

No. 108, Original

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IN THE  
**Supreme Court of the United States**

STATE OF NEBRASKA,

*Plaintiff,*

v.

STATE OF WYOMING, ET AL,

*Defendants.*

**PROPOSED JOINT SETTLEMENT**

OCTOBER 12, 2001

Owen Olpin  
*Special Master*

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*Accompanying the Final Report of the Special Master*

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No. 108, Original

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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 2000

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BEFORE THE HONORABLE OWEN OLPIN  
SPECIAL MASTER

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STATE OF NEBRASKA,  
Plaintiff,

v.

STATE OF WYOMING,  
Defendant.

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**FINAL SETTLEMENT STIPULATION**

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The States of Nebraska, Wyoming, and Colorado, the United States and Basin Electric Power Cooperative hereby enter this Final Settlement Stipulation:

I. General

- A. Nebraska, Wyoming, Colorado, and the United States agree to modification and supplementation of the North Platte Decree, 325 U.S. 665 (1945), as modified 345 U.S. 981 (1953). The Modified Decree is attached as Appendix A (Modified Decree). A redline/strikeout version of the North Platte Decree showing the modifications is attached as Appendix B.
- B. The parties to this Final Settlement Stipulation also agree to undertake certain other obligations set forth in this stipulation. By consenting to this stipulation, Colorado is not admitting that any measures to be undertaken by any other party would be reasonable or appropriate within Colorado.
- C. Upon the Courts approval and adoption of this stipulation and entry of the Modified Decree, all claims of any party to this case against another party arising prior to the date of the Courts approval of this stipulation and entry of the Modified Decree shall be dismissed with prejudice.
- D. Claims for which leave to file was or could have been sought in this case with respect to activities or conditions occurring before the effective date of this stipulation are hereby waived and forever barred, except as a possible affirmative defense in a future proceeding. With respect to activities and conditions occurring after the date of such

dismissal, the dismissal will not preclude a party from seeking enforcement of the provisions of the Modified Decree or from seeking equitable relief to modify this stipulation or the Modified Decree pursuant to Paragraph XIII of the Modified Decree. By agreeing to the dismissal with prejudice of the claims, counterclaims and cross-claims in this case, a party does not waive or prejudice any right that it otherwise would have to assert in a future action any legal theory or position that it asserted in this case with respect to activities or conditions occurring after the date of such dismissal.

- E. This Final Settlement Stipulation and the Modified Decree shall not affect the apportionment between the States of Wyoming and Colorado of the waters of the Laramie River down to and including the Wheatland Project. The only existing limitation in the Modified Decree on Wyoming's use of the Laramie River is provided in paragraph II(d) of the Modified Decree.
- F. The parties have previously entered into stipulations resolving specific claims in this case. The following stipulations are attached hereto and by this reference are incorporated into this Final Settlement Stipulation:
  - 1. Amendment of the 1953 Order to Provide for Use of Glendo Storage Water (Appendix C);



2. Procedures for 1945 Decree Paragraph II(b) [now paragraph II(e) of the Modified Decree] Storage Accounting (Appendix D); and
3. Stipulation Among the State of Wyoming, The State of Nebraska, and the United States Relating to the Allocation of Water During Periods of Shortage (Appendix E).

- G. The parties previously entered into a stipulation (Amendment of the 1953 Order to Provide for the Modification of Pathfinder Reservoir filed on September 10, 1997) providing for the modification of Pathfinder Dam. Pursuant to this Final Settlement Stipulation, the parties have amended the 1997 stipulation to provide for the modification of Pathfinder Dam. The amended stipulation, attached as Appendix F is hereby incorporated into this Final Settlement Stipulation and replaces the 1997 stipulation.
- H. The parties previously entered into a stipulation (Amendment of the 1953 Order Paragraph V, River Carriage Losses filed on September 10, 1997) providing for revision of the river carriage losses. Pursuant to this Final Settlement Stipulation, the parties have included the river carriage losses in Exhibit 9 to the North Platte Decree Committee Charter and revised paragraph V of the Modified Decree accordingly. Therefore, the parties hereby withdraw the 1997 stipulation filed with the Special Master.

