No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF NEBRASKA,
Plaintiff,
vs.
STATE OF WYOMING, *et al.*,
Defendants.

COLORADO'S EXCEPTION TO SPECIAL MASTER'S FIRST AND SECOND INTERIM REPORTS

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EXCEPTION

1. The State of Colorado excepts to the Special Master's recommendation not to grant summary judgment in favor of Colorado and Wyoming on Nebraska's claims for the continuation of flows in excess of Nebraska's decreed apportionment to serve uses that do not divert at or above Tri-State Dam.

BRIEF IN SUPPORT OF EXCEPTION

INTRODUCTION

The States of Colorado and Wyoming have during the course of these proceedings filed several motions for partial summary judgment to dispose of Nebraska's claim that the decree in this case, *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953) (the Decree), creates rights downstream of Tri-State Dam independent of her apportionment for lands served by canals that

divert at or above Tri-State. Wyoming Motion for Summary Judgment (Sept. 11, 1987) (Docket No. 23); Colorado's Motion for Partial Summary Judgment (Feb. 25, 1991) (Docket No. 292); Wyoming Second Motion for Summary Judgment (Mar. 1, 1991) (Docket No. 294). Both the first and second interim reports of the Special Master declined to recommend the entry of partial summary judgment against Nebraska on this issue. First Interim Report (June 14, 1989) (Docket No. 140); Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention (Apr. 9, 1992) (Second Interim Report) (Docket No. 463). Colorado's exception goes to that single issue, as treated in both reports.

The Special Master acknowledged that "no river sections east of the Tri-State Dam were included in the equitable apportionment," Second Interim Report at 90, and that "Nebraska did not receive an apportionment of downstream of Tri-State natural flows," *id.* at 91.[1] Despite this, he believed it would be "premature" to grant the Wyoming and Colorado motions at this time:

> To rule on such questions now would be to issue an advisory opinion that Wyoming and Colorado cannot unlawfully injure Nebraska's downstream of Tri-State interests except by actions that will violate the Decree with respect to her upstream of Tri-State apportionment.[2]

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[1]Similarly, in his First Interim Report, the Special Master stated, "Nebraska acknowledges, as she must, that the section of the North Platte below Tri-State Dam was not included in the 1945 apportionment." First Interim Report at 33. He went on to say, "Nebraska also admits, as she must, that the apportionment itself does not extend below Tri-State Dam." *Id.*

[2]The Special Master recognized that Colorado and Wyoming do not dispute that if a violation were established above Tri-State, downstream injuries caused by diminished return flows would be compensable. Second Interim Report at 92, 93.

Id. at 94.

The Special Master erred in declining to recommend the entry of summary judgment on that issue for two reasons: first and foremost, the question of whether Nebraska's apportionment is limited to the uses that divert at or above Tri-State is purely one of law, to be decided based on the opinion and decree previously entered in this case, which requires no factual development; and, second, even assuming a violation of Nebraska's decreed apportionment could be established based on injury to uses below Tri-State, Nebraska has failed to articulate any factual basis for claiming such injury.

ARGUMENT

I. THE DECREE DOES NOT PROTECT USES BELOW TRI-STATE DAM.

This is an action to enforce the existing Decree against Wyoming. That is the only relief sought in Nebraska's petition and the only basis for this Court's assumption of jurisdiction.[3] Subsequently, and consistent with her prior characterization of the case as solely an enforcement action, Nebraska requested leave to amend her petition to seek modification of the Decree to, *inter alia*, protect uses below Tri-State and enjoin future development by Colorado. Motion to Amend Petition for an Order Enforcing Decree

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[3]In her reply to Wyoming's brief opposing the motion for leave to file the petition, Nebraska emphatically assured the Court: "Each of Nebraska's allegations involves present or threatened interference with its apportionment established by the Court in this case. **Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so.**" Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition (Jan. 15, 1987) at 2 (emphasis added) (Docket No. 4).

and for Injunctive Relief and Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree (Jan. 12, 1988) (Docket No. 47). The Court denied Nebraska's motion.[4] *Nebraska v. Wyoming*, 485 U.S. 931 (1988) (Docket No. 59).

Nebraska's claims to enforce the existing Decree must, therefore, stand or fall based solely on the terms of the Decree itself. Fortunately, as it relates to uses below Tri-State that are not served by canals diverting at or above Tri-State, the Decree could hardly be plainer or less ambiguous.

