

CASE STUDY #8

THE GRAYROCKS DAM CONFLICT¹

Introduction

The Grayrocks Dam Conflict had two intertwined issues. First, it was an interstate water rights dispute between Nebraska and Wyoming over North Platte River water to be consumed by the proposed facility. The second conflict was between conservationists and the utilities over potential harm to the federally-listed endangered Whooping Crane downstream from the proposed dam. After several years of political and legal battles, the parties were able to successfully negotiate an agreement addressing the concerns of each. Fifteen years later there is still strong support for the settlement and the negotiations that created it.

Background

The Missouri Basin Power Project (MBPP) was a consortium of six utilities involved in constructing a \$1.6 billion coal-fired power plant on the Laramie River, a tributary of the North Platte River, near Wheatland, Wyoming. MBPP formed in 1970 in response to heavy industrial power requirements forecasted for the utilities' service area: eastern Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Iowa and Minnesota (figure 1). The six utilities were each experiencing increasing energy demands and viewed a combined effort as the expedient approach to meet this demand. Siting difficulties and cost considerations made individual efforts less efficient. The electricity generated by this facility was projected to serve two million customers in the eight state area.

The facility had two main components: a coal-fired plant (then 50% completed) and an adjacent reservoir and dam supplying cooling water for this plant. The Grayrocks Dam, behind which the new reservoir will form, became embroiled in controversy involving several parties with varying interests:

- The state of Wyoming (Wyoming) favored the project because of its economic benefits: jobs, economic growth, electricity for rural Wyoming, and irrigation water.
- The state of Nebraska (Nebraska) opposed the project. It felt Wyoming would consume more than its share of North Platte River water with this project and that Nebraska's water needs would suffer as a result.

¹ This case study was developed by Julia M. Wondolleck.

Figure 1: Missouri Basin Power Project Combined Service Area

- Conservation groups (National Audubon Society, National Wildlife Federation, Nebraska Wildlife Federation, Powder River Basin Resource Council and Laramie River Conservation Council) were concerned that the plant's water use would endanger wildlife along the North Platte River, especially the endangered Whooping Crane.
- The Rural Electrification Association of Nebraska (REAN) favors the facility since it stands to benefit from the power generated.
- The six MBPP utilities obviously favor continued plant construction.

The conflict among these parties and the process leading to its gradual resolution, will be described in this case study.

Federal Involvement

In addition to the requirements of the National Environmental Policy Act (NEPA), the federal government was involved in the Grayrocks Dam conflict through three agencies.

The U.S. Fish & Wildlife Service (USFWS) The U.S. Fish and Wildlife Service, within the Department of the Interior, is charged with, among other things, administering and enforcing the Endangered Species Act of 1973. This Act requires that federal agencies:

- 1) use their authority to carry out programs to protect any species designated as an endangered species;
- 2) consult with the Office of Endangered Species of the USFWS whenever their actions may jeopardize an endangered species; and,
- 3) ensure that their actions do not endanger or jeopardize designated species. This requirement is accomplished by either not issuing the requested permits or by mitigating potential impacts.

Section 7, the requirement that consultation must occur between the federal agency and the USFWS Office of Endangered Species, became an issue with the Grayrocks Dam proposal. The endangered Whooping Crane occupies a section of the North Platte River in Nebraska and could be affected by diminished water flow in the river. The U.S. Army Corps of Engineers' 404 dredge-fill permit and the Rural Electrification Administration's loan guarantees, are both federal actions requiring consultation with the USFWS.

