AGREEMENT BETWEEN
PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM
AND
WYOMING WATER DEVELOPMENT OFFICE

The parties to this Agreement ("Contract") are THE STATE OF WYOMING, acting through the Wyoming Water Development Office ("WWDO"), whose address is 6920 Yellowtail Road, Cheyenne, Wyoming 82002, hereinafter referred to as "State," and THE NEBRASKA COMMUNITY FOUNDATION, acting through the Platte River Recovery Implementation Program, whose address is 4111 4th Avenue, Suite 6, Kearney, Nebraska 68845, hereinafter referred to as "PRRIP." The State and the PRRIP are sometimes referred to herein jointly as "the Parties."

WITNESSETH THAT:

The following preliminary statements are made for the purpose of explanation:

EXPLANATORY RECITALS

WHEREAS, the Consolidated Natural Resource Act of 2008 (Public Law 110-229, Title V, Section 515) authorizes the Secretary of the Department of Interior ("Secretary") to construct, operate, and maintain the modification of the existing Pathfinder Dam and Reservoir, North Platte Project, with financial and managerial participation by the State as provided for in Contract No. 10XX6A0040, "Contractual Agreement Between the United States of America and the State of Wyoming, North Platte Project, Wyoming," dated June 14, 2010 ("Federal Contract").

WHEREAS, the United States completed construction of the existing Pathfinder Dam and Reservoir in 1909, which serves as the main water storage feature of the North Platte Project. Wyoming Permit No. 609R, with a priority date of December 6, 1904, is adjudicated for a total storage right to the United States of 1,070,000 acre-feet.

WHEREAS, Appendix F to the Final Settlement Stipulation of the settlement of the Nebraska v. Wyoming lawsuit, amending the 1953 Order Modifying and Supplementing Decree of October 8, 1945 ("Pathfinder Modification Stipulation") authorizes and describes the Modification of Pathfinder Dam and Reservoir.

WHEREAS, Chapter 105 of the 2006 Wyoming Session Laws, as amended in Chapter 25 of the 2009 Wyoming Session Laws, (W.S. 99-3-1105(b)), authorized the State to enter into an agreement with the United States for modification of the existing Pathfinder Dam and Reservoir, required approval of the Contract by the Governor and authorized funding for the modification of Pathfinder Dam.

WHEREAS, the State and the United States of America entered into the Federal Contract, which, in part, provides the State the right to provide water from the Wyoming

Account to the PRRIP under annual temporary water use agreements and to recover all costs associated with providing such water, so long as that use complies with the purposes of the Wyoming Account as specified in the Pathfinder Modification Stipulation.

WHEREAS, the original uses designated under Wyoming Permit No. 609R included irrigation and domestic use for the entire permitted capacity of 1,070,000 acre-feet. On January 26, 2009, the United States obtained a change of use (for additional uses) for 53,493 acre-feet of the permitted capacity of 1,070,000 acre-feet for Pathfinder Reservoir from the Wyoming State of Board of Control. The new uses for 33,493 acre-feet of the original storage right are environmental and fish and wildlife purposes for the establishment of the Environmental Account in Pathfinder Reservoir ("Environmental Account"). The new uses for 20,000 acre-feet of the original storage water right are municipal, environmental, and fish and wildlife purposes for the establishment of the Wyoming Account in Pathfinder Reservoir ("Wyoming Account") for which the State has the exclusive right to contract with the United States pursuant to Appendix F to the Final Settlement Stipulation in Nebraska v. Wyoming, 534 U.S. 40 (2001). The original designated uses under Wyoming Permit No. 609R, irrigation and domestic, are maintained for the entire permitted capacity of 1,070,000 acre-feet.

WHEREAS, W.S. 41-2-1301(b) states:

> "Pursuant to W.S. 41-3-115, and the Wyoming water development office is hereby authorized to transfer a maximum of nine thousand six hundred (9,600) acre feet of storage water per year from the Wyoming account in the Pathfinder Modification Project within Pathfinder reservoir to the Wyoming-Nebraska state line through annual temporary water use agreements with the Platte River Recovery Implementation Program in any year the storage water in the Wyoming account is not needed by the state of Wyoming as a municipal water supply or a replacement water supply to meet the state of Wyoming's obligations in the Nebraska v. Wyoming settlement agreement and the Platte River Recovery Implementation Program."

