

STATE OF IDAHO
COUNTY OF SHOSHONE | SS
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MARCA WINGFIELD
CLERK DIST. COURT
BY *Belle Rickell*
DEPUTY

DISTRICT COURT, FIRST JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF SHOSHONE

GARY APPEL, et al.,	)	
	)	Case No. 24822
Plaintiffs,	)	
	)	FINDINGS OF FACT AND
vs.	)	CONCLUSIONS OF LAW
	)	
WASHINGTON WATER POWER,	)	
a Washington corporation,	)	
	)	
Defendant.	)	

The above-entitled action came on for hearing upon a stipulated settlement on the 27th day of February, 1989, before the above-entitled court. Plaintiffs were present and represented by the firm of Evans, Keane, Koontz, Boyd, Simko and Ripley and Thomas C. Morris; defendant was present and represented by the firm of Paine, Hamblen, Coffin, Brooke, and Miller. The Court hereby makes its:

FINDINGS OF FACT

I.

The plaintiffs are individuals and drainage districts who claim that the operation of the Washington Water Power Company's Post Falls Dam results in damage to their real and personal property. By complaint dated October 7, 1983, plaintiffs commenced this civil action against The Washington Water Power Company.

FINDINGS AND CONCLUSIONS - 1

II.

Defendant, The Washington Water Power Company, claims that the operation of the Post Falls Dam does not result in damage to the property of the plaintiffs and that it has all right, title and interest necessary to operate the Post Falls Dam as it is presently operated, including the impoundment of the waters of Coeur d'Alene Lake to the elevation of 2,128 feet (USGS Gage Datum), and expressly denies the allegations of the plaintiffs.

III.

The Washington Water Power Company claims that the line of ordinary high water of Lake Coeur d'Alene is at or above the elevation of 2,128 feet (USGS Gage Datum) above mean sea level as measured at the United States Geological Survey (USGS) gaging station (hereinafter referred to throughout this document as USGS Coeur d'Alene Lake water gage) located on the shore of Coeur d'Alene Lake, 500 feet southwest of the south end of Eleventh Street in the City of Coeur d'Alene, Kootenai County, Idaho the elevation of which is determined by reference to a USGS bench mark in the southeast corner of the Idaho First National Bank (formerly known as the Merriam Building), at Sherman and Fourth Streets in Coeur d'Alene City, which has an original accepted elevation of 2,157.404 feet above mean sea level. After the elevation of the United States Geological Survey bench mark, referenced above, was established at 2,157.404 feet above sea level, it was reassigned an elevation based on the National Geodetic Vertical Datum established by the United States Coast and Geodetic Survey (now the National Oceanic and Atmospheric Administration "NOAA"). The elevation of 2,128 feet (USGS Gage Datum) quoted throughout this document is approximately 2,125 feet based on NOAA National Geodetic

FINDINGS AND CONCLUSIONS - 2

Vertical Datum. The Washington Water Power Company's claim is denied by the plaintiffs.

IV.

The Washington Water Power Company claims that the State of Idaho owns the property that is utilized in the reservoir operation of the Post Falls Dam. This claim is denied by the plaintiffs.

V.

The State of Idaho was not a party in this action.

VI.

By order of March 25, 1987, the trial of this matter was bifurcated, with the trial on the issue of liability being tried before any consideration of issues of damages and defendant's counterclaim in condemnation and certain of defendant's affirmative defenses.

VII.

Following pre-trial discovery and pre-trial motions, the trial of this matter commenced before a jury on January 27, 1988, on the issue of liability as described above.

VIII.

At the close of plaintiffs' case during the trial, the claims of Lawrence Mietzner and Lou Ann Mietzner, Henry Porret, Leonard Robinson, Floyd Runge and Edna Runge, Ralph Storey, Charles Wilson and Shirdean Wilson, and Claire Warehime were dismissed from the case, and a directed verdict was entered pursuant to Rule 50(a) of the Idaho Rules of Civil Procedure.

IX.

FINDINGS AND CONCLUSIONS - 3

On March 10, 1988, the jury reached a verdict. On April 11, 1988, an amended interlocutory judgment was entered granting judgment consistent with the jury's verdict.

X.

By order of June 29, 1988, the Idaho Supreme Court granted The Washington Water Power Company's motion for permission to appeal pursuant to Rule 12 of the Idaho Appellate Rules.

XI.

While the matter was pending on appeal, the parties reached a settlement in compromise of the plaintiffs' disputed claims. By order dated February 7, 1989, the Idaho Supreme Court temporarily remanded the matter to this Court pursuant to Rule 13.3 of the Idaho Appellate Rules, for further proceedings.

XII.

The Court recognizes that The Washington Water Power Company expressly denies any liability or responsibility for any of the damages claimed by the plaintiffs. The Court further recognizes that the purpose of the settlement between the parties is to forever terminate the controversy concerning The Washington Water Power Company's operation of the Post Falls Dam and that liability is now and has at all times been a vigorously disputed issue of fact and law, and that the agreement to settle this litigation is solely for the purposes of compromising disputed claims, recognizing the uncertainties of litigation, and the costs and expenses thereof. Nothing in these proceedings shall be deemed to be a finding or admission of liability or responsibility by The Washington Water Power Company for any of the damages claimed by the plaintiffs.

FINDINGS AND CONCLUSIONS - 4

XIII.

The settlement agreements entered into between the parties were provided to the Court for review and consideration. The Court has initialed and dated the agreements. The Court has given attention to the terms of the settlement agreements for the purpose of weighing the parties' requests that this case be dismissed as hereinafter set forth. The Court finds that the settlement is approved. The Court further finds that it is the parties' desire and intent that the settlement agreements remain confidential; and, upon entry of these findings of fact and conclusions of law and the judgments accompanying them, the settlement agreements will be delivered to The Washington Water Power Company.

XIV.

The Court recognizes that it is the intent of the parties that the dispute between and among them be settled and to this end the settlement agreements recite that nothing in these proceedings shall be deemed to be a finding, admission, order or judgment of liability or responsibility by The Washington Water Power Company for any of the damages claimed by the plaintiffs. The Washington Water Power Company denies any liability for injuries or damages claimed by plaintiffs. The Court further recognizes that it is the parties desire to avoid further litigation and the expense that would be incurred in connection with such litigation, and to lay to rest forever the differences existing among them; that the parties have made a settlement in compromise intended to finally and fully resolve the plaintiffs' disputed claims.

