No. 108

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

COLORADO'S BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION

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INTRODUCTION

The issue before the Court on Nebraska's Motion to Amend Petition is whether Nebraska's proposed Amended Petition for an Order Enforcing Decree, for Injunctive Relief and for Modification of Decree, which asks the Court to reopen and modify its equitable apportionment of the North Platte River in response to federal environmental regulation, presents a justiciable case or controversy.

Colorado urges the Court to deny Nebraska's Motion to Amend because Nebraska's new allegations do not present a justiciable question.

STATEMENT OF THE CASE

The North Platte Decree, entered October 8, 1945, and modified and supplemented by agreement of the parties on June 15, 1953, apportions among Colorado, Wyoming, and Nebraska, the right to withdraw for purposes of irrigation natural flow water[1] from the North Platte River and its tributaries. *Nebraska v. Wyoming,* 325 U.S. 589 (1945) (the Decree appears at 325 U.S. 665), *modified, Nebraska v. Wyoming,* 345 U.S. 981 (1953) (hereinafter the Decree as modified will be referred to as the North Platte Decree or the Decree). The Court's equitable distribution extends from the North Platte River's headwaters in Colorado, through Wyoming, to Bridgeport, Nebraska, some 60 miles east of the Wyoming-Nebraska state line. *Nebraska v. Wyoming,* 325 U.S. at 607. The Decree expressly excludes the waters of the Laramie River, apportioned separately by this Court in *Wyoming v. Colorado,* 259 U.S. 419 (1922), *modified,* 260 U.S. 1 (1922), *vacated and new decree entered upon joint motion of the parties,* 353 U.S. 953 (1957), as well as the waters of the South Platte

[1]The Decree expressly defines "natural flow water" as "all water in the stream except storage water." *Nebraska v. Wyoming,* 325 U.S. 665, 670 (1945).

River, apportioned separately by congressionally ratified compact. Act of March 8, 1926, ch. 46, 44 Stat. 195. *See Nebraska v. Wyoming,* 325 U.S. at 671.

Nebraska commenced this action against Wyoming on October 6, 1986, to enforce her equitable apportionment of the waters of the North Platte River and its tributaries under the North Platte Decree. Nebraska's initial Petition for an Order Enforcing Decree and for Injunctive Relief sought to enjoin Wyoming from increasing the depletion of the natural flows of the North Platte River, particularly with respect to the operation of the Grayrocks Dam and Reservoir, the proposed construction of the Corn Creek Irrigation Project, the proposed construction of the Deer Creek Project, and the filing of a lawsuit by Wyoming against the United States Bureau of Reclamation, to require the Bureau to obtain Wyoming permits and otherwise comply with state law in connection with the storage and diversion of water for the Inland Lakes component of the Bureau's North Platte Project. Nebraska did not seek any relief whatsoever against Colorado.

The Court granted Nebraska leave to file its Petition on January 20, 1987. On March 18, 1987, Wyoming answered the Petition and counterclaimed against Nebraska, seeking injunctive relief for alleged violations of the Decree.

As Nebraska's original Petition sought relief only against Wyoming, Colorado did not respond to Nebraska's motion for leave to file the petition, nor did Colorado file an answer. However, by letter dated March 25, 1987 to Francis J. Lorson, Chief Deputy Clerk of the United States Supreme Court, Colorado reserved the right to participate in this case in the event any party subsequently raised an issue affecting Colorado's interests.

On March 20, 1987, the Platte River Whooping Crane Critical Habitat Maintenance Trust (Platte River Trust) moved to intervene in the proceedings to request the Court to enforce and modify its earlier Decree to require a regulated flow of the

North Platte River for purposes of protecting migratory bird habitat. The National Audubon Society sought intervention on March 23, 1987, for purposes of advocating compliance with the Endangered Species Act, 16 U.S.C. secs. 1531-1543 (1982 & Supp. 1985).

Nebraska opposed intervention on the grounds that the Platte River Trust and National Audubon Society did not propose to intervene in the ordinary sense, but rather "to try a new and different case." Nebraska complained that they would "enlarge the issues" and "alter the nature of the proceedings." Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 3 (Apr. 3, 1987); Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or to Participate as Litigating Amicus Curiae at 2 (Apr. 3, 1987).

