. Census data also demonstrates that the majority of use by plovers is on the lower Platte River. Nearly 49% of all plovers observed in the eight year period were observed in the last 40 river miles, while over 82% were observed in *the* last 110 miles. This means that the upper 60% of *the* Platte River received less than 18% of plover use. Nesting data for the Platte is consistent with this trend. For example, in the year 2000, only nine plover nests were initiated on the entire Platte River, seven of which were within ten miles of the Platte's confluence with the Missouri River.
174. This data does not support the FWS's contention that the entire Platte River below Lexington is "essential" for conservation of the species. Indeed, based on historic use patterns, it does not appear that the Platte is even particularly important to the species. **If** actual habitat is only infrequently used by plovers, then it is arbitrary and capricious for FWS to suggest that potential habitat is "essential."
175. Worst of all, nesting data for the other rivers and reaches in Nebraska is largely incomplete or non-existent. EA at 3. It is impossible for the FWS to determine that an area is "essential" for nesting when it has little to no data as to whether nesting even occurs.
176. The FWS has already recognized this principal when it elected to exclude the Elkhorn River from proposed CH because of "limited documented nesting." 66 FR at 31767. It is arbitrary and capricious for the FWS to exclude the Elkhorn River because of "limited documented nesting," and simultaneously include the central Platte River and other rivers, portions of which have received little and often no historic nesting use.
177. Likewise, the FWS elected to exclude the Missouri River from Fort Peck Dam to the Milk River because it is "highly degraded and contains few sandbars" and "does not contain, and

is not likely to develop, the primary constituent elements.” 66 FR at 31766. However the Platte River from Lexington, Nebraska to Columbus, Nebraska does not contain any more primary constituent elements than the aforementioned reach of the Missouri River. It is arbitrary and capricious for the FWS to exclude the Missouri River reach but not the similar Platte River reach.

178. For these reasons, the FWS’s designation of CH on Nebraska rivers violates the ESA and APA.

IX. THE FWS’S CH DESIGNATION IS NOT JUSTIFIED BY THE BEST AVAILABLE SCIENCE AND DATA

179. The NHCC hereby re-alleges and incorporates paragraphs 178 as if fully stated herein.

180. Critical habitat can only be designated “on the basis of the best scientific data available. . . .”

16 U.S.C. § 1533(b)(2). Critical habitat may not be designated when “[i]nformation sufficient to perform required analysis of the impacts of the designation is lacking,” or when the “biological needs of the species is not sufficiently well known.” 50 C.F.R. § 424.12(a)(2). In addition, the APA requires the FWS to provide a rational basis for its decision. 5 U.S.C. § 706; *Olenhouse v. Commodity Credit Corporation*, 42 F.3d 1560 (10th Cir. 1994). The FWS has failed to meet these requirements.

181. The FWS made a number of assumptions which are not supported by the best available science. These assumptions include:

182. Historic Distribution. The FWS has limited information about the historic abundance and distribution of the plover. “Historic data on the distribution of northern Great Plains piping plovers are somewhat scarce, with regular surveying efforts beginning after 1980.” 66 FR at

31760. "Historical piping plover population trend data are generally nonexistent." Id. at 31761.

183. Absent historic use patterns, it is difficult if not impossible for the FWS to determine what, if any, habitat meets the definition of CH.
184. Moreover, the FWS fails include a summary of what distribution and abundance data it did consider. For example, based on the above summarized data for the Platte River, it appears that the FWS either ignored the data or did not consider it.
185. Habitat Not a Limiting Factor. The FWS has provided no evidence that habitat quality or quantity in Nebraska rivers is currently a limiting factor in plover abundance. As the FWS has pointed out, plover nesting and other associated habitat is quite variable. For example, the above referenced Platte River census data suggests that plovers only infrequently use habitat in the Platte River above Columbus. If Platte River habitat were a limiting factor in plover abundance, then plovers would utilize all available habitat. The fact that plovers only infrequently use these habitats runs counter to this assumption.
186. Assumption Regarding Flows and Vegetation. The FWS claims that suitable habitat in the Platte River has been reduced from dam construction and operation and associated irrigation withdraws. "After upstream dams were built, reduced flows allowed the establishment of woody vegetation on most islands, due to a lack of scouring, high spring flows." (Ziewitz et. al. 1992)." 66 FR at 31761. However, the citation which the FWS gives does not support this assertion.
187. The FWS assumes that 1) dams cause vegetation encroachment on suitable plover nesting habitat; and 2) that plover numbers are reduced by such vegetation. However, neither the

Ziewitz study nor any study cited by Ziewitz prove either of these assumptions. To date, these assumptions remain speculative.

188. Moreover, the FWS fails to acknowledge or analyze other possible effects of modified flows. For example, lower flows in the summer may result in the loss of seedling vegetation on sandbars and islands due to heat and desiccation. Likewise, higher flows in May through July may inundate nesting bars or destroy nests and eggs. Thus, flow modification by dams may, at times, benefit the species.
189. The FWS is required by the ESA to examine all economic and other relevant impacts, and to balance those impacts with proposed CH designation. 16 U.S.C. § 1533(b)(2); New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001). The above assumptions make a vital difference in this analysis. If “[i]nformation sufficient to perform required analysis of the impacts of the designation is lacking,” then the FWS cannot designate CH. 50 C.F.R. § 424.12(a)(2).
190. Since data regarding the impact of flows on vegetation, and in turn the impact of vegetation on plovers, is speculative and incomplete, the FWS cannot fully evaluate the economic and other impacts of CH designation on these rivers. Until the FWS can gather sufficient data regarding these assumptions, it is arbitrary, capricious and in violation of the ESA to designate CH on the Platte River and other applicable Nebraska rivers.
191. Description of Habitat Components. The FWS defines primary constituent elements for rivers in Nebraska as “sparsely vegetated channel sandbars, sand and gravel beaches or islands, temporary pools on sandbars and islands, and the interface with the river.” 66 FR at 31765. This description is inadequate. To adequately evaluate the impact of CH designation

on both plovers and people, the FWS should define with precision 1) the size, composition, and other relevant characteristics of a sandbar, beach and island suitable for plovers; 2) the definition of “sparsely vegetated”; 3) the definition of “temporary pool”; and 4) the definition of “interface with the river.”

192. In addition, the FWS should provide relevant data regarding the magnitude and frequency of flow necessary to create and destroy any such habitat, and regarding any other factor which can influence primary constituent elements.
193. Consistent Nesting. The FWS claims that it proposes to designate the Platte, Loup, and Niobrara Rivers because plover nesting “has been consistently documented since listing.” 66 FR at 31767. This statement is not in accord with applicable ~~data~~. Rather the applicable data clearly indicates that plover nesting and use of many of these areas is infrequent or nonexistent.
194. Moreover, breeding records do not even exist for many “counties along the Missouri, Loup, Niobrara, Elkhorn, and Platte Rivers in Nebraska.” EA at 3. It is quite impossible for the FWS to designate CH on the basis that nesting is “consistently” occurring when the FWS does not even have nesting data.
195. Nesting on these rivers is not “consistent,” but is largely inconsistent, infrequent, nonexistent, or unknown. Accordingly, the FWS should define “consistent nesting” and should exclude River reaches which do not meet this criteria or which have insufficient data for analysis. As it now stands, the FWS includes as “consistent” nesting areas hundreds on miles of river which rarely, if ever, are used by plovers for nesting. This interpretation is arbitrary, capricious, and not in accord with applicable law.

196. Summary. As the above examples illustrate, the FWS made many assumptions which are not supported by applicable data or science.
197. The FWS's designation of CH on Nebraska rivers is not based on the best available science and data and, therefore, the designation is in violation of the ESA and APA.

REQUESTS FOR RELIEF

The NHCC hereby requests the following declaratory and injunctive relief:

- A. A declaration that the FWS's designation of CH for the piping plover violates the **ESA**, **APA**, and NEPA.
- B. A declaration that the FWS's economic and other impact analysis, performed pursuant to 16 U.S.C. § 1533(b)(2), is invalid.
- C. A declaration that the FWS's EA and NEPA analysis violate the **APA** and NEPA.
- D. A declaration that the FWS's finding of no significant impact and failure to prepare and EIS violates the APA and NEPA.
- E. A declaration that the FWS's "critical habitat boundaries" approach is illegal.
- F. A declaration that the FWS's delineation of CH with "processes" is illegal.
- G. A declaration that the FWS's designation of potential habitat is illegal.
- H. A declaration that the FWS's designation of CH which does not benefit the species is illegal.
- I. A declaration that the FWS's failure to exclude critical habitat on the basis that present management of Nebraska rivers is inadequate to protect the piping plover is illegal.
- J. A declaration that the FWS's designation of CH which is not essential for conservation of the species is illegal.

