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Midlands Voices: Species conservation not factor in flooding

By Sandra Zellmer and John H. Davidson

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Zellmer is a University of Nebraska alumni professor of natural resources law and a member scholar of the Center for Progressive Reform. Davidson is an emeritus professor of law at the University of South Dakota.

As the Missouri River nears the 500-year flood mark, we sympathize with those whose homes and businesses are flooded. And we recognize that it's natural for the afflicted to cast blame on a scapegoat — a practice as old as recorded history. But those who blame the flooding on the U.S. Army Corps of Engineers' efforts to conserve native wildlife species are deeply misinformed.

First, there is no legal basis for pointing fingers in this direction. The Flood Control Act of 1944 — the statute that authorized the big mainstem dams in North and South Dakota — prioritizes flood control and navigation. The Act also authorizes operations that benefit wildlife and, when it comes to listed species, the Endangered Species Act (ESA) requires federal agencies to avoid jeopardizing species.

In operating the dams, the Corps is bound by both Acts. But the Corps has been whipsawed by lawsuits brought by both upstream states, which want to maintain high water levels in the spring to enhance the walleye fishery, and downstream states, which demand high summer and fall water levels to support the commercial navigation season and to cool their power plants. The corps' management of the river has had far more to do with the demands of the states than the demands of tern and plover.

Second, there is no factual basis for blaming endangered species. As higher than normal levels of precipitation and snowmelt began filling the system in the early winter months in Montana and North Dakota, the corps began storing higher than normal water levels in the reservoirs. The water has to go somewhere, and the corps began releasing higher than normal amounts of water from the dams.

This spring, when terns and plovers would typically begin to nest in shallow water habitat (such as sandbars), the desirable habitat was already inundated and the species had to go elsewhere to satisfy their needs. There is simply no causal relationship between the high releases and the ESA.

When it comes to the blame game, however, there are more than a few viable candidates. The Federal Emergency Management Agency, along with local governments all along the river, has played a significant role in the loss of homes and other property to the flood. FEMA has failed to maintain accurate, up-to-date flood maps and has failed to incentivize landowners in high-risk areas to maintain flood insurance.

Mortgage lenders are required to ensure that homeowners within the 100-year floodplain have insurance when they take out their loans. But some homeowners fail to renew their insurance in subsequent years, and FEMA oversight is patchy at best.

Consider Dakota Dunes, S.D. Of the 600 homes evacuated as the water rose, only 110 had policies. Granted, some of the non-insured homes were outside of the 100-year floodplain designated by FEMA — a designation that now seems suspect. But even for homes outside of the 100-year floodplain but within the 500-year floodplain, insurance was

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available — and recommended — but not mandatory.

FEMA notes, “People outside of [the 100-year floodplain] file over 20 percent of claims and receive one-third of disaster assistance for flooding.”

As for local governments, consider Union County, where Dakota Dunes is located. The Dunes, an upscale community of “estate” lots situated at the confluence of the Big Sioux and Missouri Rivers, was established in 1990 when Gateway Computers started operations in the area. When the developers announced their plans in the late 1980s, the Dunes was billed as the largest single development from Minneapolis to Kansas City.

Although Gateway has long since pulled up stakes and moved away, the Dunes is now home to a number of companies attracted by the state’s favorable tax policies — no personal income taxes or corporate income taxes — and an 18-hole Arnold Palmer-designed golf course.

Officials were well aware of the risk of flooding at the time the development was approved. As a former county flood manager observed in a 1996 report, “Naturally, much of this land was flood-prone and a re-study [of the area] was immediately started.”

Unfortunately for the developers, the re-study confirmed that numerous lots were in the floodplain. However, the former county flood manager observed, “the determined developers were not about to let this deter them from realizing their goals.” Local officials folded. The flood manager added, “Union County was able to interpret the regulations and ... working hand in hand with the developers, [we] were able to effect a community today known as Dakota Dunes.”

The impacts of the 2011 flood on communities such as Dakota Dunes underscore the conclusions of the Blue-Ribbon Interagency Floodplain (Galloway) Committee. After the 1993 flood, the committee explained, “floods are natural repetitive phenomena. Activities in the floodplain, even with levee protection, will continue to remain at risk.”

But we can reduce our vulnerability — and stop the blame game — by following the committee’s recommendation: “As a first priority, avoid unnecessary human use of the floodplain.”

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