Nebraska protested that the Platte River Trust wanted to go beyond the existing apportionment and modify the Decree:

> Notwithstanding that the upstream reservoirs in Wyoming and Nebraska are used pursuant to the present decree for irrigation and power purposes, the Trust wants the Court to enter a new decree compelling regulation for a distinctly different purpose, namely to provide certain minimum instream flows between Overton and Grand Island, Nebraska, some 120 miles downstream from the Wyoming Nebraska stateline.

Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 2 (Apr. 3, 1987) (footnote omitted).

Nebraska vigorously objected to bringing in issues such as federal environmental legislation and developments in the field of ecology. Nebraska admonished that she sought only to "enforce the existing apportionment of the waters of the North

Platte River and to prevent Wyoming from violating the Court's decree . . . ." *Id.*

Wyoming and Colorado likewise strenuously opposed intervention by the Platte River Trust and National Audubon Society. Wyoming Memorandum in Opposition to Platte River Trust and National Audubon Society Motions for Leave to Intervene (Apr. 3, 1987); Colorado Response to Platte River Trust and National Audubon Society Motions for Leave to Intervene (Apr. 3, 1987).

In an abrupt departure from her initial Petition and her course of conduct throughout this proceeding, Nebraska now seeks to amend the Petition to request modification of the Decree. Nebraska requests an entirely new apportionment of the North Platte waters to provide for uses other than irrigation. Moreover, Nebraska seeks to greatly expand the geographic scope of the Decree to include the North Platte and Platte River Basins. Nebraska's Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief at 3 (Jan. 11, 1988).

Also, for the first time in this action, Nebraska demands relief against Colorado. Nebraska seeks to modify the Decree to provide for the maintenance of critical wildlife habitat; to restrict Colorado's authority to approve new appropriations of North Platte River waters; to restrict Colorado's authority

to approve or sanction the construction of new storage projects; and to restrict Colorado's operation of existing storage projects.[2]

While Nebraska's prayer for relief is drafted more narrowly than the corresponding paragraphs 7 and 8 of the Amended Petition, which are in turn drafted more narrowly than the corresponding description of the relief sought contained in Nebraska's Brief in Support of Motion to Amend Petition, there can be no doubt that Nebraska is requesting an extraordinary remedy: Nothing short of a new allocation of interstate waters, allegedly to protect and maintain ecological balance in the North Platte and Platte River Basins. Nebraska's Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief at 3 (Jan. 11, 1988).

Yet Nebraska's Amended Petition does not allege any action or threatened action by Colorado in violation of the Decree. Nor does Nebraska allege any injury or threatened

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[2]It is disingenuous for Nebraska to claim that she is only seeking to enforce the existing Decree against Colorado or to construe the Decree to impose additional restrictions on Colorado. The Decree imposes specific numeric limitations on Colorado's use of the North Platte River and its tributaries: irrigation of no more than a total of 145,000 acres of land in Jackson County, Colorado, during any one irrigation season (Decree, para. I(a), 345 U.S. at 981); storage of no more than a total amount of 17,000 acre feet of water for irrigation purposes in Jackson County, Colorado, between October 1 of any year and September 30 of the following year (Decree, para. I(b), 325 U.S. at 665); and export out of basin of no more than 60,000 acre feet of water in any period of 10 consecutive years reckoned in continuing progressive series beginning with October 1, 1945 (Decree, para. I(c), 325 U.S. at 665). Since Nebraska does not allege that Colorado has exceeded any of those limitations, or threatens to do so (*see also* Affidavits of Roy Romer, Governor of Colorado; Duane Woodard, Attorney General for Colorado; Hamlet J. Barry III, Executive Director, Colorado Department of Natural Resources; Jeris A. Danielson, State Engineer; and J. William McDonald, Director, Colorado Water Conservation Board), the inescapable conclusion is that Nebraska desires to reopen the Decree to increase her apportionment at Colorado's expense.

injury caused by Colorado. Further, while Nebraska alleges that she has made "efforts to resolve these matters" (Amended Petition, para. 9), Nebraska has never apprised Colorado of the existence of any problem with the Decree, nor of any action or threatened action by Colorado in violation of the Decree, nor of any injury to Nebraska resulting from Colorado's administration of her apportionment under the Decree. *See* Affidavits of Roy Romer, Governor of Colorado; Duane Woodard, Attorney General for Colorado; Hamlet J. Barry III, Executive Director, Colorado Department of Natural Resources; Jeris A. Danielson, State Engineer for Colorado; and J. William McDonald, Director, Colorado Water Conservation Board.