- K. A declaration that the FWS's designation of CH which is not supported by the best available science or data is illegal.
- L. A preliminary and/or permanent injunction enjoining any action based upon CH designation for the piping plover.
- M. An order directing the Defendants to perform all obligations associated with CH designation, including those required by the ESA, NEPA, and the **APA**.
- N. **An** award of costs and attorneys fees.
- O. Any other relief this Court deems just and reasonable.

RESPECTFULLY SUBMITTED, this ____ day of _____, 2003.

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2-5-03

The American West's complex system for water allocation is coming under growing strain. The pressures, spurred by drought, are being felt here in Nebraska, which has more farmland under irrigation than any state other than California.

But the sense of anxiety is quite far-reaching, casting a regional shadow over burgeoning metro areas such as Denver and Las Vegas as well as over the vegetable farm of California's Imperial Valley.

Consider some of the details:

■ Water levels "are well below capacity in every major reservoir system in the West, and many are at record lows." The Arizona Republic recently reported. The Nebraska Panhandle and the southwest corner of the state are the driest they have been in 108 years of record-keeping, World-Herald staff writer Bill Hord recently noted.

■ The Colorado River, whose waters are diverted for intensive use in six states, is currently flowing at one-fourth its historic average. As we noted here recently, water levels are also low for the Missouri River and its reservoirs.

■ Soil moisture levels have fallen to very serious levels. Hord's article quoted a merchant in Kimball as saying the ground "is like powder ... baby powder."

■ Drought last year pushed down production of wheat, soybeans, corn and cotton. About 90 percent of Nebraska farmers have suffered setbacks due to drought, according to the Republic article.

■ Emotional-counseling hours provided by the state govt for Nebraska farm families rose by a third in 2002 compared to the same period in 2001.

■ Outdoor water-use restrictions have gone into effect in parts of Utah, Montana and Colorado. Although during last summer's dry conditions, some Denver subdivisions still continued to enforce covenants requiring heavy watering of lawns (to keep them green). In Las Vegas, officials recently warned that severe limits on water use are

Drought spurs new anxieties about West's arrangements for allocating precious water.

likely this summer

■ In the Colorado Legislature, more than 30 water-related bills have been introduced in an effort to sort through the competing water-use interests of

the state's regions.

■ Meanwhile, the federal Department of the Interior, citing obligations under the multistate compact for the Colorado River, has reduced California's allotment of water by 13 percent — enough to supply about 1 million households with water for a year. New courtroom "water wars" are being predicted as Southern California interests try to fight the decision.

It's only realistic to acknowledge the distinct possibility that the situation could become worse. Still, not all the news is bleak.

One encouraging sign has been the way Nebraska recently resolved its legal river-rights disputes with two of its neighbors, Wyoming and Kansas. Indeed, that course points toward one tool for lessening the current crisis: open communication and constructive compromises between the many parties involved in water policy.

Some might bridle at the reduced water allocations such compromises could entail for individual localities or interests, but a potential alternative seems worse. That would be a legal and logistical earthquake that could threaten the very viability of the West's water allocation system.

In 1948, the historian Bernard De Voto noted how the West had accomplished wonders through reclamation and irrigation. But he also issued a warning. "We would be wise," he wrote, "to remember every moment that roses also blossomed in Mesopotamia and Syria and Tunis and Ur ... and they are desert wastes now."

The stakes are indeed quite high. To avoid being defeated by Western aridity, the best course for Nebraska and other states lies in compromise and adaptability. In the face of limited resources and competing interests, such a course remains the only sensible one.

Bellevue Leader: 2-6-03

A clear message

No neighborhood should be without a park, an honest-to-goodness, *bona fide* park where kids can knock a baseball around without fear of shattering a window or denting a car. For too many years the city of Bellevue approved new housing subdivisions that had no such park attached. The result was the death of pick-up ball-games, and the advent of parents having to drive kids many miles so they might hone their sports skills in organized sessions at central locations.

That's all very well, but it is a poor substitute for the pick-up game, where kids band together and on their own initiative play ball and learn from their mistakes.

The City Council's recent rejection of a preliminary plan for Twin Creek Estates, not because it didn't have a park - it did - but because that park was too small, was a milestone in the development of Bellevue.

A walking trail is not a park. You cannot play baseball on a walking trail. The developers' argument that a walking trail should be counted toward their park requirement missed the point so badly that we almost despair. This is not an exam where we try to patch together a passing grade with chewing gum and chicken wire. This is an obligation to give to kids not yet born a chance to experience childhood - an American childhood - as fully as possible.

If that means that a few more lots must be sacrificed in order to expand a park to a decent size then let them be sacrificed. And if that means that homebuyers must pay more for the lots then let them pay more.

Bellevue is long past the point where it needs to beg developers to build homes. We have a lot to offer any builder who hopes to turn a profit. There are probably 70,000 people in and around Bellevue and an awful lot of kids who deserve better than an undersized park and a walking trail that is of no use to them.

Give us a park like the ones our fathers and grandfathers knew, and require it of every developer without fear or favor.

If we hang tough on that principle, we will have done Bellevue an immeasurable favor.

w-14
2-9-03

A welcoming splash

Fountains gush in the middle of an algae-prone pond in summer. A blacktop trail, broken, cracked and difficult to negotiate, circles

the park, where ducks and geese, although amusing in their antics, are eyed with wary concern by airport officials. **This** is the face Kiwanis Park, near Locust Street and Abbott Drive, presents today.

Omaha's downtown Kiwanis Club has a new vision for the space: bronze sculptures tempting the eye along Abbott Drive, and a pavilion and plaza at the lake's north end where visitors can gaze over the pond and soak up the city's skyline.

All this is happening as the city works on its "Back to Nature" trail. The trail will swing northward from the planned Missouri River pedestrian bridge into Kiwanis Park, which will serve as a trailhead for

**Kiwanis Park
plans an
engaging
Omaha
entryway.**

the larger city trail.

The Kiwanis Club and its partners envision the park as a focal point in Omaha's "String of Pearls" gateway.

Although the Omaha skyline, with its new and soon-to-be additions, beckons beautifully in the background, this stretch of Abbott Drive is a strip of Anywhere, U.S.A., with its parking lots, motels and car rental firms presenting common chain names and facades. Plans for the park will make it a distinctly Omaha presence. (View the designs at <http://www.livelyomaha.org/whatsnew/kiwanis.html>.)

"If we're successful in getting anywhere near the design we have in mind, it will be quite an attraction," Kiwanis President Jim Farrell said.

Yes. And quite a welcome for Omaha's visitors.

More tests requested on MUD well field

Officials want to be sure a former munitions plant didn't contaminate groundwater.

2-9-03

By NANCY GAARDER

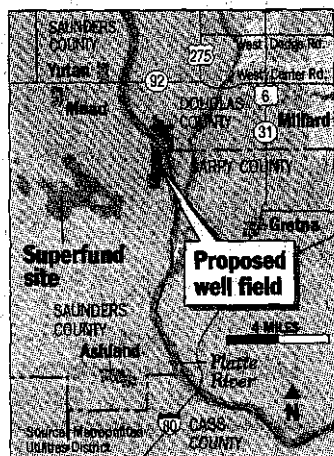
WORLD-HERALD STAFF WRITER

The long-awaited federal approval for Omaha to expand its drinking water system will have to wait a bit longer.

Federal officials have decided they need more data on the extent of contamination near the area where the Metropolitan Utilities District wants to install wells.

MUD is planning to build a well field along the Platte River in Saunders and Douglas Counties. The well field is about two miles from a federal cleanup of contamination in the Platte River aquifer.

Now it looks like the approval



that MUD had hoped to receive last fall may not come until this spring.

Delays in the project have worried utility officials. Metro area residents have voluntarily restricted water use the past two summers because of dry conditions. If dry summers and delays continue, the five years of design and construction that lie ahead could spill into another summer watering season.

Board member John S. McCollister said MUD remains optimistic that approval is at hand. The utility, he said, will look at whatever it can do to accelerate construction.

The tests are needed to determine that contamination has not migrated toward MUD's proposed well field, said Rodney Schwartz, the Corps of Engineers project manager who is reviewing MUD's application. The aquifer is contaminated from work at a former munitions plant and abandoned missile silos.

"It's just prudent on everyone's part to get a little more information before we go forward," Schwartz said. The Army Corps of Engineers also is handling the cleanup.

