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STATE ENGINEER'S FINAL OPINION AND RECOMMENDATION

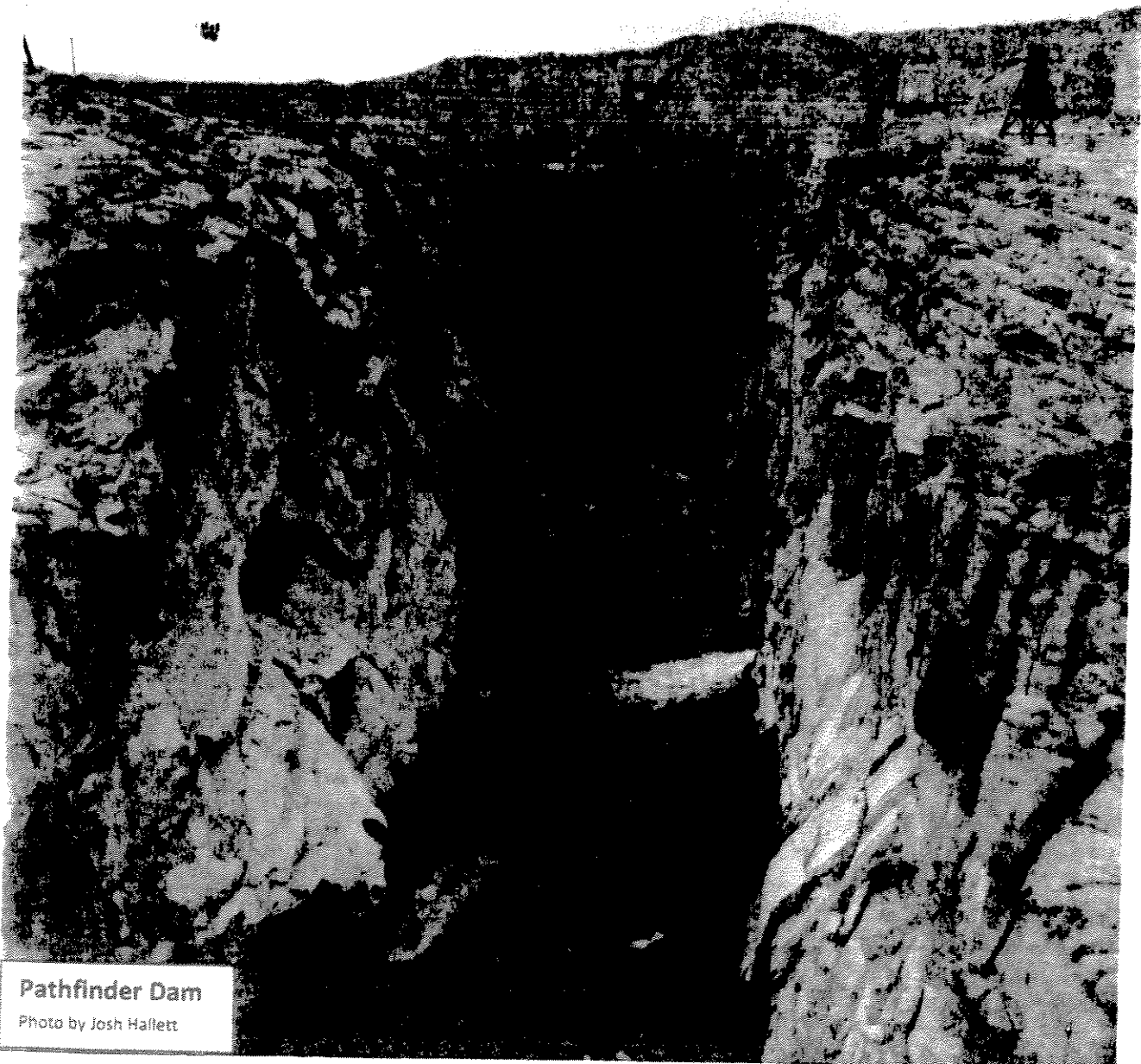
on the

APPLICATION TO EXPORT STORAGE WATER

from the

PATHFINDER MODIFICATION PROJECT

January 14, 2009



Pathfinder Dam

Photo by Josh Haffett



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January 14, 2009

Honorable John J. Hines
President, Wyoming Senate

Honorable Colin M. Simpson
Speaker of the House

Wyoming State Legislature
220 West 24th Street, Room 213
Cheyenne, WY 82002

RE: State Engineer's Final Opinion Regarding an Application under W.S. § 41-3-115

Dear Senator Hines and Representative Simpson,

On November 17, 2008, the Bureau of Reclamation and the Wyoming Water Development Commission jointly submitted a document entitled "Application to Export Storage Water from the Pathfinder Modification Project" to my office for review. Pursuant to WYO. STAT. ANN. § 41-3-115, I have reviewed the application, rendered a preliminary analysis of it, advertised and held a public hearing about it in Natrona County (where the proposed appropriation is located) and solicited public comment on the proposal. Upon consideration of the application, comments received at the hearing and during the comment period which followed, and all other information I deemed to be relevant, I have prepared the enclosed final opinion and recommendation and respectfully submit it to the legislature in keeping with the requirements of WYO. STAT. ANN. § 41-3-115(r) (i) – (x). In summary, I respectfully recommend that the proposed action be approved by the legislature.