## II. North Platte Decree Committee

The North Platte Decree Committee (NPDC) is hereby created by the States of Nebraska, Wyoming, and Colorado, and the United States of America effective upon the Court's approval and adoption of this Final Settlement Stipulation and entry of the Modified Decree. The North Platte Decree Committee shall operate in accordance with the North Platte Decree Committee Charter (Charter) attached as Appendix G. Attached to the Charter as Exhibits 4 through 15 are administrative procedures that are hereby approved and adopted to monitor, administer, and implement the Modified Decree and this Final Settlement Stipulation. The North Platte Decree Committee may modify the procedures which are attached to the Charter and referenced elsewhere in this Final Settlement Stipulation. The parties agree that failure of the North Platte Decree Committee, or the parties to the North Platte Decree Committee, to act upon, resolve or agree on a matter that has been submitted to the North Platte Decree Committee shall not preclude a party from seeking leave of the Court to bring an action pursuant to Paragraph XIII of the Modified Decree. The states of Nebraska, Wyoming, and Colorado, and the United States of America may modify the Charter by unanimous agreement consistent with this Final Settlement Stipulation and the Modified Decree.

## III. Allocation Year Administration

During allocation years, pursuant to the procedure attached to the North Platte Decree Committee Charter as Exhibit 5, Wyoming will implement the following water rights administration:

- A. With respect to water rights administration upstream of Pathfinder Reservoir, before May 1, when the Bureau has advised the other parties that the current water year is likely to be an allocation year, as defined in Appendix E, the Bureau shall be deemed to have placed a priority call for Pathfinder Reservoir, excluding the Pathfinder Modification Project, without the need to formally request such a call. Consistent with applicable state law, the Wyoming State Engineer shall determine whether the call is valid and warrants the regulation of water rights upstream of Pathfinder Reservoir. If the Wyoming State Engineer determines that the call is not valid or that regulation of upstream water rights is not warranted, he/she shall so notify the Bureau and the North Platte Decree Committee in writing and describe the basis for that determination. However, the Wyoming State Engineer's refusal to honor such a call cannot be based upon the provisions of the Modified Decree or this Final Settlement Stipulation other than the provisions of the procedure attached to the Charter as Exhibit 5. In all other circumstances, the call will be applied by the Wyoming State Engineer to discontinue diversions under water rights junior to Pathfinder Reservoir and to limit diversions under water rights senior to Pathfinder Reservoir to one cubic foot per second per seventy acres.
- B. With respect to water rights administration along the mainstem of the North Platte River

and the tributaries between Pathfinder Dam and Guernsey Reservoir, before May 1, when the Bureau has advised the other parties that the current water year is likely to be an allocation year, as defined in Appendix E, the Bureau shall be deemed to have placed a priority call for the Inland Lakes (April only), Guernsey, and Glendo storage rights, without the need to formally request such a call. Consistent with applicable state law, the Wyoming State Engineer shall determine whether the call is valid and warrants the regulation of water rights upstream of the calling water right. If the Wyoming State Engineer determines that the call is not valid or that regulation of upstream water rights is not warranted, he/she shall so notify the Bureau and the North Platte Decree Committee in writing and describe the basis for that determination. However, the Wyoming State Engineer's refusal to honor such a call cannot be based upon the provisions of the Modified Decree or this Final Settlement Stipulation other than the provisions of the procedure attached to the Charter as Exhibit 5. In all other circumstances, the call will be applied by the Wyoming State Engineer to discontinue diversions under junior water rights and to limit diversions under senior water rights to one cubic foot per second per seventy acres, with the exception that if Guernsey Reservoir has filled and Glendo Reservoir has not filled, water rights with priorities senior to March 1, 1945 will be allowed to divert up to two cubic feet per second per seventy acres.

- C. After May 1, in an allocation year, Wyoming will limit the cumulative irrigation diversions from the mainstem of the North Platte River between Pathfinder Dam and Guernsey Reservoir to 6,600 acre-feet per two week period.

#### IV. Adjudications

- A. Within five years of the final court approval of this stipulation, pursuant to Wyoming law, Wyoming will adjudicate the following:
  - 1. All unadjudicated groundwater permits for irrigation wells hydrologically connected to the North Platte River or its tributaries above Guernsey Reservoir;
  - 2. All unadjudicated surface water permits for irrigation purposes that divert from tributaries and drains that lie within the area bounded by Whalen Diversion Dam on the west, the Ft. Laramie Canal on the south, the Interstate Canal on the north, and the state line on the east, excluding the drainage basins of the Laramie River and Horse Creek;
  - 3. All existing unadjudicated groundwater permits for irrigation wells within the area bounded by Whalen Diversion Dam on the West, 300 feet south of the Ft. Laramie Canal on the south, one mile north of the Interstate Canal on the north and extending downstream to the state line on the east; and

4. All unadjudicated groundwater permits for irrigation wells hydrologically connected to the Laramie River or its tributaries downstream of Wheatland Tunnel #2, exclusive of the Wheatland Irrigation District.