Tests done in January bode well for MUD. Two wells that hadn't been sampled since 1995 were checked and turned up negative for contamination, said Ed Louis, project manager for the Corps' cleanup.

"That's good for everyone," he said, "There's been no fur-

Learn more

The Army Corps of Engineers will host a meeting about its environmental cleanup of groundwater at 6 p.m. Feb. 20 in the Mead (Neb.) Community Center.

ther eastward migration at this point that we know of.)

The fact that the two wells hadn't been tested since 1995 had raised concerns among some Saunders County officials. They worried that MUD's proposal was moving forward with outdated information.

Now the Corps is waiting for the results of another batch of tests that are being done this month. Work on those tests has been expedited, Louis said, and results should be available in late March.

Schwartz does not see the contamination as a threat to MUD's water supply or plans.

"Everybody is in agreement that basically whatever is on the site can be contained," he said.

New lake for Dakota County?

Recreation area, economic development, jail and transportation discussed.

By Gary Dickson
Star Editor

Dakota County economic development, transportation, a scaled-down jail and a new recreational area and lake near Hubbard were some of the topics at the 26th annual city/county/school joint meeting Monday night.

The oldest meeting of its kind in the United States, the joint meeting featured updates and reports from

the South Sioux and Dakota City City Councils. Dakota County Board of Commissioners, South Sioux City community School Board and a host of projects from various entities.

Jim Hurm, director of the Siouxland Interstate Metropolitan planning council (SIMPCO), suggested it might be time to hire an economic development person for Dakota County.

SIMPCO held a priority-setting meeting in Homer Nov. 6, 2002 at which 15 county residents and community leaders attended. Three main categories of priorities were identified: transportation, economic devel-

opment and housing.

Hurm suggested that a committee of representatives from each jurisdiction conduct a transit feasibility study.

"This would be the first step in making decisions on providing transit assistance," Hurm said. "SIMPCO, which has managed the Siouxland Regional Transit System for many years, could undertake such a study."

He added that funding is available from a number of sources for such a study and that SIMPCO has already begun work on grant applications.

County economic development

Regarding economic development, Hurm said, "Economic development plans are necessary if communities or counties want to succeed and are not completed overnight."

He suggested that it was important for the county to undertake a technology assessment and create a plan for technology development. While Community Development Block Grant funds might be available for such an undertaking, local matching funds were necessary.

South Sioux City Administrator Lance Hedquist said that, to his knowledge, no one was working on economic development and business recruitment leads other than the city of South Sioux. He also cited the area between Homer and Dakota City as prime territory for attracting industry - especially those that have more extensive space needs.

County Commissioner Pam Miller said she thought a cooperative effort would help the smaller towns in the county that can't afford their own economic development staff.

A smaller jail?

County Commission Chairman Lyle Todd said the commissioners are leaning towards recommending a county jail without moving courtrooms and remodeling the old jail.

He said cutting back to just the jail attached to the courthouse would cost about \$9 million. Dakota County voters turned down an \$11.3 million jail during an election last November.



NRD Special Projects Coordinator Dick Sklenar, pictured right, talks to Joe Baxter (L) and Chad Kehrt from the City about a possible recreational area and lake near Hubbard. (Photo by Gary Dickson)

**See Joint meeting
page A2**

S. Sioux Star 2/10/03

Joint meeting

continued from A1

Todd said that he and other commissioners toured other jails in Columbus and the Omaha area. He said some of the facilities' cost \$100,000 a bed. He projected that Dakota County's plan would cost \$48,000 a bed.

"Believe me, the jail we have planned here is a bargain," Todd said.

He added that the commissioners have not picked an exact date for another bond election.

Recreation area

One of the more intriguing presentations during the meeting came from Dick Sklenar, Special Projects Coordinator for the Papio-Missouri River Natural Resources District.

"We see the potential for a recreation area with a 100-120 acre lake near Hubbard," Sklenar said. "We've been tossing around the idea for a couple of years and there appears to be a good deal of interest for it in the county."

The proposed recreation area would be located about three-quarters of a mile southeast of Hubbard along Jones Creek. Sklenar said that it would be for passive recreation such as no-wake boating, camping, hiking and picnicking.

He stated the NRD would like to kick the project off with a feasibility study conducted by an engineer later this year. He said the study could take five or six months to complete.

"The whole project could take five to 10 years to complete and cost from \$6-12 million dollars," he said. "The funds would be a combination of state, federal and local dollars."

Another major issue, Sklenar said, was what government entity would operate the area.

Sklenar emphasized that the project was not a done deal. After the feasibility study lands would need to be appraised and offers to landowners made.

"It's still in the idea stage," he said. "A lot more needs to be done before we can start on it."

State distributes conservation grants

The funds will go to 16 projects that help conserve at-risk wildlife species.

7-10-03
BY JOE DUGGAN
Lincoln Journal Star

Creatures with fur, feathers and fins all got some cash from the federal government Friday.

The Nebraska Game and Parks Commission awarded nearly \$565,000 to 16 projects for declining or at-risk species in the state. The funds came from the Wildlife Conservation and Restoration Program, which is funded by Congress.

The grants will help conserve dozens of species, including river otters, grasshopper sparrows and pallid sturgeon. Each grant requires the recipient to contribute 25 percent

of the project's total cost.

The commission voted unanimously to approve the grants through a conference call Friday morning.

A mixture of state agencies and private wildlife conservation groups received the grants. The program generated 41 grant applications.

The Rocky Mountain Bird Observatory received the largest grant, \$80,000, for monitoring of prairie birds in western Nebraska. Species targeted by the group are mountain plovers, burrowing owls and ferruginous hawks.

Two other out-of-state applicants won grants. Southern Illinois University received nearly \$33,000 to evaluate Platte River slough/wetland restorations. Oklahoma State University received \$39,000 for studying invertebrates in wetlands in the Nebraska Rainwater Basin.

The Game and Parks Commission re-

ceived the most grants, four, worth \$137,500. The grants will be used for grassland conservation, to study the effectiveness of river otter reintroductions, evaluate the improvement of Conservation Reserve Program lands and develop a statewide bird conservation partnership.

Commission staff helped evaluate the applicants and select 16 winners. Representatives from the Nature Conservancy and the Nebraska Wildlife Federation assisted.

Federal law allows each state's wildlife agency to spend the money internally. Nebraska, however, established an application system to help forge partnerships with private conservation organizations, said Kirk Nelson, assistant director of the agency.

"We feel pretty confident that our system is fair and unbiased," he said. "But there's only so much to go around and you're not going to make everyone happy when you've got to make judgments."

Vince Shay, director of the Nature Conservancy in Omaha, said he was involved with the selection process. Though the Nature Conservancy's two applications failed to make the cut, he credited the commission with devising a fair system.

"The state is not obligated to distribute the money, so I think Game and Parks deserves praise for doing so," he said.

By law, the commission must develop a state comprehensive wildlife conservation plan by late 2005. The U.S. Fish and Wildlife Service gave the commission about \$370,000 for the plan.

In a related matter Friday, Gov. Mike Johanns appointed Gary Parker of Columbus to the commission. Commission Director Rex Amack said Parker, a former executive with Lindsay Manufacturing, is an avid big game hunter.

Reach Joe Duggan at 473-7239 or jduggan@journalstar.com.

Low flows expected on Missouri this year

2-11-03

By DAVID HENDEE

WORLD-HERALD STAFF WRITER

Disappointing mountain snowpack and continuing drought in the Great Plains are indications of lower Missouri River reservoirs and flows **again** this year.

The forecast by the Army **Corps** of Engineers in **Omaha** means that:

- Boaters could again have problems getting in and out of river and reservoir marinas this summer as water levels remain low.

- Barges will carry lighter loads because river levels will be lower.

- Hydropower plants on the Missouri dams will produce 25 percent less electricity compared with a normal year.

- Nebraska's nuclear power plant operators will anxiously watch the temperature of the river water they use to cool the reactors. The plants must shut down when the river temperature hits 90 degrees. Last year, it reached 88 near the Cooper nuclear plant at Brownville.

The mountain snowpack as of Feb. 1 was 73 percent of normal above Fort Peck Lake in Montana and 80 percent of normal in the stretch from Fort Peck to Garrison Dam, which creates Lake Sakakawea in North Dakota, the corps said Monday.

Normally, 60 percent of the peak snow in the mountains is accumulated by early February, said Larry Cieslik, chief of the Missouri River Basin Water Management Division in Omaha.

With below-normal mountain snow and **normal** precipitation the rest of the year, the corps is forecasting annual runoff in the upper Missouri to be 76 percent of normal, or 19.2 million acre-feet instead of 25.2 million acre-feet.