The U.S. Army Corps of Engineers Under Section 404 of the Federal Clean Water Act, the Army Corps is required to review any request to place dredge and fill material in a U.S. waterway. (Reilly, 1979) When MBPP wanted to begin Grayrocks Dam construction, it

applied to the Army Corps for this 404 permit. Although the endangered species habitat along the North Platte River had not yet been designated as critical, the designation process was underway. Regardless, under Section 7 of the Endangered Species Act, the Army Corps was required to enter into consultation with the USFWS about potential impacts on the habitat and crane. (Westly, 1979)

The Army Corps did begin consultation with the Office of Endangered Species. It was told, however, that the USFWS had inadequate information and would need approximately three years to do sufficient research before the impact of the dam could be determined. A hearing was held at the Wheatland, Wyoming, project site. The Army Corps then made their own determination that there would be no impact and issued the 404 permit. (Reilly, 1979)

The Rural Electrification Administration (REA) The REA gives loan guarantees to small electrical companies or cooperatives delivering power to rural areas in the U.S. It had guaranteed loans to the MBPP without entering into consultation with the USFWS as directed under Section 7 of the Endangered Species Act. The USFWS had contacted the REA twice, informing it of this requirement, but the REA never responded. The USFWS never commenced action against the REA on this account since conservation groups were already doing so. (Westly, 1979)

The National Environmental Policy Act (NEPA) NEPA also played a role in the Grayrocks Dam controversy. The EIS required by NEPA was attacked as inadequate on several accounts by conservation groups and Nebraska. These allegations led to several lawsuits, and eventually, encouraged negotiations to avoid extended and costly court battles.

The Issues

During the 50 years preceding this conflict, 43 dams and numerous irrigation projects had diminished streamflow in the North Platte River by almost 70%. The Missouri Basin Power Project facility would consume an additional 60,000 acre feet of water each year to satisfy cooling needs. Conservationists feared that this additional reduction in streamflow would be "the straw that breaks the camel's back" in its effect on North Platte River wildlife habitats. (Calkin, 1978)

The conservationists centered their concerns on the endangered Whooping Crane's critical habitat. Located on the North Platte River in central Nebraska, the habitat is 270 miles downstream from the Grayrocks Dam. It serves as a major stopover on the flyway between the Aransas National Wildlife Refuge in Texas and the Wood Buffalo National Park in Canada (Figure 2). This critical habitat consists of a 60-mile long stretch of sandbars. Flood waters and ice from the annual snow melt have historically scoured the

Figure 2: Whooping Crane Habitat and Flyway

Source: The Washington Post, November 27, 1978.

sandbars and kept them free of vegetation. (Wildlife Management Institute, 1979) If streamflow along the North Platte recedes to the extent that this scouring will no longer occur, vegetation will overcome the sandbars and make them unsuitable for the Whooping Crane and other wildlife currently using them. The project's water use, conservationists contended, would diminish the river flow beyond this critical level.

Although the conservation groups were concerned about wildlife in general along the North Platte, they focused their efforts on the Whooping Crane. The crane is protected by the Endangered Species Act and therefore gives the groups a strong legal position in negotiations with MBPP officials. Specifically, groups can sue to enjoin project construction should it threaten the Whooping Crane. The Supreme Court's then recent opinion in the Tellico Dam case gave the groups a high probability of stopping all construction provided they could demonstrate this harm to the endangered species. Additionally, the conservationists were taking advantage of NEPA's EIS requirement to gain further intervention leverage. They contested the adequacy of the EIS in addressing North Platte River habitats and the Whooping Crane.

Water Rights

The water rights issue in the western United States is very complex. Water rights to Laramie River and North Platte River waters have been contested on several occasions. In 1945 and in 1956 the U.S. Supreme Court issued rulings delimiting how water is to be distributed among the three states (Colorado, Wyoming, Nebraska) common to the two waterways. (Snyder, 1979; Wisdom 1979) All three states interpret these decrees differently, though. (Weinberg, 1979) To complicate the issue, each state has developed its own way of reallocating waters perceived as its own. Since these western states are so arid, each has irrigation districts that allocate water to farmers and ranchers, ideally in a manner that maximizes the crop return for water consumed. These districts form large networks of farmers and ranchers who are able to buy and sell "water rights" under supervision and approval of the irrigation boards in their districts. (Weinberg, 1979)

Project officials argued that Nebraska interprets the Supreme Court's rulings in a light most beneficial to Nebraska's interests. (Wisdom 1979) Since Nebraska is furthest downstream of the three states, it has been taking advantage of its share of the water plus whatever was left over from upstream users. As a result, when the Grayrocks Dam was proposed, Nebraska feared they would no longer be able to use the same amount of water previously claimed.