Sincerely,

Patrick T. Tyrrell
State Engineer

Enc: State Engineer's Final Opinion and Recommendation, with attachments

CC: Honorable Dave Freudenthal, Governor
Honorable Bruce A. Salzburg, Attorney General
Wyoming State Senators, 2008 Senate, 60th Legislature
Wyoming State Representatives, 2008 House, 60th Legislature
John H. Lawson, Wyoming Area Manager, U.S. Bureau of Reclamation
Michael K. Purcell, Director, Wyoming Water Development Office

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BEFORE THE WYOMING STATE ENGINEER

IN THE MATTER OF THE APPLICATION BY THE BUREAU OF RECLAMATION AND THE WYOMING WATER DEVELOPMENT COMMISSION TO EXPORT A PORTION OF THE UNITED STATES OF AMERICA APPROPRIATION, PERMIT NO. 609 RES., PATHFINDER RESERVOIR, STORING WATER FROM THE NORTH PLATTE RIVER WITH A PRIORITY OF DECEMBER 6, 1904 FOR IRRIGATION, DOMESTIC, MUNICIPAL, FISH & WILDLIFE AND ENVIRONMENTAL USES

STATE ENGINEER'S FINAL OPINION AND RECOMMENDATION

I. Introduction

Having completed a review of an application dated November 17, 2008 for the appropriation of water stored in Pathfinder Reservoir for use out of state (commonly referred to as "export") pursuant to WYO. STAT. ANN. § 41-3-115, this final opinion about, and recommendation in favor of, that application is hereby rendered by the Wyoming State Engineer. The complete application is included as Appendix A herein.

The United States Bureau of Reclamation (Reclamation) is the owner and operator of Pathfinder Reservoir and the Wyoming Water Development Commission (WWDC) is the contractor for storage water in the Pathfinder Modification Project (PMP). The PMP is comprised of two accounts within the original adjudicated capacity of Pathfinder Reservoir. Additional uses for the Environmental Account with a capacity of 33,493 Acre Feet (AF) and the Wyoming Account with a capacity of 20,000 AF were approved by the Board of Control action on November 4, 2008 (B.O.C. Docket I-2008-1-7). The 2001 Modified North Platte Decree (Modified Decree), and the 2001 Pathfinder Modification Stipulation, envisioned the PMP and the associated accounts.

The application describes a proposed export greater than 1,000 AF which is necessary to fulfill Wyoming's obligation under the Platte River Recovery Implementation Program (Program). WYO. STAT. ANN. § 41-3-115 requires approval of the proposed appropriation by the Wyoming State Legislature after receipt of an opinion and recommendation from the State Engineer.

It is recommended that the legislature approve the application. The following general and statutory analyses provide background for this recommendation.

II. General Summary of the Application

- A. Reclamation and the WWDC seek authorization to export a portion of the water stored in Pathfinder Reservoir to serve as the State of Wyoming's water contribution to the Program. This water contribution, in addition to Wyoming's monetary contribution, would provide regulatory certainty, within the context of the Program, to Wyoming water users and federal water contractors under the federal Endangered Species Act, 16 U.S.C. §§ 1531-1544 (ESA).
- B. The exported water would be released from the "Environmental Account" in the PMP. That account has a capacity of 33,493 AF. Water from the account would specifically be used for fish and wildlife and environmental purposes to improve and develop habitat in central Nebraska for four target species (interior least tern, whooping crane, piping plover and pallid sturgeon), all listed as threatened or endangered under the ESA. Annual releases from the Environmental Account would be made as needed to meet Wyoming's obligation for water delivery under the Program. Specific dates and amounts of each release would be determined by the Environmental Account Manager, a representative of the U.S. Fish and Wildlife Service (Service).
- C. Additionally, Reclamation and the WWDC seek authorization to transfer stored water from the "Wyoming Account" in the PMP. Transferred water from this account would be leased to the Program. These leases would have a term of one year and would be accomplished through temporary water use agreements which would need to be approved in advance by the Wyoming State Engineer under WYO. STAT. ANN. § 41-3-110.

The Wyoming Account has a capacity of 20,000 AF. Reclamation would operate this account to provide a reliable yield of 9,600 AF of water per year. If that water is not needed for Wyoming's primary purposes (listed below), the WWDC would be allowed to lease all or part of the yield from the Wyoming Account to the Program. Wyoming's primary purposes, listed in descending priority order, are to provide:

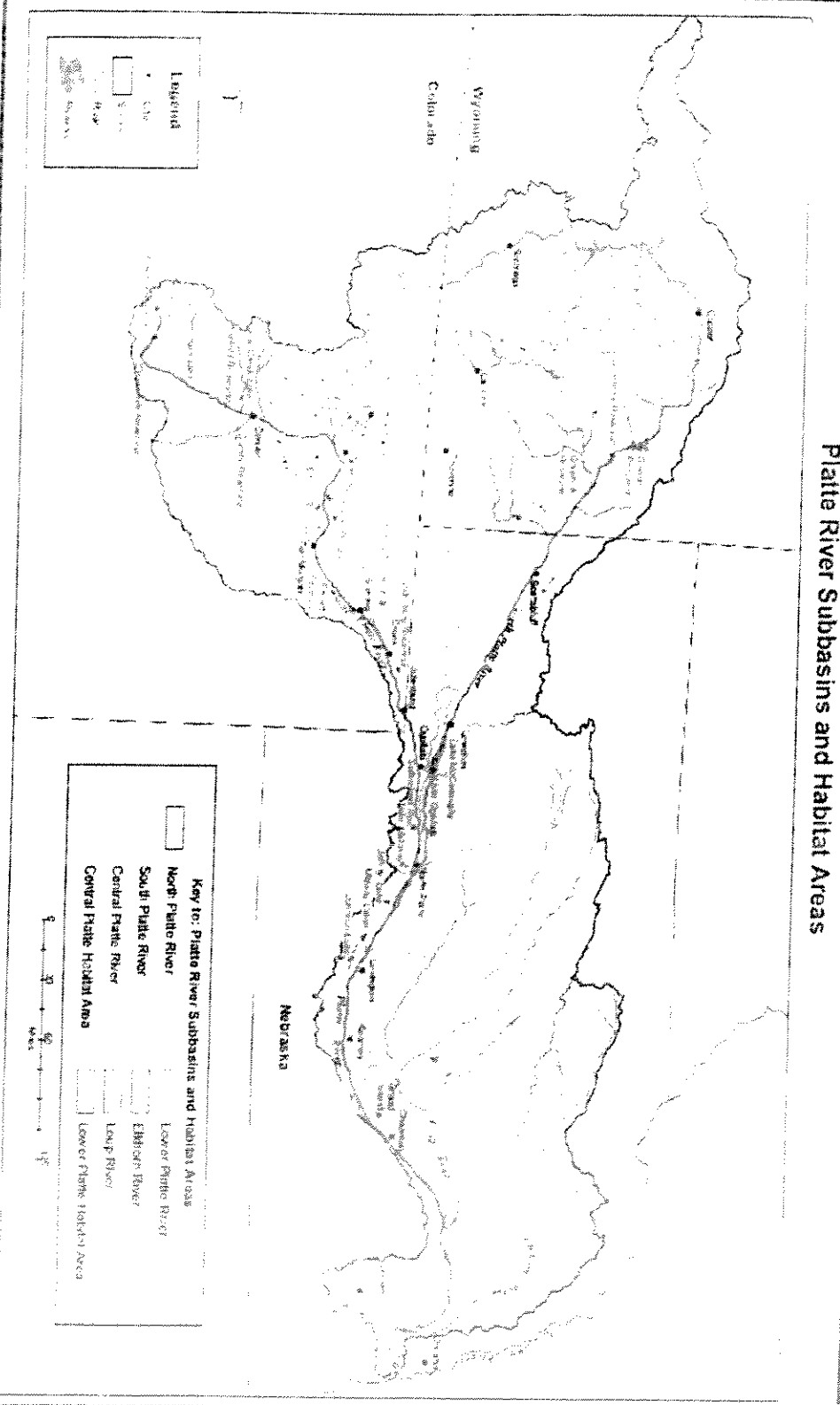
1. A supplemental water supply for Wyoming municipalities during times of water rights regulation.
2. A replacement water supply needed to meet certain Wyoming obligations in the settlement agreement among the States of Wyoming, Colorado and Nebraska and the United States of America, and formally approved by the United States Supreme Court in *Nebraska v. Wyoming*, 534 U.S. 40 (2001).

3. A replacement water supply needed to mitigate water use in excess of Wyoming's existing water-related baselines defined in Wyoming's Depletions Plan, which is defined under the Program. Wyoming's Depletions Plan is the primary instrument used to ensure its compliance with that part of the Program directed at protecting existing water uses as of the Program's baseline date (1997).
4. A potential additional water supply for the Program under temporary annual lease agreements with the State of Wyoming.

The concept of yield should be discussed. A reservoir volume will "yield," predictably, somewhat less than the total volume of a reservoir (or account). This is due to the variability of hydrology, and in low runoff years a reservoir, or an account, may not always fill. So, while a volume of storage describes the maximum needed to fill the space, the yield describes how much water, on a more predictable basis, can actually be expected to be available from that space considering it will not always fill. The yield of the Environmental Account, on an average annual basis, is estimated by the Service to be 25,000 AF. The annual yield of the Wyoming account, on a more firm basis, is estimated to be 9,600 AF.

On the following page, the entire Platte River Basin, including the North Platte and South Platte Rivers, is shown in *Figure S-1 – Platte River Subbasins and Habitat Areas* (Platte River Recovery Implementation Program Final Environmental Impact Statement, Summary, Department of Interior, April 2006). The figure exhibits locations discussed throughout the application and this final opinion.

Platte River Subbasins and Habitat Areas



Legend

- City
- Subbasin
- Habitat Area

Key to: Platte River Subbasins and Habitat Areas

- North Platte River
- South Platte River
- Central Platte River
- Central Platte Habitat Area
- Lower Platte River
- Embury River
- Loop River
- Lower Platte Habitat Area

0 25 50 75 100
Miles

Figure 1. Platte River Subbasins and Habitat Areas

III. Analysis under WYO. STAT. ANN. § 41-3-115

A. State Engineer and Legislature Considerations

WYO. STAT. ANN. § 41-3-115(r) requires both the State Engineer and the legislature to consider the following factors, in addition to any other information deemed relevant by the State Engineer per WYO. STAT. ANN. § 41-3-115(o), in assessing an application for transfer of water for use outside of the state to assure meeting Wyoming's interests in conserving and preserving its water resources for the maximum beneficial use. The assessment of the proposal with respect to each of these factors is given below.

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 No. 609 Res. storing water from the North Platte River with a priority date of December 6, 1904. The transfer water (water proposed for export) would be stored in the Environmental Account and Wyoming Account of that portion of the Pathfinder Reservoir described as the PMP, which is more fully described in Appendix A.