Water stored behind the corps **dams at the end of January is 73.8** percent of average.

Releases **from** Gavins Point Dam near Yankton, S.D., the lowermost dam on the river, continue to be set as low as possible to meet downstream municipal drinking water and power plant needs while conserving water in the reservoirs, Cieslik said.

The **corps** expects the 2003 navigation season to begin April 1 at St. Louis with minimal flows and to be shortened by five days in November.

Shrinking lake's future is weighed

2-12-03

By DAVID HENDRE
WORLD-HERALD BUREAU

LINCOLN — Two bleak scenarios could be in the future of drought-shrunk Lake McConaughy:

■ Farmers might have to be paid not to irrigate in order to save the big reservoir near Ogallala, Neb., and its prized walleye fishery.

■ An algae bloom could destroy the fishery regardless of how much water is kept in the lake.

And then, there is the doomsday scenario:

■ Crop irrigation and other downstream demands next year could completely drain the state's largest reservoir — an event once considered impossible by many who for decades used the lake as a fishing, boat-

ing and camping playground in western Nebraska.

Lake McConaughy's big stakeholders meet today in Lincoln to talk about the future of the reservoir. The meeting comes as the Great Plains and Rocky Mountains slip into a fourth year of drought that is expected to drain the lake this summer to its lowest level since it was created in 1941.

"It's a very serious situation," said Kirk Nelson, assistant director of the Nebraska Game and Parks Commission. "It's not just an easy irrigation and (hydro)power situation. There's also the major fishery concern."

Tim Anderson, spokesman for the irrigation district that owns the lake, said the water rights held by various groups

See *Reservoir*: Page 2

Big fishing at Big Mac

Anglers in 2001:

- Spent on trip related expenses: \$1.3 million
- Harvested walleye: 88,000 (13.6 million total pounds)
- Harvested walleye weight: 227,000 pounds
- Harvested walleye value: \$1.4 million
- Walleye value in the reservoir: \$2.5 million

Why anglers want higher water in irrigation reservoirs:

- Higher water levels in reservoirs would increase the amount of water available for irrigation.
- Higher water levels would also increase the amount of water available for hydroelectric power.
- Higher water levels would also increase the amount of water available for recreation.
- Higher water levels would also increase the amount of water available for navigation.
- Higher water levels would also increase the amount of water available for flood control.

Why higher water in irrigation reservoirs would be a problem:

- Higher water levels would increase the amount of water available for irrigation, which would increase the amount of water available for hydroelectric power.
- Higher water levels would also increase the amount of water available for recreation.
- Higher water levels would also increase the amount of water available for navigation.
- Higher water levels would also increase the amount of water available for flood control.

THE WORLD-HERALD

Reservoir :

Needs of fish and farmers to be discussed

Continued from Page 1
are a big legal issue.

"There's a lot of balls in the air, and we've got to figure out a way to balance them all," he said.

Reduced by drought, the 22-mile-long lake is now 12 miles long. It is now nearly 10 feet higher than it was at its low point in September but is still 20 feet below its peak last April. The lake is fed by the North Platte River, which is forecast to receive 31 percent of its average snowpack runoff this year.

Today's meeting brings together officials from the Game and Parks Commission, the Central Public Power and Irrigation District and the Nebraska Public Power District, which operates a coal-fired power plant cooled by water from the reservoir. A delegation from Keith County, where the lake is located, is expected to attend the meeting.

Anderson said the district is looking ahead to the 2004 irrigation season, which could drain the reservoir if drought continues to sap the North Platte.

"At what level do we start seeing damage to the walleye fishery?" Anderson asked. "Hopefully, they've got some research and information that will give us those numbers."

Nelson said the answer is complicated by the low river flows coming into the reservoir. The water is laden with nitrates and organic matter that threaten to create algae blooms, he said. Excessive growth of algae can eventually lower oxygen levels and reduce lake vegetation, making it difficult for fish to survive.

Don Gabelhouse, the commission's fisheries chief, said University of Nebraska-Lincoln biologists are finding increased growth of blue-green algae.

"We're fearful that an algae bloom could kill off the whole thing regardless of whether every last drop is drained out of McConaughy," he said.

Park Service bid goes to Kiewit, Daly

BY RICK RUGGLES
WORLD-HERALD STAFF WRITER

Kiewit Construction Co. and the Leo A. Daly Co. will erect a new National Park Service regional headquarters along Omaha's riverfront.

The Park Service building will go up northeast of the convention center and just north of Rick's Cafe Boatyard.

The headquarters will serve as one more element in the city's effort to turn its riverfront into

an area that attracts visitors for recreation and leisure.

Kiewit, Daly, Pacific Realty Development Services and Noddle Development Co. of Omaha combined to make up a team that competed with numerous other development groups for the right to build the headquarters.

"My understanding is we're going to be working with Noddle on that," Chris Stolzer, a Kiewit Construction Co. vice president, said Tuesday afternoon. "I got a phone call internally saying,

'Hey, it looks like we're going to be working on the Park Service building.'"

Mayor Mike Fahey and the federal General Services Administration will hold a press conference about the project this morning.

The Park Service headquarters in Omaha, currently at 1709 Jackson St., administers the Park Service's Midwest region. The region includes 13 states, ranging from Michigan to Arkansas.

Kiewit is the general contractor on the \$291 million convention center and arena. Daly is an architectural firm. Noddle Development Co. is the owner and Pacific Realty Development Services is the developer.

Among other elements on the rejuvenated riverfront are a \$22.6 million pedestrian bridge, which is expected to be built over the next two years, and the Gallup Organization campus, which is being built now.

Park Service to get showplace; county wads old building

2-13-C3

By RICK RUGGLES

WORLD-HERALD STAFF WRITER

The mission of the brown brick building at 1709 Jackson St. appears likely to change from parks to prison-related business.

The longtime National Park Service regional headquarters will move next year from the Jackson Street building to a gleaming new facility on the riverfront.

Federal and county representatives hope to convert the old Park Service building into a headquarters for Douglas County correctional programs. The Douglas County Corrections Center stands about 25 feet south of the Park Service

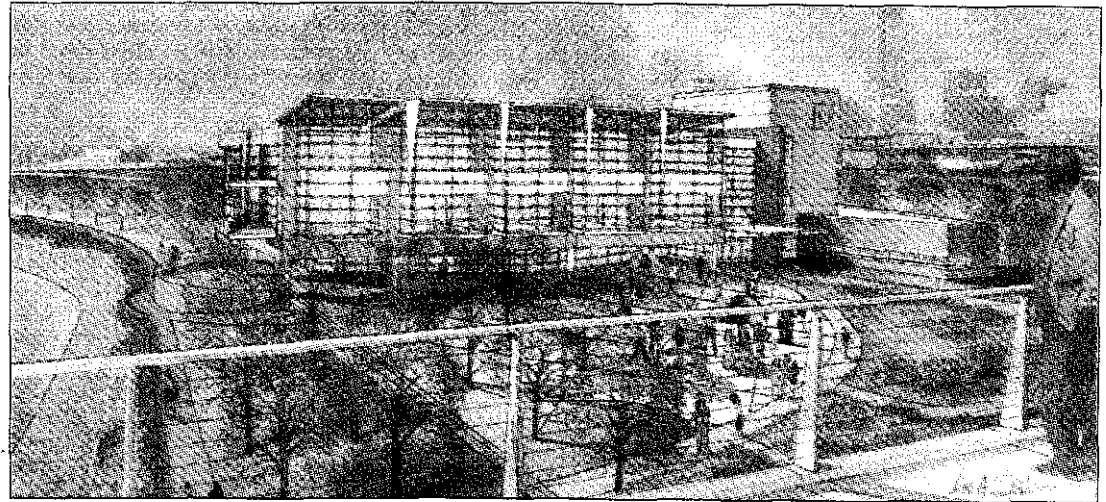
building.

"I'd say it's a probability," Jim Ogden of the federal General Services Administration in Kansas City, Mo., said Wednesday.

Ogden said if the plan comes to fruition, the building will go to the county as a "public benefit donation."

He said the federal government first must consider uses by other federal agencies and entities serving the homeless. After that, state and local governments and nonprofit agencies may be considered.

County Board Chairwoman Carole Woods Harris said use of the building, built in 1928 to house the Omaha Bee newspaper. See Riverfront: Page 2



LEO A. DALY CO.

The new regional Park Service headquarters on Omaha's riverfront is scheduled for completion in spring 2004. This view is looking south from the planned pedestrian bridge.