Consequently, project officials argued that the conservation groups "have a larger quarrel" with Nebraska than with the Grayrocks Dam and MBPP. (Weinberg, 1979) Edward Weinberg, MBPP counsel, asserted that Nebraska has been the most inconsiderate user of North Platte River water. He believed that the Grayrocks Dam will affect the Whooping Crane little compared with Nebraska's water consumption. William Wisdom, attorney for Basin Electric (major interest-holders in the MBPP), pointed out that the Kingsley Dam, located on the North Platte River in Nebraska between the critical habitat and the Grayrocks Dam site, has

a 2.1 million acre foot reservoir. He emphasized that "this dam has absolutely no provisions for wildlife or conservation of water use in its operations at all."²

Nebraska, on the other hand, felt that the Supreme Court ruling allocated 75% of North Platte waters to Nebraska.³ It felt that the project's reservoir was too big given the power plant's needs and that water consumption by the plant could be diminished substantially. Further, Paul Snyder, assistant Attorney General for Nebraska, pointed out that the project was creating a new irrigation district, in addition to the dam and reservoir, that would further consume North Platte River water before it enters Nebraska. (Snyder, 1979)

Informal Negotiations

Interplay between these interests began in 1973 when the MBPP established an Environmental Advisory Committee to explore potential environmental impacts of the Grayrocks Dam. (Turner, 1979) It solicited input from concerned environmental groups yet, according to Robert Turner, Wyoming representative of the National Audubon Society, the project officials response to committee advice and recommendations was "negative in every regard." The committee suggested that a smaller plant would supply power needs with less environmental impact. MBPP officials disagreed and disbanded the committee in 1976. Turner feels that project representatives were generally unsympathetic to the needs of wildlife along the North Platte and saw no need to make concessions for wildlife protection. (Turner, 1979)

Informal negotiations began occurring at this point between the MBPP and conservation groups, as well as between the MBPP and Nebraska. (Turner, 1979; Wisdom, 1979) Both interests were trying to convince the utilities to alter their proposal by decreasing water use and including measures to protect the Whooping Crane.⁴

Nebraska and MBPP officials met almost thirty times over the course of the conflict to discuss their differences. (Weinberg, 1979) William Wisdom asserts that specific water flows were discussed in these negotiations but that Nebraska would never agree to the levels offered.

²The Kingsley Dam and Lake McConaughy Reservoir are entirely privately-owned and operated. As there is no federal involvement in the operation and maintenance of this dam and reservoir, its water use could not be considered when determining impacts upon the Whooping Crane. Originally, MBPP officieals and the Army Corps were asserting that the McConaughy Reservoir would be able to offset any water loss by the Grayrocks Dam. (Wisdom, 1979)

³The Supreme Court rulings, because they are vague in calculating river water availability and relative needs, leave a certain degree of interpretation and discretion up to the individual state. As a result, the states still contest the precise distribution of rights to Laramie and North Platte River waters. (Fischer, 1978)

⁴No one was able to recall specifically which group initiated these negotiations. From interviews with representatives of most groups, it seems probable that Nebraska and conservation group representatives originally approached MBPP officials when they determined cause for concern with project plans. When lawsuits became a fact instead of a threat, it is likely that MBPP officials in turn initiated further negotiation efforts.

Paul Snyder, on the other hand, felt that MBPP officials were never willing to concede anything in these negotiating sessions. His impression throughout was that MBPP officials were convinced that Nebraska "did not know what they were talking about." Snyder believes these sessions were nothing more than "game-playing" by the MBPP. He asserted that the MBPP was continually telling various officials different stories about what could or could not be done to alter project plans.

