

No. 108, Original

IN THE
Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

**MOTION TO AMEND PETITION FOR AN ORDER
ENFORCING DECREE AND FOR INJUNCTIVE RELIEF,
AMENDED PETITION FOR AN ORDER ENFORCING
DECREE, FOR INJUNCTIVE RELIEF, AND FOR
MODIFICATION OF DECREE, AND BRIEF IN SUPPORT
OF MOTION TO AMEND PETITION FOR AN ORDER
ENFORCING DECREE AND FOR INJUNCTIVE RELIEF**

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TABLE OF CONTENTS

**MOTION TO AMEND PETITION FOR AN
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INJUNCTIVE RELIEF**

**AMENDED PETITION FOR AN ORDER ENFORCING
DECREE, FOR INJUNCTIVE RELIEF, AND
FOR MODIFICATION OF DECREE**

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PETITION FOR AN ORDER ENFORCING
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CERTIFICATE OF SERVICE

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**MOTION TO AMEND PETITION FOR AN ORDER
ENFORCING DECREE AND FOR INJUNCTIVE RELIEF**

The State of Nebraska hereby moves for leave to file its amended petition for an order enforcing the Court's Decree of October 8, 1945, as modified on June 15, 1953, for injunctive relief, and for modification of the Decree.

Respectfully submitted,

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Department of Justice

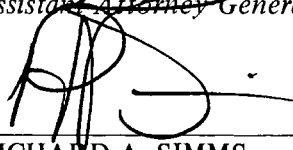
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**AMENDED PETITION FOR AN ORDER ENFORCING
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MODIFICATION OF DECREE**

The State of Nebraska hereby petitions the Court for an order enforcing the provisions of its Decree of October 8, 1945, as amended on June 15, 1953, granting injunctive relief, construing the Decree, and, if necessary, modifying the Decree, and in support hereof states:

1. The Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska.

of North Platte River waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

6. The current and imminent actions of the State of Wyoming are inconsistent with and will directly reduce and interfere with existing water uses in Nebraska for irrigation and for maintenance of critical wildlife habitat and thereby disturb and violate the equitable balance of the North Platte River and its tributaries established in the Decree.

7. In addition to enforcing the Decree's apportionment for irrigation uses in Nebraska, the State of Nebraska seeks to have the Court construe the Decree as apportioning waters of the North Platte River to the State of Colorado, the State of Wyoming, and to the State of Nebraska for maintenance of critical wildlife habitat, and, in addition, to construe the Decree as placing restrictions on the State of Colorado's and the State of Wyoming's authority to approve new appropriations of North Platte River waters and restrictions on Colorado's and Wyoming's and the United States' authority to approve construction of new storage projects and their operation of existing storage projects for the purpose of impounding the waters of the North Platte River and its tributaries to the extent that such uses in Colorado or Wyoming would reduce the flows of the river into Nebraska and would thereby reduce the amount of water historically used in Nebraska for irrigation purposes and to maintain and preserve critical wildlife habitat.

8. Alternatively, in addition to enforcing the Decree's apportionment for irrigation uses in Nebraska, the State of Nebraska seeks to have the Court modify the Decree to recognize and provide for changes in the conditions of the North Platte River resulting from or that would result from the State of Colorado's or the State of Wyoming's authorization of new appropriations of the waters of the North Platte River

and its tributaries and the State of Colorado's, the State of Wyoming's, and the United States' authorization of new storage projects and their operation of existing storage projects on the North Platte River and its tributaries and to modify the Decree to recognize and provide for changes in federal and state legislation that recognize the need for the regulation of the flows and storage of the North Platte River and its tributaries for the continued protection of critical wildlife habitat. The proposed modification of the Decree should protect existing critical wildlife habitat in Nebraska by placing restrictions on the State of Colorado's and the State of Wyoming's authority to approve new appropriations of North Platte River waters and restrictions on Colorado's and Wyoming's and the United States' authorization of new storage projects and their operation of existing storage projects on the North Platte River and its tributaries to the extent that such uses in Colorado or Wyoming would reduce the flow of waters passing into Nebraska and would thereby reduce, adversely affect, or eliminate existing critical wildlife habitat in Nebraska.

9. Despite the State of Nebraska's efforts to resolve these matters, no resolution has been reached and no alternative forum exists in which to enforce the apportionment of the North Platte River and its tributaries for irrigation and the protection of critical wildlife habitat or, alternatively, to enforce the apportionment of the North Platte River and its tributaries for irrigation and to apportion the North Platte River and its tributaries in order to protect critical wildlife habitat.

10. Present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

11. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Colorado, the State of Wyoming, and the United States of America. Injunctive

relief is necessary to enforce the Decree and to restrain further violations of the Decree.

WHEREFORE, the State of Nebraska prays that the Court enter its order enforcing and modifying the Decree to:

(1) Require the State of Colorado, the State of Wyoming, and the United States and their agencies to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953 in this action;

(2) Enjoin the State of Wyoming and its agencies from authorizing additional depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree;

(3) Explicitly recognize the apportionment of North Platte River waters to the State of Colorado, the State of Wyoming, and to the State of Nebraska for maintenance of critical wildlife habitat;

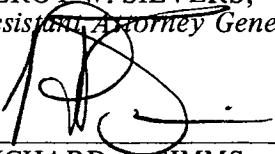
(4) Enjoin the State of Colorado and the State of Wyoming and their agencies from approving new appropriations of the waters of the North Platte River and its tributaries, and to enjoin the State of Colorado, the State of Wyoming, and the United States and their agencies from authorizing or sanctioning construction of new storage projects on the North Platte River and its tributaries which would reduce the flows of the river into Nebraska and would thereby reduce the amount of water historically used in Nebraska to maintain and preserve critical wildlife habitat; and

(5) Provide such other and further relief as the Court shall deem proper, necessary and equitable in the circumstances.