4

Riverfront: New building to be a showpiece

Continued from Page 1

per, could save the county more than \$300,000 that it currently spends on rent.

County Commissioner Carol McBride Pirsch said such services as community corrections, the victim-witness program, work release, drug court and others could be placed in the building.

Mayor Mike Fahey and federal administrators on Wednesday disclosed the design of the

\$12 million headquarters on the riverfront. The glass building framed by precast concrete panels will go on five acres that the city donated for the project.

Construction is to start within a month and is scheduled to be completed by spring 2004. The three-level building will stand just north of Rick's Cafe Boatyard and south of the planned \$23.6 million pedestrian bridge across the Missouri River.

The Midwest headquarters serves 54 Park Service areas in

13 states.

Much of the first floor will be open to the public. Park Service representatives envision plaques containing information on park areas, a bookstore and an outdoor plaza connected to a riverwalk.

Noddle Development Co. and Pacific Realty will develop the building. The Leo A. Daly Co. is the architect, and Kiewit Construction Co. is the builder.

The federal government will lease the building for about

\$29 million over 20 years.

The project will receive the federal government's Leadership in Energy and Environmental Design designation, meaning that it will incorporate features that make it an environmentally sound building.

The building, for example, will use recycled and recyclable building materials, solar panels, an efficient heating and cooling system, erosion control measures and landscaping that won't require watering.

W-H
2-13-03

A welcome riverfront upgrade

The innovative, environmentally conscious National Park Service headquarters about to go up on Omaha's riverfront

looks to be a delightful addition. It's yet another link in a chain of beautiful developments that will grace the Missouri River near downtown Omaha.

The design goes well outside the old notion of the standard-issue governmental rectangle. Its use of angles and glass should nicely complement the site, located between Lewis and Clark Landing and the spectacular pedestrian bridge being planned to span the river.

**Park service
will put up
a beautiful
green-friendly
headquarters.**

The park service, which oversees 54 national park areas in 13 states from its regional headquarters, is appropriately committed to environmental

protection. The building, which will be leased for \$29 million over 20 years, will receive the federal government's Leadership in Energy and Environmental Design designation. Among other things, it includes solar panels and recycled building materials.

The riverfront is just the place for the park service. and the park service's design is just right for the riverfront.

W-14
2-15-03

Bring on the lawsuit

Unfortunately, the other shoe has dropped in the dispute over water levels in the Missouri River. Environmental interests have filed suit.

They charge that the Army Corps of Engineers has failed to do its job properly — that job being, among other things, to protect wildlife habitat in the river for endangered species such as the pallid sturgeon. The suit is “seeking new operations for six Corps dams that are causing the Missouri River’s continued ecological decline and imposing economic hardships on some riverfront communities,” according to a press release.

The suit was filed by American Rivers, Environmental Defense and the Izaak Walton League, as well as the National Wildlife Federation and several state affiliates. Those groups have been active in the battle to change the corps’ management of the Missouri to include a spring water rise and a summer low-flow period.

Those changes have been opposed

**Perhaps judge
can sort out
disagreements
on Missouri
River science.**

by barge operators, who don’t want the navigation season shortened, and river-side farmers, who fear flooding.

The issue has become mired in politics, with the Bush administration as well as Congress sticking oars into the water.

The lawsuit could mean a protracted court battle and years more to wait for changes. The conservation groups, however, appear to have reached the end of their tether with the endless delays and inaction. We sympathize.

The corps has been considering management changes in the river for well over a decade now. The National Academy of Sciences weighed in on the side of the federal Fish and Wildlife Service in favor of the flow changes. And still delay has followed delay.

The answer to this standoff is in science, which each side claims supports its position. If it takes a federal judge to cut through the mud and get things moving on the Missouri, then there is little choice.

Bring it on.

Coalition files lawsuit over bird protection

THE ASSOCIATED PRESS

A consortium of natural resource districts, farm interests and others filed a lawsuit Friday in federal court to overturn a U.S. Fish and Wildlife Service critical-habitat designation for an endangered bird.

Attorneys for the 33-member Nebraska Habitat Conservation Coalition filed the complaint in Omaha's U.S. District Court, according to the Kearney Hub. The lawsuit seeks to force the federal agency to withdraw the designation of land along Nebraska rivers as critical habitat for piping plovers, which are listed as a threatened species under the Endangered Species Act.

Also named as defendants in the lawsuit are U.S. Secretary of the Interior Gale Norton and Steven Williams, director of the U.S. Fish and Wildlife Service.

The U.S. Fish and Wildlife

Service has designated hundreds of miles in the Platte, Loup, Niobrara and Missouri Rivers' basins and along other rivers in the northern Great Plains as critical habitat for the birds.

Attorney Karen Budd-Falen of Cheyenne, Wyo., who represents the coalition, said the group has

attempted to work with the federal wildlife agency to have their concerns addressed. She said the suit was filed after the group's concerns were not addressed.

"For starters, we'd like to be able to put it on a map," Budd-Falen said of the designation. The federal agency instead has a designation process where changing conditions can place a person's property within the protected area one day and remove it from the designation the next, she said.

"If the wind's blowing and it's raining, and the rain runs off

your property into the river, then you might be within the critical habitat," Budd-Falen said. "If the sun is shining and it's not raining, then you're not in critical habitat."

She said the coalition had filed an intent to sue in September. Members of the coalition include 23 natural resource, irrigation

and power districts, the Cities of Lexington and Grand Island, the Nebraska Farm Bureau Federation and the Nebraska Cattlemen.

Steve Anschutz, field supervisor with the U.S. Fish and Wildlife Ecological Services in Grand Island, said he had not seen the lawsuit.

Nebraska's natural interests

The early birds are already here. By mid-March, the gigantic spectacle of the sandhill cranes migration will be in full swing.

More and more every year, the great flocks of birds are greeted by tourists flocking to watch them. Many of the visitors are not Nebraskans. To many Nebraskans, it's still something of a novelty that visitors come to these cold, winter-bare plains to see the birds.

In 1996, the spring migration brought an estimated \$24 million to \$53 million economic impact to Central Nebraska. Common sense suggests that it's much more than that now. More than 100,000 bird and wildlife watchers may stop in Grand Island this year, that city's newspaper reports.

Bird and wildlife watching is the fastest-growing leisure activity in the United States. It's one of the trends that will undoubtedly make its way into the state's Travel and Tourism strategic plan currently being developed.

Another trend noted by several tourism studies is that people are taking shorter vacations and more weekend trips.

Such trends seem perfect for Nebraska, where Mahoney State Park,

**State's outdoor
tourist trade
should get
equal time
in coming
drought debate.**

Niobrara River canoeing and Lake McConaughy fishing and boating have become booming businesses.

But as interest in outdoor and weekend

destinations grows, as the Lewis and Clark anniversary celebrations draw nearer, drought threatens to dry up many of Nebraska's attractions. Agriculture and wildlife interests were butting heads on the Platte River long before the current drought, just as recreation and barge interests have butted heads on the Missouri River.

The ever-growing interest — and money — spent on nature tourism shouldn't escape Nebraskans' notice. A study by nature tourist company Fermata Inc. of Texas indicated that while other states are aggressively pursuing nature tourism, Nebraska is actually losing ground.

Omaha's tourism trade will surely grow as a new convention center opens, as Henry Doorly Zoo continues to add to its wonderful exhibits, as the riverfront grows in development and beauty. It's an economic boon the state doesn't have to cede to the prospering urban areas. But the state's nature enthusiasts must start planning now to protect and augment the outdoor tourist trade.

Offers next at NRD site

Burt County Plain Dealer
2-19-03

Proponents of the Lower Decatur Bend habitat restoration project can finally see the light at the end of the tunnel. For a small group of Burt County landowners, it's an oncoming train.

A public hearing held Feb. 13 at Papio-Missouri River Natural Resources District headquarters in Omaha means the long-delayed Lower Decatur Bend habitat restoration project is picking up speed. In approximately a month, the district will make offers to purchase land from Mike Williams, Mike Olson and Tob-Isle, Inc., some of which has been held by the same family for generations.

The 30-minute hearing officially began the process of acquiring land rights for the project. A purchase of 22 acres of private land made in 2001, was the first—and last—made for the project. Efforts to acquire the additional land have been stalled for nearly two years while legal descriptions and appraisals meeting Corp. of Engineers guidelines were prepared.

The NRD requires the three parcels to allow enough room for the 745-acre project in northeast Burt County. The NRD seeks the land because it is among the few places along the river where a restoration project can be successful. The Lower Decatur Bend area was identified as one of a dozen priority areas when over 40 Missouri River Corridor project sites were identified in 1989, NRD officials said last Thursday.