ARGUMENT

I. THE PROPOSED AMENDED PETITION FAILS TO PRESENT A JUSTICIABLE CASE OR CONTROVERSY.

The doctrine of justiciability limits the court's judicial power, both original and appellate, to "cases" and "controversies." *Flast v. Cohen,* 392 U.S. 83, 94-97 (1968).

> [The doctrine of justiciability] takes on an added dimension in the context of the Court's original jurisdiction. Because original cases require the Court to sit as a trial court, without the benefit of a lower court's fact-finding and clarification of the issues, and because of the time which the action demands of the Court, the Court jealously guards its original docket.

12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* para. 350.02[02] at 3-15 (2d ed. 1982) (footnotes omitted). The exercise of original jurisdiction, particularly in interstate environmental cases which pose complex and novel issues, intrudes on the Court's "paramount role as the supreme federal appellate court," and can be justified "only by the strictest necessity." *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 505 (1971); *see id.* at 498, 504-505.

Thus, the Court exercises its original jurisdiction sparingly, *United States v. Nevada,* 412 U.S. 534, 538 (1973) (per curiam); *Utah v. United States,* 394 U.S. 89, 95 (1969) (per curiam), with "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Texas v. New Mexico,* 462 U.S. 554, 570 (1983). The Court exercises "that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system." *Id.*

A. Nebraska's Amended Petition presents only hypothetical questions as to Colorado, which questions are beyond the Court's judicial power.

Nebraska's Amended Petition presents the Court with the hypothetical question of whether an increased scientific understanding of the ecological effects of water development, coupled with the enactment of federal and state environmental legislation, requires modification of a longstanding equitable apportionment of interstate waters.

The Amended Petition would embroil the Court in exceedingly complex water resource planning and policy issues, when these issues have not been framed in an adversarial context.

The Court's judicial power does not extend to a case that presents hypothetical questions. "Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen,* 392 U.S. 83, 97 (1968).

The hypothetical problems to which Nebraska alludes may never present a justiciable controversy. Application of the Endangered Species Act, 16 U.S.C. secs. 1531-1543 (1982 & Supp. 1985) and Section 404 of the Clean Water Act, 33 U.S.C. sec. 1344 (1980), just two of a host of federal laws which affect water development, may well resolve any wildlife habitat concerns in an alternate forum. *See e.g., Riverside Irrigation District v. Andrews,* 758 F.2d 508 (10th Cir. 1985); *Nebraska v. Rural Electrification Administration,* 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. Oct. 2, 1978), *dismissed and vacated upon stipulation,* 594 F.2d 870 (8th Cir. 1979).

Aetna Life Insurance Company of Hartford, Connecticut v. Haworth, 300 U.S. 227, 240-41 (1937), requires that a justiciable controversy

> be definite and concrete, touching the legal relations of the parties having adverse legal interests . . . . It must

> be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . .

Nebraska does not allege that Colorado has violated or threatens to violate the North Platte Decree. Nebraska does not allege that Colorado has taken or threatens to take any action injurious to Nebraska. Nebraska therefore has failed to present an actual and substantial controversy capable of judicial redress. *Colorado v. New Mexico,* 459 U.S. 176, 187 n.13 (1982); *United States v. West Virginia,* 295 U.S. 463, 474 (1935); *Connecticut v. Massachusetts,* 282 U.S. 660, 669 (1931); *New York v. New Jersey,* 256 U.S. 296, 309 (1921); *Missouri v. Illinois,* 200 U.S. 496, 521 (1906).

B. The ripeness doctrine similarly precludes judicial redress because Nebraska has suffered no injury, nor has she alleged injury sufficient to invoke this Court's original jurisdiction.

