

Written Testimony of Mike Purcell, State of Wyoming
Before the United States House of Representatives
Committee on Natural Resources
Subcommittee on Water and Power

In Support of H.R. 1462
Platte River Recovery Implementation Program and
Pathfinder Modification Project Authorization Act

My name is Mike Purcell. I am Wyoming Governor Dave Freudenthal's representative on the Governance Committee of the Platte River Recovery Implementation Program. Presently, I am serving as Chairman of that Governance Committee. I would like to offer the following thoughts relating to the importance of H.R. 1462 to the Department of Interior, States of Colorado and Nebraska, and, in particular, the State of Wyoming.

The Platte River Recovery Implementation Program and Pathfinder Modification Project enjoy the support of water users in the Platte River Basin in Wyoming, including the irrigators that contract for federal storage water, several municipalities, and others.

I. Platte River Recovery Implementation Program (Program)

Issues related to the endangered birds and the critical habitat in the Central Platte River in Nebraska have affected water use and management in the States of Colorado, Nebraska, and Wyoming since the late 1970's. They have affected the relationships between the states and with the federal government. The Platte River Recovery Implementation Program affords the states the opportunity to address these issues through cooperation rather than conflict.

After 14 years, the negotiations have been completed. The Wyoming Legislature has approved the state's Program financial contribution of \$6M and Governor Freudenthal and the other signatories have executed the necessary agreements. The Program commenced on January 1, 2007.

The Program will provide the states coverage under the Endangered Species Act (ESA) through simplified consultation processes for existing water related activities and certain specified new water related activities. The states and their water users will not be required to complete contentious ESA consultations on each water related activity requiring federal approvals. Without the Program, proponents of these activities would likely be required to provide funding and water to gain clearance under the ESA.

A. Key Components of the Program

1. A major Program objective 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.

2. Another Program objective is to provide and maintain 10,000 acres of habitat in the Central Platte.
3. The monetary budget is approximately \$187M for the first increment of the Program. The federal government will provide approximately \$157M. To match the federal funding, the three states are making \$160M in contributions. These contributions include: \$30M in cash, approximately 3,000 acres of land, and an average of 80,000 acre feet of water per year. Program cash will be dedicated to additional land purchases and restoration, additional water (50,000-70,000 acre feet of water per year), and an adaptive management program.
4. While it does not show up as a contribution to match the federal funding, it should not be overlooked that the states have also agreed to curtail their water use to 1997 levels. Each state has developed a depletions plan which has been approved by the parties that outlines how that state will manage its water to meet this threshold. Implementing these depletions plans will be costly and will affect future water use and management decisions in all three 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.
6. An adaptive management scientific approach will be implemented to determine the water and habitat needs of the 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. The states and their water users will have 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 will be implemented by a Governance Committee in which the states and their water users will both have individual members. The Committee will operate on a consensus basis, which will ensure that all views must be addressed.
8. The Program will serve as the reasonable and prudent alternative under the Endangered Species Act for existing 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, and certain specified new water related activities.

B. Why?

Wyoming, Nebraska, and Colorado became interested in the Program when it became apparent that the 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. Therefore, the three states, the

Department of Interior, affected water users, and environmental groups began seeking a cooperative solution in 1993.

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:

1. The Fish and Wildlife Service would be obligated under ESA to undertake separate ESA consultations on the federal reservoirs and other major reservoirs in each state. The likely outcome would be that the operations of those reservoirs that are presently serving our water users would be reconfigured to provide 417,000 acre of feet water for the endangered species and their habitat. The loss of this water would “ripple” through each state’s water right system impacting not only the users of the storage water but also all water users in our states.
2. Without the Program, ESA consultations required for future federal actions (permits, including renewals; funding; contracts; easements; and others) would require our water users (irrigators, municipalities, industries and others) to replace existing and proposed new depletions.
3. 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.

II. Pathfinder Modification Project

A. Description

The Pathfinder Modification Project is authorized by Appendix F to the Final Settlement Stipulation relating to the Nebraska v. Wyoming law suit, as approved by the U.S. Supreme Court. A copy of the Stipulation is attached to this written testimony. The Bureau of Reclamation (USBR) has a Wyoming water right to store 1,070,000 acre feet of water in Pathfinder Reservoir for the benefit of the North Platte Project, which includes irrigated land in Eastern Wyoming and Western Nebraska. Over the years, 53,493 acre feet of the storage capacity of the reservoir have been lost to sediment. The project would recapture this storage space. The recaptured space would be administered through two accounts, the “Environmental account” and the “Wyoming account.” The operation of these accounts was carefully crafted during the negotiations that lead to the settlement of the Nebraska v. Wyoming law suit which has been approved by the U.S. Supreme Court in November, 2001. The United States and the States of Colorado, Nebraska, and Wyoming were parties to the negotiations.

