



United States Department of the Interior
BUREAU OF RECLAMATION

Great Plains Region
Wyoming Area Office
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HAND DELIVERED

NOV 17 2008

Mr. Patrick T. Tyrrell
Wyoming State Engineer
Wyoming State Engineer's Office
Herschler Building-4-E
122 West 25th Street
Cheyenne, Wyoming 82002

Subject: Application to Export Storage Water - Pathfinder Modification Project

Dear Mr. Tyrrell:

In accordance with W.S. 41-3-115, enclosed for your consideration is an application to export storage water from the Pathfinder Modification Project within Pathfinder Reservoir for fish and wildlife and environmental purposes in the Central Platte River in Nebraska. This export will benefit Wyoming water users, including federal storage water contractors in Wyoming and Nebraska, through the Platte River Recovery Implementation Program.

The United States Bureau of Reclamation, as owner and operator of the Pathfinder Reservoir, and the Wyoming Water Development Office, the contractor for storage water in the Pathfinder Modification Project, are hereby jointly seeking authorization for this export.

Should you have questions or require additional information, please do not hesitate to contact us.

Respectively submitted,

Mr. John H. Lawson
Area Manager
Bureau of Reclamation

Mr. Michael K. Purcell
Director
Wyoming Water Development Office

Enclosure

APPLICATION TO EXPORT STORAGE WATER FROM THE PATHFINDER MODIFICATION PROJECT

I. INTRODUCTION

The United States Bureau of Reclamation (Reclamation), as owner and operator of the Pathfinder Reservoir and the Wyoming Water Development Office (WWDO), the contractor for storage water in the portion of the Pathfinder Reservoir designated as the Pathfinder Modification Project (PMP), are hereby jointly seeking authorization to export storage water from the PMP for fish and wildlife and environmental purposes in the Central Platte River in Nebraska.

A more specific description of the proposed export and the purpose of the export are offered below:

1. Reclamation and the WWDO are seeking authorization to export water from the Environmental Account in the PMP to serve as the State of Wyoming's water contribution to the Platte River Recovery Implementation Program (PRRIP) on behalf of Wyoming's water users including the federal storage water contractors in Wyoming and Nebraska. This water contribution, as well as Wyoming's monetary contribution of six million dollars (\$6M), will ensure that clearances required under the Endangered Species Act will be provided for existing uses and certain specified new uses, which are more particularly described herein.

The exported water will be released from the Environmental Account in the Pathfinder Modification Project. The Environmental Account has a capacity of 33,493 acre feet. Water from the account will specifically be used for fish and wildlife and environmental purposes to develop habitat in Nebraska for four target species (interior least tern, whooping crane, piping plover and pallid sturgeon) listed as threatened or endangered pursuant to the Endangered Species Act. Annual releases from the Environmental Account will be made as needed to meet the demands of the habitat development as determined by the Environmental Account Manager, a representative of the U.S. Fish and Wildlife Service.

2. Reclamation and the WWDO are seeking authorization to export water from the Wyoming Account in the PMP. The exported water would be leased to the Platte River Recovery Implementation Program. Any such leases would have a term of one year and would be accomplished through temporary water use agreements approved by the Wyoming State Engineer.

The Wyoming Account has a capacity of 20,000 acre feet. Reclamation will operate this account to provide a reliable yield of 9,600 acre feet of water per year. If the water is not needed for Wyoming's priority purposes, municipal or depletion replacement, the WWDO may lease all or part of the yield from the Wyoming Account to the PRRIP. (See Attachment B.)

II PATHFINDER MODIFICATION PROJECT

The Pathfinder Modification Project (PMP) is described in Appendix F-Amendment of the 1953 Order to Provide for the Modification of Pathfinder Reservoir to the Final Settlement Stipulation for the Nebraska v. Wyoming law suit (stipulation).

The project would recapture 53,493 acre feet of reservoir storage space lost to accumulated sediment. The PMP would be accomplished by raising the elevation of the existing spillway by approximately 2.4 feet with the installation of an ogee crest. The resulting recaptured or restored capacity would be administered through two accounts, the "Environmental Account" and the "Wyoming Account" which are described in Attachment B.

The negotiations leading to the stipulation and the PRRIP resulted in the documented support for the PMP by the U.S. Fish and Wildlife Service, Reclamation, the states of Nebraska, Colorado, and Wyoming, water users, and environmental groups. The PMP affords Wyoming the best alternative to resolve Endangered Species Act issues in Wyoming through the Environmental Account and provides a supplement water supply for Wyoming's municipalities and its depletion replacement obligations under the Modified North Platte Decree through the Wyoming Account.

In order to provide background information related to this application, please refer to the following attachments:

Attachment A-Appendix F-Amendment of the 1953 Order to Provide for the Modification of Pathfinder Reservoir to the Final Settlement Stipulation for the Nebraska v. Wyoming law suit.