This Court exercises its original jurisdiction to remedy real and substantial injury inflicted on one state by another. *California v. Texas,* 437 U.S. 601, 614 (1978) (per curiam) (Stewart, J., concurring); *Pennsylvania v. New Jersey,* 426 U.S. 660, 663 (1976) (per curiam); *New York v. New Jersey,* 256 U.S. 296, 309 (1921)

For example, in *Kansas v. Colorado,* 206 U.S. 46 (1907), upstream appropriations in Colorado, which brought about the reclamation of large areas in Colorado, caused perceptible injury to limited areas of the Arkansas Valley in Kansas. The Court found that Kansas had not made a sufficient showing that she was entitled to a decree. The Court observed that

there might come a time when a material increase in the depletion of the Arkansas River by Colorado would injure the substantial interests of Kansas to the extent of destroying the equitable division of benefits between the two states resulting from the flow of the river, and that Kansas would be free to institute new proceedings at that time. *Id.* at 117-18.

Many years later, the equitable apportionment of the Arkansas River again came before the Court. And, once again, in *Colorado v. Kansas,* 320 U.S. 383 (1943), the Court found that Kansas had "not sustained her allegations that Colorado's use has materially increased, and that the increase has worked a serious detriment to the substantial interests of Kansas." *Id.* at 400. The Court concluded, "Whatever may be said of the practices of Colorado since 1905, Kansas is not entitled to relief unless she shows they clearly have entailed serious damage to her substantial interests and those of her citizens." *Id.* at 398.

New York v. New Jersey, 256 U.S. 296, 309 (1921), prescribes the standard Nebraska must meet to engage this Court's original jurisdiction:

> Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.

With respect to the requirement that actual and substantial injury be shown, the Court wrote in *Pennsylvania v. New Jersey,* 426 U.S. 660, 663 (1976) (per curiam), "It has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." In that case, the Court found that the defendent state had not inflicted any injury on the plaintiff state. Rather, the plaintiff state's injuries were self-inflicted. Denying

Pennsylvania leave to file an original action, the Court held, "No State can be heard to complain about damage inflicted by its own hand." 426 U.S. at 664.

The case of *Pennsylvania v. New Jersey* is particularly apposite. In the first place, Nebraska has failed to allege any injury directly caused by the actions of Colorado. Second, to the extent Nebraska complains about the burdens of the Endangered Species Act, those burdens may well be self-inflicted. For example, Nebraska recently approved a water rights application for the Catherland Reclamation Project which will divert 125,000 acre-feet of water per year just upstream of the Big Bend reach of the Platte River, the reach designated as critical habitat for the whooping crane. *In re Applications 15145, 15146, 15147, and 15148 Assigned to the Catherland Reclamation District, appeal filed,* No. 86-692 (Neb. 1986). Nebraska's intrastate administration of water rights may well prove responsible for the magnitude of the "burdens" Nebraska bears.

In any event, since Nebraska does not even allege injury, she fails utterly to meet the threshold requirement of demonstrating that the actions of Colorado have resulted in an actual injury or threat of injury of serious magnitude. The case, therefore, is not ripe for adjudication.

C. Nebraska's allegations against Colorado are too vague and ill-defined to admit to judicial determination.

The Court has declined to exercise its original jurisdiction when a complainant raised "an issue too vauge and ill-defined to admit to judicial determination." *United States v. West Virginia,* 295 U.S. 463, 474 (1935).

In support of her Motion to Amend, Nebraska points to increased scientific knowledge and the passage of environmental legislation for the broad proposition that:

> 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.

Nebraska's Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief at 3 (Jan. 11, 1988).

Nebraska has not and indeed can never show that the full burden of compliance with the Endangered Species Act falls on Nebraska alone. All federal actions involving water projects in Colorado and Wyoming are subject to the requirements of the Endangered Species Act. *See, e.g., Riverside Irrigation District v. Andrews,* 758 F.2d 508 (10th Cir. 1985); *Nebraska v. Rural Electrification Administration,* 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. Oct. 2, 1978), *dismissed and vacated upon stipulation,* 594 F.2d 870 (8th Cir. 1979). The burdens of compliance with federal environmental regulation fall on all three states.

Nebraska's vague and ill-defined factual allegations, presented at page 2 of Nebraska's Brief in Support of Motion to Amend — that the Endangered Species Act, the National Environmental Policy Act, 42 U.S.C. secs. 4331-4370 (1982 & Supp. 1985); the Fish and Wildlife Coordination Act, 16 U.S.C. secs. 661-667 (1982 & Supp. 1985); the Fish and Wildlife Conservation Act, 16 U.S.C. secs. 2901-2911 (1982 & Supp. 1985); and the Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986), impact some 230 species of migratory birds in the North Platte and Platte River Basins — simply do not give rise to a case or controversy amenable to judicial redress. The nebulous amendments to the Petition suggested by Nebraska's motion raise questions far beyond the scope of this Court's jurisdiction. Nebraska's proposed amendments do not raise any issues whatsoever "in an adversary context and in a form historically viewed as capable

of resolution through the judicial process." *Flast v. Cohen,* 392 U.S. 83, 95 (1968). Accordingly, leave to amend should be denied.