FINDINGS AND CONCLUSIONS - 5

XV.

Prior to 1983, The Washington Water Power Company made annual payments to some of the plaintiffs. The plaintiffs agree that the settlement agreements shall fully and completely satisfy any obligation The Washington Water Power Company may have for any past and future payments (other than set forth in the settlement agreements, findings, conclusions and judgments) of any kind relating to, or arising out of, the operation of the Post Falls Dam and the impoundment of waters.

XVI.

The foregoing general findings having been made, there are certain factual matters which have been conclusively established through the trial of this matter and, as a part of the settlement, the Court makes the following specific findings of fact:

XVII.

The Washington Water Power Company is the owner and operator of the Post Falls Dam located on the Spokane River below the outlet of Coeur d'Alene Lake.

XVIII.

The right to develop the water power at Post Falls was obtained in 1871 when Frederick Post entered into an agreement with the Coeur d'Alene Indians. A dam was constructed shortly thereafter.

XIX.

In 1887, Frederick Post obtained a written confirmation of his agreement with the Coeur d'Alene Indians, and he reconstructed part of the old dam and constructed new dams in all three channels of the Spokane River at Post Falls.

FINDINGS AND CONCLUSIONS - 6

XX.

In 1891, the United States Congress ratified the agreement between Frederick Post and the Coeur d'Alene Indians. In 1894, a patent was issued by the United States to Frederick Post giving him the right to develop the water power at Post Falls and the land necessary for such development.

XXI.

In 1900, Frederick Post conveyed his rights to R.K. Neill. In 1902, R.K. Neill conveyed the land and water power at the Post Falls site to The Washington Water Power Company.

XXII.

From 1905 to 1907, The Washington Water Power Company removed the Post dams, excavated rock, and constructed new dams and a powerhouse in the three river channels at Post Falls. During the construction, the north channel and middle channel of the river were deepened and widened. Power was first generated from the Post Falls powerhouse in 1906.

XXIII.

On February 2, 1909, United States Secretary of the Interior issued a permit to The Washington Water Power Company allowing it to overflow certain tribal lands below the level of 2,128 feet (USGS Gage Datum) above the mean sea level within the Coeur d'Alene reservation. On July 29, 1910, an order was issued revoking the permit. On April 22, 1912, the order revoking the permit was rescinded and the permit was reinstated.

XXIV.

The dams at Post Falls are located approximately nine miles down the Spokane River from the outlet of Coeur d'Alene Lake. At the

FINDINGS AND CONCLUSIONS - 7

outlet of Coeur d'Alene Lake, there is a natural riverbed obstruction which limits the outflow of water.

XXV.

The water that is in Coeur d'Alene Lake comes primarily from the St. Joe River and the Coeur d'Alene River. The St. Maries River is a principal tributary which feeds into the St. Joe River at the City of St. Maries. The Coeur d'Alene River has two principal tributaries, which are the South Fork of the Coeur d'Alene River which flows through Mullan, Wallace and Kellogg, and the North Fork of the Coeur d'Alene River. The North Fork of the Coeur d'Alene River and the South Fork of the Coeur d'Alene join to form the Coeur d'Alene River near the towns of Enaville and Kingston. The Washington Water Power Company currently maintains gages on the St. Joe River near St. Joe City and on the Coeur d'Alene River at Dudley.

XXVI.

The St. Joe, St. Maries, and the Coeur d'Alene Rivers have an annual flow regime. During the winter, large amounts of snow accumulate in the mountains in the drainage areas for those rivers. In a typical year, the snow melts in the spring, which results in what is commonly referred to as a Spring runoff. The Spring runoff normally results in high river flows and high water surface elevations in the rivers and Lake Coeur d'Alene and flooding of lands bordering the rivers and lake.

XXVII.

By opening gates and operating the plant, The Washington Water Power Company is able to pass all of the water that is capable of flowing out of Lake Coeur d'Alene and into the Spokane River.

XXVIII.

After the Spring high water has peaked and is going down, The Washington Water Power Company closes the gates to hold some water back in Coeur d'Alene Lake for use in generating power in the fall and winter when The Washington Water Power Company's customers make maximum use of electrical power. From 1907 to 1941, The Washington Water Power Company would hold the lake at an elevation of 2,126.5 feet (USGS Gage Datum) above sea level during the summer months. Since 1941, The Washington Water Power Company has held the water in Coeur d'Alene Lake near an elevation of 2,128 feet (USGS Gage Datum) during the summer months.

XXIX.

Through prudent operation of the Post Falls Dam, The Washington Water Power Company does not control the level of Coeur d'Alene Lake when the lake is above the elevation of 2,128 feet (USGS Gage Datum) above mean sea level, as measured at the USGS Coeur d'Alene Lake water gage. The Washington Water Power Company agrees to operate the dam utilizing prudent utility practices as set forth in Findings of Fact No. XLV, XLVI, and XLVII.

XXX.

Over the years, individuals on the Spokane River upstream from Post Falls have complained to The Washington Water Power Company that it was not holding the Spokane River high enough. In 1982, the Post

Falls Irrigation District sued The Washington Water Power Company to require that it temporarily close the gates at Post Falls to raise the level of the Spokane River so that it could operate its irrigation pumps.

XXXI.

As part of the Amended Interlocutory Judgment entered on April 11, 1988, judgment was granted in favor of The Washington Water Power Company against the following plaintiffs: Charles Epler and Lola Epler; Rudolph Larson; Allison Norton, Sr., and Verna Norton; John E. Pugh and Marjorie Pugh; Lawrence Mietzner and Lou Ann Mietzner; Henry Porret; Leonard Robinson; Floyd Runge and Edna Runge; Ralph Storey; Charles Wilson and Shirdean Wilson; Claire Warehime.

XXXII.

The plaintiffs listed in Findings of Fact XXXI, against whom judgment was granted in favor of The Washington Water Power Company, have stipulated and agreed to waive their right of appeal.

XXXIII.