Attachment B-Summary of the Pathfinder Modification Project

Attachment C-Summary of the Platte River Recovery Implementation Program

Attachment D-Tracking, Accounting and Management of the Exported Water

III. CONSIDERATION OF WYOMING STATUTES

W.S. 41-3-115(r) offers the following guidance to the legislature in its deliberations of proposals for the export of Wyoming water. The following provides the applicants' input on each of the factors to be considered:

“(r) The legislature shall consider the proposed appropriation following receipt of the state engineer's opinion and recommendation. Notwithstanding subsections (d) through (k) of this section, legislative consent for the proposed appropriation of water for use out of the state shall be based upon consideration of the factors necessary to assure meeting the state's interests in conserving and preserving its water resources for the maximum beneficial use. Factors to be considered by the legislature shall include the following:

(i) The amount of water proposed to be appropriated and the proposed uses;

The water to be exported is stored by Reclamation in Pathfinder Reservoir under Permit 609 Res. More specifically, the water will be stored in the Environmental Account and Wyoming Account of that portion of the Pathfinder Reservoir described as the Pathfinder Modification Project (PMP). The PMP is approved as described in Appendix F-Amendment of the 1953 Order to Provide for the Modification of Pathfinder Reservoir to the Final Settlement Stipulation for the Nebraska v. Wyoming law suit.

No more than 33,493 acre feet per year would be exported from the Environmental Account in the PMP.

No more than 9,600 acre feet per year would be exported from the Wyoming Account in the PMP.

The proposed uses for the exported water are fish and wildlife and environmental purposes. More particularly, the water would be used to develop habitat for threatened and endangered species in Nebraska. And importantly, the water is being exported to provide clearances under the Endangered Species Act for water users in Wyoming, including the federal storage water contractors in Wyoming and Nebraska.

(ii) The amount of water available for appropriation from the proposed source, and the natural characteristics of the source;

Pathfinder Reservoir stores waters of the North Platte River in accordance with Permit 609 Res. and has a permitted capacity of 1,070,000 acre feet. The storage accounts within Pathfinder Reservoir apportioned for the purposes of the proposed exports have a capacity of 53,493 acre feet, as per the stipulation approving the Pathfinder Modification Project. On November 4, 2008, the Wyoming Board of Control approved a petition to change the use (for additional uses) for that portion of Pathfinder Reservoir designated as the Pathfinder Modification Project in the following manner:

<u>Account</u>	<u>Additional Uses</u>	<u>Capacity</u>
Environmental	Fish & Wildlife, Environmental	33,493 Acre feet
Wyoming	Municipal, Fish & Wildlife, Environmental	20,000 Acre feet

The existing permitted uses for irrigation and domestic uses were maintained for the entire permitted capacity of 1,070,000 acre feet

(iii) The economic, social, environmental and other benefits to be derived by the state from the proposed appropriation;

The exported water from the Pathfinder Modification Project will serve as the State of Wyoming's water contribution to the Platte River Recovery Implementation Program on behalf of Wyoming's water users including the federal storage water contractors in Wyoming and Nebraska. This water contribution, as well as Wyoming monetary contribution of \$6M, will ensure that clearances required under the Endangered Species Act will be provided for water uses in the Platte River Basin in Wyoming.

The U.S. Congress has given the Endangered Species Act (ESA) the broad authority to trump state laws and other federal laws and contracts, as well as interstate compacts and decrees. This broad authority has been unsuccessfully challenged in courts throughout the United States. The U.S. Fish and Wildlife Service (FWS), the guardian of the species protected by the ESA, is required by federal law to pursue its objectives with or without the PRRIP. Without the Program, Wyoming water users would be required to undergo individual consultations under the ESA. The collective result of those consultations would be the requirement for more water from Wyoming to achieve FWS objectives than is being provided by the proposed exports. The PRRIP was developed by the States of Wyoming, Colorado, Nebraska and the Department of the Interior on the principle that cooperation was better than litigation. In particular, the three states understood that taking on the ESA in court would be an expensive and, in all likelihood, a futile effort.

The exported water will be delivered to develop habitat in Nebraska. (See Attachment C, paragraph no. 6.) The benefits to be derived by the State of Nebraska would be indirect and due to Wyoming's participation in the PRRIP, just as Wyoming benefits from Nebraska's participation in the PRRIP.

(iv) The benefits to the state by the use of the water within the state that will be foregone by the proposed appropriation;

The Pathfinder Modification Project recaptures 53,493 acre feet of storage space within Pathfinder Reservoir. The inability to store this amount of water in Pathfinder Reservoir, which serves the North Platte Project, has benefitted the Kendrick Project, which provides water to the Casper Alcova Irrigation District. The contractors of federal storage water from both the North Platte and Kendrick Projects have documented their support of the Pathfinder Modification Project as the exported water will serve to ensure their water supplies will not be subject to consultation under the Endangered Species Act. (See Attachment B, paragraphs B.5 and B.6.)

(v) The benefits presently and prospectively derived from the return flow of water in intrastate use which will be eliminated by the proposed out-of-state use;

As the exported water will be derived from storage water in Pathfinder Reservoir, through the Pathfinder Modification Project, there will be minimal effects on return flow. Those

minimal effects would primarily fall on the federal contractors for storage water from Pathfinder Reservoir, who documented their support for the PMP.

(vi) The injury to existing water rights of other appropriators that may result from the proposed use;

The injury relating to the exports will primarily fall on the water rights of the federal reservoirs in Wyoming, which like the water rights for the Pathfinder Reservoir, are held by Reclamation, an applicant for the proposed export. During the evaluation of the feasibility of the PMP, Reclamation and the WWDO completed preliminary hydrologic analyses relating to the potential effects of the project. Based on these analyses, it was apparent that the effects of the PMP would be borne primarily by the Kendrick Project (Seminole Reservoir) and the North Platte Project (Pathfinder Reservoir). The federal contractors of storage water from the Kendrick and North Platte Projects have documented their support for the PMP, as the exported water will serve to ensure their water supplies will not be subject to consultation under the Endangered Species Act. (See Attachment C, paragraph 11.a.)