WHEREAS, the United States, acting through the Bureau of Reclamation, will operate the Wyoming Account to insure an annual estimated firm yield of 9,600 acre feet per year.

NOW THEREFORE, in consideration of the premises and mutual promises of the Parties, it is agreed as follows:

I. PURPOSE OF CONTRACT.

A. The Parties wish to enter into this Contract whereby the State will provide water to the PRRIP, through annual temporary water use agreements, from the Wyoming Account to which the State has a right under the Federal Contract, in accordance with the provisions herein.

B. This Contract is entered into pursuant to and subject to the court decrees, compacts, laws, permits and Federal Contract hereinabove described which are, by reference, incorporated herein.

C. The water contracted for by the PRRIP under the provisions of this Contract shall be deemed, for the purposes of said Federal Contract, to have been used by the State.

II. TERM OF CONTRACT.

A. Effective Date. This Contract is effective on the date of the signature last affixed to the signature page.

B. Term. The term of this Contract shall extend until December 31, 2019 or the date that the State withdraws from the PRRIP, whichever comes first. The Contract may be extended if approved by the Parties.

III. SERVICES AND PAYMENTS.

A. Purchase Price.

The PRRIP shall purchase thirty-eight thousand four hundred (38,400) acre feet of water ("Purchase Water Amount") from the Wyoming Account. The price of the Purchase Water Amount is based on a unit price of fifty-one dollars ($51.00) per acre foot and the total purchase price is one million nine hundred fifty-eight thousand four hundred dollars ($1,958,400.00). Payment of this amount is due on or before July 1, 2012.

1. If more than the Purchase Water Amount is delivered to the PRRIP during the term of this Contract, the price per acre foot of the overrun will be sixty-five dollars ($65.00) and the PRRIP shall be annually obligated to take delivery of a minimum of four thousand eight hundred (4,800) acre feet or the amount of water available determined in accordance with subsection III.B.1, whichever is less. As an alternative, the Parties may negotiate another prepayment option based on the circumstances at the time the overrun occurs.

2. If less than the Purchase Water Amount is delivered the PRRIP during the term of this Contract, the State shall reimburse the PRRIP for the underrun at a unit price of fifty-one dollars ($51.00) per acre foot of underrun on or before November 1, 2019.

The purchase price shall be increased if the Bureau of Reclamation assesses the State for a share of costs related to major repair and construction relating to Pathfinder Dam. In the event of major dam repair and construction, the price will be increased by the 37.4% (20,000/53,493) of the State's actual allocation of major dam repair and construction costs assessed by the Bureau of Reclamation for the Pathfinder Modification Project amortized at a rate of 6% for the remaining term of this Contract and divided by nine thousand six hundred (9,600) acre feet and multiplied by the amount of water yet to be delivered under the Contract. A lump sum payment for the increase will be made by the PRRIP within thirty

(30) days after receipt of an invoice from the WWDO. The unit price described in subsection III.A.2 will be increased to compensate for the increase in the purchase price resulting from major dam repair and construction costs.

B. Terms.

1. On or before the first of May of each year, the Director of the WWDO ("Director"), in consultation with the Wyoming Area Manager of the Bureau of Reclamation ("Area Manager") and the Wyoming State Engineer, will provide an estimate of the water in the Wyoming Account that may be available to the PRRIP. The deliberations will be based on the amount of water needed by the State to meet its obligations to its municipal customers, the State's obligations under the Nebraska v. Wyoming settlement or the PRRIP, and carryover requirements in the Wyoming Account to ensure a reliable supply for the following year. The estimate ("Available Water Amount") will be provided to the Executive Director of the PRRIP ("Executive Director") and the Environmental Account Manager of U.S. Fish and Wildlife Service ("EA Manager").

2. On or before the first day of June of each year, the Executive Director, in consultation with the EA Manager, will respond to the Director with the quantity of water the PRRIP would like to have released from the Wyoming Account ("Delivered Water Amount"). The Delivered Water Amount shall not be less than four thousand eight hundred (4,800) acre feet or the Available Water Amount, whichever is less. The Delivered Water Amount shall not be more than the Available Water Amount.