As part of the Amended Interlocutory Judgment entered on April 11, 1988, The Washington Water Power Company was granted judgment against all of the plaintiffs on their claim for punitive damages.

XXXIV.

The parties have stipulated that the claims of plaintiffs Gary Bader and Leta K. Bader are dismissed without prejudice.

XXXV.

The parties have stipulated that the claims of the following plaintiffs are dismissed with prejudice and are forever barred: Lawrence Mietzner and Lou Ann Mietzner; Henry Porret; Leonard

Robinson; Floyd Runge and Edna Runge; Ralph Storey; Charles Wilson and Shirdean Wilson; Claire Warehime; Charles Epler and Lola Epler; Rudolph Larson; Allison Norton, Sr., and Verna Norton; and John E. Pugh and Marjorie Pugh.

XXXVI.

The parties have stipulated that the claims of the following plaintiffs are dismissed with prejudice: Benewah County Drainage District No. 3; Benewah County Drainage District No. 7; Kootenai County Drainage District No. 1; Gary Appel and Linda Appel; Grace Barden; Albert Best and Ludie Best; Robert W. Fitzgerald and Donna G. Fitzgerald; Frank Frutchey and Rose Frutchey; C. J. Hanan and Velma Hanan; James O. Hansen and Ida Patricia Hansen; Charles Harpole and Darlene Harpole; Reese Hubbard and Pauline Hubbard; Lynn P. Kerns; Robert R. Kingsley and Betty J. Kingsley; Buford McDaniel and Ruby R. McDaniel; Lester A. Nelson and Lucille Nelson; Peter Nemeth and Mary Nemeth; Daniel A. Porret individually and as the sole survivor of the partnership composed of Daniel A. Porret and George H. Porret; Dennis W. Powell and Mina L. Powell; Jack A. (Rocky) Rauch and E. Elizabeth Rauch; Paul Reimann and Martha "Marty" Reimann; Aaron C. Robinson and Jeanne M. Robinson; Jacob Schlepp, Michael R. Schlepp, and Paul Schlepp; Ray R. Schoenick and Bernice Schoenick, individually and as co-trustees of the Schoenick Family Trust of 1987; John W. Sines and Shirley Sines; Edward M. Sullivan and Bernice L. Sullivan; Halvor O. Thorhaug; W. D. Thurston and Barbara "Bobbie" Thurston.

XXXVII.

The parties have stipulated and agreed that the Amended Interlocutory Judgment entered on April 11, 1988 will be vacated in

all respects and effect and that the Judgments accompanying these Findings and Conclusions shall be substituted therefore.

XXXVIII.

The parties have stipulated and agreed that all rulings by the Court on motions brought by the parties will be vacated.

XXXIX.

The Washington Water Power Company previously obtained overflow easements and/or overflow permits covering the properties of the following plaintiffs: Grace Barden; Albert Best and Ludie Best; C. J. Hanan and Velma Hanan; Charles Harpole and Darlene Harpole; Reese Hubbard and Pauline Hubbard; Robert Kerns and Lynn Kerns; Robert Kingsley and Betty Kingsley; Lawrence Mietzner and Lou Ann Mietzner; Lester Nelson and Lucille Nelson; Peter Nemeth and Mary Nemeth; Allison Norton, Sr., and Verna Norton; Daniel Porret, individually and as the sole survivor of the partnership composed of Daniel A. Porret and George H. Porret; Paul Reimann and Martha "Marty" Reimann; Aaron Robinson and Jeanne Robinson; Floyd Runge and Edna Runge; Jacob Schlepp; Michael Schlepp; Paul Schlepp; John Sines and Shirley Sines; Ralph Storey; W. D. Thurston and Barbara "Bobbie" Thurston; Charles Wilson and Shirdean Wilson; James Hansen and Ida Hansen; Jack A. (Rocky) Rauch and Elizabeth Rauch; Ray Schoenick and Bernice Schoenick, individually and as co-trustees of the Schoenick Family Trust of 1987. Plaintiffs have stipulated and agreed that the previously granted overflow easements and permits are valid and are in full force and effect; provided, however, nothing contained therein shall relieve The Washington Water Power Company from complying with and adhering to the settlement agreements referenced herein.

FINDINGS AND CONCLUSIONS - 12

XL.

The Washington Water Power Company has the right, pursuant to the laws of the State of Idaho, to condemn property for the operation of the Post Falls Dam.

XLI.

The Washington Water Power Company operates the Post Falls Dam pursuant to a license (Project No. 2545) from the Federal Energy Regulatory Commission (FERC). The license allows The Washington Water Power Company to operate the reservoir with Lake Coeur d'Alene at 2,128 feet (USGS Gage Datum) above mean sea level or below.

XLII.

The Washington Water Power Company has and will continue to operate the Post Falls Dam pursuant to the FERC license in effect at the time and all applicable laws and regulations.

XLIII.

The Washington Water Power Company agrees that it will comply with its FERC license and not control the elevation of Coeur d'Alene Lake when the level of the lake is above 2,128 feet (USGS Gage Datum) mean sea level, as measured by the USGS Coeur d'Alene Lake water gage.

XLIV.

The Washington Water Power Company agrees that at all times when the elevation of Coeur d'Alene Lake is above 2,128 feet (USGS Gage Datum) mean sea level, as measured by the USGS Coeur d'Alene Lake water gage, the Company will open gates at Post Falls Dam and allow as much water to pass as is capable of flowing out of Lake Coeur d'Alene and into the Spokane River.

XLV.