(vii) Whether the use formulated and carried out promotes or enhances the purposes and policies of the state's water development plans and water resources policy, and that the use will not unreasonably interfere with other planned uses or developments for which a permit has been or may be issued;

The federal administration of the Endangered Species Act in the Platte River Basin has impacted Wyoming's water development plans and water resources policies since the 1970's. These proposed exports, along with Wyoming's participation in the PRRIP, will serve to alleviate these impacts by providing ESA compliance for water uses throughout the Platte River Basin in Wyoming; thereby allowing Wyoming to pursue those policies in a manner consistent with Wyoming water law and the North Platte Decree.

(viii) Whether the proposed use will significantly impair the state's interest and ability to preserve and conserve sufficient quantities of water for reasonably foreseeable consumptive uses and other beneficial uses recognized by law to include but not limited to domestic, livestock, agricultural, municipal and industrial purposes;

The exports will not impact Wyoming's entitlements under the North Platte Decree. In fact, the North Platte Decree envisions the development of the PMP by Reclamation and the WWDO, including the exports proposed in this application. Again, the exports and Wyoming's participation in the PRRIP will allow for the continued use of water in the Platte River Basin under Wyoming water law without limitations caused by the Endangered Species Act.

(ix) Whether the proposed use will adversely affect the quantity or quality of water available for domestic or municipal use;

The proposed exports will not adversely affect domestic and municipal use. In fact, the primary purpose of the Wyoming Account within the Pathfinder Modification Project is to provide supplemental water supplies to municipalities during times of water rights administration.

(x) Whether, to the greatest extent possible, the correlation between surface water and groundwater has been determined, to avoid possible harmful effects of the proposed use on the supply of either."

As the exported water will be derived from storage water in Pathfinder Reservoir, through the Pathfinder Modification Project, there will be minimal, if any, effects on groundwater.

W.S. 41-3-115 (s) states: "Nothing in this act [section] shall be construed to interfere with compacts, court decrees and treaty obligations."

The North Platte Decree envisions the development of the Pathfinder Modification Project by Reclamation and the WWDO, including the exports proposed in this application.

Attachment A

Appendix F

Amendment of the 1953 Order to Provide for the Modification of Pathfinder Reservoir

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

BEFORE THE HONORABLE OWEN OLPIN
SPECIAL MASTER

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

AMENDED STIPULATION

AMENDMENT OF THE *1953 ORDER*
TO PROVIDE FOR THE MODIFICATION OF
PATHFINDER RESERVOIR

COME NOW, the States of Nebraska, Wyoming,
Colorado and the United States of America and hereby
stipulate and agree to the amendment of the *1953 Order*
Modifying and Supplementing Decree of October 8, 1945,

and present this Stipulation, hereinafter referred to as the Pathfinder Modification *Stipulation*, for approval by the Special Master and for his recommendation to the United States Supreme Court for entry of an Order approving this Pathfinder Modification *Stipulation* and amending the *1945 Decree*, in accordance with the terms hereof.

WHEREAS, on January 14, 1953, the parties to this proceeding entered into a stipulation, hereinafter referred to as the *1953 Stipulation*, in part, to provide for the construction, operation and limitations on the use of water stored in a proposed North Platte River reservoir known as Glendo Reservoir; and

WHEREAS, the *1953 Order Modifying and Supplementing Decree of October 8, 1945, Nebraska v. Wyoming*, U.S. Supreme Court, No. 5 Original (October 8, 1945), hereinafter referred to as the *1953 Order*, adopted the *1953 Stipulation* of the parties and modified and supplemented the *1945 Decree* to, among other things, allow for the construction and operation of Glendo Reservoir on the North Platte River in Wyoming; and

WHEREAS Paragraph IV of the *1953 Order Modifying and Supplementing Decree of October 8, 1945*, provides, in pertinent part:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1, and September 30

of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows....

WHEREAS, in the present controversy between the parties, Nebraska has claimed that Wyoming is violating and threatening to violate Nebraska's equitable apportionment by depleting the natural flows of the North Platte River through the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

WHEREAS, the proposal contained herein for the modification of Pathfinder Reservoir does not affect Colorado's apportionment under the *1945 Decree* or the *1953 Order*, and neither Colorado nor the United States opposes the adoption of this Pathfinder Modification *Stipulation* by the Court.

WHEREAS, all parties agree that disposition of the issues addressed in this *Stipulation* is not and should not be construed as a precedent for the resolution of any other issue in this case or of these or similar issues in the future.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, following execution of this Pathfinder Modification *Stipulation* by each of the parties,

the parties will file a joint motion with the Special Master to recommend the entry of an Order by the United States Supreme Court approving this Pathfinder Modification *Stipulation* and modifying the *1945 Decree*, as amended in the *1953 Order*, as follows:

1. The Pathfinder Modification Project would increase the capacity of the existing Pathfinder Reservoir by approximately 54,000 acre feet to recapture storage space lost to sediment. The modification would be accomplished by raising the elevation of the existing spillway by approximately 2.39 feet with the installation of an inflatable dam or some other means. The recaptured storage space would store water under the existing 1904 storage right for Pathfinder Reservoir and would enjoy the same entitlements as other uses in the reservoir with the exception that the recaptured storage space could not place regulatory calls on existing water rights upstream of Pathfinder Reservoir other than the rights pertaining to Seminoe Reservoir.