3. The Director will ensure the accuracy of the May estimate and advise the Executive Director by the fifteenth of June if there have been changes to the Available Water Amount and if the Delivery Water Amount must be revised.

4. The Director will secure the necessary annual temporary water use agreements from the Wyoming State Engineer.

5. There is a possibility that the demand from the WWDO's municipal customers will be less than anticipated. If this is the case, additional water will added to the Available Water Amount on or before September 1. If the total is less than or equal to 4,800 acre feet, the Delivery Water Amount will be increased and the temporary use agreement will be revised accordingly. If the total is greater than 4,800 acre feet, the PRRIP has the option to add the additional water to the Delivered Water Amount. If this option is exercised, the Delivery Water Amount will be increased and the temporary use agreement will be revised accordingly.

6. The Delivery Water Amount will be released beginning no earlier than the first of September each year unless the Executive Director and EA Manager request an alternative release schedule. The alternative release schedule must be approved by the Director and Area Manager. No releases will be made that could result in or exacerbate flooding below Pathfinder Dam.

7. The Delivery Water Amount will annually be credited against the Purchase Water Amount. The Delivery Water Amount will be annually tabulated and agreed to by the Director and the Executive Director.

8. Release by the State of the Delivery Water Amount into the North Platte River at the Pathfinder Dam shall constitute delivery of the Delivery Water Amount to the PRRIP. The Delivery Water Amount shall be measured and accounted for at the Pathfinder Dam. The PRRIP shall assume any loss of any nature whatsoever occurring to the Delivery Water Amount between the Pathfinder Dam and the PRRIP's point of use. Conveyance loss from Pathfinder Dam to the Wyoming/Nebraska state line shall be assessed by the Wyoming State Engineer. In accordance with Nebraska law, conveyance losses from the Wyoming/Nebraska state line to the PRRIP point of use will be assessed by the Nebraska Department of Natural Resources.

9. The State makes no warranty with respect to the quality of the Delivery Water Amount released to serve the PRRIP, it being understood that this is raw, untreated water as it naturally occurs in the North Platte River at Pathfinder Dam. In the use of the Delivery Water Amount, the PRRIP agrees to comply with all applicable State and Federal laws. The PRRIP agrees that it will comply fully with all laws, orders, standards, or regulations under federal, State and local jurisdictions now or hereafter in force as may be applicable to the facilities at which the Purchase Water Amount may be used.

IV. <u>SPECIAL PROVISIONS.</u>

A. Assignability

1. The PRRIP shall not make any sale, gift, delivery, assignment or other disposition of this Contract or the whole or any part of the Purchase Water Amount except to any entity or entities associated with or retained by the PRRIP for purposes and operations advantageous to the PRRIP as determined by the Governance Committee of the PRRIP.

2. Nothing contained herein relating to the assignability of this Contract shall preclude the PRRIP from entering into arrangements with others for the installation, construction, operation and maintenance of water diversion, carriage and distribution facilities by which the Purchase Water Amount, separately or together with other permitted water appropriations, may be applied for PRRIP purposes.

3. Neither party hereto shall be, or be considered as, the agent, servant, or employee of the other party or be held responsible or liable for damages for the acts or conduct of the other.

4. Wherever in this Contract a time for performance of an obligation is established, then it is agreed that time is of the essence.

B. Delivery.

1. The State shall exercise all rights under the Federal Contract to arrange for release to the PRRIP of the Purchase Water Amount. In the event that the schedule for release creates operational problems for the State which cannot be overcome by the exercise of reasonable effort and expense and which require a change in the specified schedule (e.g., rate of flow, timing of flow, etc.), then the State shall notify the PRRIP at the earliest time reasonable under the circumstances. The Parties will use their best efforts to develop a schedule that will accommodate the PRRIP's needs and avoid the operational problems being experienced by the State.

2. The State will comply with all applicable provisions of the Federal Contract and will make all required payments to the United States when they become due. If the United States withholds from the State scheduled deliveries of the Purchase Water Amount to the PRRIP, the PRRIP shall be credited for payments made for water not delivered.

V. <u>Provisions Required by the Federal Contract.</u>

A. The provisions of Section V shall apply only to water delivered from the Wyoming Account within the terms of the Federal Contract.