It is understood that large amounts of snow may accumulate and that warm winds and rains sometimes occur during the months of November through March (which condition is sometimes referred to as a "chinook") which sometimes cause substantial flooding. It is understood that such chinook conditions are unpredictable and may occur before all of the water stored by The Washington Water Power Company in Coeur d'Alene lake has been drawn and utilized. It is understood by all parties that the climate and weather conditions in the Pacific Northwest region varies substantially from unusually dry conditions to unusually wet conditions. The Post Falls Dam is operated in coordination with most of the other hydroelectric projects in the Pacific Northwest region, including the states of Idaho, Montana, Oregon and Washington. It is understood that prudent utility operations includes the storage of water in reservoirs, such as Lake Coeur d'Alene and its tributary rivers for use during high energy consumption periods in the Pacific Northwest region, which is usually in the months of December through February. Due to the foregoing, it is understood that prudent utility operations may include having stored waters in reservoirs such as Coeur d'Alene Lake and its tributary rivers at a time when a chinook condition may occur. So long as The Washington Water Power Company operates the Post Falls Dam in compliance with and consistent with applicable licenses, laws, regulations, and prudent utility practices in the interest of the general public, and so long as the operation of the dam is consistent with its operation since 1941 including, without limitation, since 1984, The Washington Water Power Company shall not be liable for any

FINDINGS AND CONCLUSIONS - 14

claims or damages arising from or in connection with the operation of the Post Falls Dam to any of the plaintiffs listed in Findings of Fact No. XXXVI or to their heirs, successors, or assigns. Prudent utility practices as used herein shall include consideration of all uses of the lake and its tributaries and adjacent and surrounding property, including, but not limited to, farming, commercial, industrial, recreational, municipal, power production, navigation, fish and wildlife. Mechanical and electrical failures at the Post Falls Dam beyond the reasonable control of The Washington Water Power Company, and requests from public safety officials, shall also be taken into consideration in determining whether prudent utility practices have been violated. If practical, public notice of mechanical and electrical failures or requests from public safety officials to close the gates of the dam, shall be given if it will cause the elevation of the Coeur d'Alene Lake to exceed 2,128 feet (USGS Gage Datum) above mean sea level as measured by the USGS Coeur d'Alene Lake water gage. As part of its prudent utility practices, The Washington Water Power Company agrees to collect appropriate data at appropriate times from its gaging stations on the St. Joe and Coeur d'Alene Rivers.

XLVI.

From 1907 to 1941, The Washington Water Power Company would hold and store water in Lake Coeur d'Alene and its tributary rivers up to an elevation of 2,126.5 feet (USGS Gage Datum) as measured by the USGS Coeur d'Alene Lake water gage. Since 1941, The Washington Water Power Company has held and stored waters in Coeur d'Alene Lake up to an elevation of 2,128 feet (USGS Gage Datum) (with actual fluctuations

up to 1.2 inches above 2,128) as measured by the USGS Coeur d'Alene Lake water gage. The timing of the storage of water in Coeur d'Alene Lake and the withdrawal of such water has varied from year to year. Prior to 1984, if the spring high water rose above elevation 2,128 feet (USGS Gage Datum) as measured by the USGS Coeur d'Alene Lake water gage, The Washington Water Power Company would generally operate the Post Falls Dam to allow the water surface elevation in Coeur d'Alene Lake to recede to an elevation of 2,126.5 feet (USGS Gage Datum) and then would cause the water surface elevation of the lake to be raised to 2,128 feet (USGS Gage Datum) as measured by the USGS Coeur d'Alene Lake water gage. In 1984, and in the future, The Washington Water Power Company has and may continue to operate the Post Falls Dam so that, after spring high water, water is held and stored in Lake Coeur d'Alene at or near an elevation of 2,128 feet (USGS Gage Datum) without the water surface elevation of Lake Coeur d'Alene first receding to a lower elevation (i.e. 2,126.5 feet (USGS Gage Datum) as measured by the USGS Coeur d'Alene Lake water gage). So long as The Washington Water Power Company operates the Post Falls Dam in a manner which is consistent with its operation of the Post Falls Dam since 1941, including without limitation, the operation of the Post Falls Dam since 1984, and so long as it operates the Post Falls Dam following prudent utility practices in the interest of the general public, as that term is defined in Finding of Fact No. XLV, the plaintiffs listed in Findings of Fact No. XXXVI and their heirs, successors, and assigns, shall make no claim of any kind whatsoever against The Washington Water Power Company in connection with the operation of the Post Falls Dam.

FINDINGS AND CONCLUSIONS - 16

XLVII.

The plaintiffs recognize that the USGS Coeur d'Alene Lake water gage is located at the north end of Lake Coeur d'Alene. The plaintiffs further recognize that Coeur d'Alene Lake is approximately thirty miles in length from north to south and generally varies from two to five miles in width. The predominate direction of the wind is from the southwest to the northeast, which may cause the water surface elevation on the north end of Coeur d'Alene Lake as measured by the USGS Coeur d'Alene Lake water gage to rise even though there has not been any increase in the amount of water in Coeur d'Alene Lake. The wind effect may cause the water surface elevation to fluctuate up to three-tenths of a foot. In addition, fluctuations in water surface elevation of Lake Coeur d'Alene may be caused by substantial changes in the flows of the Coeur d'Alene River and of the St. Joe River resulting from weather events such as high temperatures, melting snow, and precipitation. Therefore, since 1941 when The Washington Water Power company changed its operating procedure so as to allow it to control Coeur d'Alene Lake at 2,128 feet (USGS Gage Datum) or below, precise control of the elevation of Lake Coeur d'Alene at 2,128 feet (USGS Gage Datum) above mean sea level as measured by the USGS Coeur d'Alene Lake water gage has not been possible. However, control of Lake Coeur d'Alene within two-tenths of a foot as measured by the USGS Coeur d'Alene Lake water gage is possible after spring high water and when Lake Coeur d'Alene is at and below elevation 2,128 feet (USGS Gage Datum) above mean sea level as measured by the USGS Coeur d'Alene Lake water gage. The plaintiffs agree that so long as the water surface elevation of Coeur d'Alene Lake does not exceed 2,128.2 feet

FINDINGS AND CONCLUSIONS - 17

(USGS Gage Datum) for any 48 hour period as measured by the Coeur d'Alene Lake water gage when the water surface elevation of Coeur d'Alene Lake is under the control of The Washington Water Power Company, the plaintiffs, their heirs, successors, and assigns, shall have no claim against The Washington Water Power Company arising out of the fact that the lake elevation, as measured by the Coeur d'Alene Lake water gage, exceeded the elevation of 2,128 feet (USGS Gage Datum) above mean sea level while under the control of The Washington Water Power Company.

XLVIII.