2. Approximately 34,000 acre feet of the proposed 54,000 acre foot modification would be accounted for in an environmental account and operated for the benefit of endangered species and their habitat in Central Nebraska.

- a. Water would accrue to the environmental account as an equal priority partner to other reservoir uses. The 34,000 acre-foot account is approximately 3.18% ($34,000/1,070,000$) of the capacity of Pathfinder Reservoir. Therefore, the account would accrue 3.18% of the inflow that is storable under the 1904 storage right.
- b. The environmental account could not contain more than 34,000 acre feet at any

one time and will be administered under Wyoming water law. For example, if at the end of a water year, which is defined as October 1 to September 30, 10,000 acre feet of water was in the account, the account could only accrue 24,000 acre feet under its priority fill during the forthcoming water year.

- c. The account would be assessed its proportionate share of evaporation losses based on the storage water in the account.
- d. If there is a Platte River Recovery Implementation Program (Program), the environmental account could be operated, under contract with the Bureau of Reclamation, by the same manager that would manage the environmental account in Lake McConaughy. If the program does not exist, the account would be operated by the Bureau of Reclamation, in accordance with subsequent contracts and ESA consultations and in a manner consistent with Wyoming water law and the North Platte Decree.
- e. The storage and delivery of water from the environmental account to the Wyoming/Nebraska stateline would serve as Wyoming's proposed reasonable and prudent alternative for the Pathfinder Modification Project. If there is a Platte River Recovery Implementation Program (Program) that serves as the reasonable and prudent alternative for water related activities in the Platte River basin, the

storage and deliveries from the environmental account would serve as a Wyoming contribution to the water component of that Program on behalf of Wyoming's existing water users, including the federal storage water contractors located in Wyoming and Nebraska to the extent the activities of such contractors are related to the delivery of storage water from the federal reservoirs in Wyoming. If no Program exists, such storage and deliveries would serve as a proposed reasonable and prudent alternative for the ongoing section 7 consultation on the operation of Bureau of Reclamation reservoirs serving Wyoming and Nebraska. Further, if a separate program is sought by Wyoming and the federal storage contractors in Wyoming and Nebraska, they may seek credit for such deliveries for purposes of ESA evaluations.

3. The State of Wyoming would have the exclusive right to contract with the Bureau of Reclamation for the use of the remaining 20,000 acre feet of the modification capacity in a "Wyoming account" to provide municipal water to North Platte communities in Wyoming, replacement water to satisfy any obligations under the modified North Platte Decree or any stipulation in this case, or water for endangered species as described in Paragraph 3.e.

- a. Water would accrue to the Wyoming account as an equal priority partner to other reservoir uses. The 20,000 account is 1.87% ($20,000/1,070,000$) of the

capacity of Pathfinder Reservoir. Therefore, the account would accrue 1.87% of the inflow that is storable under the 1904 storage right.

- b. The Wyoming account could not contain more than 20,000 acre feet at any one time and will be administered under Wyoming water law. For example, if at the end of a water year, which is defined as October 1 to September 30, 5,000 acre feet of water was in the account, the account could only accrue 15,000 acre feet under its priority fill during the forthcoming water year.
- c. The Wyoming account would be assessed its proportionate share of evaporation losses based on the storage water in the account.
- d. The storage water would be used to supplement Wyoming municipalities' water rights or to satisfy any obligation under the modified North Platte Decree or any stipulation in this case. If released to meet an obligation under the Decree or stipulation in this case, the storage water will be administered under procedures adopted by stipulation in this case as such procedures may be modified from time to time by the North Platte Decree Committee. Storage water used to supplement municipal water rights will be administered as follows: When the municipal surface or hydrologically connected ground water rights, or a portion thereof, are regulated due to a

priority call, the municipality whose rights are regulated, subject to state law, could continue to divert to meet its municipal demands and its depletions would be replaced from its contracted portion of the Wyoming account subject to the following conditions:

- i. The municipality must have the capability to measure its diversions and its return flows in a manner approved by the Wyoming State Engineer in order to accurately measure the resulting depletions. If the return flows cannot be measured in a manner acceptable to the Wyoming State Engineer, the entire amount diverted will be considered a depletion and will be debited from the respective municipalities' account.
- ii. Contracts for water from the Pathfinder Modification Project with the State of Wyoming will stipulate that the contracting municipality can only serve new individual demands less than 100 acre feet of water per year.
- iii. If the City of Casper contracts for water in the Wyoming account, water in its portion of the account must be depleted before it can exercise its entitlements in Seminoe Reservoir. This condition serves to alleviate project impacts on Seminoe Reservoir.

- e. The Bureau of Reclamation, under contract with the State of Wyoming, will operate the 20,000 acre feet Wyoming storage account to insure an annual estimated firm yield of 9,600 acre feet. In any year that the demand for municipal use is less than 9,600 acre feet, the remaining balance of the annual firm yield may be used by Wyoming for depletion replacement or release for endangered species in Central Nebraska. Such uses are secondary to the purpose of providing water for municipal use for North Platte communities in Wyoming. Any water used for endangered species purposes must be released from storage before the end of the water year and does not constitute a permanent water right.

