

Appendix F

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

107

No. 108, Original

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,

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