The requested uses of water from the PMP accounts as described in the application are:

- No more than 33,493 AF per year would be exported for Program purposes from the Environmental Account in the PMP.
- No more than 9,600 AF per year potentially would be exported for Program purposes from the Wyoming Account in the PMP. Any such transfer from the Wyoming Account would only occur when water is not needed for other uses in Wyoming, as environmental uses are fourth in order of priority (see Paragraph II.C. earlier).
- The proposed uses for the exported water are fish and wildlife and environmental purposes. The transferred water would be used to benefit threatened and endangered species and their habitat in central Nebraska as required by Wyoming's participation in the Program.

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 and its tributaries in accordance with Permit No. 609 Res. with a December 6, 1904 priority date. It has an adjudicated capacity of 1,070,000 AF. The PMP storage accounts apportioned for the purposes of the proposed exports have a capacity of 53,493 AF. The proposal required a change in use under WYO. STAT. ANN. § 41-3-104 and a petition for that purpose was duly filed with the Board of Control on January 3, 2008. At its public meeting on November 4, 2008 the Board of Control approved an amended petition for a change in use (by adding additional uses to those already existing) for that portion of Pathfinder Reservoir designated as the PMP in the following manner:

<u>Account</u>	<u>Additional Uses</u>	<u>Capacity</u>
Environmental Wyoming	Fish & Wildlife, Environmental	33,493 AF
	Municipal, Fish & Wildlife, Environmental	<u>20,000 AF</u>
Total		53,493 AF

The total adjudicated capacity of Pathfinder Reservoir of 1,070,000 AF would be maintained and existing adjudicated uses (i.e., irrigation and domestic) would not be affected by approval of this proposal. Reclamation's December 6, 1904 priority water right for storage in Pathfinder Reservoir is a senior right in the North Platte Basin during the non-irrigation season. The amount of water available to the proposed export is the same as was previously available to Pathfinder Reservoir under historic operations (see also the response under paragraph III.A.iv. which follows). Water available to this senior right would not be affected by this export of water if approved by the legislature.

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

In other river basins in the West, interpretation by the Service of the ESA's broad authority has sometimes negatively impacted those states' abilities to use and administer water under state law. Federal storage contracts, as well as provisions under interstate compacts and decrees, have also been affected. The Service, as guardian of the species protected by the ESA, is required by Federal law to pursue its objectives with or without the Program. Without approval of this proposal, Wyoming water users may be required to undergo costly and uncertain individual consultation processes to obtain project clearance under the ESA. The collective effect of those consultations could result in the requirement to commit more Wyoming water to achieve Service objectives than that which is expected to be provided by the proposed export.

If approved.

Irrigated agriculture throughout the North Platte Basin has long been the foundation of economic stability for the residents and communities of southeastern Wyoming. One of the goals of the Program is to achieve ESA compliance without disrupting this important economic base.

The Program is a three-state effort through which Wyoming derives benefit by actively working with Colorado and Nebraska to accomplish threatened and endangered species recovery goals. The Service's acceptance of an adaptive management approach, which would be facilitated by approval of this proposal to achieve recovery goals, would likely lessen impacts to individual water users and federal contractors. One such adaptive management approach includes the use of existing canals in Nebraska versus the river channel for water delivery to the critical habitat, which is an action that improves the efficiency of use and reduces loss of Wyoming's Program water. Through participation in the Program, ESA-related regulatory burdens shift from individual water users and federal contractors to the State of Wyoming.

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

The PMP recaptures 53,493 AF of storage space within Pathfinder Reservoir. The present inability to store this amount of water in Pathfinder Reservoir, which serves the North Platte Project, has largely 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 in Wyoming have documented their support of the PMP because they believe the exported water would serve to ensure their water supplies would not be subject to consultation under the ESA.

As the proposal should have no impact on water users upstream of Reclamation's North Platte River reservoirs (see response item III.A.vi.), there are no benefits foregone by that segment of Wyoming water users. The application acknowledges that there may be a small impact to the federal water contractors, since approximately five percent of the space in Pathfinder Reservoir would be devoted to the PMP. However, these contractors have reviewed their risk and are in support of the proposed transfer which will facilitate the Program and PMP because they believe any potential negative impacts attributable to the proposed transfer would be offset by the ESA assurance they expect to gain.

- 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 water proposed for transfer would be delivered from storage space in Pathfinder Reservoir made available through the PMP, there would be minimal effects on return flows that would otherwise be available for Wyoming water users. Those minimal effects would primarily fall upon federal contractors for storage water from Pathfinder Reservoir, and these contractors have already documented their support for this proposal and the PMP itself. A large percentage of the water delivered to North Platte Project contractors is delivered via the Whalen Diversion Dam either to Nebraska or to irrigators in the state line area in Wyoming. The return flows from these deliveries are largely unavailable for diversion to other Wyoming water rights. Lands served by the Kendrick Project are further upstream in Wyoming, so there could be a slightly higher impact to return flows from these lands if the application is approved. However, lands served by the Kendrick Project are presently undergoing operational changes, such as improved irrigation delivery and application practices. These changes are expected to have a more significant impact on return flow dynamics than any effects on return flows potentially attributable to the proposed transfer deliveries.