Respectfully submitted,

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**BRIEF IN SUPPORT OF MOTION
TO AMEND PETITION FOR AN ORDER
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January 11, 1988

INDEX OF AUTHORITIES

CASES:	Page
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982)	3
<i>Froman v. Davis</i> , 371 U.S. 178 (1962)	3
<i>Idaho ex rel. Evans v. Oregon</i> , 462 U.S. 1017 (1982)	3
<i>Utah v. United States</i> , 394 U.S. 89 (1969)	3
STATUTES:	
Electric Consumers Protection Act of 1986, Pub.L. 99-495, 100 Stat. 1243 (1986)	2
Endangered Species Act, 16 U.S.C. §§ 1531-1541 (1982 & 1985 Supp.)	2
Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.)	2
Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.)	2
National Environmental Policy Act, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.)	2
RULES:	
Federal Rule of Civil Procedure 15 (a)	3
Supreme Court Rule 9.2	3
OTHER:	
3 Moore, Moore's Federal Practice Para. 15.08[3] (2nd ed. 1987)	3

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**BRIEF IN SUPPORT OF MOTION
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STATEMENT OF THE CASE

This is an action to enforce the equitable apportionment made to the State of Nebraska pursuant to the Court's Decree of October 8, 1945, as amended on June 15, 1953, and for injunctive relief against the State of Wyoming for present and threatened depletions of the flows of the North Platte River and its tributaries.

On January 20, 1987, the Court granted Nebraska's motion for leave to file its petition. Wyoming answered the petition on March 18, 1987, counterclaimed against Nebraska, and sought injunctive relief for alleged violations of the Decree.

When originally litigated, the object of the suit was to equitably apportion the waters of the North Platte River and its tributaries among the States of Colorado, Wyoming, and Nebraska for irrigation purposes. Accordingly, certain restrictions were placed on diversions and storage of water in each of the three states. While the Decree does not expressly apportion the waters of the North Platte and its tributaries for purposes other than irrigation, the apportionment has resulted in a certain regimen of stream flow in the three states that has been used for non-irrigation purposes. Encouraged and sanctioned by the passage of federal and state legislation since the entry of the Decree in 1945, the principal instream use of the waters of the North Platte and its tributaries has been for the development and protection of critical wildlife habitat.

STATEMENT OF FACTS

Since the entry of the Court's Decree in 1945 and its modification in 1953, increased scientific knowledge and concern have been focused on the ecological effects of water development for irrigation, industrial, municipal and domestic purposes. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1541 (1982 & 1985 Supp.); National Environmental Policy Act, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.) Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.); Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986). In the North Platte and Platte River valleys, this legislation has been directed, in part, to some 230 species of migratory birds which inhabit the area, six of which are endangered or threatened.

POINTS OF LAW

The preservation and regulation of flows of the North Platte and its tributaries for the protection of critical wildlife habitat presents a basin-wide problem, necessitating affirmative action not simply by the State of Nebraska, but also by the states of Wyoming and Colorado and the United States. Equity requires that the apportionment of the waters of the North Platte River and its tributaries recognize the need to protect critical wildlife habitat in the respective states and that the responsibility of doing so should not be shouldered by any one of the states. The multi-state, federal nature of the problem also requires the participation and cooperation of the United States in the operation of the various federal projects which divert and impound the flows of the North Platte and its tributaries.

The Court has recognized that equitable apportionment embraces more than the quantitative division of an interstate water supply. *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1982). In the North Platte River and Platte River basins, it is clear that the equitable burdens and benefits of maintaining critical wildlife habitat are interstate in nature and must be subject to the apportionment necessary to protect the ecological balance in the basins.

Pursuant to Supreme Court Rule 9.2 and Federal Rule of Civil Procedure 15(a), leave to amend a pleading "shall be freely given when justice so requires." The object is to promote the exposition of pertinent facts and to avoid piecemeal adjudication of interstate disputes. See *Utah v. United States*, 394 U.S. 89 (1969); *Froman v. Davis*, 371 U.S. 178 (1962). The purpose of Nebraska's amended petition is to assure that all issues relevant to the Court's construction or modification of the Decree are litigated in this proceeding. See 3 J. Moore, *Moore's Federal Practice* Para. 15.08[3], at 15-55 (2nd ed.

1987) ("The clearest cases for leave to amend are correction of an insufficient claim or defense and amplification of previously alleged claims or defenses.")

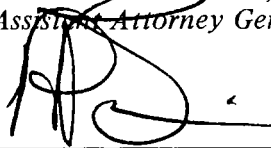
CONCLUSION

Congress and the Court have repeatedly recognized that the protection of environmental values, including critical wildlife habitat, are national in character. In apportioning the benefits of the flows of the North Platte River, equity requires that the Court take cognizance of the post-Decree laws designed to further environmental interests and to spread the burden of protecting critical wildlife habitat throughout the North Platte River Basin. Accordingly, the State of Nebraska respectfully requests that the Court grant leave to file its amended petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of the foregoing Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree, and brief in support thereof were served on each of the following parties required to be served, in accordance with United States Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 11th day of January, 1988 to:

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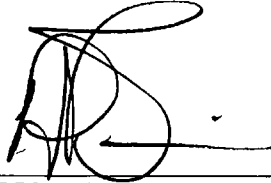
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