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April 14, 1997

Denise Fort
 Chairperson
 Western Water Policy Review Advisory Commission
 PO Box 25007, D-5001
 Denver, Colorado 80225-0007

Re: Review and Comments on the Draft *Platte River Basin Study*
 report dated March 1, 1997

Dear Chairperson Fort:

This letter will serve to transmit the review comments of the Wyoming State Engineer's Office on the draft *Platte River Basin Study* report that was released for review on March 1, 1997. This office has been actively following the activities of the Western Water Policy Review Advisory Commission and the reports and studies that have been commissioned by it. I wish to thank you, and the other members of the Commission and its staff, in advance for your consideration of these comments. Should you have any questions, please don't hesitate to contact me.

It is my understanding that the goals of this study, and the several others that have been completed for other Western river basins, are to describe the most critical water problems in the basin, analyze the effectiveness of federal and state programs to address those problems, describe promising initiatives and, finally, to make recommendations regarding the appropriate role and organization of federal water-related programs in the future. The report has attempted to meet these purposes, however, the descriptions of promising initiatives could have been more thorough and, it seems me, that the recommendations that are offered in this report go far beyond the role and organization of federal water-related programs.

My specific comments follow:

Page 2, first full paragraph, last line - change "necessary" to "habitat" because, while the states might agree to provide water to improve habitat as part of the MOA/Cooperative Agreement effort, the states reserve the right to argue the concept that more water is necessary for the recovery of the threatened and endangered species. Many other factors, besides water, may be impacting the viability of these species.

Page 2, second full paragraph, line 4 - strike "on the tributaries" since there is no irrigated acreage limit on the tributaries

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between Pathfinder and Whalen dams.

Same, line 7 -- change "major" to "minor" since only minor issues have been resolved, to date, in the settlement efforts in Nebraska v. Wyoming.

Page 4, item 3., line 7 -- change "necessary" to "habitat". While the states might agree to provide water to improve habitat as part of the MOA/Cooperative Agreement effort, the states reserve the right to argue that additional water is necessary for the recovery of the threatened and endangered species.

Page 4, last paragraph -- While it would be ideal to develop linkages between flow characteristics and response of individual species, this may not be possible without an actual adaptive management program. It would be difficult to measure the response of the species to additional water because of the difficulty of isolating water from the other factors (such as pesticides, power lines, and bad parenting skills) that also may affect the viability of the species.

Page 5, first full paragraph, first sentence - insert "with peer review" at the end of the sentence.

Page 6, item 9, line 4 - replace "recovery of" with "habitat for".

Page I-3, first bullet - insert "habitat for" so that it reads "Flows for habitat for endangered...".

Page II-1, section titled Overview and Description -- change "Ploven" to "Plover".

Change "Section VII" to "Section 7" throughout the document.

Page II-2, second full paragraph -- the discussion in this paragraph is confusing, particularly the last sentence seems to be at odds with what I understand are the facts. The draft biological opinions, and there were seven of them, were on the reissuance of special use permits for existing water-related facilities and structures within the Arapaho/Roosevelt National Forest in Colorado. All of the facilities are in the Rocky Mountain headwaters of the South Platte River. Those specific facilities that were consulted on, with the reissuance of the special use permits being the nexus determined to require Section 7 consultation, are critical components of the drinking water supply system on Colorado's Front Range and included the City of Greeley's Barnes Meadow Reservoir and Peterson Lake Reservoir; the City of Ft. Collins' Joe Wright Reservoir; the City of Boulder's Lakewood Pipeline; the City of Loveland's Idylwilde Hydroelectric Project; Water Supply and Storage Company's Long Draw Reservoir; and Public Service Company of Colorado's Boulder Hydroelectric Gravity Line.

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Page II-3, end of the first paragraph -- a review of the extension of the MOA will indicate that it was extended to mid-December 1996.

Page II-4, third full paragraph, line 4, replace "Fish and Wildlife Service" with "recovery Program".

Page II-4, last sentence of the third full paragraph -- it is my understanding that if a Platte River Recovery Implementation Program were to be implemented that it would serve as the reasonable and prudent alternative (RPA) for water project depletions. Those projects would receive a jeopardy opinion but the Program would provide the RPA. The last sentence of this paragraph indicates that new projects would receive "non-jeopardy opinions" which I believe is not the case. If the projects were receiving non-jeopardy opinions, there would be no need for an RPA. Furthermore, the term "mitigation" as used in this sentence really doesn't have very much meaning or confer information. It should also be noted that the intent of the Recovery Implementation Program, as indicated by its name, will be to facilitate the recovery of the species in the Central Platte, as opposed to offsetting or mitigating the impacts of depletive water projects.

Page II-17, first line of the second full paragraph -- What are the words "as required by this consultation" are intended to convey? It is my belief that the issuance of biological opinions with "either/or" RPAs, such as the subject opinion with its RPA-I and RPA-II, are most unusual and uncommon. Perhaps the cited phrase should just be deleted.

Pages II-17 through II-18 -- given that the topic that is headed "Nebraska Statute LB108" and is identified as both a major unresolved issue (page II-17) and as critical (page IV-5), perhaps the report's authors would be justified in expanding on the discussion presently found in these three paragraphs. The report presently seems to be unclear about what the extent of the Nebraska DWR's authorities. Without a good analysis of what they are, it is difficult for the report to then go on and make a recommendation relative to this need for additional legal and institutional mechanisms. We are not doubting the need for same with this comment, but rather feel that the report should expand explaining the present problem.