An “Environmental account” consisting of 33,493 acre feet of the proposed 53,493 acre foot enlargement will be established and will be operated for the benefit of the endangered species and their habitat in Central Nebraska. The Environmental account is

Wyoming's water contribution to the Platte River Recovery Implementation Program (Program) on behalf of all of its water users in the Platte River basin, including the federal government and its major storage facilities in our state and irrigators in Nebraska that rely on storage water from the federal dams in Wyoming.

The State of Wyoming has the exclusive right to contract with the 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 insure an annual firm yield of 9,600 acre feet. This is the same yield that was anticipated from the proposed Deer Creek Dam and Reservoir. Upon completion of the Pathfinder Modification Project, Wyoming will cancel existing water rights and federal permits pertaining to the Deer Creek Project.

The "Wyoming account" will serve as a much needed supplemental water supply for Wyoming's municipalities during times of water rights regulation. Many of the municipal water supplies along the North Platte River have junior water rights which may be shut off or severely curtailed during water rights regulation. The account will also provide water to meet some of Wyoming's obligations specified in the Nebraska v. Wyoming settlement agreement and documented in the Modified North Platte Decree.

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. 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 Seminole Reservoir.

The Pathfinder Modification Project is essential to Wyoming in order for the state to meet its obligations under the Program and the Modified North Platte Decree.

B. Status

State authorization to contract with the USBR was approved by the 2006 Wyoming Legislature. The Wyoming Legislature has approved an appropriation of \$8.5M to implement the project.

The next critical step is securing Congressional authorization for the Secretary of the Interior to modify the Pathfinder Dam and Reservoir and enter into agreements with the State of Wyoming for the implementation of the project. Upon receipt of this authorization, the following work can be completed:

1. The USBR must obtain a partial change of use for its Wyoming water right for Pathfinder Reservoir from the Wyoming Board of Control for the 53,493 acre feet of Pathfinder storage water from irrigation use to the uses proposed by the Project. The funding approved by the Wyoming Legislature cannot be encumbered until the

USBR obtains this partial change of use. This condition was placed on the funding to ensure that those with concerns about the project could express those concerns before a state tribunal before construction could begin.

2. The State of Wyoming and USBR must negotiate a contract to formalize the partnership between the parties.
3. While the final EIS for the Program will serve to address the regional effects of the project, a site-specific NEPA document will be required.
4. Under the PRRIP, Wyoming is obligated to have the Project operational in 2011. However, the WWDC would like to have the project completed as soon as possible as the water is needed to meet the state's obligations under the Modified North Platte Decree.

C. Proposed Amendment

An amendment to Senate Bill 752 and House Resolution 1462 has been proposed on behalf of the Upper North Platte Water Users. The proposed amendment suggests that the Bureau of Reclamation should be restricted from seeking water rights administration (calls for regulation) on behalf of Pathfinder Reservoir during the irrigation season. I would like to offer the following clarifications:

1. The Platte River Recovery Implementation Program (Program) and the Pathfinder Modification Project (Project) will not impact the issue of priority calls on water rights upstream of Pathfinder Reservoir during the irrigation season. This matter relates to interpretations of the Modified North Platte Decree and Wyoming water law.
2. All calls for regulation must be deemed valid by the Wyoming State Engineer before any water rights administration can occur. The Wyoming State Engineer has advised that a very difficult standard must be overcome for such calls to be honored.
3. The Wyoming Attorney General, upon review of the Modified North Platte Decree, concluded that such calls should not be honored.
4. The matter of the effects of the Project on Wyoming water users will be brought before the Wyoming Board of Control during its hearings on the Bureau of Reclamation's petitions for the partial change of use to the storage water right for Pathfinder Reservoir. The Upper North Platte Water Users will be afforded the opportunity to present their views and evidence to this state tribunal and state statutes ensure that the project cannot be constructed until the opportunities for any resulting appeals have been exhausted.
5. Please refer to Section 1 of the attached copy of Appendix F to the Final Settlement Stipulation which states in part: "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*

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storage space could not place regulatory calls on the existing water rights upstream of Pathfinder Reservoir other than the rights pertaining to Seminoe Reservoir.” (Emphases added.) The Upper North Platte Water Users are located upstream of Pathfinder Reservoir.