A "Back to the River" initiative, Lower Decatur is designed to restore some of the Missouri River's natural character sacrificed when it was channelized for barge navigation and flood control.

The 6.1 million dollar project is a joint effort between the NRD and the U. S. Army Corps of Engineers, the body responsible for managing the

river. Because it is the sponsoring agency, the NRD must provide the necessary right-of-way and one-fourth of the money, approximately \$1.5 million. The rest comes from federal sources.

Speaking for the landowners, Williams said he wanted to note the past opposition to the project by local people. Williams also objected to the loss of taxable property within the Tekamah-Herman school district in a time when schools face financial hardships.

NRD officials deflected issue, saying the loss of tax receipts will be minimal because of the low valuation most of the property carries. Only approximately 125 acres of the 540 the NRD wants to obtain are cropland.

When asked by board member Joe Neary, a real estate developer in Omaha, if he thought he had been treated appropriately by the district, Williams replied, "No, I don't. I was notified as required by law, but not on a personal level like it should be."

Williams said he thought this project, and others like it, should begin by speaking with the landowners first, rather than waiting to make contact until more engineering work is done.

Later in the evening, board member Richard Connealy of Decatur suggested the board use an upcoming eminent domain workshop to take a look at the possibility of acquiring land earlier in the construction process. NRD general manager Steve Oltmans said it is impractical to do so because the NRD often doesn't know how much money it will have available, nor how much land will be needed, that early in the process.

"We hear that on practically every project" Oltmans said. "I sympa-

(Continued on Page 3)

NRD to make offers

(Continued from Page 1)

thize with him, but I don't know what the answer is."

Following the hearing, the NRD has 45 days before it can make an offer to the landowners. The NRD is required by law to offer cash for outright sales, but another option is on the table. The owners asked for, and received, flowage or habitat easement language in agreements with the NRD. Easement language had never been used before in restoration projects. The owners think an ease-

ment will help them control future access to the project area. The NRD has no plans to develop the area for public use, however, they could turn management of the property over to another body, such as the U.S. Fish and Wildlife Service, which would be free to do as it wished.

If no agreement can be reached the NRD can sue for possession in Burt County Court under eminent domain laws. If legal proceedings begin, the NRD is allowed to proceed with the project although the case may still be in court.

States covet Missouri River water

■ Drought has created more problems for the Army corps of Engineers.

a-20-03

By DAVID HENDEE

WORLD-HERALD STAFF WRITER

GARRISON, N.D. — The last time the man who manages the Missouri River asked for help, he was sued a half-dozen times

Less than a year later, he's back asking for help — and he expects to land in court again.

Lawsuits, however, are no way to run a river, said Army Brig. Gen. David Fastabend, who commands a Corps of Engineers region that stretches from St. Louis to Seattle.

"The strategy of managing the river with litigation is disastrous," he told a crowd this week in Billings, Mont.

Fastabend is touring Missouri River states — from Montana to Missouri — on a mission to see and hear for himself how a drought now entering its fifth year in the mountains and Plains is affecting the people of the region and the complex reservoir system he manages. He will inspect Lewis and Clark Lake near Yankton, S.D., and travel through Nebraska over the next two days.

Although they will continue to be among the largest reservoirs in the nation, Fort Peck Lake in Montana, Lake Sakakawea in



JEFF BEIERMANN/THE WORLD-HERALD

On Jan. 31, the water level in Lake Oahe north of Pierre, S.D., was dramatically low. Lake Oahe and other Missouri River reservoirs are expected to hit record-low levels this summer.

North Dakota and Lake Oahe in South Dakota are expected to dip near or below record-low levels this summer.

In addition to meetings with hundreds of Montanans and Dakotans this week, he is asking the states to craft a joint plan on how to manage the drought-stricken reservoirs. Fastabend's only requirement is that the governors' plan can't eliminate barge navigation and other downstream uses required by federal law.

It isn't an easy pitch on the upper Missouri, where many people see navigation on the lower third of the river — from Sioux City, Iowa, to St. Louis — as an obsolete industry kept afloat by water better kept upstream for recreation and tourism.

North Dakota Gov. John Hoeven told Fastabend to expect a

lawsuit from his state in an attempt to slow the flow of water from Lake Sakakawea.

U.S. Rep. Denny Rehberg, told Fastabend that his state also is ready to go to court to protect water levels in Fort Peck Lake.

Montana Gov. Judy Martz told Fastabend in a private meeting at the Capitol in Helena that there is no petty motive behind her state's push to shorten the navigation season.

"This is not about jealousy," she said. "This is about life to our people."

Fastabend, who commands the corps' Northwestern Division out of Portland, Ore., said he spends 80 percent of his time on Missouri River issues. "It is probably the most contentious water management problem in the country today," he said.

Mayors tout pedestrian bridge

2-20-03

By JULIE ANDERSON
WORLD-HERALD STAFF WRITER

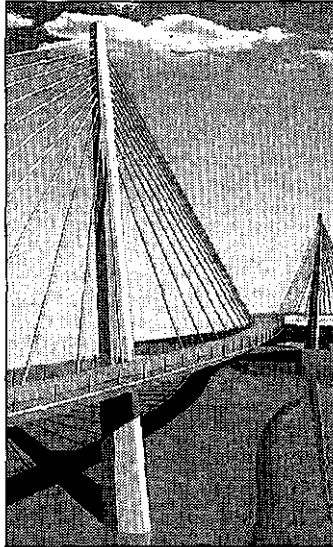
COUNCIL BLUFFS — Omaha Mayor Mike Fahey and Council Bluffs Mayor Tom Hanafan talked Wednesday about how a planned \$22.6 million pedestrian bridge over the Missouri River will become a landmark for both communities.

But mostly, the mayors of two cities that haven't always seen eye to eye focused on how the curvy, 200-foot-high span will connect the two communities and further economic development on both sides.

"That bridge is going to be the centerpiece and the icon for our two communities, and we're very excited about it," Fahey told about 75 people at a Southwest Iowa Realtors Association breakfast.

Fahey said he and Hanafan agree that the two communities need to see the metropolitan area and its fringes as one community.

The population in that area



An architect's rendering of the proposed walking bridge over the Missouri River between Omaha and Council Bluffs.

now totals 1.1 million people, a number expected to climb to 1.7 million by the next U.S. Census and 2.5 million by 2030, he said.

Those are important numbers

when it comes to drawing people and businesses, Fahey said.

Hanafan noted that Omaha's new National Park Service headquarters and Gallup Organization campus will help Council Bluffs, too.

"Anything they do on that side of the river benefits us," he said.

On the Omaha side, the new bridge will touch down at a plaza for festivals and other events, with 4,000 nearby parking stalls. The rest of the riverfront is being transformed with a new convention center and arena and other urban features.

The bridge will land on the Iowa side in the middle of a proposed high-rise condominium development, which includes plans for a public lake on the river side of the levee.

Council Bluffs, which has a quarter-mile of land between its levee and the river, is working on its riverfront plans.

The Papio-Missouri River Natural Resources District will contribute \$1 million, with Nebraska and Iowa giving \$1.5 million each.

X

Corps official backs birds, dams

2-22-03

By DAVID HENDEE

WORLD-HERALD STAFF WRITER

YANKTON, S.D. — Big dams and baby birds.

Brig. Gen. David Fastabend said here Friday that he is one Army Corps of Engineers officer who believes that operating a system of dams on the upper Missouri River for multiple uses while simultaneously protecting endangered species is not impossible.

"It's a huge debate, and it's awesome to be part of this. We're here to protect these species," Fastabend told five corps biologists stationed at Gavins Point Dam. "You guys are doing exceptional work. Everybody thinks we just do concrete. That ain't so. Concrete is easy."

Fastabend is the commander of the corps' Northwestern Division, which includes the Missouri River basin

Protecting threatened birds (Since 1995)

Eggs in the wild

4,279 hatched (60.5%)

Least tern

Total eggs laid: 7,072

Piping plover

Total eggs laid: 9,275
5,723 hatched (61.7%)

Interior least tern



SOURCE: Army Corps of Engineers

Rescued eggs (captive rearing)

378 hatched (83%)

Least tern

Total eggs rescued: 456

Piping plover

Total eggs rescued: 575

472 hatched (82%)

DEAN WEINLAUB/THE WORLD-HERALD

The biologists at Gavins Point manage year-round projects to protect two species of shorebirds, the interior least tern and the piping plover, and a fish, the

pallid sturgeon, under state and federal Endangered Species lists.