B. The Parties agree that the delivery of water or the use of federal facilities is pursuant to the Federal Contract.

C. The United States, through its Contracting Officer, shall have the right to make determinations necessary to administer the Federal Contract, the laws of the United States and the State of Wyoming and the rules and regulations promulgated by the Secretary of the Interior. Such determinations shall be made in consultation with the State. If such determinations affect this Contract, the State will consult with the PRRIP as soon as practicable.

D. The PRRIP agrees that it will comply fully with air and water pollution control laws, orders, standards, or regulations under federal, state and local jurisdictions now or hereafter in force.

E. During the performance of this Contract, the PRRIP agrees as follows:

1. The PRRIP will not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, or disability. The PRRIP will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, national origin, or disability. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The PRRIP agrees to post in conspicuous places, available to

employees and applicants for employment, notices to be provided by the United States setting forth the provisions of this Equal Opportunity clause.

2. The PRRIP will, in all solicitations or advertisements for employees placed by or on behalf of the PRRIP, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, or disability.

3. The PRRIP will send to each labor union or representative of workers within which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the United States, advising the labor union or workers' representative of the PRRIP's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

4. The PRRIP will comply with all provisions of Executive Order No. 11246 of September 24, 1965 as amended, and of the rules, regulations and relevant orders of the Secretary of Labor.

5. The PRRIP will furnish all information and reports required by said amended Executive Order and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records and accounts by the contracting officers under the Federal Contract and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

6. In the event of PRRIP noncompliance with the Equal Opportunity clause of this Contract or with any of the said rules, regulations or orders, this Contract may be canceled, terminated or suspended, in whole or in part, and the PRRIP may be declared ineligible for further United States Government contracts in accordance with procedures authorized in said amended Executive Order, and such other sanctions may be imposed and remedies invoked as provided in said Executive Order, or by rules, regulations, or order of the Secretary of Labor, or as otherwise provided by law.

7. The PRRIP will include the provisions of paragraphs 1 through 7 in every subcontract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The PRRIP will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance: provided, however, that in the event the PRRIP becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the PRRIP may request the United States to enter into such litigation to protect the interests of the United States.

F. The State shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112, as

amended), the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.), Title II of the Americans with Disabilities Act of 1990, and any other applicable civil rights laws, as well as with their respective implementing regulations and guidelines imposed by the U.S. Department of the Interior and/or the Bureau of Reclamation.

G. In its operation of Pathfinder Dam and Reservoir, the United States, through its Contracting Officer, will use all reasonable means to guard against a condition of shortage in the quantity of water to be made available to the State pursuant to the Federal Contract. In the event the Contracting Officer determines that a condition of shortage appears probable, the Contracting Officer will notify the State of said determination as soon as practicable. In turn, the State will notify the PRRIP of said determination as soon as practicable.

H. If there is a condition of shortage because of errors in physical operations of Pathfinder Dam and Reservoir, drought, other physical causes beyond the control of the United States, through its Contracting Officer, or actions taken by the Contracting Officer to meet current and future legal obligations, then no liability shall accrue against the United States or the State or any of their officers, agents, or employees for any damage, direct or indirect, arising therefrom.

VI. GENERAL PROVISIONS.

A. Amendments. Any changes, modifications, revisions or amendments to this Contract which are mutually agreed upon by the Parties shall be incorporated by written instrument, executed and signed by all Parties.

B. Default. No Purchase Water Amount shall be released to the PRRIP under this Contract if the PRRIP is in default in making any payment due the State under this Contract.

C. Americans with Disabilities Act. The PRRIP shall not discriminate against a qualified individual with a disability and shall comply with the Americans with Disabilities Act, P.L. 101-336, 42 U.S.C. 12101, *et seq.,* and/or any properly promulgated rules and regulations related thereto.

D. Applicable Law/Venue. The construction, interpretation and enforcement of this Contract shall be governed by the laws of the State of Wyoming. The courts of the State of Wyoming shall have jurisdiction over this Contract and the Parties, and the venue shall be the First Judicial District, Laramie County, Wyoming.

E. Compliance with Laws. The PRRIP shall keep informed of and comply with all applicable federal, State and local laws and regulations in the performance of this Contract.