B. All groundwater permits for irrigation wells within the area bounded by Whalen Diversion Dam on the west, 300 feet south of the Ft. Laramie Canal on the south, one mile north of the Interstate Canal on the north and extending downstream to the state line on the east permitted after final court approval of this stipulation shall be adjudicated under Wyoming law within ten years after permitting.

V. Administration

A. Upon any occurrence of “negative natural flow at Orin”, as defined in Exhibit 7 to the Charter, the Wyoming State Engineer will administer water rights or take other action as necessary to eliminate the negative natural flow at Orin.

This administration will be implemented pursuant to the procedure attached to the Charter as Exhibit 7.

B. The flow releases that are to be delivered at the mouth of the Laramie River for the months of May through September made from Grayrocks Reservoir pursuant to the Agreement of Settlement and Compromise dated December 4, 1978 shall be protected

administratively by the State of Wyoming to ensure their delivery to the North Platte River. From May through September such releases will be subject to administration and accounting as natural flow. Wyoming will administer the Grayrocks Reservoir water rights and other water rights associated with the Laramie River Power Station pursuant to the Water Administration of the Lower Laramie River System Relating to Basin Electric Power Cooperative's Water Rights, attached to the Charter as Exhibit 3. Said Exhibit 3 cannot be modified without the consent of the North Platte Decree Committee and Basin Electric.

- C. Consistent with paragraph XII(a) of the Modified Decree, nothing in this Final Settlement Stipulation or the procedures attached to the Charter shall prevent any water right holder from requesting a priority call on the North Platte River.

#### VI. Acquisition of Rights

- A. Within three years of the final court approval of this stipulation, Wyoming will acquire the rights pertaining to the development of the Corn Creek Irrigation Project and cancel all water rights and water supply obligations of Basin Electric Power Cooperative under its agreement entitled "Contract" dated July 24, 1974, as amended by "Contract Amendment No. 1," dated April 6, 1982, with the Corn Creek Irrigation District.

- B. Within three years of the final court approval of this stipulation, Wyoming will acquire the water rights and facilities associated with the Goshen Irrigation District pump station (further described in Permit No. 4883 Enl.). Wyoming will seek a change of use and change of point of diversion under state law to the confluence of the Laramie River and the North Platte River, subject to the following conditions:
1. The use would be limited to supplementing natural flow to meet demand in the Whalen to Tri-State reach of the North Platte River;
  2. The maximum seasonal volume for the new use at the new point of diversion will be 2,500 acre feet per year; and
  3. The flow releases that are to be delivered at the mouth of the Laramie River for the months of May through September made from Grayrocks Reservoir pursuant to the Agreement of Settlement and Compromise dated December 4, 1978 will not be diminished by such change of use or change of point of diversion.

VII. Acreage in the Kendrick Project

The Kendrick Project was found feasible by the Secretary of the Interior on August 27, 1935, and approved by the President on August 30, 1935, under terms of section 4 of the Act of June 25, 1910 (36 Stat. 836), and subsection B of section 4 of the Act of December 5, 1924 (43 Stat. 702). Subsection B of



section 4 of the Act of December 5, 1924, provided that the project would be constructed in two units of 35,000 acres and 31,000 acres respectively. The construction of the second unit of 31,000 acres was to be deferred, however, until the results of conservation and legal utilization of water were ascertained.

Pursuant to the Act of September 4, 1957 (Public Law 85-283, 71 Stat. 608) and the Amendatory Contract between the United States of America and the Casper-Alcova Irrigation District, no more than 35,000 acres of land in the First Unit of the Kendrick Project may be irrigated. The right to the use of the major works of the Kendrick Project for the Second Unit remains suspended until (a) a determination has been made that an adequate water supply is available for the irrigation of lands of the Second Unit under water permits for the Kendrick Project issued by the State of Wyoming, (b) the Casper-Alcova Irrigation District has undertaken the obligation to repay a proportionate share of the construction costs of project works, and (c) works for the delivery and distribution of water for the lands of the Second Unit have been constructed.