The project started in 1995 — See **River:** Page 2

River: Official says wildlife, dams are compatible

Continued from Page 1

a year of high water flows from Gavins Point Dam — when the U.S. Fish and Wildlife Service approved a corps request to either move plover and tern nests or remove eggs for incubation and hatching to prevent them from washing away in the rising river. It continued in subsequent high-water years.

Casey Kruse, the project chief, said he knows of no other research site in the nation that can match the Gavins Point undertaking in magnitude and success with the two bird species.

The plovers and terns nest together and raise their young on

bare sandbars along the Missouri River and other streams. They lay two to four eggs in shallow scrapes in the sand.

The birds' river habitat is an issue in the how the corps hopes to manage releases this year from its dams as a way to save water in the drought-stricken reservoirs. Rather than release a steady amount of water from Gavins Point during the nesting season, the corps wants to start at a lower point and gradually increase flows.

Nests threatened by rising water or erosion would be moved to higher ground when possible. Threatened chicks and eggs would be collected by biol-

ogists for captive rearing at Gavins Point bird house and subsequently released.

The Fish and Wildlife Service, however, prefers a steady flow that establishes a constant shoreline for nesting birds.

The corps and the wildlife agency are meeting to try to resolve their differences before the migratory birds return to the river to nest in mid-May.

Hatching rates in the controlled setting are more than 22 percent higher for terns and more than 19 percent higher for plovers than their wild counterparts, according to corps statistics.

A University of Wisconsin-

Madison study of the plover project showed that the survival of captive-reared plovers was the same as those reared in the wild. Of the captive-reared birds that returned to the breeding grounds, six paired with wild adults and nested. All exhibited normal incubating and defense behaviors.

During last year's nesting season, a record 1,134 piping plover adults were found on the Missouri River system. They produced a record number of fledged chicks.

Fastabend is touring the river basin to see the impact of four or more years of drought on the reservoir system.

Protest against trail starts early

■ A group of residents in Omaha's Dundee area is objecting to plans that haven't been made yet, city officials say.

2-24-03
BY CLIFF BRUNT

WORLD-HERALD STAFF WRITER

Many people who called Omaha City Councilman Marc Kraft last week weren't sure why.

Kraft's phone number has been posted in the Dundee area on 100 signs that read "Stop Trail," "Save our Neighborhood" and "Save Our Trees."

Most of the green and white signs are along Happy Hollow Boulevard between Underwood and Western Avenues.

Kraft fielded about 10 calls per day last week from people wondering about the signs. He is spending from three to 75 minutes per call, usually telling people their concerns about a proposed hiking-biking trail are premature.

"People don't know what they're calling about or who they're calling," Kraft said, "and they're surprised when they reach me."

The signs were placed by the Stop the Trail committee, a group of Dundee-area residents that doesn't want the city to construct a trail it has been awarded a \$360,000 federal grant to build.

According to the grant application, the trail would start at Elmwood Park, head north along Happy Hollow Boulevard and end between Parker and Decatur Streets.

The route would build on the

boulevard system that connects Omaha's older parks. The Stop the Trail committee is concerned that a trail would destroy trees, damage the neighborhood's historic character, bring extra traffic and cause liability problems.

The problem, Kraft said, is that the signs don't say those things.

Kraft doesn't mind the calls, but he finds it interesting that many callers are uninformed and says others seem to be jumping the gun. He said no path has been selected for the trail, and there is no guarantee it will even be built.

Larry Foster, acting parks director, said he has received calls from angry residents, too.

"It surprises me that before the project is even defined that there's this kind of opposition," he said.

There also is a petition circulating.

Kraft and Foster said the City Council hasn't voted to accept the federal grant and a preliminary plan won't be created until the grant is accepted and the council agrees to a consultant.

No date is set for the issue to go before City Council.

See Trail: Page 2

Trail: Neighbors protest early plans for project

Continued from Page 1

"They're concerned about trees," Foster said. "We're not even sure which side of the road the trail would be on, or if they're going to lose no trees or five trees. We think this trail needs to be considered on its own merits."

The Stop the Trail committee believes it knows enough.

"This is an ill-conceived project," committee member Jerry Finocchiaro said. "It would do damage to this part of the city, which is quite unique."

Kraft said about one-third of the callers favor a trail.

Carrie Howard said trails

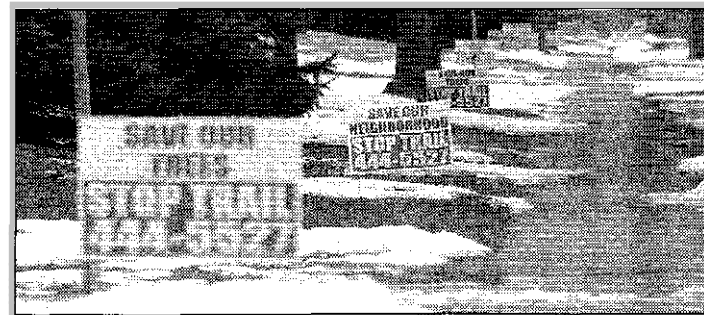
have been good for neighborhoods in other cities where she has lived.

"When trails are built, people come out of their houses and into the community," she said. "You get to meet your neighbors. It's a beautiful area that can only be enhanced by the trail."

Jim Ducey, leader of the Central Omaha Action League, said a trail is long overdue in the area.

"To think the trail is going to ruin the neighborhood is kind of excessive," he said.

Gary Wence, a Stop the Trail committee member, said the group isn't against trails. "We



PHIL JOHNSON/THE WORLD-HERALD

The Stop the Trail committee in the Dundee area opposes a project for which Omaha has been awarded a \$360,000 federal grant.

just don't believe they belong in our residential neighborhood."

Finocchiaro agreed.

"The people here don't want

it," he said. "It would be a shame if this pushed ahead because somebody has federal dollars burning a hole in their pocket."

w-15-03

2-

Trail blasters

It seems as if every time a government agency or a volunteer group proposes adding a hiking/biking/jogging trail someplace, the wheel (or the shoe) has to be invented all over again. There are always some nearby property owners who act as if they've never heard of such an idea before.

Here we go again. An undetermined number of Happy Hollow/Dundee residents are styling themselves the "Stop the Trail" committee. They've put up signs with such legends as "Save our Trees," listing the City Hall phone number of Omaha City Councilman Marc Kraft — although the signs don't explain whose number it is.

The sign-posters seem not to know:

■ That in almost every neighborhood where a trail is added, it turns out to be a welcome amenity. Far from drawing unwholesome elements, it opens up a community, brings people out of their houses and gets people acquainted with one another.

■ What they're talking about — literally. Although a federally disbursed grant of \$360,000 has been approved for such a trail, little else is known about it at present. It would

Some don't need facts about a hiking/biking amenity — their minds are made up.

begin at Elmwood Park and head north along Happy Hollow Boulevard, ending between Decatur and Parker Streets. No plan has been drawn. No mention has been made of how many (if any) trees would be lost. (People who design trails tend to be Gee-savers, not tree-destroyers.) No one has even figured out what side of Happy Hollow it would be on.

Even at that, how can it escape the notice of the protesters that the sidewalks in their neighborhood already are being used as de facto trails? Hot or cold, rain or shine, light or dark, folks are out there huffing along using concrete walks that really aren't up to the job. They make do as best they can — trail or no trail.

The City Council should get moving and vote to accept the grant for this trail before there's a risk that these premature complaints get out of hand and roil the politics. And it wouldn't hurt for the Parks Department to draw up and publicize a sketch of the trail. This might quell criticism — or, for that matter, might augment it. But at least given a real plan, all concerned could actually understand what's at stake.

Unlike now.

Marina to be hub on riverfront

■ The project, set for completion in 2004, will include a water taxi service.

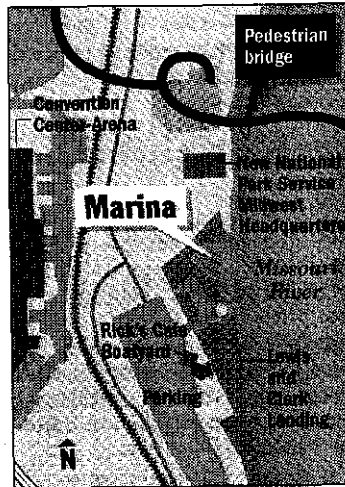
BY RICK RUGGLES

WORLD-HERALD STAFF WRITER
2-25-03

What is now a muddy hole along the Missouri River will one day lure boaters, a water taxi and spectators and become a focal point for riverfront activity.