Snyder feels the real reason project officials were not eager to seriously negotiate at first was because they believed they had "political clout" that could be used to undermine any lawsuits threatened by Nebraska. These utilities were well known in their service areas and had always received cooperation from state and local officials. Snyder noted that "nobody had ever stood up to them before"; they were "used to getting away with whatever they proposed."

Similar reactions were expressed by the conservation groups. Throughout discussions between these groups and MBPP representatives, the utilities seemed unwilling to seriously consider measures directed towards protecting the Whooping Crane. Turner believed that the MBPP was in essence telling the conservation groups to "go ahead and sue us" as they seemed confident that the conservationists "could never win the suit."

It is likely that the MBPP's confidence during these discussions arose from activities in Washington, D.C., where retiring Rep. Teno Roncalio (D-Wyo) was completing his final term. Pleading:

Do you want to send me back to Wyoming, after ten years as your friend and colleague, to face 2,000 unemployed people in Wheatland on account of a totally unjustified thing like this, the Endangered Species Act? (Washington Post, 11/27/78)

Roncalio convinced the House to pass a bill exempting the Missouri Basin Power Project from all federal requirements. When the bill moved on to the Senate Conference Committee, it was altered substantially to exempt the project solely from the Endangered Species Act. Furthermore, this exemption was only to be valid if the newly-established Endangered Species Committee were to decide so after considering the issue "expeditiously."⁵

⁵When the Endangered Species Act came up for extension in Congress in November, 1978, it was attacked as being inflexible. As a condition to extending the Act, Congress established the Endangered Species Committee. This committee is to review "irreconcilable conflicts" involving endangered species that are unable to be resolved through the Act's provisions. The committee is to grant exemptions for projects that otherwise fall under the Endangered Species Act "only if it concluded that the public interest is best served by completing the project, that no reasonable and prudent alternatives exist, and that the project's benefits clearly outweigh the benefits of any alternative courses of action which would conserve the species or its critical habitat." (Cahn, 1979; Yaffee, 1982)

Any settlement in the Grayrocks case must be conditioned on the approval of this committee. The Endangered Species Committee never ruled on this exemption. By the time the committee had its first

Litigation

Intervening groups would rather have avoided the time and expense involved in fighting the MBPP in court. Since informal negotiations had failed to remove the need for lawsuits, this approach remained the only alternative to having their concerns realized and acted upon. Using their only leverage _ NEPA and the Endangered Species Act _ the conservation groups and Nebraska took the MBPP to court.

The first lawsuit involving the Grayrocks Dam was filed in 1976 by Nebraska against the REA. (Snyder, 1979) Nebraska alleged that the REA's loans to the MBPP were illegal on the grounds that the project had an inadequate EIS. Nebraska filed a second suit against the Army Corps alleging that the Corps had issued its 404 dredge-fill permit when the project, again, had an inadequate EIS. Nebraska asserted that the EIS was inadequate because it said "nothing" about impacts upon the state of Nebraska's irrigation and municipal water needs nor about the impacts upon the aquatic ecosystem along the North Platte River as it flows through Nebraska. (Snyder, 1979) Several other lawsuits were filed by the conservation groups, again citing an inadequate EIS in addition to a failure to fulfill the requirements of the Endangered Species Act. (Turner, 1979)

All suits were consolidated and all plaintiffs and defendants to original suits were joined to the consolidated suit. As the lawsuit proceeded, some attempts were made by the two sides to negotiate but little progress resulted. (Parenteau, 1978; Snyder, 1979) Both parties felt confident of winning the suit and negotiations therefore seemed unwarranted by both sides. Given the impasse, the court issued its ruling. The court enjoined the project from proceeding, the REA from issuing loan guarantees to the MBPP, and the Army Corps from issuing the 404 dredge-fill permit.