- vi. *The injury to existing water rights of other appropriators that may result from the proposed use;*

The potential for injury to existing water rights as a result of the change of use was considered at length by the Wyoming Board of Control during its deliberations on the change of use petition. Other appropriators' objections to the proposed change of use were withdrawn and, at its public meeting on November 4, 2008 the Board of Control approved the amended petition for change use (by adding additional uses to those already existing) for that portion of Pathfinder storage water which would be dedicated to the proposed transfer if it is ultimately approved by the legislature. Letters in support of the PMP were received by the Board of Control at its hearing on this matter conducted on October 20 - 21, 2008. The Board of Control received letters from the Chimney Rock Irrigation District, Rock Ranch Irrigation District, Browns Creek Irrigation District, Farmers Irrigation District, Central Irrigation District, Hill Irrigation District, and the Wyoming North Platte River Water Users Association. Consents to the petition heard by the Board of Control were also received from the Pathfinder Irrigation District, Gering-A. Laramie Irrigation District, Goshen Irrigation District, Northport Irrigation

District, and the Casper-Alcova Irrigation District.

During the evaluation of the feasibility of the PMP, which incorporated the effects of the proposed transfer, Reclamation (and the WWDC) completed preliminary hydrologic analyses. These analyses indicate 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 this proposal, since they believe that the proposed export of water would serve to protect their own water supplies from certain requirements under the ESA.

The question at issue for purposes of this application review is whether there would be injury to existing water rights of other appropriators *attributable to the proposed out-of-state transfer of water*. Any effect of this transfer would likely be felt mainly by the federally-held reservoir water rights or, possibly, by other users below Pathfinder Reservoir and above Whalen Diversion Dam. All of the water rights for the Pathfinder and Seminole Reservoirs are held by Reclamation.

Other than some potential impacts to the federal contractors, minimal to no injury to downstream municipalities is anticipated to occur if the transfer is approved. Users upstream of Seminole Reservoir would be protected from injury resulting from storage by the PMP due to Reclamation's stipulation and settlement agreement to develop dual accounting to track the forecasted supply calculations both with and without the PMP in place in keeping with the 2001 Pathfinder Modification Stipulation. Reclamation's utilization of the larger forecasted supply calculation of the two accounting methods benefits the Upper North Platte water users by ensuring that allocation-year-related administration can not occur any more often, or require any more water, than it would if PMP did not exist.

Natural flow users downstream of Pathfinder Reservoir will see little opportunity for injury because the proposed action is simply to move previously-stored water down the river system (the injury impacts of the actual storage having already been addressed). Assuming this water accrued to the Kendrick Project for use by Casper-Alcova Irrigation District rather than being transferred for Program purposes, there is some opportunity for additional use of that water by Kendrick, and the additional return flows to the river that might be generated by that use. Conceivably, the loss of these potential return flows could be a cause of injury. Pragmatically, however,

return flows from Kendrick are already diminishing due to the increases in operational efficiencies in that District. It is an oversimplification to say that if the 25,000 AF of water (as an annual estimate) proposed to be transferred for Program purposes were rather to be stored and diverted by Kendrick, there would be a significant amount returned to the system to become natural flow for other users. First, Kendrick operations would not use another 25,000 AF per year in any case. The water would likely stay in storage as a hedge against future years when Seminole Reservoir stores nothing because its water right does not come into priority. This additional water would also serve to offset annual evaporation losses. Therefore, the water would serve to extend Kendrick's storage uses into future years, not increase them dramatically in any one year. Finally, under improved operations, return flows from Kendrick in general are expected to be less than that seen historically or than that assumed from other typical irrigation diversions.

In addition, the presence of the transferred (or export) water in the system would serve to keep river levels incrementally higher when that water is in transit. Higher levels would improve accessibility to water for natural flow appropriators in the reach from Pathfinder Reservoir to Whalen Diversion Dam. While this effect would not be large, it is a positive, rather than negative, impact of the transfer.

Finally, it is reasonable to view the amount of water comprising the transfer in context of the annual flow of the river. A full irrigation season demand for releases from Guernsey Reservoir is described in the Modified Decree to be 1.1 million AF. If the exported water were used annually in Wyoming, which is unlikely, it might generate return flows on the order of 12,500 AF or less. This represents about 1.1 percent of the total stored water delivered, on average, for use.

The combined effects of little to no reduction in return flows from the Kendrick Project (or, conversely, little opportunity for increased return flows if this water was used there rather than exported), the marginal positive effect of the exported water's physical presence in the system, and the relatively small amount of water at issue relative to the system flows, reveal little likelihood of measurable or demonstrable injury. It is believed that this combination of factors is why many downstream interests, both agricultural and municipal, have consented to or overtly supported this transfer (export). Therefore, no injury to existing water rights is anticipated. Letters in support of the PMP by municipalities were sent from the City of Douglas, City of Casper, City of Cheyenne, and the Central Wyoming Regional Water System

Joint Powers Board.

- 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 Wyoming Water Development Commission is a joint applicant for the proposed transfer which indicates that this agency considers the proposal congruent with Wyoming's water development plans. Federal administration of the ESA has impacted Wyoming's water development plans and water resources policies for many years. Approval of this proposal would facilitate future water development plans and water resources policy by assisting Wyoming water users to achieve ESA compliance and by providing regulatory certainty in the context of the Program. It is believed there are no other planned uses or developments for which a permit has been or may be issued with which this proposal, if approved, may unreasonably interfere.

- 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;*

Wyoming participates in the Program in order to allow for the continued use, and potential development, of water for the purposes outlined in the application and to minimize impediment or delay which could result from individual water users having to achieve ESA compliance. The North Platte River in Wyoming has for decades been understood to be an essentially fully-appropriated system. This fact, not the PMP or the export of water for the Program, is what is recognized in the Modified Decree and is effectively controlling Wyoming's future increases in water use in this basin. In general, the recovery of PMP-related space in Pathfinder Reservoir is not viewed to be an additional use imposed upon this system, because Seminole Reservoir generally stored any excess water when Pathfinder Reservoir filled to its restricted level. For all practical purposes, the PMP simply takes the water back.

