



UPPER NORTH PLATTE VALLEY WATER USERS ASSOCIATION

April 18, 2007

United States Senate
Committee on Energy and Natural Resources
Washington, DC 20510-6105

RE: Testimony on Senate Bill 752

Dear Committee Members:

The Upper North Platte Valley Water Users Association ("UNPVWUA") is an organization of ranchers and irrigators who utilize the waters of the Upper North Platte River. Our members divert water from the North Platte and its tributaries in Wyoming in the area between the Colorado/Wyoming state line downstream to Pathfinder Reservoir. Our members own both direct flow and storage water rights with priority dates both junior and senior to the 1904 priority for Pathfinder Reservoir. The UNPVWUA was originally formed in 1989 as a reaction to the first call for administration of the 1904 priority for Pathfinder Reservoir. Up until that time, the occurrence of such administration was considered highly unlikely.

The UNPVWA opposes Senate Bill 752 in its current form. The proposed expansion of Pathfinder Reservoir with the Pathfinder Modification Project ("PMP") that is authorized in Senate Bill 752 will cause injury to water rights held by UNPVWA members, and irreparable harm to the natural resources and economy of the Upper North Platte River basin.

As proposed, the PMP will enlarge the capacity of Pathfinder Reservoir by 54,000 acre-feet, and will also add new uses for Pathfinder Reservoir water. This new capacity and the new uses will not be administered under a new, junior water right priority as one would expect, but will instead be given a 1904 priority date. Pathfinder's December 6, 1904 priority is senior to 1091 of the 1596 Water Right in the Upper North Platte Basin. This attempt to expand both the size and the authorized uses of the original 1904 water right violates the fundamental principle of Western water law that senior water rights cannot be expanded or changed to the injury of junior users. See e.g., *Basin Electric Power Cooperative v. Wyoming State Board of Control*, 578 P.2d 557 (Wyo. 1978). As the burden of this enlargement will be borne by the holders of junior water rights in the Upper North Platte River basin, it also represents a taking of the vested property rights that our members have in the junior water rights that will be diminished by the expansion and change. See *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 319 (2001).

The taking issue is addressed in greater detail in the March 20, 2007 letter from our attorney to the Wyoming Congressional delegation that I am submitting as Exhibit A to this written testimony. The letters attached as Exhibits B and C to this written testimony document in greater detail the potential injury arising from the PMP and the administration of the Platte River Recovery Implementation Program ("PRRIP").

The supposed call protection in the PMP does not prevent injury to upstream junior users. By its terms, that protection does not extend to Seminole Reservoir. See Modified Decree, App. F. The increased call against Seminole that will result from the expansion under the PMP will mean less water for Seminole, and Seminole in turn will place a greater demand under its priority against junior water rights. Moreover, the call protection supposedly offered under the PMP as explained in Appendix F to the Modified Decree is absent and not considered in the actual formula for determining an "allocation year" in Appendix E of the Modified Decree.

Even the Final Environmental Impact Statement ("FEIS") for the PRRIP documents the injury to the Upper North Platte Basin from the PRRIP. The UNPVWUA feels the FEIS grossly understates the injury from the PMP and PRRIP, because, among other reasons, it uses a study period that ends in 1994, and does not even consider the most relevant data from the past 12 years when drought has increased, and allocation years and overall demands have all increased. The FEIS also fails to consider Nebraska's expansion of irrigation during this recent period. Although issues concerning the FEIS deficiencies were raised to officials responsible for preparation of the FIES, they were largely ignored.

Moreover, the FEIS fails to even consider the devastating impacts on water resources when the Pathfinder 1904 right is administered after May 1. In this regard, it is important to direct you again to Appendix F of the final Modified Decree which addresses the PMP. It mandates that the Bureau of Reclamation cannot proceed with the PMP until it has been appropriately considered under the National Environmental Policy Act. As the impacts of a post-May 1 call were not even considered in the FEIS, such a call cannot be part of the approved PRRIP program.

The foregoing concerns demonstrate the need to place appropriate limits on Pathfinder Reservoir. The UNPVWUA views this proposed legislation as just such an opportunity. To prevent further and future injury, we respectfully ask that you consider adding the following language at the end of Section 202 of the current bill:

To protect existing upstream water rights in Wyoming, the Bureau of Reclamation shall not place a priority call for Pathfinder Reservoir, including the proposed Pathfinder Modification Project, between May 1st and September 30th in any year.

Although this amendment would not completely remove injury in the Upper Basin, it will address the most serious threat. The basis for May 1 call protection is explained in the March 20, 2007 letter that is attached as Exhibit A. As noted therein:

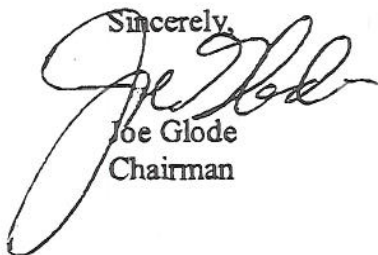
- The United States never intended that Pathfinder would fill in the irrigation season against upstream junior users.
- The original North Platte Decree of 1945 declined to require strict priority administration for Pathfinder as against the Upper North Platte Basin.
- There is a Wyoming Attorney General's Opinion stating the Wyoming State Engineer should not honor a post May call for any component of the Pathfinder Reservoir.
- There is a Wyoming State Engineer letter stating he would probably not honor an irrigation season call by Pathfinder.
- As explained above, the language in the FEIS states that post May 1 administration on behalf of Pathfinder's 1904 priority date is highly unlikely; so unlikely, the impacts of such a call were never considered in the EIS.

- Governor Freudenthal issued a letter requesting the Wyoming delegation's assistance in imposing a May 1st Call Restriction on Pathfinder.

Finally, we ask you to consider the basic equity of what is going on here. The FEIS shows no correlation between water uses in the Upper Basin and deficiencies in the target recovery area in Nebraska. The Supreme Court and the Special Master in the various *Nebraska v. Wyoming* lawsuits have similarly recognized that there is little or no real hydrologic connection between water use above Pathfinder Reservoir in Wyoming and water shortage in the critical area in Nebraska. Nevertheless, by way of the PMP, it is proposed that irrigators and other water users above Pathfinder be asked to bear the burden of solving a problem they have not created. The UNPVWA asks that you give serious consideration to the amendment it proposes, and bring some small measure of equity to those who rely on the waters of the Upper North Platte River.

I thank the respected members of this Committee for the opportunity to present our comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "Joe Glode", with a large, stylized flourish extending from the bottom left.

Joe Glode
Chairman