It was at this point, Snyder noted that "the real negotiations started!"

Formal Negotiations

MBPP officials appealed the court's decision and felt confident the injunction would be reversed. Nevertheless, Edward Weinberg, attorney for the MBPP, noted that it was still in their best interest to proceed with negotiations, even given the "probable" court reversal. The appeal would take time; project officials estimated they would be in court a full year. They estimated further that they could lose close to \$500 million if construction were delayed for this amount of time. The MBPP's immediate concern, therefore, was to settle differences as soon as possible so as to proceed with the halted construction. Reaching a quick settlement seemed

meeting on January 23, 1979, an agreement between all parties in the Grayrocks conflict had been reached so that the exemption was a moot point. The committee then simply ratified this agreement, thereby exempting the project from the Endangered Species Act for as long as the agreement was upheld.

to be the expedient approach given the time and money expected to be consumed by an appeal process. (Weinberg, 1979)

The conservation groups also agreed to negotiate even though it seemed that they had everything leaning in their favor. Turner (National Audubon Society) explains that they did not want to "win the lawsuit but lose the issue." He believed it was "better to resolve a conflict without a lawsuit." His organization saw in this conflict a potential for resolution and chose to negotiate rather than wait for the court appeal outcome. (Turner, 1979) Patrick Parenteau, attorney for the National Wildlife Federation, commented that it "is a good project from an environmental standpoint," and that the National Wildlife Federation (NWF) was not seeking to permanently stop its construction. Rather, they wanted to see some modifications to it such that the Whooping Crane would be protected. Parenteau did not believe that any of the intervenors were set on completely halting the project. He asserted that intervenors wanted "accommodation" such that environmental concerns would be addressed sufficiently to protect the crane's critical habitat.

The uncertain outcome of the Endangered Species Committee meeting on whether or not to exempt the project from the Endangered Species Act also undoubtedly influenced these groups to negotiate rather than prolong court battles. Neither group could feel confident about the committee's ruling since the committee had never before met to resolve any issue.

The formal negotiations leading to a final settlement occurred during three meetings: one in Lincoln, Nebraska, in mid-October, 1978, and two in Cheyenne, Wyoming, on November 2-3, 1978. Snyder described these negotiations as having "come about in a strange way." MBPP officials had maintained contact with REAN and other groups favoring the proposed plant and dam. While these people were not parties to any of the lawsuits, they stood to benefit by the project and were concerned about the outcome of the dispute. The MBPP sent these people as intermediaries to Wyoming and Nebraska's attorney generals to inquire whether or not they would be willing to negotiate now. Both states agreed, as did the conservation groups.

Lincoln Meeting

The first meeting in Lincoln was more symbolic than a serious negotiating session. Patrick Parenteau believed that, to a large extent, the two states used these meetings for "political posturing" purposes as elections were forthcoming and state water rights were at stake. About 60 individuals participated in the first meeting in Lincoln with the two governors serving as co-chairmen. The participants included representatives of all parties to the lawsuits, several Nebraska and Wyoming government officials, MBPP officials and representatives of the REAN. In this meeting, the parties determined that it was possible for them to reach an agreement and that they should meet and formally negotiate later. They selected six individuals to participate in these formal negotiations whom they felt reflected the divergent interests involved. These six were: Nebraska's attorney general, Nebraska's Director of Water Resources, Basin Electric's James Grahl, MBPP attorney Edward Weinberg, Patrick Parenteau

of the National Wildlife Federation and David Pomerly of the Nebraska Wildlife Federation. They were instructed to immediately develop and distribute their "bottom-line proposals" which would form the basis for the negotiations. Although no negotiations per se occurred in Lincoln, all parties seemed pleased with the progress that was made towards negotiation there.