4. In order for the project to be implemented, [1] the federal authorization of Pathfinder Reservoir will be amended if necessary to include municipal and environmental purposes, [2] the water right for Pathfinder Reservoir must undergo a partial change of use under Wyoming water law to allow the uses of the Wyoming and environmental accounts contemplated by this Stipulation, and [3] the Wyoming Legislature must approve the export of water for downstream environmental purposes. Further, any decision of the Bureau to proceed with the project in this Stipulation will not be made until after completion of any appropriate analysis under NEPA or consultation under the ESA.

5. In order to address the effects the Pathfinder Modification Project may have on contractors for water from Glendo, Pathfinder and Seminoe Reservoirs in Wyoming, upon completion of the Pathfinder Modification Project,

Wyoming will pay the Wyoming and Nebraska federal storage water contractors' share of the Safety of Dams Modifications to the federal reservoirs to be implemented by the Bureau of Reclamation in the near future.

6. In order to address the effects the Pathfinder Modification Project may have on the Kendrick Project, upon completion of the Pathfinder Modification Project, Wyoming will assist the Casper Alcova Irrigation District with the resolution of existing selenium issues that are impacting its existing operation.

7. Existing Wyoming and Nebraska federal storage water contractors will not be held responsible for any costs assigned to the Pathfinder Modification Project.

8. Subject to the appropriate approvals and conveyance losses, Wyoming, in accordance with its water law, will assure delivery of the storage water from the Pathfinder Modification Project herein designated for downstream environmental purposes to the Wyoming/Nebraska state line. A permit will be secured under Nebraska water law by the contractor for the environmental account to conduct the quantities of water thus delivered at the state line, subject to appropriate conveyance losses, to specified locations between the state line and Chapman, Nebraska. The environmental releases will begin subsequent to completion of the project and issuance of the permits by Nebraska. Beyond the state line, Nebraska will assure delivery of the water in accordance with the terms of any such permit granted and with other applicable Nebraska law.

9. As long as the project is implemented in the manner outlined herein, the State of Nebraska hereby stipulates that it will support the project in this litigation and

in any other proceeding necessary to implement and operate the project.

10. Upon completion of the Pathfinder Modification Project, Wyoming will release the 404 permit and the water rights for the Deer Creek Project, a proposed and permitted reservoir with a capacity of approximately 66,000 acre feet and provide fee simple title to the 470 acres of habitat it owns in the critical habitat area in Central Nebraska to the USFWS or other entities as deemed appropriate by the USFWS. Nebraska will move to dismiss Jess v. West, No. 88-1-308 (D. Neb.).

11. The parties previously entered into a stipulation providing for the modification of Pathfinder Dam filed on September 10, 1997. This document represents the parties amendment to that stipulation and is intended to supersede that stipulation.

DATED this 13th day of March, 2001.

Respectfully submitted,

/s/ Gay V. Woodhouse
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U.S. Department of Justice

Environmental and Natural Resources

Division

General Litigation Section

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Attachment B
Summary-Pathfinder Modification Project

A. Description

The Pathfinder Modification Project (PMP) is approved by Appendix F to the Final Settlement Stipulation for the Nebraska v. Wyoming law suit. (See Attachment A) The project would increase the existing capacity of Pathfinder Reservoir by 53,493 acre feet to recapture storage space lost to accumulated sediment. The modification would be accomplished by raising the elevation of the existing spillway by approximately 2.4 feet with the installation of an ogee crest. This increased capacity would be administered through two accounts, the "Wyoming Account" and the "Environmental Account."

The Environmental Account will consist of 33,493 acre feet of the proposed 53,493 acre foot enlargement and will be operated for the benefit of the endangered species and their habitat in Central Nebraska. The Environmental Account is the state's contribution to the Platte River Recovery Implementation Program (Program) on behalf of its water users. This water contribution, as well as Wyoming's monetary contribution of six million dollars (\$6M), will ensure that clearances required under the Endangered Species Act will be provided for existing uses and certain specified new uses, more particularly described in Attachment C.

The State of Wyoming has the exclusive right to contract with the Bureau of Reclamation (USBR) for the use of 20,000 acre feet of the enlargement capacity in a "Wyoming Account." The USBR, under contract with Wyoming, will operate the 20,000 acre feet of storage to provide an annual reliable yield of 9,600 acre feet. This is the same yield that was anticipated from the proposed Deer Creek Dam and Reservoir.

The "Wyoming Account" would serve the following purposes, in order of priority:

1. A supplemental water supply for Wyoming's municipalities during times of water rights regulation.
2. A replacement water supply to meet certain Wyoming obligations in the Nebraska v. Wyoming settlement agreement.
3. A replacement water supply to mitigate water use in excess of Wyoming's existing water related baselines defined in Wyoming's Depletions Plan.
4. An additional water supply for the Program under temporary annual lease agreements with the State of Wyoming.

B. Review of the Stipulation

The stipulation in the settlement places the following conditions on the municipal operations of the Wyoming Account:

1. When the municipal surface water or hydrologically connected ground water rights, or a portion thereof, are regulated due to a priority call, the municipality whose rights are

regulated, subject to state law, could continue to divert to meet its municipal demands and its depletions would be replaced from its contracted share of the Wyoming Account.

2. The municipality must have the capability to measure its diversion and return flows in a manner acceptable to the State Engineer in order to accurately measure the resulting depletions. If return flows cannot be measured in a manner acceptable to the State Engineer, the entire amount diverted may be considered depletions and debited from the respective municipalities' account.