It is reasonably foreseeable that new large uses in the North Platte Basin will obtain their water by the retirement of other uses. Therefore, the proposed use cannot significantly impair future the development of water in this basin. Any

other potential injurious effects of restoring the full adjudicated storage in Pathfinder Reservoir in the reach above Pathfinder Reservoir have further been resolved through the settlement and stipulation reached during the petition process (B.O.C. Docket I-2008-1-7), and below Pathfinder Reservoir by consent to the PMP and the Program by interests in that reach. Therefore, the proposed transfer is not expected to impair reasonably foreseeable uses as described.

- ix. *Whether the proposed use will adversely affect the quantity or quality of water available for domestic or municipal use;*

The proposed use cannot affect the available quantity of water as the quantity of water available for new large uses is constrained as described above. The priority list of purposes for the use of water from the Wyoming Account within Pathfinder Reservoir specifies that supplemental water for municipal use is the number one priority and would be satisfied before water from the Wyoming Account is made available for transfer. Thus, no appreciable impact on water quantity is expected to occur. There will be future water made available to municipalities as a result of the Wyoming Account. Also, domestic use permits continue to be granted as coverage for these uses is provided in Wyoming's Depletions Plan and the Program. This transfer is not expected to affect domestic uses.

No water quality impact, positive or negative, is anticipated should this proposal be approved by the legislature. Primarily, this is due to the project simply recovering the capacity within Pathfinder Reservoir that originally existed. The proposal requires no water from new sources that may be of a differing quality, and there is nothing in the character of the proposed uses that would materially reduce the quality of water in the North Platte River system. Additionally, export water in transit could serve to dilute return flow related constituents in the lower river. The export of water simply means the water will be shepherded to the state line for Program uses in Nebraska. Therefore, no water quality impacts are foreseen.

- 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.*

Shallow groundwater resources are more available in the central and lower North Platte Basin in Wyoming, especially in the Torrington area, which in turn means that shallow groundwater usage in the basin is exploited more

heavily than other areas. In the Torrington area, ground water levels benefit by being recharged from surface water supplies. In fact, the current levels of ground water are largely higher than what would naturally exist because of decades of percolation from flood irrigation and canal leakage. However, because ground water recharge is already being reduced to some extent by conversion to pivot systems, and drought, the marginal impact from an approximate five percent reduction in surface water application (which is what would be seen by local irrigation interests who have consented to the change of use) is likely negligible.

In addition, the marginal difference (increase) in the amount of water which would be transported in the North Platte channel to satisfy this transfer would be quite small and no significant influence to the groundwater resource is expected.

IV. Other Relevant Information

- A. WYO. STAT. ANN. § 41-3-115(s) indicates that nothing in that section should be construed to interfere with existing compacts, court decrees, and treaty obligations. The 2001 Pathfinder Modification Stipulation envisions the development of the PMP, which in turn depends upon approval of the proposed transfer to achieve full compliance with the terms of the Program documents. The proposed transfer is integral to the development of the PMP for Program purposes. Therefore, nothing in this proposal interferes with Wyoming's obligations, or rights, under those instruments. Likewise, the PMP and the transfer (export) of water stored therein are not in conflict with any provisions of the Modified Decree or any other relevant document.

- B. This proposal is intended to assist Wyoming to comply with the requirements of the Platte River Recovery Implementation Program, which was established by Colorado, Nebraska and Wyoming and the Department of the Interior to help resolve Endangered Species Act issues in the Platte River Basin. One of Wyoming's obligations established under the Program is to provide water to be used for fish, wildlife and environmental purposes and to develop habitat in Nebraska for four target species: the interior least tern, whooping crane, piping plover and pallid sturgeon. (Transcript of Hearing [Tr. Hrg.], p. 5).

- C. WYO. STAT. ANN. § 41-3-320 provides that water stored in any reservoir cannot be used outside the boundaries of Wyoming without a special permit from the Wyoming State Engineer and that the Wyoming State Engineer may deny any such use that would be detrimental to the public interest. A permit therefore would be issued to make this action a matter of administrative record in the State Engineer's Office.

V. Public Process

A. Public Hearing

The following paragraphs describe the major points presented at the hearing:

1. As required by WYO. STAT. ANN. § 41-3-115, a public hearing on this proposal was conducted in Casper, Wyoming on December 12, 2008, after having been advertised, along with the availability of a reasonable summary of a preliminary analysis of the proposal, for three consecutive weeks in the Casper Star Tribune. (Tr. Hrg. pp. 2, 3). It was attended by 10 people, none of whom registered any objection to the proposal.
2. This proposal is intended to assist Wyoming to comply with the requirements of the Program, which was established by Colorado, Nebraska and Wyoming and the Department of the Interior to help resolve Endangered Species Act issues in the Platte River basin which date back to the 1980s. A joint effort involving the Bureau Reclamation and the governors of the three states led to a 1997 cooperative agreement. (Tr. Hrg., pp. 5, 10).
3. One of Wyoming's commitments to the Program is to provide water from Pathfinder Reservoir to be used for fish, wildlife and environmental purposes and to develop habitat in Nebraska for four target species: the interior least tern, whooping crane, piping plover and pallid sturgeon. The water contributions sought in this application are projected to provide regulatory certainty, in the context of the Program, for clearances needed under the federal Endangered Species Act for existing and some new water uses in Wyoming. (Tr. Hrg., pp. 5, 6).
4. Pathfinder Reservoir, in Natrona County, Wyoming, has an adjudicated capacity of 1,070,000 AF of water, and the entire appropriation stored in Pathfinder Reservoir is in the name of the United States of America, with a priority date of December 6, 1904. The 53,493 AF of storage space previously lost to sedimentation will be recaptured by raising Pathfinder Dam's spillway. (Tr. Hrg., pp. 1, 6, 11).
5. The federal modification of Pathfinder Reservoir required the passage of federal legislation, which occurred in May, 2008. The federal government has also been required to approach the Wyoming Board of Control to seek approval for a change of use, by adding uses and it did so in 2008. (Tr. Hrg.,