In the original action, Nebraska sought an apportionment extending to all irrigated lands as far east as Grand Island, Nebraska. *Nebraska v. Wyoming*, 325 U.S. 589, 607 (1945). By the end of the case, Nebraska conceded that the lands east of Bridgeport, Nebraska, some sixty miles from the Wyoming-Nebraska state line, could be reasonably satisfied out of local supplies. *Id.* Thus, Special Master Doherty and the Court were not concerned with the section between Bridgeport and Grand Island. *Id.*

As to the section between Tri-State Dam and Bridgeport, the Special Master concluded that local supplies even during the drought period were adequate to satisfy the needs of the canals in that reach without calling upon water from above Tri-State. *Id.* at 607. The Court agreed, saying, "[T]he record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Id.* at 628.

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[4]Nebraska has since moved yet again to amend her petition to include below Tri-State uses not covered by the Decree, this time as a request for an apportionment of non-irrigation season flows. Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Oct. 10, 1991) (Docket No. 407). Nebraska's motion is presently pending before the Court. *See* Order of May 18, 1992 (Docket No. 477).

When the United States voiced the concern that Nebraska would try to "circumvent" the Decree by permitting water to pass Tri-State Dam for downstream uses, the Court responded, "If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree." *Id.* at 628-629.

Later in the opinion, discussing the section from Tri-State Dam to Bridgeport, Nebraska, the Court amplified on and reaffirmed its conclusion:

> The Special Master excluded this section of the river from the apportionment on the grounds that its canals are adequately supplied from return flows and other local sources. Nebraska takes exception to that exclusion. . . . [T]he record supports the conclusion of the Special Master that seasonal supplies are adequate. . . .
>
> This section will accordingly not be included in the apportionment.

Id. at 654-655.

The Decree itself conformed to the Court's opinion by apportioning the natural flow of the North Platte River as far east as Tri-State Dam and no further.

Given the plain language of the opinion and Decree, one may well ask how Nebraska's claims to protect uses below Tri-State have survived this long. The credit must go to creative advocacy. Faced with the Court's justifiable refusal to expand a straightforward enforcement action against Wyoming, alleging discrete violations of

the Decree, into a full-fledged equitable apportionment action,[5] Nebraska attempted to recast the present action as one to modify the Decree. Thus, the "downstream of Tri-State issues [were] newly defined by Nebraska during oral argument [on November 18, 1988]." Tenth Memorandum of Special Master (Mar. 2, 1989) at 69 (Docket No. 119).

First, Nebraska redefines "enforce" to mean "modify." Her reasoning seems to be that because she invoked the Court's retained jurisdiction to enforce the Decree under Article XIII, and because Article XIII also retained jurisdiction to modify the Decree, then the Court's accepting jurisdiction over the enforcement action was tantamount to accepting jurisdiction to modify the Decree. This reasoning is expressed in Nebraska's answers to Colorado's requests for admission, where she asserts:

> While Nebraska's Petition is premised on violations or prospective violations of the Decree by Wyoming, Nebraska will not preclude its right under Article XIII of the Decree to seek relief based on changed needs as well as threatened injuries that could result from the actions of any party.

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[5]What Nebraska and *amici curiae* Audubon and Platte River Trust seek is nothing less than a long, complex trial on the highly technical issues surrounding the habitat needs of wildlife, and particularly endangered species, on the mainstem of the Platte River some 250 miles east of the Wyoming-Nebraska state line, in the section between Bridgeport and Grand Island. Not only is such a trial far beyond the scope of the present case, it is wholly unnecessary, since wildlife interests have been and are presently being protected under the Endangered Species Act in more appropriate forums. *See* Colorado and Wyoming Response to Brief of Amicus Curiae National Audubon Society on the Extent to which Fish and Wildlife Interests Downstream from the Tri-State Dam Must Be Protected in this Proceeding (Apr. 26, 1991) at 5-10 (Docket No. 333); Second Interim Report at 105-107.