3. Contracts for water from the project are required to limit the use of the storage water by new individual demands within the participating municipalities to less than 100 acre feet of water. This provision was included in the stipulation to ensure the water would be used for municipal purposes rather than large industrial purposes.

4. In any year that the demand for municipal use is less than 9,600 acre feet, the remaining balance of the yield may be used by Wyoming for depletion replacement or release for endangered species in Central Nebraska.

5. The stipulation states: "In order to address the effects the Pathfinder Modification Project may have on the Kendrick Project, upon completion of the Pathfinder Modification Project, Wyoming will assist the Casper Alcova Irrigation District with the resolution of existing selenium issues that are impacting its existing operation." The Wyoming Water Development Office (WWDO) has been working with the Casper Alcova Irrigation District to improve the efficiency of its irrigation water delivery system to enhance water conservation and assist in the resolution of selenium issues within the boundaries of the district.

6. The stipulation states: "In order to address the effects the Pathfinder Modification Project may have on contractors for water from Glendo, Pathfinder and Seminoe Reservoirs in Wyoming, upon completion of the Pathfinder Modification Project, Wyoming will pay the Wyoming and Nebraska federal storage water contractors' share of the Safety of Dams Modifications to the federal reservoirs to be implemented by the Bureau of Reclamation in the near future." The appropriation for construction of the PMP contains funds to pay the federal contractors share of dam safety requirements imposed on Seminoe, Pathfinder, and Glendo Dams.

C. Proposed Operations

During its evaluation of the water supply benefits of the Environmental Account, the U.S. Fish and Wildlife Service estimated that the account would provide approximately 25,000 acre feet of water on an average annual basis at the Wyoming/Nebraska state line. It is envisioned that the contents of the account will likely be released in September of each year to minimize losses and avoid conflicts with other water uses of the North Platte River.

The Wyoming Account will serve as an insurance water account for those municipalities that feel their water rights may be subject to regulation. Reclamation will operate the Wyoming Account to provide a reliable yield of 9,600 acre-feet per year. Exchanges will be implemented as appropriate to enhance the water supply benefits.

D. Draft Marketing Plan

While municipal use will be the first priority of the Wyoming Account, the state needs to maintain the flexibility to use water from the Wyoming Account for other purposes if it is not needed by the municipalities during times of water right regulation. Therefore, the municipalities will be restricted from re-marketing the water in the term of the contracts. The states will enter into readiness-to-serve contracts with the municipalities. Under the contracts, the municipalities would pay an annual fixed readiness-to-serve charge to protect their use of water if needed.

Each year, on or before the end of February, the municipalities could evaluate runoff forecasts and determine how much of the water reserved for them in the account would be needed that year. The municipalities would provide written notice to the WWDO as to the amount of water needed and a check for the service charge for the water. If the municipalities do not need the water requested in February, the WWDC would allow the municipalities to turn back the water and be reimbursed for the service charges paid for the returned water.

In contracting for the water, the WWDC will want to ensure that the water will serve those municipalities that are or will be impacted by water rights administration. Meetings will be held with interested municipalities to evaluate their water rights and discuss various water right regulation scenarios. The purpose of the meetings will be to determine an amount of water that would provide insurance for that municipality during realistic water rights regulation scenarios without allowing any one community to contract for water it will not need that could be used by others.

E. Summary

The negotiations leading to the settlement of the Nebraska v. Wyoming law suit and the Platte River Recovery Implementation Program resulted in the documented support for the Pathfinder Modification Project by the U.S. Fish and Wildlife Service, Reclamation, the states of Nebraska, Colorado and Wyoming, water users in all three states, and environmental groups. The PMP affords Wyoming the best alternative to resolve Endangered Species Act issues in Wyoming through the Environmental Account and provides a supplement water supply for our municipalities and our obligations under the North Platte Decree through the Wyoming Account.

Attachment C
Summary of the Platte River Recovery Implementation Program

Wyoming, Nebraska, and Colorado became interested in a Platte River Recovery Implementation Program (Program) when it became apparent that the Endangered Species Act (ESA) provided the U.S. Fish and Wildlife Service the authority to require the replacement of existing depletions until it achieved its water supply goal for the critical habitat in the Central Platte River in Nebraska. The water supply goal was 417,000 acre feet per year. In addition, the Fish and Wildlife Service would have likely assessed depletion fees in order to acquire 29,000 acres of habitat in the Central Platte.

After 13 years, the negotiations between the Department of Interior and the three states have been completed. The Wyoming Legislature has approved the state's financial contribution of six million dollars (\$6M) and Governor Freudenthal has executed the necessary agreements. The Program commenced on January 1, 2007.