pp. 11, 12). The Board approved the requested change at its meeting held November 4, 2008. (B.O.C. Docket I-2008-1-7).

6. A number of upstream water users initially opposed the change of use under consideration by the Wyoming Board of Control but their concerns were resolved by a stipulation and settlement agreement reached in October, 2008. The Board of Control conducted a public hearing in Saratoga on the change of use in October, 2008 and ultimately approved an amended change of use petition at its regular meeting in Cheyenne in November, 2008. (Tr. Hrg. p. 12).
7. Water stored in Pathfinder Reservoir is divided into various accounts for management purposes. This application seeks the ability to transfer up to 33,493 AF of water from the Environmental Account and the 9,600 AF yield of the 20,000 AF Wyoming Account. The adjudicated capacity of Pathfinder Reservoir, 1,070,000 AF, would remain unchanged if this proposal is approved by the Wyoming State Legislature. (Tr. Hrg., pp. 6, 13).
8. Wyoming, Nebraska and Colorado all contribute water to the Program. These water contributions, along with monetary contributions, are needed to obtain federal Endangered Species Act clearances throughout the Platte River Basin for the continued operation of existing federal reservoirs and other uses in Wyoming, and to facilitate consultation processes to obtain federal funding for some water conservation projects and other projects, including irrigation uses specified in the 2001 Pathfinder Modification Stipulation, renewals of federal permits, water supply contracts, easements and access agreements and other existing uses defined in a document entitled Wyoming's Depletions Plan. (Tr. Hrg., pp. 13-15).
9. The application seeks to transfer 33,493 AF of water from the Environmental Account within Pathfinder Reservoir and, on a contingency basis, a maximum of the 9,600 AF yielded from the 20,000 AF Wyoming Account. The 9,600 AF would be made available in times of water scarcity and in the following order of priority: first as a supplemental supply for Wyoming municipalities during periods of water right regulation; second, as a replacement water supply to meet Wyoming's obligations under the 2001 Pathfinder Modification Stipulation; third, as a replacement water supply to offset exceedances of the baseline amounts which Wyoming is allowed to use under the Depletions Plan. (Tr. Hrg. pp. 15, 16).
10. In water years when the 9,600 AF yield of the Wyoming Account is not

needed for the listed priority purposes, the applicant requests the flexibility to lease it or a portion of it, to the Platte River Recovery Implementation Program and be paid for that water by the lessee on one-year terms. (Tr. Hrg. p. 16).

11. Mr. David Hill, Public Utilities Manager for the City of Casper, appeared at the hearing convened on this application on December 12, 2008. He voiced the continued support of the City of Casper for the proposal, indicating that the City had been anticipating it for a number of years. Mr. Hill stated the City fully supports the proposal to transport water for environmental purposes out of state and is excited about seeing the project come to fruition after many years. (Tr. Hrg. pp. 17, 18).
12. The applicant(s) explained how Wyoming could be assured that transferred water would actually make it to the project area in Central Nebraska once it passes the state line. Mr. Purcell of the Wyoming Water Development Commission explained that, in his view, Wyoming's only obligation is to deliver water from the Environmental Account to the state line. However, the Wyoming Water Development Commission will nevertheless be seeking a Nebraska permit to shepherd the water that arrives at the Wyoming/Nebraska state line down to the Lewellen gage upstream of Lake McConaughy near Ogallala, Nebraska. Release orders from the Environmental Account in Lake McConaughy will be made by the Service and water would be shepherded down through the system to the critical habitat areas of the central Platte River Basin. The water contributed by each of the three states is actually managed by the U.S. Fish and Wildlife Service but its representative is subject to the oversight of a number of committees on which Wyoming is well-represented. One goal of those committees is to make sure that the water arrives at the central Platte to effectively and efficiently achieve the desired habitat benefit and complete habitat experiments needed to support adaptive management. Nebraska is equally committed, as are Wyoming and Reclamation, to effectuate the purposes of the water transfer, if it is approved. (Tr. Hrg. pp. 19, 20, 21).
13. Under the terms of the Program, the State of Wyoming has an obligation to deliver water to the state line for environmental purposes in Nebraska. This obligation is separate from the State of Nebraska's need to issue a permit, and for that reason, the two obligations should not be combined. If Nebraska fails to issue a permit, the State of Wyoming should not lose its benefits which derive from being included in the Program. Additionally, the State of Wyoming is required by the 2001 Pathfinder Modification Stipulation to apply

for the appropriate permits in Nebraska to ensure the Program water is delivered from the state line to the vicinity of Lewellen, Nebraska. Nebraska is signatory to the same stipulation and is supportive of Wyoming's efforts to obtain the permit to shepherd water to that area. The stipulation, in fact, says Nebraska cannot hamper Wyoming's attempts to supply such water. (Tr. Hrg. pp. 19, 20, 21, 22).