Cheyenne Meeting

When the next meeting commenced a few weeks later in Cheyenne, the six participants were accompanied by their technical advisors and legal counsel. Immediately, participants realized that the size of the group was unwieldy and was leading to little progress. Thus, they devised a different approach. Advisors and counsel assembled in an adjacent room while the six representatives met as a closed group to discuss the essence of their differences and where possible concessions could be made. Whenever one of the negotiators had a question he could simply leave the negotiations and consult with his experts. There was no mediator or arbiter presiding over these negotiations. Use of a third party was never actually considered by the participants. They felt negotiations could be successful without such outside help since all parties wanted the conflict to be resolved.

At the end of two days of negotiations, the parties had agreed to a 21-point settlement. thirty days later, a formal, binding agreement had been drawn together and signed by all parties.

The Settlement

Although the settlement has 21 points of agreement, these can be categorized into two general accords:

- 1) a \$7.5 million trust fund for protection of the Whooping Crane, and
- 2) minimum streamflow levels that vary for different seasons during the year for the North Platte River.

Before the Wyoming negotiations, MBPP officials decided to offer \$15 million to the intervening groups. (Wisdom, 1979) This money was to be used by the conservationists and Nebraska to purchase water rights to maintain whatever streamflow level they thought appropriate. Additionally, some money could be used to artificially protect the Whooping Crane's critical habitat. MBPP officials derived the \$15 million value through calculations of how much they could afford to pay, how much they could potentially lose if a settlement was not reached and approximately what amount the concerned parties would need to satisfy their needs. (Wisdom 1979) No one was able to recall the specific formula used to obtain this value, though.

The MBPP presented the \$15 million offer to participants in the Cheyenne negotiations. The money was rejected for several reasons. Nebraska wanted a guaranteed streamflow

through the state and did not feel assured by this offer that it would be obtained. Moreover, Nebraska officials viewed money offers as "very suspect." Snyder comments that Nebraska realized the negotiations were constantly in the public's eye, and as a result, it wanted to make sure that the "state of Nebraska was not given any money except legal fees." Nebraska wanted to be sure that the money did not appear to be a "payoff to Nebraska." (Snyder, 1979)

The conservation groups also wanted guaranteed minimum streamflows. They were unsure how successful they could be at maintaining specific streamflow levels through water rights purchases. Guaranteed streamflows would make their efforts to protect the Whooping Crane's habitat more likely to succeed.⁶ (Parenteau, 1979; Turner, 1979)

When the \$15 million offer was rejected, project officials met to develop their next offer. The second offer halved the money to \$7.5 million and provided several water concessions. Discussions involving the \$7.5 million offer were not as directed as those occurring over water use. Since water levels were the major contention, the offer of money caught Nebraska and the conservation groups by surprise. (Parenteau, 1979; Snyder, 1979) Never did they discuss the value of \$7.5 million versus, for example, \$7 million or \$8 million. As a result, they never determined that \$7.5 million was the appropriate amount of money to protect the Whooping Crane.

Both groups were hesitant to discuss receipt of money as part of any agreement. Nebraska feared that it would appear as though it was "selling out" to the utilities for money and thus not upholding the best interests of its citizens. (Snyder, 1979) The National Wildlife Federation did not feel it could fulfill its *raison d'être* without risking its reputation if it accepted money from the utilities. (Parenteau, 1979) Given these hesitations, participants began discussing alternative means of addressing the Whooping Crane's needs. They did not want to subject Nebraska and the conservation groups to public misconceptions. It was at this point that Patrick Parenteau devised the trust fund idea. Paul Snyder emphasized that it was the development of this "independent" trust fund with a separate board of trustees that made the final settlement acceptable to Nebraska.