The following is a description of the major components of the Program:

1. The water supply goal is to provide 130,000-150,000 acre feet of water per year to reduce shortages to the Fish and Wildlife target flows in the Central Platte. The three states are contributing 80,000 acre feet of water per year. Wyoming's water contribution on behalf of its water users is an average of approximately 25,000 acre feet per year from the Environmental Account in the Pathfinder Modification Project.
2. The remaining supplies, 50,000-70,000 acre feet of water per year, will be developed by the Program. Presently, the Program is looking at potential supplies in the area of the habitat in the Central Platte in Nebraska. In addition, the Program may seek additional water supplies through water leasing through agreements with willing participants.
3. The habitat goal is to provide and maintain 10,000 acres of habitat in the Central Platte. Wyoming's share is approximately 460 acres of habitat in the Central Platte acquired for mitigation for the Deer Creek project.
4. The monetary budget is approximately \$187M for the first increment of the Program. The federal government will provide approximately \$157M and the states will provide \$30M. Wyoming's share is \$6M. In addition, the states will receive credit of approximately \$130M for their water and land contributions. The Program will be funded approximately 49.5% (\$157M) by the Department of Interior and approximately 50.5% (\$30M and \$130M credit for water and other contributions) by the states.
5. The first increment of the Program will be 13 years. Provisions in the Program call for additional increments if needed and if approved by the states and the Department of Interior. However, it is important to note that the Governor can pull Wyoming out of the Program at any time if it is determined that it is progressing counter to the best interests of our state.
6. An adaptive management scientific approach is being implemented to determine the water and habitat needs of the threatened and endangered birds (whooping crane, least tern, and piping plover) in the Central Platte River basin in Nebraska and the pallid sturgeon in the Lower Platte River basin in Nebraska. Wyoming has a seat at the table during the development of this

information, which will become the best scientific information available for ESA purposes and will become the basis of future consultations.

7. The Program is being implemented by a Governance Committee in which the State of Wyoming and Wyoming water users (including Nebraska water users that use federal storage water from Wyoming reservoirs) have individual members. The Committee operates on a consensus basis, which will provide Wyoming protection that its views must be addressed.

8. The Program serves as the reasonable and prudent alternative under the Endangered Species Act for water related activities (depletions) that occurred prior to July 1, 1997, the date of the initiation of the Cooperative Agreement which led to the Program.

9. Existing water related activities covered by the Program include irrigation, municipal, industrial and other water uses in place on or before July 1, 1997. For example:

a. The existing operations of federal and other reservoirs in Wyoming.

b. The use of Wyoming's entire allocation of Glendo storage water in accordance with Appendix C of the Final Settlement Stipulation and the Modified North Platte Decree entered in Nebraska v. Wyoming, No. 108 Original (hereafter referred to as the Final Settlement Stipulation and the Modified North Platte Decree).

c. Pathfinder Modification Project as described in Appendix F of the Final Settlement Stipulation and Modified North Platte Decree.

d. Transfers approved by the Wyoming Board of Control.

e. Water conservation projects.

f. Receipt of federal grants and loans.

g. Irrigation water uses specified in the North Platte Decree.

h. Issuance and renewals for federal permits, water supply contracts, easements and access agreements.

i. Existing water related activities as defined by the baselines set forth in Wyoming's Depletions Plan.

10. The Program has already served the municipalities of Casper, Cheyenne, Douglas, Rawlins, Saratoga, Sinclair and Torrington. In addition, the Program is providing ESA coverage for agricultural water supplies on lands managed by the U.S. Forest Service and BLM. The Program will provide the mitigation required for the renewal of federal contracts for Glendo storage water. Recently, Pacificorp Energy received ESA clearances for improvements to its river intake on the North Platte River.

11. Why did the states stay the course during 14 years of negotiations relating to the Program? The state representatives had several meetings and discussions relating to future life without a Program and came to the following conclusions:

a. The Fish and Wildlife Service would be obligated under ESA to undertake separate, individual ESA consultations on the federal reservoirs, other major reservoirs in each state, and other existing water related activities of our citizens. The likely outcome would be that the operations of those reservoirs and water supplies that are presently serving our water users would be reconfigured to provide water for the endangered species and their habitat. This would result in the loss of more than the 130,000-150,000 acre feet of water to be provided by the Program. The loss of this water would “ripple” through each state’s water right system impacting not only the users of the storage water and other existing water supplies but also all water users in our states.

b. The following table depicts the goals of the Fish and Wildlife Service with and without a cooperative Program:

<u>Element</u>	<u>With a Program</u>	<u>Without a Program</u>
Water Goals	150,000 acre feet/year	417,000 acre feet/ year
Habitat Goals	10,000 acres	29,000 acres

The implications of the above table are that, without a Program, the U.S. Fish and Wildlife (FWS) would be using the individual consultations with water users requiring federal approvals in Wyoming, Colorado, and Nebraska to meet a goal of 417,000 acre feet per year for the habitat in Central Platte, Nebraska. In addition, the same water users would likely be required to financially contribute toward the development of 29,000 acres of habitat in Central Nebraska.

In Wyoming, if the FWS uses the same formulas as it has in the past for individual consultations, FWS may expect the federal reservoirs alone to provide approximately 88,000 acre feet per year without a Program, instead of the 25,000 acre feet proposed by the Environmental Account under the Program.

c. Prolonged and costly law suits would likely be initiated by each state or by the states collectively, challenging the ESA and the Fish and Wildlife Service’s interpretation of the ESA. Recent case history indicates that unless there is meaningful reform to ESA, investments in such litigation would likely be lost. The Program is based on the principle that our water users will be better served by cooperation rather than litigation.

d. Wyoming’s participation in the Program will ensure ESA compliance for our water users for at least 13 years and perhaps longer. During the 13 years, the participants in the Program will be working to find the most effective means to provide habitat for the endangered and threatened birds in the Central Platte, Nebraska.