As part of, and pursuant to the settlement agreement, the non-drainage district plaintiffs, with the exception of plaintiffs Rauch who no longer own the real property that was a subject in this action, listed in Findings of Fact No. XXXVI, for themselves, their heirs, successors and assigns, have stipulated and agreed that a perpetual overflow easement be granted in favor of The Washington Water Power Company allowing it to hold and store the waters of Coeur d'Alene Lake to an elevation of 2,128 feet (USGS Gage Datum) above mean sea level as determined by the USGS Coeur d'Alene Lake water surface gage, and also the right, in perpetuity, to damage land, crops and any improvements or structures thereon by wave wash, erosion, seepage, inundation or similar cause, as may result from holding the water of Coeur d'Alene Lake up to an elevation of 2,128 feet, still water measurement, above mean sea level as measured by the USGS Coeur d'Alene Lake water gage.

XLIX.

In addition to granting the easements described above, the non-drainage district plaintiffs listed in Findings of Fact No. XXXVI, for

themselves, their heirs, successors and assigns, have stipulated and agreed to release and forever discharge The Washington Water Power Company, its agents, employees, and assigns, from any and all past and future claims, demands, and damages arising out of or in any way resulting from The Washington Water Power Company operating the Post Falls Dam in such a manner as to hold and control the level of Lake Coeur d'Alene at and below the elevation of 2,128 feet (USGS Gage Datum) above mean sea level as measured by the USGS Coeur d'Alene Lake water gage. The release and discharge is for all past and future claims for damages of every kind and nature, including, but not limited to, crop loss, pumping costs, dike maintenance costs, ditch maintenance costs, crop loss occurring on leased lands, seepage damage, dike damage, erosion damage, flooding damage, damage caused by the raising of the ground water table, damage caused by the inability of land to drain, real property damage, personal property damage, consequential damages, punitive damages, loss or damages or claims of any kind already sustained or that the plaintiffs their heirs, successors and assigns, may hereinafter sustain arising out of, or in any way relating or resulting from The Washington Water Power Company operating the Post Falls Dam in such a manner as to hold and control the level of Lake Coeur d'Alene at and below the elevation of 2,128 feet (USGS Gage Datum) as measured by the USGS Coeur d'Alene Lake water gage. Provided, however, said release does not preclude a claim for a violation of any of these Findings, Conclusions, Judgments and settlement agreement. With respect to plaintiffs Rauch, this release does not bind their successors and assigns since they sold the real property involved in this action prior to this settlement.

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L.

Benewah County Drainage District No. 3, Benewah County Drainage District No. 7, and Kootenai County Drainage District No. 1, have stipulated and agreed, pursuant to their powers under Idaho Code Section 42-2901 et seq., to release and forever discharge The Washington Water Power Company, its agents, employees, and assigns, from any and all past and future claims, demands, and damages arising out of or in any way resulting from The Washington Water Power Company operating the Post Falls Dam in such a manner as to hold and control the level of Lake Coeur d'Alene at and below the elevation of 2,128 feet (USGS Gage Datum) above mean sea level as measured by the USGS Coeur d'Alene Lake water gage. The release and discharge is for all past and future claims for damages of every kind and nature, including, but not limited to, pumping costs, dike and pump maintenance costs, ditch maintenance costs, seepage damage, dike damage, ditch damage, erosion damage, flooding damage, damage caused by the raising of the ground water table, damage caused by the inability of land to drain, real property damage, personal property damage, equipment damage, consequential damages, punitive damages, loss or damages or claims of any kind already sustained or that the drainage districts, their successors and assigns, may hereinafter sustain arising out of, or in any way relating to or resulting from The Washington Water Power Company operating the Post Falls Dam in such a manner as to hold and control the level of Lake Coeur d'Alene at and below the elevation of 2,128 feet (USGS Gage Datum) as measured by the USGS Coeur d'Alene Lake water gage. Provided, however, said

FINDINGS AND CONCLUSIONS - 20

release does not preclude a claim for violation of any of these Findings, Conclusions, Judgments and settlement agreements.

LI.

The parties agree that The Washington Water Power Company has no control or responsibility for the operations of the drainage districts. Further, that the drainage districts have sole responsibility for the operations of the drainage districts including pumping, dike and pump maintenance, ditch maintenance, seepage control, dike repair, erosion repair and equipment repair.

LII.

The Washington Water Power Company has agreed, in exchange for the Release of All Claims and easement described in Finding of Fact Nos. XLVIII, XLIX, and LVIX, to pay or provide to the non-drainage district plaintiffs listed in Finding of Fact No. XXXVI, the consideration set forth in the settlement agreement according to the terms of the agreement, on the date of these findings, conclusions and judgments are entered by the Court.

LIII.

The Washington Water Power Company has agreed, in exchange for the Release of All Claims described in Finding of Fact No. I above, from Benewah County Drainage District No. 3, Benewah County Drainage District No. 7, and Kootenai County Drainage District No. 1, to provide the consideration set forth in the settlement agreements according to the terms of those agreements.

LIV.

The parties stipulate that the agreement entered into between The Washington Water Power Company and Kootenai County Drainage District

No. 1 on February 5, 1959 is rescinded and is hereby declared to be null and void.

LV.

The parties stipulate that these Findings, Conclusions, Judgments and settlement agreements are binding on The Washington Water Power Company, its successors and assigns.

LVI.

The parties have stipulated and agreed that if a dispute arises concerning whether any of the terms of the settlement agreements, Findings, Conclusions, and Judgments have been breached, the sole and exclusive manner to resolve the dispute will be by arbitration pursuant to the Idaho Uniform Arbitration Act. The arbitration procedure shall be commenced by a party making a written demand for arbitration delivered to the other party by certified mail with a return receipt requested. Upon such a written demand, each party within thirty days will select an arbitrator with knowledge concerning the operation of hydroelectric projects and coordinated hydro operations in the Pacific Northwest region. The two arbitrators will select a third with the same qualifications. If they cannot agree upon the third arbitrator within thirty days, either party may request that the selection of such a third arbitrator be made by the state district court judge having jurisdiction in Kootenai or Benewah counties. Arbitration will take place in Coeur d'Alene Idaho. A decision by two of the arbitrators shall be binding. The Idaho Rules of Civil Procedure & Evidence shall apply to the arbitration proceedings including prehearing discovery by the parties involved in

the dispute. All matters before the arbitrators shall be kept confidential by the arbitrators and by the parties.