⁶In Nebraska, as in several western states, water is allocated by the state to users only if it will be put to a "beneficial use." "Beneficial uses" include agriculture, mining, municipal water needs, recreation, and the maintenance and propagation of fish and wildlife. The intent behind the \$15 million offer was that this money could be spent purchasing water rights and artificially protecting the Whooping Crane's habitat. It seems at face value that this would legitimately fall under the "maintenance and propagation of fish and wildlife" intention. There is a catch in western water law, though, which states that any "beneficial use" must entail "physical removal of the water from the stream" (Calkin, 1978; Fischer, 1978) The Wildlife Management Institute, a privately-funded scientific organization devoted to the restoration and improved management of wildlife, asserts that the only way money will be useful in boosting stream flows is if the negotiators can "change Nebraska state law." (Williamson, 1979) The U.S. Fish and Wildlife Service believes that there are "ways to get around these restrictions." The fact that Nebraska was participating in the negotiations led participants to believe that there would be no problems with purchasing water rights to be left in the river. (Turner, 1979)

This "change in name" of the \$7.5 million offer assured that the money would actually be used for its designated purposes and thus removed appearances of misconduct by Nebraska or the conservation groups. The trust fund is established for perpetuity. Its yearly interest is invested in protective measures for the Whooping Cranes and their habitat. The settlement is a legally-binding contract, signed by all parties to the negotiations. It has a monitoring stipulation included to assure implementation of its provisions.

Conclusion

The Grayrocks case illustrates how parties in a dispute weigh their different options and their likelihood of success. It was not until the uncertainty posed by the Endangered Species Committee's eventual ruling that each perceived that they could possibly be worse off without than with negotiations. They chose to negotiate when they realized that not negotiating could possibly lead to an outcome which would be less desirable.

The extent and success of negotiations with Grayrocks followed closely the shifting leverage by different parties throughout the process. The utility's bargaining leverage included the fact that the project was going to increase the region's energy resources, provide irrigation water to Wyoming for agricultural expansion, provide jobs and economic development stimulus, and tax revenues to Platte County, Wyoming. Further, the utilities had money and expertise resources which could be used as potential means of compensation. Nebraska and conservation groups also possessed bargaining leverage. They had a court victory leaning in their favor and felt confident the appeal would not overturn the earlier court decision. They had the potential absolute power of the Endangered Species Act, should the Endangered Species Committee rule in their favor. Further they could continue to impose costly delays which the MBPP wanted to avoid. Thus, in the Grayrocks Dam case, the conflict reached the point wherein all parties possessed the means and the desire to negotiate. Negotiations therefore occurred and were successful.

It is only obvious that the MBPP would rather not have had to negotiate. When faced with costly delays due to litigation by Nebraska and the conservation groups, they are pleased that the settlement allowed them to get on with their work at a lesser cost than would drawn-out court battles. Basin Electric Power Cooperative general counsel, William Wisdom, provided the following analogy of his company's reaction to the settlement:

A young man, walking along a street in his hometown, encounters an elderly gentleman who is an old family friend. The young man asks congenially, "How are you enjoying your old age?" to which the elderly gentleman can do little more than reply, "When I think about the alternatives, just fine!"

The MBPP would much rather not have to pay the \$7.5 million nor concede to reduced water consumption, but, given the delays and costs inherent in other approaches to gaining approval to restart construction, the settlement was quite attractive to them.

Similarly, conservation groups viewed negotiations and a settlement as a more desirable alternative to extended litigation. While it is true that these conservation groups, like the utilities, were uncertain about the Endangered Species Committee ruling, they also did not have the resources to continue in a court battle.

The Grayrocks Dam dispute was the first major endangered species versus development dispute to be resolved through collaborative negotiations. It occurred a short 5 years after passage of the Endangered Species Act. It is interesting to note the varying perceptions of the conservation and development communities as to the legitimacy of the outcome. The National Audubon Society feels the settlement is "excellent" because it is now forcing the utilities to pay "economically what it is costing" to construct this plant. Turner feels that the payment and concessions are "directed at the facility's environmental impacts" and therefore are legitimate compensation. He further emphasizes that "it was not a bribery"; it "was the right thing for the utilities to do."