Attachment D
Tracking, Accounting and Management of the Exported Water

The following is a description of the process that will be used to deliver the exported water to Central Platte, Nebraska for fish and wildlife and environmental purposes:

1. The final decisions regarding the use of all water for purposes of the Platte River Recovery Implementation Program (PRRIP), including Wyoming's water contribution or water leases, will be determined by the U.S. Fish and Wildlife Service's (FWS) Environmental Account Manager. Item 7 below describes the input the states will have in assisting the FWS in making their water management decisions. Allowing the FWS to manage the Program water was a concession made by the states with a purpose in mind. The FWS has historically wanted water to manage for the benefit of the Central Platte. The state representatives during the negotiations that led to the PRRIP understood that managing water as envisioned by the FWS for environmental purposes halfway across the State of Nebraska would be very difficult, if not impossible. As the states understood that the FWS may be skeptical if we controlled the PRRIP water, the states agreed to provide water to the PRRIP so FWS could attempt to achieve their water supply goals for the Central Platte. The water will be used to conduct research through an adaptive management process to determine the most effective means to develop habitat for the threatened and endangered species.
2. Exhibit 9 to the Final Settlement Stipulation for the Nebraska v. Wyoming law suit established the carriage (conveyance) losses from Alcova Reservoir in Wyoming to the Lewellen gage in Nebraska, just upstream of Lake McConaughy.
3. The FWS Environmental Account Manager, using the annual operating plan discussed later herein, will request releases of water stored in the Environmental Account in the Pathfinder Modification Project (PMP). Reclamation, after consulting with the WWDO, will make the releases. The storage water released will be administered by the Wyoming State Engineer's Office to ensure the water, less prescribed conveyance losses, arrives at the gage at the Wyoming/Nebraska state line. The most efficient time to release the water from the Environmental Account is the month of September when conveyance losses are lower and activity on the river is limited. The water must be moved to the state line before the gates at Guernsey Reservoir are closed in the fall and the North Platte River below Guernsey Reservoir can no longer convey water from upstream storage releases. The Wyoming State Engineer's Office will determine the actual amount of the water released from the Environmental Account that arrives at the state line. This information will be coordinated with the Nebraska Department of Natural Resources (NDNR) on a daily basis.
4. The protection and accounting of the water from the state line to the Lewellen gage will be performed by the NDNR. However, Reclamation and the Wyoming State Engineer's Office will monitor the NDNR's protection of the water. As the carriage losses in this reach of the river are established in the previously cited Exhibit 9, Reclamation and the Wyoming State Engineer's Office will know how much of the water at the Lewellen gage should be credited to

Wyoming. The amount of water released from the Environmental Account in the PMP arriving at Lewellen will be Wyoming's annual water contribution to the Platte River Recovery Implementation Program. In other words, Wyoming's obligation to provide water is met when the water reaches the Lewellen gage.

5. The FWS Environmental Account Manager could use Wyoming's water contribution at the Lewellen gage in the following manner:

a. Bypass the water through Lake McConaughy or store the water in the PRRIP's Lake McConaughy environmental account for later release.

b. Water could be bypassed or released to the North Platte River for conveyance to the Central Platte. The NDNR has established conveyance loss factors from Lake McConaughy to the habitat area. The NDNR will administer the releases to ensure the water is not diverted by intervening appropriators and that the water, less conveyance losses, arrives at the habitat area.

c. Water could be bypassed or released into the canal and reservoir system owned by the Central Nebraska Public Power and Irrigation District and Northern Public Power District under the condition that the districts must ensure that the water will not incur any more conveyance losses than if the water was released directly to the river. The NDNR will ensure this condition is met. Releasing water into the district system provides re-timing and re-regulation benefits to the PRRIP and allows for deliveries of Program water in excess of the available channel capacity of the North Platte River.

6. While Wyoming will have met its water supply obligations to the PRRIP with the delivery of water to the Lewellen gage, Wyoming representatives to the PRRIP will be afforded the opportunity to review the administration of Program water and provide input into water management plans of the FWS Environmental Account Manager, as well as monitor the use of the Wyoming's water contribution. Water monitoring is an important aspect of the PRRIP. At the end of thirteen years, the parties must decide if the use of water is an effective and efficient means to develop and maintain habitat for the target species (cranes, terns and plovers). The states have long contended that habitat is best developed and maintained with mechanical means. The PRRIP will hopefully serve to resolve this matter.

7. The FWS Environmental Account Manager will draft an annual operating plan (AOP). The draft AOP will outline the amount of Program water that will be released in the upcoming year and the purposes of the releases (peak flows, pulse flows, or minimum flows). Representatives of the State of Wyoming will have many opportunities to have input into the AOP and monitor the use of Wyoming's water contribution and all Program water:

a. As a contributor of water to the PRRIP, Wyoming is a project sponsor and will have the opportunity to review and comment on the draft AOP as a member of the Reservoir Coordinating Committee.

b. Wyoming has a representative on the Environmental Account Committee (EAC). The Environmental Account Manager must consult with the EAC during the drafting of the AOP.

c. Reclamation, Wyoming, and Wyoming water users have representatives on the Water Advisory Committee, the technical arm of the PRRIP's Governance Committee on water related issues.

d. Reclamation, Wyoming and Wyoming water users also have representatives on the PRRIP's Governance Committee. The Governance Committee or its individual members may recommend changes to the AOP at any time.

At the end of each year, the FWS Environmental Account Manager will prepare a report documenting the Program water operations for the previous year and describing whether or not water released served the goals and objectives outlined in the AOP.