D. Principles of finality and repose militate against reopening and modifying the Decree.

The equitable apportionment which Nebraska seeks to upset has been in place since 1945, modified by stipulation of the parties in 1953.

In *Arizona v. California,* 460 U.S. 605, 620-21 (1983), the Court wrote that principles of res judicata and collateral estoppel should inform the Court's decision to adjust an equitable apportionment of interstate waters, particularly with respect to water rights in the arid west. Justice Brennan in a separate opinion wrote, "A final judgment makes a difference. It marks a formal point at which considerations of economy, certainty, reliance, and comity take on more strength than they have before the judgment." 460 U.S. at 645.

Modification of the Decree, particularly to the extent intimated in Nebraska's supporting brief — a basin-wide adjustment for the purpose of taking into account unspecified "increased scientific knowledge" and "the passage of federal and state legislation since entry of the Decree in 1945," Nebraska's Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief at 2 (Jan. 11, 1988) — would impair vested property rights, perhaps for a decade or more, before a special master's report could be submitted to the Court for final action.

What Nebraska's proposed Amended Petition leaves unsaid or understated should be of great concern, particularly in light of Nebraska's invocation of the catchall prayer for all further relief deemed proper, necessary, and equitable. Nebraska's prayer for relief in its specific requests speaks only to the North Platte River and its tributaries. Yet allegations in the Amended Petition refer directly to the Laramie River (paras.

5(A), 5(B), 5(D)), and obliquely to the South Platte River ("the North Platte and Platte Rivers," para. 4).

What commenced as four discrete issues in Nebraska's original Petition, amenable to judicial redress and now ripe for decision pursuant to Wyoming's September 11, 1987 Motion for Summary Judgment, has escalated into nothing short of a request for the Supreme Court to undertake the task of basin-wide planning for irrigation, municipal and industrial uses, domestic purposes, and environmental quality in both the North Platte and Platte River Basins. *See* Nebraska's Brief in Support of Motion to Amend Petition at 2 (Jan. 11, 1988). Furthermore, Nebraska asks the Court to restrict Colorado's intrastate administration of water rights, by limiting Colorado's "authority to approve new appropriations" and by limiting Colorado's "authorization of new storage projects" and "operation of existing storage projects," Nebraska's Amended Petition, paras. 7 and 8, without even so much as a bare allegation of injury or of violation of the existing Decree.

The North Platte Decree itself specifically excludes the Laramie and South Platte Rivers, as well as intrastate administration of water rights. Section XII of the Decree states in pertinent part:

> This decree shall not affect:
>
> (a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;
>
> . . . .
>
> (d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the Laramie River, a tributary of the North Platte River;

(3) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

Nebraska v. Wyoming, 325 U.S. 665, 671 (1945). It would be totally improper to reopen or modify the Laramie Decree or the South Platte Compact in these proceedings, and Colorado strenuously objects to any attempt by Nebraska to do so, either directly or indirectly.

The North Platte Decree itself only encompasses the stretch of the North Platte River and its tributaries, excluding the Laramie River, from the North Platte's headwaters in Colorado to Bridgeport, Nebraska, some 60 miles east of the Nebraska-Wyoming state line. *Nebraska v. Wyoming*, 325 U.S. 589, 607 (1945). Earlier in this litigation, Nebraska vigorously opposed intervention by the Platte River Trust on the grounds that the Trust wanted the Court "to enter a new decree compelling regulation for a distinctly different purpose, namely to provide certain minimum instream flows between Overton and Grand Island, Nebraska, some 120 miles downstream from the Wyoming/Nebraska state line." Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 2 (Apr. 3, 1987) (footnote omitted). Nebraska protested that the intervenors sought intrastate relief, in the form of minimum instream flows, provided for and regulated by state law. *Id.* at 2-3. The 42-year-old North Platte apportionment, Nebraska said, "is an historic fact." Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or Participate as Litigating Amicus Curiae at 2 (Apr. 3, 1987).