Page II-19 - Spell out the first occurrence of "GPC".

Throughout the document, change "DEQ" to "NDEQ" to distinguished it from Wyoming's DEQ.

Since the Nebraska v. Wyoming lawsuit is still unfolding, I did not invest a lot of time in critiquing your statements about the case. I do agree with the authors of this report that this lawsuit is not the appropriate forum for resolving the critical water issues identified in Section II.

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Page II-27, third line from the bottom -- the citation to a U.S. Supreme Court opinion in 1993 is not sufficient to allow the reader to find the material cited without a large degree of effort. Perhaps the authors intended to cite a specific number and volume of the opinions of the Court, but failed to do so. In addition, it would seem appropriate to list this, and other citations to Court opinions, in the "References."

Page II-35, first line of the last paragraph -- isn't the acronym for the Forest Land Management Planning Act usually specified as "FLPMA"?

Page II-37, last sentence of the second full paragraph -- What is meant by "since endangered species were not a concern in the Platte Basin in Colorado" ?

SECTION III

As a general comment about the section entitled "Analysis of Policies and Programs for Endangered Species Flows in Central Platte", the authors seem to portray efforts to resolve the habitat flow needs of the Central Platte River as beginning with the initiation of the MOA effort and thus they ignore and don't even mention the Platte River Management Joint Study and its efforts that were ongoing from 1985 to 1993. That is unfortunate and skews the analysis of this issue.

Page III-1, second line of the third paragraph -- the Grayrocks Dam and Reservoir is misspelled as "Greyrocks" in this line. In the third and fourth lines, remove "but did not necessarily provide reliable flows to the critical reach for recovery purposes" and insert "and water releases to assist in the recovery process".

Page III-3, middle of the second full paragraph -- reference is made to the statement to the effect that "... development of a recovery program will continue to be retarded by conflicts over the technical and scientific uncertainty involved in providing necessary flows." The point that I would like to make about this statement is that there are technical and scientific uncertainties about what are the necessary flows. I am not sure that this is what this sentence is actually getting at; if it is, perhaps the sentence could be modified to make this clearer.

Page III-7, replace the second bullet with "Is the limitation on irrigated acreage on the mainstem and tributaries above Pathfinder and from the mainstem between Whalen Diversion Dam and Pathfinder Reservoir being exceeded?" since there is no limit on the tributaries between Whalen and Pathfinder.

FINDINGS AND RECOMMENDATIONS

Page IV-2, last paragraph -- relative to the "reluctance of the USGS" we believe that the point should not be lost that these water

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resource issues are, for the most part, basin-wide or have implications for the entire basin and thus are of an interstate nature. Typically and historically, most USGS scientific efforts occur at a district level, with most USGS districts following state boundaries.

Page IV-3, first full paragraph - I note and find it interesting that here, as was the case on page 3 as well, there is no reference to the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin in the listing of environmental restoration programs that are taking place elsewhere. This is somewhat curious in that two of the three states that would be parties to the proposed Platte River Recovery Implementation Program are participants in the Upper Colorado program.

In the fourth to last sentence the statement is made that "Increased levels of federal funding of the Platte River recovery program equivalent to funding levels for these other environmental restoration projects and programs would facilitate implementation of the Platte River recovery program." While there may be good reasons for so doing, it does not strike me that this has yet been a significant factor in the inability of the parties to come to agreement on the terms and conditions of the proposed Program. Obviously, once such a Program was underway, funding at levels comparable to the other large, high visibility programs mentioned would be most helpful.

Page IV-5, middle of the first full paragraph -- the reference to "Nebraska Statute LB108" seems a bit odd in that LB108 was the bill number of the act that was codified into the Nebraska Statutes, but the numerical title and section of the new law is not cited in such a manner that the reader can easily discern what portion of the statutes is being discussed. In the seventh line, rather than just saying that Colorado and Wyoming "... would have the option to purchase water rights in the habitat region ...", the authors have failed to include Nebraska along with the other two states. The same is true in the next sentence as well in the context that a "delivery requirement" may be of upstream water from within Nebraska.

Page IV-6, heading -- I believe that this should state "... water resources conflicts" and that the word "reserve" is a typographical error.

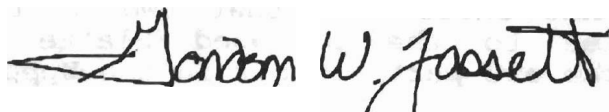
Page IV-6 -- second sentence of the first full paragraph -- the authors' conclusion that: "Litigation is probably the only way that conflicts over interpretation of a decree such as the 1945 Decree for the North Platte River can be resolved" is not supported by material presented in Section II of the report and seems to be in conflict with the finding stated above it that "Litigation has limited potential for resolving water reserve (sic) conflicts." Wyoming does not agree with the conclusion as it is stated. Rather, in the absence of an ability to resolve issues and

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conflicts through dialogue and reasonable accommodations,
litigation is the only remaining avenue available. This conclusion
seems unduly broad.

Thank you for the opportunity to submit these comments. If
questions or clarification concerning the items contained in this
letter arise, please don't hesitate to contact this office.

With best regards,



Gordon W. Fassett
Wyoming State Engineer

GWF/js

cc: Pat O'Toole

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