The United States will provide notice to the states of Nebraska, Wyoming and Colorado no less than twelve months in advance of taking any of the above steps. The irrigated acreage under the Kendrick Project must remain within the Kendrick Project.

#### VIII. Additional Reporting

- A. Wyoming will report to the North Platte Decree Committee water right applications and associated water use of irrigation wells permitted after January 1, 2001 within the

boundaries of Wheatland Irrigation District. The obligation in this paragraph will be implemented pursuant to procedures attached to the Charter as Exhibit 13.

- B. Wyoming will report to the North Platte Decree Committee all municipal, industrial and export water right applications and petitions for water right changes of use within the Wyoming North Platte River basin, excluding the area upstream of Wheatland Tunnel #2 on the Laramie River and excluding those uses defined as de minimis in paragraph XII(f) of the Modified Decree. The obligation in this paragraph will be implemented pursuant to procedures attached to the Charter as Exhibit 14.
- C. Wyoming will report to the North Platte Decree Committee all water right applications for construction of new dams or enlargements of existing dams with a proposed reservoir capacity for storage of water originating in the North Platte River basin of greater than twenty acre-feet and ground water recharge projects within the Wyoming North Platte River basin, excluding the Laramie River basin upstream of Wheatland Tunnel #2. The obligation in this paragraph will be implemented pursuant to procedures attached to the Charter as Exhibit 15.
- D. The NPDC will develop procedures to monitor water use in the area between Guernsey Dam and the Whalen Diversion Dam.

IX. Approval, Adoption and Modification of Procedures

The procedures attached to the Charter as exhibits 4 through 15 are hereby approved and adopted. Such procedures may be modified from time to time by the North Platte Decree Committee if the modifications are consistent with this stipulation and the Modified Decree.

X. Entirety of Agreement

This Final Settlement Stipulation and appendices thereto, the Modified Decree, the Charter with exhibits, and the Joint Motion for Approval of Stipulation, Modification of Decree and Dismissal With Prejudice, together constitute the entire agreement among the parties hereto. No previous representations, inducements, promises or agreements, oral or otherwise, among the parties not contained in the documents identified in this paragraph or made in compliance with the requirements and obligations contained in the documents identified in this paragraph shall be of any force or effect. Nothing in this paragraph shall be construed as preventing the States of Nebraska, Wyoming, and Colorado and the United States of America from modifying the Charter as provided in paragraph II of this Final Settlement Stipulation. Nothing in this paragraph shall be construed as preventing the North Platte Decree Committee from modifying administrative procedures as provided in Article V. of the Charter.

**THE STATE OF NEBRASKA**

/s/ Mike Johanns  
Mike Johanns, Governor States

**THE STATE OF WYOMING**

/s/ Jim Geringer  
Jim Geringer, Governor

**THE UNITED STATES OF AMERICA**

/s/ Barbara D. Underwood  
Barbara D. Underwood,  
Action Solicitor General

**THE STATE OF NEBRASKA**

/s/ Don Stenberg  
Don Stenberg, Attorney General

April 4, 2001  
Date

/s/ Richard Simms  
Richard Simms, Counsel of Record

March 26, 2001  
Date

**THE STATE OF WYOMING**

/s/ Gay V. Woodhouse  
Gay V. Woodhouse, Attorney General

March 13, 2001  
Date

/s/ Thomas J. Davidson  
Thomas J. Davidson, Counsel of Record

March 13, 2001  
Date

**THE STATE OF COLORADO**

/s/ Ken Salazar  
Ken Salazar, Attorney General

4/3/2001  
Date

/s/ Wendy C. Weiss  
Wendy C. Weiss, Counsel of Record

April 3, 2001  
Date

**THE UNITED STATES OF AMERICA**

/s/ Andrew F. Walch  
Andrew F. Walch, Counsel of Record

April 3, 2001  
Date

**BASIN ELECTRIC POWER COOPERATIVE**  
Project Manager for the Missouri Basin Power Project

/s/ Richmond F. Allan  
Richmond F. Allan, Counsel of Record

March 14, 2001  
Date

/s/ Claire Olson  
Claire Olson, General Counsel

March 14, 2001  
Date