Nebraska would now stand the "historic fact" of the 42-year-old North Platte Decree, the 65-year-old Laramie Decree, and the 62-year-old South Platte Compact on its head. This Court must not allow Nebraska, under the rubric of "constru-

ing" the North Platte Decree, to reopen and modify these long-standing equitable apportionments.

The relief requested by Nebraska would violate all principles of finality and repose.

> Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country.

Arizona v. California, 460 U.S. 605, 621 (1983).

The grant of leave to amend on the basis of vague and ill-defined allegations, none of which accuse Colorado of injuring or threatening to injure Nebraska, would upset reasonable expectations and cause great uncertainty throughout the whole North Platte and Platte River Basins. Unless Nebraska comes forward with a justiciable case or controversy, principles of finality and repose dictate that leave to amend be denied.

E. Nebraska's failure to seek accommodation with Colorado before filing her Motion to Amend demonstrates the absence of a justiciable case or controversy.

Until filing her Motion to Amend, Nebraska had not apprised Colorado of any need or desire to modify the Decree. Please see accompanying affidavits. Nebraska's silence leads to the conclusion that a justiciable controversy has not yet emerged. As observed in *Louisiana v. Texas,* 176 U.S. 1, 18 (1900), to invoke the original jurisidiction of the Court,

> there must be a direct issue between [two states], and the subject matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made.

Compare id. with Nebraska v. Wyoming, 325 U.S. 589, 608 (1945) ("A genuine controversy exists. The States have not been able to settle their differences by compact.").

This Court has repeatedly admonished the states that disputes over interstate water allocations are more likely to be resolved by cooperative study and conference, and by mutual concession. *Texas v. New Mexico,* 462 U.S. 554, 575 (1983), *citing New York v. New Jersey,* 256 U.S. 296, 313 (1921); *Vermont v. New York,* 417 U.S. 270, 277-78 (1974); *Minnesota v. Wisconsin,* 252 U.S. 273, 283 (1920); *Washington v. Oregon,* 214 U.S. 205, 218 (1909).

Nebraska's complete failure to advise Colorado that Colorado's administration of her equitable apportionment of the North Platte River raises endangered species concerns, much less to commence any effort at accommodation, only underscores the absence of a justiciable controversy.

II. BECAUSE NEBRASKA'S PROPOSED AMENDED PETITION FAILS TO PRESENT A JUSTICIABLE CASE OR CONTROVERSY, LEAVE TO AMEND SHOULD BE DENIED.

Ordinarily, under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires." *Foman v. Davis,* 371 U.S. 178, 182 (1962), explains that when the underlying facts and circumstances relied upon by the plaintiff are "a proper subject of relief," the plaintiff ought to be afforded an opportunity to test his claim on the merits.

However, actions within the original jurisdiction of the United States Supreme Court are not ordinary civil actions. Notwithstanding Supreme Court Rule 9.2, which provides that the Federal Rules of Civil Procedure may serve as a guide in original actions, the liberal amendment policies of Civil Rule 15 do not apply with equal force to original actions. *Ohio v.*

Kentucky, 410 U.S. 641, 644 (1973). In *Ohio v. Kentucky,* the Court specifically recognized that it should treat a motion to amend a complaint invoking the Court's original jurisdiction differently, and required the plaintiff to meet a stricter standard before granting leave to amend.

In an original action, the Court applies a stricter standard to a motion to amend in order to parallel the requirements applied to a motion for leave to file an original action. The latter motion, which requires thorough briefing, allows the parties to reach and argue the merits of a controversy as soon as possible. The court may thus dispose of extraneous or nonjusticiable matters early in the litigation, narrowing the issues to be ultimately decided. *See Ohio v. Kentucky,* 410 U.S. at 644.

Thus, Nebraska may not rely upon the liberal amendment policies of Civil Rule 15, but must meet the stricter standards applicable to motions for leave to file a complaint invoking the Court's original jurisdiction. In fact, Nebraska's Motion to Amend represents the first time in this proceeding that Nebraska has sought any relief against Colorado. As to Colorado, Nebraska's Motion to Amend is effectively a motion for leave to file an original action.