F. Entirety of Contract. This Contract, consisting of twelve (12) pages, represents the entire and integrated Contract between the Parties and supersedes all prior negotiations, representations, and agreements, whether written or oral.

G. Force Majeure. Neither Party shall be liable for failure to perform under this Contract if such failure to perform arises out of causes beyond the control and without the fault or negligence of the nonperforming Party. Such causes may include, but are not limited to, acts of God or the public enemy, fires, floods, epidemics, quarantine restrictions, freight embargoes, and unusually severe weather. This provision shall become effective only if the Party failing to perform immediately notifies the other Party of the extent and nature of the problem, limits delay in performance to that required by the event, and takes all reasonable steps to minimize delays. This provision shall not be effective unless the failure to perform is beyond the control and without the fault or negligence of the nonperforming Party.

H. Indemnification. The PRRIP shall release, indemnify, and hold harmless the State of Wyoming, the WWDO, its officers, agents, employees, successors, and assignees from any cause of action, or claims, charges or costs, including attorney's fees and expert witness fees, or demands of any sort arising out of, directly or indirectly, the PRRIP's performance or failure to perform under this Agreement.

I. Notices. Any notice, demand, or request authorized or required by this Contract shall be deemed to have been given, on behalf of the PRRIP, when mailed, postage prepaid, or delivered to the:

Director
Wyoming Water Development Office
6920 Yellowtail Road
Cheyenne, WY 82002

and on behalf of the State, when mailed, postage prepaid, or delivered to the:

Executive Director
Platte River Recovery Implementation Program
4111 4th Avenue, Suite 6
Kearney, Nebraska 68845

The designation of the addressee or the address may be changed by notice given in the same manner as provided in this Article for other notices.

J. Sovereign Immunity. The State of Wyoming and the Wyoming Water Development Office do not waive sovereign immunity by entering into this Contract, and specifically retain immunity and all defenses available to them as sovereigns pursuant to Wyo. Stat. § 1-39-104(a) and all other state law.

K. Termination. Upon failure of the PRRIP to make timely payments in accordance with of this Contract, and upon thirty (30) days written notice to the PRRIP by the State and failure to cure such non-payment by the PRRIP, this Contract may be terminated at the option of the State.

L. Third Party Beneficiary Rights. The Parties do not intend to create in any other individual or entity the status of third party beneficiary, and this Contract shall not be construed so as to create such status. The rights, duties and obligations contained in this Contract shall operate only between the Parties , and shall inure solely to the benefit of the Parties. The provisions of this Contract are intended only to assist the Parties in determining and performing their obligations under this Contract.

M. Titles Not Controlling. Titles of paragraphs are for reference only, and shall not be used to construe the language in this Contract.

N. Waiver. The waiver of any breach of any term or condition in this Contract shall not be deemed a waiver of any prior or subsequent breach.

O. Officials Not To Benefit. No Member of or Delegate to the Congress, or state or federal officials shall benefit from this Contract other than as a water user or landowner in the same manner as other water users or landowners.

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VII. <u>SIGNATURES.</u> In witness thereof, the Parties, either personally or through their duly authorized representatives, have executed this Contract on the days and dates set out below, and certify that they have read, understood, and agreed to the terms and conditions of this Contract.

The effective date of this Contract is the date of the signature last affixed to this page.

NEBRASKA COMMUNITY FOUNDATION

_____ _____
Diane M. Wilson Date
Chief Financial and Administrative Office

STATE OF NEBRASKA) ss.
COUNTY OF)

The foregoing instrument was acknowledged before me by _____, _____ of _____, this ___ day of _____ of 2010.

Witness my hand official seal.

(SEAL) _____
Notary Public

My Commission expires: _____

STATE OF WYOMING

_____ _____
Michael K. Purcell Date
Director, Wyoming Water Development Office

STATE OF WYOMING) ss.
COUNTY OF LARAMIE)

The foregoing instrument was acknowledged before me by Michael K. Purcell, Director, Water Development Office of the State of Wyoming, this ___ day of _____ of 2010.

Witness my hand official seal.

(SEAL) _____
Notary Public

My Commission expires: _____

WYOMING ATTORNEY GENERAL'S OFFICE APPROVAL AS TO FORM

_____ _____

S. Jane Caton Date
Senior Assistant Attorney General