The arbitrators will determine whether there has been a breach of any of the terms of these Findings, Conclusions, Judgments and settlement agreements. If they find that a breach has occurred, they will determine the amount of damages to be awarded or other appropriate remedy authorized by law, licenses and regulations. The prevailing party will be entitled to an award of attorneys' fees and all costs and expenses associated with the arbitration. The non-prevailing party will be required to pay the expenses of the arbitrators.

LVII.

The parties have stipulated and agreed, pursuant to I.R.C.P. 79(e) that all exhibits lodged with the Court pursuant to pre-trial order, and all exhibits, offered, marked, or admitted in the trial of this action shall be delivered by the Court Clerk to The Washington Water Power Company. Provided, however, that selected personal photographs agreed upon by the parties, shall be delivered to the parties sponsoring the same for delivery to the person to whom they belong. Exhibits delivered to The Washington Water Power Company may be disposed of by the Company.

LVIII.

The non-drainage district plaintiffs listed in Findings of Fact No. XXXVI have authorized their attorneys to execute the Settlement Agreement on their behalf.

LVIX.

Plaintiffs Albert Best and Ludie Best, Charles Harpole and Darlene Harpole, Lester A. Nelson and Lucille Nelson, Robert R. Kingsley and Betty J. Kingsley, and W. D. Thurston and Bobbie Thurston, for themselves, their heirs, successors and assigns, have stipulated and agreed to release and forever discharge The Washington Water Power Company, its agents, employees, and assigns, from any and all past and future claims or demands of any kind and nature, if any, which Benewah County Drainage District No. 8 may make against The Washington Water Power Company on behalf of or in any way connected with property of the above-named plaintiffs, concerning The Washington Water Power Company operating the Post Falls Dam in such a manner as to hold and control the level of Lake Coeur d'Alene at and below the elevation of 2,128 feet (USGS Gage Datum) above mean sea level as measured by the USGS Coeur d'Alene Lake water gage, so long as The Washington Water Power Company complies with the Findings of Fact, Conclusions of Law, Judgments, and Settlement Agreement. This release includes, but is not limited to, claims that may be made by the Drainage District for pumping cost, dike and pump maintenance costs, ditch maintenance costs, seepage damage, dike damage, ditch damage, flooding damage, damage caused by the raising of the ground water table, damage caused by the inability of the land to drain, real property damage, personal property damage, equipment damage, consequential damage and punitive damage. The above-listed plaintiffs for themselves, their heirs, successors and assigns, do covenant that their property will not be a subject of any action or claim, if any, by Benewah County Drainage District No. 8 against The Washington Water

FINDINGS AND CONCLUSIONS - 24

Power Company concerning the operation of the Post Falls Dam as described above.

The Court, having made the foregoing findings of fact, now makes the following:

CONCLUSIONS OF LAW

I.

The Amended Interlocutory Judgment entered on April 11, 1988, is vacated in all respects and effect and the Judgments accompanying these Findings and Conclusions shall be substituted therefor.

II.

The following plaintiffs: Charles Epler and Lola Epler; Rudolph Larson; Allison Norton, Jr. and Verna Norton; John E. Pugh and Marjorie Pugh; Lawrence Mietzner and Lou Ann Mietzner; Henry Porret; Leonard Robinson; Floyd Runge and Edna Runge; Ralph Storey; Charles Wilson and Shirdean Wilson; Claire Warehime, against whom a judgment of dismissal will be entered in favor of The Washington Water Power Company, have waived their right of appeal through stipulation and agreement.

III.

The Amended Interlocutory Judgment entered on August 11, 1988, which is vacated in all respects and effect, shall have no res judicata or collateral estoppel effect.

IV.

Since the Amended Interlocutory Judgment has been vacated, there is no judicial determination concerning the location of the ordinary

high water mark of Coeur d'Alene Lake, Coeur d'Alene River, the St. Joe River, and the St. Maries River.

V.

The State of Idaho holds title to the beds of all navigable bodies of water below the ordinary high water mark for the use and benefit of the people of the State of Idaho.

VI.

In any action in which the ordinary high water mark is to be decided to determine State versus private ownership of lands, the State of Idaho is a necessary and indispensable party in the proceedings.

VII.

The State of Idaho was not a party to this action, however, all parties have recognized throughout the entirety of this action that the State of Idaho owns the lands within the State up to the ordinary high water mark of the navigable rivers, streams and lakes within the state. Since the interlocutory judgment has been vacated, there is no binding determination between the parties hereto of the ordinary high water mark of Coeur d'Alene Lake, the Coeur d'Alene River, the St. Joe River and the St. Maries River.

VIII.

The generation of electric power from water power is a beneficial use of water under the water law of Idaho.

IX.

The law of Idaho grants an electrical utility the right to fill completely with water the bed of a natural stream, channel, or lake up to the ordinary high water mark for the purpose of producing

FINDINGS AND CONCLUSIONS - 26

electric power from water power. The Washington Water Power Company agrees that the foregoing Conclusion of Law in no way affects its obligations as contained in these Findings, Conclusions, Judgments and settlement agreements.

X.

Pursuant to I.C. 42-2901 et seq. drainage districts are quasi municipal corporations. They have the power to sue in their name, conduct the business and affairs of the district, and to make and execute contracts. The settlement agreement concerning Benewah County Drainage District No. 3, Benewah County Drainage District No. 7, and Kootenai County Drainage District No. 1 is approved and the Release of All Claims set forth in Findings of Fact No. L is in full force and effect.

XI.

The agreement entered into between The Washington Water Power Company and Kootenai County Drainage District No. 1 on February 5, 1959 is rescinded and is hereby declared to be null and void.

XII.

The non-drainage district plaintiffs listed in Findings of Fact No. XXXVI have authorized their attorneys to execute the Settlement Agreement on their behalf.

XIII.

The settlement agreement with the non-drainage district plaintiffs listed in Findings of Fact No. XXXVI is approved and, upon receipt of the consideration stated therein, the Release of All Claims set forth in Findings of Fact No. XLIX will be in full force and effect, and The Washington Water Power Company shall be granted

overflow easements as set forth in Findings of Fact No. XLVIII. A judgment concerning each of the non-drainage district plaintiffs listed in Findings of Fact No. XXXVI shall be entered reflecting that an overflow easement is being granted to The Washington Water Power Company. The form of the judgment has been approved by the parties.