Nebraska's Answers to Colorado's First Set of Requests for Admission (Below Tri-State Dam Issue) (Oct. 10, 1989) No. 6 (Docket No. 162). (These are reproduced in their entirety as Appendix No. 1 and will hereafter be cited as "Nebraska Ans. No. __.")[6]

This argument has at least three obvious flaws. First, it would virtually eviscerate *Supreme Court Rule 9.3*, requiring that leave be sought and granted before the Court's original jurisdiction is invoked, since the Court's decision to hear a particular claim would open the door to additional claims without further scrutiny. *See Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (motion for leave to amend denied based on the same considerations that govern the decision whether to exercise original jurisdiction in the first place). Second, the argument blithely disregards Nebraska's prior representations to the Court about the scope of this case. *See supra* note 3. Finally,

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[6]Similarly, Nebraska Ans. No. 10 states:

> "The petition requests an order construing or clarifying the Decree, modifying it if necessary, and enforcing the Decree by enjoining Wyoming from increasing current depletions of the 'natural flow' of the North Platte River . . . ." Nebraska's Response to Wyoming's Motion for Summary Judgment at 4. Special Master Olpin has confirmed that the Decree can be modified or expanded in this proceeding. See First Interim Report at 5-6.

Nebraska misstates her own petition, which requests an order "**requiring the State of Wyoming to comply with the provisions of the Decree and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.**" Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) at 3-4 (citation omitted) (emphasis added) (Docket No. 1). The language on "construing or clarifying . . . modifying it if necessary" appears to be a paraphrase of the petition's quotation from Article XIII of the Decree. *See also* Nebraska Ans. No. 5.

the argument is inconsistent with Nebraska's previous motion for leave to amend her petition to request modification of the Decree and the Court's denial of that motion. Not only is an action to enforce an existing decree far simpler than one to modify it, it also does not involve the strong considerations of certainty and finality that militate against relitigating a long-standing apportionment. *See Arizona v. California*, 460 U.S. 605 (1983). The Court was presumably cognizant of this when it denied Nebraska's motion to amend.

Nebraska's second approach to transforming this into a proceeding to modify the Decree is to redefine what constitutes a violation of the Decree. Without reference to a specific requirement of the Decree, Nebraska instead alleges violations of the "regimen of the river" and, even more cryptically, the "predicate" of the apportionment. *See, e.g.*, Nebraska Ans. Nos. 1, 2, 5, and 6; Nebraska Response to Wyoming's and Colorado's Motions for Summary Judgment (Apr. 26, 1991) at 42, 46, 52 (Docket No. 335); First Interim Report at 34, quoting from transcript of May 12, 1989 hearing; Second Interim Report at 91.

Ultimately, Nebraska combines both arguments, confusing the Court's undisputed **power** to exercise jurisdiction to modify the Decree with the **acceptance** of jurisdiction to do so to protect the "regimen of the river." Nebraska's semantic gyrations to recast this enforcement action as an action to modify the Decree are apparent in the following discovery response:

> Explicit in Article XIII of the Decree is the right of any party to petition the Court for appropriate relief as material changes in conditions on the North Platte River affect water uses maintained or developed since 1945. Article XIII protects equities that have come to rely on the regimen of the river. Changes in the regimen of the North Platte River which adversely affect historical flows are thus cognizable under the Decree.

> Even though the Decree does not apportion a direct natural flow right to uses below Tri-State, the apportionment is expressly predicated on the fact that continued return flows from uses above Tri-State were required to satisfy demands below Tri-State. Special Master Doherty expressly considered the return flows below Tri-State as an independent entitlement in formulating the apportionment, recognizing the return flows as necessary. Maintenance of return flows is not incidental to the apportionment of uses above Tri-State.

Nebraska Ans. No. 1. With equally twisted logic, Nebraska in one breath concedes that the Decree does not provide an apportionment for fish and wildlife habitat and in the next breath asserts a right to the maintenance of flows for fish and wildlife uses:

> The Decree as written in 1945 does not provide for an independent apportionment for fish and wildlife habitat, and in particular endangered species. Article XIII does provide the power to protect such equities that have come to rely on the regimen of the river. See Answer to Requests for Admission No. 1. Nebraska has a right to maintain certain flows that have been recognized by the apportionment. Nebraska may not seek a separate apportionment for fish and wildlife uses in this proceeding, but it will ask the Special Master to consider such equities when formulating his decision of whether to modify, expand or enforce the Decree.

Nebraska Ans. No. 5.