While Nebraska's Paul Snyder simply comments that Nebraska "got what they wanted," Basin Electric's general counsel Bill Wisdom believes that this settlement "didn't have a damn thing to do with the issues; all we did was buy a lawsuit." Edward Weinberg, MBPP attorney feels that the utilities got the "bum end" of the deal. He saw the negotiations as "the constructive thing to do" but the settlement as misdirected with the time, effort and concessions not meaningful to the real issues.

It is important to note that the conservation groups involved in this dispute stressed all along that they were not opposed to the dam per se, but only to the extent that it threatened the endangered Whooping Crane. They were not using the ESA to try to halt construction of the dam, but instead to try to force the concessions and mitigation necessary to protect the endangered species. Negotiations provided them with the most productive forum within which to discuss specific measures for achieving this outcome.

In this case, the parties were fortunate to have a situation where all sides could be accommodated; where the dam could be constructed and the endangered species could be protected. Moreover, the conservationists recognized this reality very early on in the dispute and structured their arguments and strategies accordingly. Not all endangered species disputes offer such a striking "win-win" outcome.

When interviewed 15 years after the Grayrocks Dam settlement was reached, representatives of the Platte River Trust (trustees for the \$7.5 million trust fund) and other conservationists currently involved in Platte River issues, are still strongly supportive of the settlement and its effects. The trust fund monies have provided a focus for research efforts and land acquisition on behalf of endangered species along the river. Environmentalists feel that helpful scientific data has been generated by the Trust's activities and that the Trust has been

able to accomplish more for the species on the river than has the federal government in the same period of time.

Sources

Phone Interviews

Mr. Patrick Parenteau, Attorney, National Wildlife Federation, Washington, D.C., December 19, 1978 and January 26, 1979.

Mr. Michael Reilly, Legal Counsel, U.S. Army Corps of Engineers, Omaha, Nebraska, March 5, 1979.

Mr. Paul W. Snyder, Assistant Attorney General, State of Nebraska, Lincoln, Nebraska, March 13, 1979.

Mr. Robert Turner, Wyoming Regional Representative, National Audubon Society, Sheridan, Wyoming, March 13, 1979.

Mr. Edward Weinberg, Attorney, Missouri Basin Power Project, Washington, D.C., March 8, 1979.

Mr. David Westly, U.S. Fish & Wildlife Service, Office of Endangered Species, Arlington, Virginia, March 16, 1979.

Mr. Lonnie L. Williamson, Secretary, Wildlife Management Institute, Washington, D.C., March 13, 1979.

Mr. William Wisdom, General Counsel, Basin Electric Power Cooperative, Bismarck, North Dakota, March 9, 1979.

Publications

Agreement of Settlement and Compromise, Basin Electric Power Cooperative, et.al., December 4, 1978.

Audubon Magazine, "Perspective_The God Committee," by Robert Cahn, May, 1979, Volume 81, Number 3, page 10.

Outdoor News Bulletin, Wildlife Management Institute, "Dam Settlement Leaves Whoopers in Jeopardy," February 9, 1979, Volume 33, Number 3, pages 1-3.

Sierra, The Sierra Club Bulletin

- (a) Calkin, Brant, "An Archaic Quirk of Western Water Law," February/March 1978, Volume 63, Number 2, page 31.

- (b) Fischer, Hank, "Montana's Yellowstone River_Who Gets the Water?", July/August 1978, Volume 63, Number 5, pages 13-15.
- (c) Hamilton, Bruce, "The Whooping Crane: A Success Story," May/June 1979, Volume 64, Number 3, page 56.

The Washington Post

- (a) "Rare Whooping Crane vs. Western Power Project," November 27, 1978, pages A1, A7.
- (b) "Whooping Crane Safety Promised, Dam Fight Ends," November 28, 1978.
- (c) "Saving a Place for Cranes," Editorial, November 29, 1978.

Yaffee, Steven L., Prohibitive Policy: Implementing the Federal Endangered Species Act
Cambridge, MA: MIT Press, 1982.