XIV.

The following plaintiffs are dismissed with prejudice: Lawrence Mietzner and Lou Ann Mietzner; Henry Porret; Leonard Robinson; Floyd Runge and Edna Runge; Ralph Storey; Charles Wilson and Shirdean Wilson; Claire Warehime; Charles Epler and Lola Epler; Rudolph Larson; Allison Norton, Sr., and Verna Norton; and John E. Pugh and Marjorie Pugh.

XV.

The following plaintiffs are dismissed with prejudice: Benewah County Drainage District No. 3; Benewah County Drainage District No. 7; Kootenai County Drainage District No. 1; Gary Appel and Linda Appel; Grace Barden; Albert Best and Ludie Best; Robert W. Fitzgerald and Donna G. Fitzgerald; Frank Frutchey and Rose Frutchey; C. J. Hanan and Velma Hanan; James O. Hansen and Ida Patricia Hansen; Charles Harpole and Darlene Harpole; Reese Hubbard and Pauline Hubbard; Lynn P. Kerns; Robert R. Kingsley and Betty J. Kingsley; Buford McDaniel and Ruby R. McDaniel; Lester A. Nelson and Lucille Nelson; Peter Nemeth and Mary Nemeth; Daniel A. Porret, individually and as the sole survivor of the partnership composed of Daniel A. Porret and George H. Porret; Dennis W. Powell and Mina L. Powell; Jack A. (Rocky) Rauch and E. Elizabeth Rauch; Paul Reimann and Martha "Marty" Reimann; Aaron C. Robinson and Jeanne M. Robinson; Jacob Schlepp, Michael R. Schlepp,

and Paul Schlepp; Ray R. Schoenick and Bernice Schoenick, individually and as co-trustees of the Schoenick Family Trust of 1987; John W. Sines and Shirley Sines; Edward M. Sullivan and Bernice L. Sullivan; Halvor O. Thorhaug; W. D. Thurston and Barbara "Bobbie" Thurston.

XVI.

With respect to plaintiff's Gary Bader and Leta K. Bader, the complaint of Baders is dismissed without prejudice. Since the Amended Interlocutory Judgment of April 11, 1988 and all of the rulings made by the Court during the pendency of this action are vacated, they shall have no res judicata or collateral estoppel effect in favor of, or against, Baders or The Washington Water Power Company.

XVII.

All exhibits lodged with the Court pursuant to pre-trial order, and all exhibits offered, marked, or admitted in the trial of this action shall be delivered by the Court Clerk to The Washington Water Power Company. Provided, however, that selected personal photographs agreed upon by the parties, shall be delivered to the parties sponsoring the same for delivery to the person to whom they belong. Exhibits delivered to The Washington Water Power Company may be disposed of by the Company.

XVIII.

All discovery material in the Courts files shall be delivered to The Washington Water Power Company.

XVIX.

All rulings by the Court on motions brought by the parties are vacated and they shall have no res judicata or collateral estoppel effect.

FINDINGS AND CONCLUSIONS - 29

XX.

The previously granted overflow easements and permits described in paragraph XXXIX of the Findings of Fact are valid and are in full force and effect. Provided, however, nothing contained therein shall relieve The Washington Water Power Company from complying with and adhering to the Findings, Conclusions, Judgments and settlement agreements referenced herein.

XXI.

The Release of All claims set forth in Findings of Fact No. LVIX is in full force and effect.

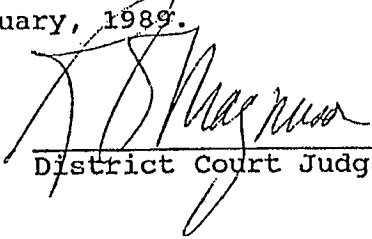
XXII.

The arbitration procedure set forth in Findings of Fact No. LVI shall be in full force and effect.

XXIII.

The amount and/or terms of the settlement agreements shall be kept confidential and secret to the parties and shall not be disclosed to third parties unless required by order of a court or agency of competent jurisdiction, or unless necessary to do so in the enforcement of this settlement by the parties.

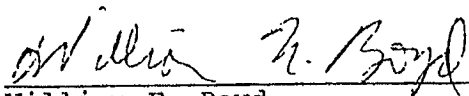
DATED this 27TH day of February, 1989.



District Court Judge

FINDINGS AND CONCLUSIONS - 30

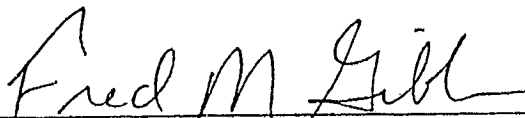
Approved As To Form And Content



William F. Boyd
Attorney for Plaintiffs



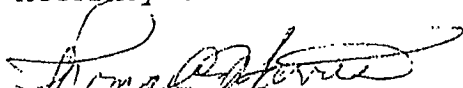
Patrick E. Miller
Attorney for Defendant



Fred M. Gibler
Attorney for Plaintiffs



Jerry K. Boyd
Attorney for Defendant



Thomas L. Morris
Attorney for Plaintiffs



William J. Schroeder
Attorney for Defendant

FINDINGS AND CONCLUSIONS - 31

STATE OF IDAHO
COUNTY OF SHOSHONE | SS
FILED

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MARGARET L. HINGFIELD
CLERK DIST. COURT
BY Bessie L. Kirkell
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

GARY APPEL, et al.,	)	
	)	Case No. 24822
Plaintiffs,	)	
	)	ORDER APPROVING SETTLEMENT
vs.	)	AND VACATING INTERLOCUTORY
	)	JUDGMENT; ORDER OF DISMISSAL;
WASHINGTON WATER POWER	)	AND JUDGMENT
COMPANY, a Washington corp.,	)	
	)	
Defendant.	)	
	)	

The above-entitled Court having made and entered its Findings of Fact and Conclusions of Law, now hereby enters the following order and judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the settlement between the parties is approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Amended Interlocutory Judgment entered on April 11, 1988, is vacated in all respects and said judgment shall have no res judicata or collateral estoppel effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that since the Amended Interlocutory Judgment has been vacated, there is no judicial determination concerning the location of the ordinary high