14. Mr. Randy Tullis, Water Division I Superintendent and member of the Wyoming Board of Control, was asked if he foresaw any problem in shepherding the water at issue in this application from Pathfinder Reservoir to the Wyoming/Nebraska state line, and whether he anticipated any injury which might occur to water users in that stretch of the North Platte River as it flows through southeast Wyoming to Nebraska. He responded that he did not see any conveyance problems and that he expected releases to be accomplished at a time of the year that would not conflict with either natural flow or storage deliveries for irrigation water. (Tr. Hrg. p. 23).

15. Mr. John Barnes, the Surface Water Administrator for the State Engineer's Office, was asked what additional permitting would be necessary with his program if this transfer were approved by the legislature. He indicated that the project proponents could file a special application with the State Engineer to permit the transmittal or export of water outside Wyoming boundaries and that this could be treated as a secondary permit to allow for the transport of water to the state line. (Tr. Hrg. pp. 24, 25). This approach would be directed at complying with the requirements of WYO. STAT. ANN. § 41-3-320.

B. *Public Comments*

The following additional comments were received on the proposal. Responses are as follows:

1. **Wyoming Stock Growers Association Comment:** "It is our understanding that Wyoming's obligation under the Recovery Program is to provide an average of approximately 25,000 AF per year from the Environmental Account. The application provides for the export of up to 33,493 AF. What is the basis for this additional export beyond the state's Recovery Program obligation?"

State Engineer's Response: The U.S. Fish and Wildlife Service established the 25,000 AF per year as an estimate of the average annual yield of

Wyoming's Environmental Account contribution. There is no requirement or obligation for Wyoming to meet this level. The range of Wyoming's contribution to the Program is essentially zero AF to 33,493 AF, with an estimated 25,000 AF average contribution by the Service. Wyoming's obligation is to provide the available water of the Environmental Account, up to the 33,493 AF maximum in any one year. The Environmental Account is administered by the U.S. Fish and Wildlife Service, who is Environmental Account Manager.

2. **Wyoming Stock Growers Association Comment:** "It seems clear that the state has no obligation to lease water for export from the Wyoming Account. What is the rationale for such leasing with the inherent risk that this will establish an additional dependence on the export of Wyoming water?"

State Engineer's Response: The comment is correct – there is no obligation to lease water from this account, and it would only occur if the state saw a benefit from such leasing and there was no other Wyoming need for the water. Leasing from the Wyoming Account will only occur through a one-year temporary water-use agreement approved by the State Engineer as allowed under WYO. STAT. ANN. § 41-3-110. The year-to-year decision to lease would be based on the availability of water and the satisfaction of higher priority uses within Wyoming. Due to the year-to-year leasing decision and use of one-year leases, this structure will not create a dependency on the use of this water, as there is great variance associated with the annually availability of water.

3. **Wyoming Stock Growers Association Comment:** "What is the proposed term of the export permit?"

State Engineer's Response: There is no specific end term associated with the transfer (or export) of water outside the state boundary. If the legislature approves this transfer of water outside the state boundaries, the legal framework then exists to complete that transfer. Until such time as the statute is amended or repealed, the ability exists to continue the transfer. The Program is being implemented in an incremental manner, with the first increment covering the 13-year period from 2007 through 2019. Additional increments are proposed beyond 2019, and will be subject to the National Environmental Policy Act (NEPA) and ESA compliance and will incorporate the wealth of information gathered during the first increment. Because the Program is voluntary, the State of Wyoming may conclude at some time in the future that it is not in Wyoming's interest to remain in the Program, and the

legislature may elect to repeal the export approval at that time. It is important to show Wyoming's commitment to the Program by allowing the export of water to occur with certainty as long as the state's water users are covered by its protections.

4. **Wyoming Association of Conservation Districts Comment:** "[We] ... request that additional information be provided in regard to the [idea that] no water quality impact, positive or negative, is anticipated."

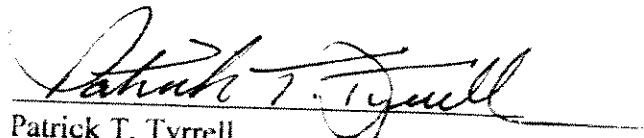
State Engineer's Response: Pathfinder Reservoir's adjudicated capacity is, and it has in the past held up to, 1,070,000 AF of water. Due to sediment collection over time, the reservoir is now considered full at 1,016,507 AF. The recapturing of 53,493 AF of water through the PMP represents approximately a five per cent increase in potential storage per year. Approval of this proposed transfer would not constitute a "new" source of water and there are no expected or reasonably anticipated changes in the activities and operation of Pathfinder Reservoir that would alter the water quality of the North Platte River. The PMP returns the use of Pathfinder Reservoir, in terms of overall storage capacity, to the way it was designed to run, and has run, historically.

VI. Conclusion

The preliminary analysis of the application indicated this proposal should proceed through the process for consideration by the Wyoming State Legislature, for all the reasons given above. Information obtained at the public hearing conducted on this proposal, in the form of public comment, or upon review of agency files, did not change this preliminary finding.

In conclusion, the joint application is acceptable and describes a use of water out-of-state which is in keeping with Wyoming's interests in conserving and preserving its water resources for the maximum beneficial use. Under the terms of WYO. STAT. ANN. § 41-3-115(r), it is therefore respectfully recommended that the legislature approve the proposed transfer.

Dated this 14 day of January, 2009.


Patrick T. Tyrrell
Wyoming State Engineer