That's what Acting Parks Director Larry Foster envisions when he sees crews working on a \$1.8 million marina in the riverfront development area.

"You have to have access to the river," Foster said. "A riverfront park that doesn't have access to



THE WORLD-HERALD

marina, although it won't be finished until summer or fall of 2004. The work has been incorporated into a nearby sewer im-

proximately 32-slip marina will turn into a huge attraction. Spectators will gather along the marina railing, relaxing and watching the boats move in and out, he said.

"This will be the hub of activity on the waterfront," he said.

Just a week ago, Mayor Mike Fahey decried the expense involved in paying off bonds for the many riverfront amenities being built, including the convention center-arena.

Foster said the marina has been in the city's plan all along, is budgeted and isn't an add-on.

City Finance Director Stan Timm agreed that from the beginning, the vision for the riverfront included river traffic.

The marina "has been planned and budgeted for, yes," Timm said.

Foster said he will have to decide whether boaters will be al-

See Riverfront: Page 2

Council Bluffs has been on the

predicted that the up-

Riverfront: Marina will have walkway, water taxi

Continued from Page 1

lowed to use the marina for one- and two-hour stops, or for a day or two.

Perhaps the city will allocate some spaces for short-term use and some for longer stays. Revenue could be generated from fees, but expenses also will be incurred by the need to supervise the marina.

Dave Schall said he liked the concept a great deal.

"That would be an outstanding addition for any of the boaters," said Schall, a 51-year-old sales manager who spends sum-

mer weekends on the river with his wife.

I boat with nieces and nephews and sisters and also a hotelier. And my parents," he said. They would love to picnic on a riverfront plaza or visit Rick's Cafe Boatyard, he said.

Construction of the marina will cost \$1.5 million, plus \$300,000 to \$400,000 for floating docks, a walkway ramp, dividers between boats, lighting, benches and other items. Foster said he hoped to acquire a federal grant for the docks.

The city intends to request

proposals for a private water taxi service that would carry people along the Missouri River to hotels, restaurants, the Council Bluffs casinos and other attractions.

Foster said those proposals might be requested this year. The water taxi service would start in 2004 or 2005.

The marina concept initially leaned toward a docking area that ran parallel to the river bank and required no inlet or circular marina system.

But a potential for a lower flow on the Missouri River, oc-

curring either naturally or because the federal government decides to diminish it, concerned planners.

Foster said a lower flow would have required a longer walkway farther into the river and extend possibly too close to the navigational channel.

Given those problems, he said, planners decided to go with an inlet and boat slips placed around a semicircular marina. The cost for the two designs was similar, he said.

You'll pay price for clean water

■ New rules on storm water runoff will

require millions of dollars in improvements

and possibly new taxes for you.

By NANCY GAARDER
AND ROBYNN TYSEER
WORLD-HERALD STAFF WRITERS

If you live or run a business in lakes in your town could be cleaner—substantially.

The federal government is re- quiring urban areas to take bet- ter care of their streams and lakes by better controlling their storm water runoff. To that end, fact this year. Because those im-

getting sick from wading or fish-

If you worry about your kids

—substantially.

Your taxes could be going up

way, you'll want to read this

areas and have a roof or a drive-

one of Nebraska's larger urban

If you live or run a business in

lakes in your town could be

cleaner—substantially.

The federal government is re-

quoting urban areas to take bet-

ter care of their streams and

lakes by better controlling their

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fact this year. Because those im-

Fees: Cash-strapped local governments face costs

Storm water fees

Fees are under consideration to pay for new federal regulations that require urban areas to better control storm water runoff. The fees would be based on how much storm water could wash off of property.

Who is affected? Urbanized areas of Douglas, Sarpy, Lancaster and Dakota Counties. A number of other Nebraska cities could be affected in the future.

How much would it cost me? Based on the average storm water fee elsewhere, the annual amount in Omaha might be: residence, \$36; church, \$3,500; high school campus, \$8,300; large grocery store, \$9,400; large shopping mall, \$33,500; industrial building, \$95,900. These numbers are preliminary. They assume that the city would levy an amount comparable to the average nationwide and that part of the cost isn't shifted to property or sales tax. Businesses might be able to reduce their fees by as much as a third by taking corrective actions. The city would not be obligated to implement these fees. Any such fee would require a vote of the City Council.

Why is this being done? While water pollution has been reduced, it remains a problem. The Papillion Creek and Carter Lake are in violation of the Clean Water Act for fecal coliform bacteria (feces). Zionsky Lake is in violation for nutrients (fertilizer) and sediment.

Sources: U.S. Environmental Protection Agency, City of Omaha, Nebraska Department of Environmental Quality.

Sen. Ed Schroock, who heads the legislative committee re- viewing Legislative Bill 32, said the bill is needed so local gov- ernments can get ahead of this mandate. Cities and counties could be sued by citizens or cited by the federal government for failing to enact these mea- sures of the Clean Water Act.

Schroock may make the bill a committee priority, which would give it a better chance of being acted upon. "It is too seri- ous a matter not to take up," said

the Elim Creek lawmaker. Mary Mindrup, regional chief of the branch of the EPA that oversees storm water runoff, said the long-term goal is to im- prove water quality. "Storm water everywhere, but particularly in urban areas, carries chemicals and pollu- tants into streams," Mindrup said. "The goal is to have fish- able, swimmable, cleaner streams so that we feel comfort- able having our kids play in them."

Dennis Pool, assistant super- intendent of the Omaha Public Schools, voiced similar con- cerns.

"It takes money away from what's available for children's education," Pool said.

Car dealerships, malls and in- dustrial complexes with large expenses of rooftops and park- ing lots also could be hard-hit.

Larry Ruth, a lobbyist for Ruth & Mueller LLC, of Lincoln, said the proposed law is over- broad and unfair. The "sleeper" of this bill, Ruth said, is that it would allow cities and counties to fund existing programs under the new tax. And it's unfair, he said, because the fee targets roofs and pavement, not total property.

"That ignores the fact that there is runoff from undevel- oped land," said Ruth, who is op- posing the bill on behalf of the Nebraska Association of Commercial Property Owners.

The money generated by the fee would be used on such things as public education, erosion con- trol at construction sites, moni- toring illegal dumping and more frequent sweeping of streets and parking lots.

Priester said he recognizes there is disagreement over how the fees should be structured.

"It makes the most sense to have those who contribute to the problem pay for the solution," he said. "We're trying to decide what is the fairest way to do something."

can't afford this extra expense. the university is facing cuts and body to the other. Furthermore, he said, "We're trying to decide what is the fairest way to do something."

university, said it doesn't make sense to simply transfer tax dol- lars from one governmental entity to another. "The goal is to have fish- able, swimmable, cleaner streams so that we feel comfort- able having our kids play in them."

Builder's plans depend on rural water system

BY TODD VON KAMPEN
WORLD-HERALD STAFF WRITER

BLAIR, Neb. — Washington County officials say a developer must tie into a proposed rural water system to proceed with his planned residential subdivision three miles south of here.

That position, ratified Tuesday by the County Board confirmed growing concerns about water supplies for acreages in the increasingly popular hills between Blair and Omaha.

It pleased neighbors of developer Mitch McGowan's 120-acre tract, but left McGowan unhappy that his plans depend on whether the Papio-Missouri River Natural Resources District builds a rural water system.

Even if the Natural Resources District proceeds with construction, "we couldn't sell any lots for three years. I don't know how that works," McGowan said Wednesday.

County supervisors, who rejected McGowan's initial 31-lot plan Dec. 10, gave 7-0 approval Tuesday to a revised 24-lot plan.

But they adopted a condition attached by the county's Planning Commission that the subdivision's water supply must come from the district, not private wells.

The district, which already supplies water to Fort Calhoun

and southeast Washington county, will receive an engineer's report March 13 on whether it's feasible to build a new system south of Blair and west of Fort Calhoun.

The City of Blair probably would supply such a system, on which talks began in 2001.

If a system is feasible, the Natural Resources District must have hookup fees from a minimum number of homes to proceed, said special-projects coordinator Dick Sklenar. Construction would take two to three years.

Sklenar said the district likely will outline the engineer's report for the County Board on March 25, the same day a preliminary plat for McGowan's subdivision is expected to reach the board.

The Planning Commission will review that plat March 6, exactly a month after it drew about 100 people to its first meeting on McGowan's new plan.

McGowan said he hasn't had any test wells drilled on his land, but it's in an area with good wells 250 to 300 feet deep. Professional well-drillers have said water shouldn't be a problem, he said.

Although some people in the broader study area may be running out of water, "you don't hear from the people who have good water," he said. "You hear from the people who don't."