Because the new questions presented by the proposed Amended Petition are nonjusticiable, the Court should deny leave to amend. Even if the Court should find the new questions justiciable, however, the Court, in exercise of its sound discretion, should deny leave to amend.

Granting the motion on basis of vague allegations, none of which complain that Colorado has violated or threatens to violate the North Platte Decree, nor that Colorado has engaged in any action which injures or threatens to injure Nebraska's interests, will result in great uncertainty in water rights administration and water resources planning in the Platte River Basin for many years to come. The hypothetical facts and circumstances relied upon by Nebraska, even under the most liberal standards of *Foman* and Civil Rule 15, are

not "a proper subject of relief." *Foman v. Davis,* 371 U.S. at 182. Until Nebraska comes forward with a concrete case or controversy, and demonstrates that Colorado's acts have caused or threaten to cause her substantial injury, leave to amend should be denied.

CONCLUSION

Colorado respectfully requests that the Court deny Nebraska's Motion to Amend Petition.

Respectfully submitted,

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Defendant.

AFFIDAVIT OF ROY ROMER
Governor of the State of Colorado

I, Roy Romer, being first duly sworn upon oath, state as follows:

1. I am the Governor of the State of Colorado. I was elected to office in November of 1986, and my term of service commenced in January of 1987.

2. To the best of my knowledge and information:

   a) at no time during my tenure in office has any officer, representative, or agency of the State of Nebraska advised me that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to the State of Nebraska;

b) to date, no officer, representative, or agency of the State of Nebraska has contacted me to request that the North Platte Decree be modified;

c) to date, no officer, representative, or agency of the State of Nebraska has contacted me to request that Colorado administer its apportionment under the North Platte Decree in a different manner; and

d) to my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)

ROY ROMER
Governor of the State of Colorado

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 9th day of February, 1988.

/s/ June E. Salveson

NOTARY PUBLIC

My Commission expires:
March 1, 1988

(SEAL)

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Defendant.

AFFIDAVIT OF DUANE WOODARD
Attorney General for the State of Colorado

I, Duane Woodard, being first duly sworn upon oath, state as follows:

1. I am the Attorney General for the State of Colorado. I was elected to office in November of 1982, and my term of service commenced in January of 1983.

2. As Attorney General, I serve as legal advisor to every Department, Board, and Agency of the Colorado state government other than the Legislative Branch. I am charged in Colo. Rev. Stat. sec. 24-31-101(a) (1973) with the responsibility to appear for the State of Colorado, and prosecute and defend all actions in which the state is a party.

3. As Attorney General, I am specifically authorized by state law to provide legal assistance to the Office of the

State Engineer. Colo. Rev. Stat. sec. 37-80-116 (1973). Also, as Attorney General, I am specifically designated as legal advisor to the Colorado Water Conservation Board. Colo. Rev. Stat. sec. 37-60-114 (1973). Colo. Rev. Stat. sec. 37-60-113 (1973) directs the Colorado Water Conservation Board to cooperate with the Attorney General in all matters relating to interstate suits concerning the waters of the rivers of the State of Colorado.

4. To date, no Nebraska state official has contacted me or my office to advise me that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to Nebraska.

5. To date, no Nebraska state official has contacted me or my office to request that the North Platte Decree be modified.

6. To date, no Nebraska state official has contacted me or my office to request that Colorado administer its apportionment under the North Platte Decree in a different manner.

7. To my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)

DUANE WOODARD
Attorney General for the State of Colorado

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 9th day of February, 1988.

/s/ Prestine Mickens

NOTARY PUBLIC

My Commission expires:
June 4, 1991
13602 E. Dakota Place
Aurora, Colorado 80012

(SEAL)

No. 108, Original

IN THE
Supreme Court of the United States
October Term, 1986

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

AFFIDAVIT OF HAMLET J. BARRY III
Executive Director, Colorado Department of Natural Resources

I, Hamlet J. Barry III, being first duly sworn upon oath, state as follows:

1. I am the Executive Director of the Colorado Department of Natural Resources.

2. The Colorado Water Conservation Board and the Office of the State Engineer, the state agencies responsible for protecting the rights and interests of the State of Colorado and its citizens in the waters of the interstate streams which flow through this state and for administering the equitable apportionment decrees of the United States Supreme Court as well as our interstate compacts, are Divisions within the Department of Natural Resources.