ORDER APPROVING SETTLEMENT,
VACATING INTERLOCUTORY JUDGMENT,
ORDER OF DISMISSAL AND JUDGMENT - 1

water mark of Coeur d'Alene Lake, Coeur d'Alene River, the St. Joe River, and the St. Maries River.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that The Washington Water Power Company shall be granted a perpetual overflow easement by each of the non-drainage district plaintiffs, with the exception of plaintiffs Rauch, listed in Findings of Fact No. XXXVI. The easements will be granted by separate judgments entered by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that The Washington Water Power Company shall pay or provide the consideration set forth in the settlement agreements, and the parties shall comply with all the terms, obligations and conditions of the settlement agreements, Findings of Fact, Conclusions of Law and Judgments.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Release of All Claims as set forth in Findings of Fact No. XLIX is in full force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Release of All Claims as set forth in Findings of Fact No. L is in full force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Release of All Claims as set forth in Findings of Fact No. LVIX is in full force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a judgment is granted in favor of The Washington Water Power Company against all plaintiffs dismissing the claims for punitive damages and is

ORDER APPROVING SETTLEMENT,
VACATING INTERLOCUTORY JUDGMENT,
ORDER OF DISMISSAL AND JUDGMENT - 2

granted in favor of The Washington Water Power Company dismissing with prejudice all claims of the following plaintiffs: Charles Epler and Lola Epler; Rudolph Larson; Allison Norton, Jr. and Verna Norton; John E. Pugh and Marjorie Pugh; Lawrence Mietzner and Lou Ann Mietzner; Henry Porret; Leonard Robinson; Floyd Runge and Edna Runge; Ralph Storey; Charles Wilson and Shirdean Wilson; Claire Warehime. The above-listed plaintiffs have waived their right of appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims and cause of action of the following plaintiffs are dismissed with prejudice: Benewah County Drainage District No. 3; Benewah County Drainage District No. 7; Kootenai County Drainage District No. 1; Gary Appel and Linda Appel; Grace Barden; Albert Best and Ludie Best; Robert W. Fitzgerald and Donna G. Fitzgerald; Frank Frutchev and Rose Frutchev; C. J. Hanan and Velma Hanan; James O. Hansen and Ida Patricia Hansen; Charles Harpole and Darlene Harpole; Reese Hubbard and Pauline Hubbard; Lynn P. Kerns; Robert R. Kingsley and Betty J. Kingsley; Buford McDaniel and Ruby R. McDaniel; Lester A. Nelson and Lucille Nelson; Peter Nemeth and Mary Nemeth; Daniel A. Porret, individually and as the sole survivor of the partnership composed of Daniel A. Porret and George H. Porret; Dennis W. Powell and Mina L. Powell; Jack A. (Rocky) Rauch and E. Elizabeth Rauch; Paul Reimann and Martha "Marty" Reimann; Aaron C. Robinson and Jeanne M. Robinson; Jacob Schlepp, Michael R. Schlepp, and Paul Schlepp; Ray R. Schoenick and Bernice

ORDER APPROVING SETTLEMENT,
VACATING INTERLOCUTORY JUDGMENT,
ORDER OF DISMISSAL AND JUDGMENT - 3

Schoenick, individually and as co-trustees of the Schoenick Family Trust of 1987; John W. Sines and Shirley Sines; Edward M. Sullivan and Bernice L. Sullivan; Halvor O. Thorhaug; W. D. Thurston and Barbara "Bobbie" Thurston.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cause of action by Gary Bader and Leta K. Bader is dismissed without prejudice. However, the Amended Interlocutory Judgment of April 11, 1988 and all of the rulings made by the Court during the pendency of this action, shall have no res judicata or collateral estoppel effect in favor of, or against, Baders, or The Washington Water Power Company, inasmuch as the same are vacated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all discovery material in the Court files shall be delivered to The Washington Water Power Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all rulings by the Court on motions brought by the parties are vacated and they shall have no res judicata or collateral estoppel effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the arbitration procedure set forth in Findings of Fact No. LVI shall be in full force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the overflow easements and permits as described in paragraph XXXIX of the Findings of Fact are valid and are in full force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the agreement entered into between The Washington Water Power Company and

ORDER APPROVING SETTLEMENT,
VACATING INTERLOCUTORY JUDGMENT,
ORDER OF DISMISSAL AND JUDGMENT - 4

Kootenai County Drainage District No. 1 on February 5, 1959 is rescinded and is null and void.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount and/or terms of the settlement agreements will be kept confidential and secret to the parties and will not be disclosed to third parties unless required by order of a court, or agency of competent jurisdiction, or unless necessary to do so in the enforcement of this settlement.

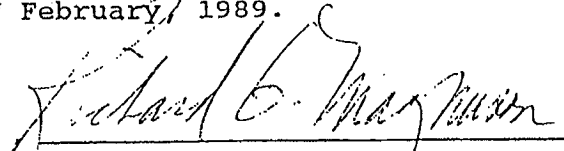
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the settlement agreements reviewed, initialed and dated by the Court shall be delivered to The Washington Water Power Company in order to preserve the confidentiality which is desired by the parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all exhibits lodged with the Clerk pursuant to pre-trial order, and all exhibits offered, marked or admitted in the trial of this action be delivered by the Court Clerk to The Washington Water Power Company. Provided, however, that selected personal photographs agreed upon by the parties, shall be delivered to the parties sponsoring the same for delivery to the person to whom they belong. Exhibits delivered to The Washington Water Power Company may be disposed of by the company.

ORDER APPROVING SETTLEMENT,
VACATING INTERLOCUTORY JUDGMENT,
ORDER OF DISMISSAL AND JUDGMENT - 5

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all requests for costs and attorney fees have been withdrawn and dismissed by the parties by stipulation.

DATED this 27th day of February, 1989.


DISTRICT COURT JUDGE

ORDER APPROVING SETTLEMENT,
VACATING INTERLOCUTORY JUDGMENT,
ORDER OF DISMISSAL AND JUDGMENT - 6