3. To my knowledge, at no time has any officer, representative, or agency of the State of Nebraska apprised the Department that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to Nebraska.

4. To my knowledge, at no time has any officer, representative, or agency of the State of Nebraska contacted the Department to request that the North Platte Decree be modified.

5. To my knowledge, at no time has any officer, representative, or agency of the State of Nebraska contacted the Department to request that Colorado administer its apportionment under the North Platte Decree in a different manner.

6. To my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)
HAMLET J. BARRY III
Executive Director
Colorado Department of
Natural Resources

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 9th day of February, 1988.

/s/ Betty A. Bartlett
NOTARY PUBLIC

My Commission expires:
March 30, 1991

(SEAL)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AFFIDAVIT OF JERIS A. DANIELSON
State Engineer for the State of Colorado

I, Jeris A. Danielson, being first duly sworn upon oath, state as follows:

1. I am the State Engineer for the State of Colorado. I have held this position since December 19, 1979.

2. As State Engineer, I have general supervisory control over the public waters of the State of Colorado. Colo. Rev. Stat. sec. 37-80-102 (1973). I am also responsible for making and enforcing such regulations with respect to deliveries of water as will enable Colorado to meet its interstate compact requirements. Colo. Rev. Stat. sec. 37-80-104 (1973).

3. As State Engineer, I am charged with the responsibility of assuring that the State of Colorado meets its

obligations under the North Platte Decree, 325 U.S. 665 (1945), *modified and supplemented,* 345 U.S. 980 (1953).

4. To date, no Nebraska state official has contacted me or my office to advise me that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to Nebraska.

5. To date, no Nebraska state official has contacted me or my office to request that the North Platte Decree be modified.

6. To date, no Nebraska state official has contacted me or my office to request that Colorado administer its apportionment in a different manner.

7. To my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)
JERIS A. DANIELSON
State Engineer

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 10th day of February, 1988.

/s/ Paula J. Lacey
NOTARY PUBLIC

My Commission expires:
August 26, 1991

(SEAL)

No. 108, Original

IN THE
Supreme Court of the United States
October Term, 1986

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

AFFIDAVIT OF J. WILLIAM McDONALD
Director, Colorado Water Conservation Board

I, J. William McDonald, being first duly sworn upon oath, state as follows:

1. I am the Director and Secretary of the Colorado Water Conservation Board. I have held this position since September 1979.

2. The Colorado State Legislature has charged the Colorado Water Conservation Board with the duty to promote the conservation of the waters of the state in order to secure the greatest utilization of such waters and to prevent floods. Colo. Rev. Stat. sec. 37-60-106(1) (1973). Among the many powers and duties of the Board are the power and duty to confer with the officers, representatives, and agencies of other states or of the federal government for the purpose of protecting and asserting the authority, interests, and rights of the State of

Colorado and its citizens with respect to the waters of the interstate streams in Colorado. Colo. Rev. Stat. sec. 37-60-106(1)(i) (1973).

3. Also, the Colorado State Legislature has charged the Board with the responsibility to cooperate with the Attorney General in all matters relating to interstate suits concerning the waters of the rivers of Colorado, and to gather all information and other data for the Attorney General's use in such suits. Colo. Rev. Stat. sec. 37-60-113(1973).

4. To my knowledge, at no time has any official, representative, or agency of the State of Nebraska contacted me or the Board to advise the Board that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to Nebraska.

5. To my knowledge, at no time has any officer, representative, or agency of the State of Nebraska contacted me or the Board to request that the North Platte Decree be modified.

6. To my knowledge, at no time has any official, representative, or agency of the State of Nebraska contacted me or the Board to request that Colorado administer its apportionment under the North Platte Decree in a different manner.

7. To my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)

J. WILLIAM McDONALD
Director
Colorado Water Conservation Board

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 9th day of February, 1988.

/s/ Betty A. Bartlett

NOTARY PUBLIC

My Commission expires:
March 30, 1991

(SEAL)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

PROOF OF SERVICE

I, Lois G. Witte, Deputy Attorney General, State of Colorado, counsel of record for the State of Colorado and a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of Colorado's Brief in Opposition to Nebraska's Motion to Amend Petition have been served on each of the following parties by depositing said copies in a United States mailbox with first-class postage prepaid, this 12th day of February, 1988, addressed to:

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