Although Nebraska's argument is convoluted, its refutation is remarkably simple. The Decree takes the form of injunctions against

certain specific future conduct by Colorado and Wyoming. Nebraska cannot, in the guise of an action to enforce the Decree, rewrite that Decree to enjoin not only those actions expressly prohibited, but also hitherto permissible actions that she contends run afoul of an undefined "regimen" or indeterminate "predicates." Such a vague expansion of the specific injunctions of the Decree is simply untenable in the context of water rights in the arid western states, where this Court has recognized that "[c]ertainty of rights is particularly important." *Arizona v. California* at 620.

The Special Master has fallen into Nebraska's snare, confusing this action to enforce the existing Decree with one before the Court under the "changed conditions" or "reopener" provision of the Decree. Second Interim Report at 4. When one bears in mind that the Court denied Nebraska's motion to amend, so that this remains an enforcement action, pure and simple, it becomes clear that Nebraska's below Tri-State claims must stand or fall based on the language of the Decree. And since it is undisputed that the Decree does not give Nebraska the right to demand flows for uses diverting below Tri-State, First Interim Report at 33; Second Interim Report at 90, 91, no amount of "factual development" or "unseen evidence," *id.* at 94, can conceivably establish a violation of the Decree based on the diminution of flows for such uses.

II. NEBRASKA HAS FAILED TO ARTICULATE A VIOLATION OF THE DECREE AS TO USES BELOW TRI-STATE DAM.

Assuming *arguendo* that Colorado or Wyoming could conceivably violate the Decree by reducing flows below Tri-State independent of any violation above Tri-State, Nebraska must provide

some factual basis for asserting such a claim.[7] More than five years after the filing of this case, and after extensive discovery, briefing, and argument, Nebraska still has not articulated any such basis.

In 1989, the Special Master observed, "Nebraska has yet to specify exactly what injuries she apprehends . . . . " First Interim Report at 34. Almost three years later, the Special Master, like the parties, was no better informed as to Nebraska's supposed claim:

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[7] Nebraska has conceded that she has the burden of proving substantial injury of serious magnitude below Tri-State:

> The resolution of the Tri-State issue will depend in large part upon Nebraska's own definition or own assertion of the injury that would be caused by proposed developments in Wyoming to equities in Nebraska that rely on the apportionment at Tri-State. That is the issue as we see it.
>
> . . . .
>
> Our position, I think, derives from two lines of cases that perhaps are really one in original actions. One line says that for the Court to exercise its jurisdiction, the case must be a serious magnitude. The other line says the party claiming to be injured must be able to prove substantial injury. That goes all the way back to the first one of these actions, Kansas versus Colorado.
>
> We have to be able to present to the Court the injury to all equities that rely on the apportionment, and many of those equities have developed as a result of the regimen of the river created by the apportionment.

Transcript of May 12, 1989, Status Conference at 96-98 (Docket No. 136). Interestingly, Nebraska's articulation of what she believes she must prove further demonstrates that Nebraska is really seeking a new apportionment, rather than the enforcement of existing rights.

> The specific issue to be addressed at this point is the appropriateness of ruling on whether Nebraska's as yet unseen evidence of injury or threatened injury to her interests downstream of Tri-State will be material to whether Wyoming or Colorado has violated Nebraska's decreed apportionment. At this stage, however, it is premature to enter an order advising Nebraska on how she may develop her case and the propositions for which her evidence will be deemed material.

Second Interim Report at 94. With all due respect, Colorado submits that not only is it appropriate to interpret the Decree as a matter of law prior to trial, it also is not premature to dismiss a claim that the plaintiff refuses to define more than five years after the case was filed.

Colorado is especially prejudiced by Nebraska's refusal to clarify her claim. Since Nebraska's petition does not allege that Colorado has violated or threatens to violate the Decree, Colorado should not have to actively participate in these proceedings. However, so long as Nebraska's nebulous claims on behalf of below Tri-State uses remain inchoate in this case, Colorado is at serious risk if she neglects to participate.[8] Colorado should not be forced to

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[8]The Special Master recognized the legitimacy of Colorado's concerns, even while failing to allay them:

> Colorado expresses justifiable concern over Nebraska's suggestion of claims respecting "collective equities equaling historical averages." Sustaining that position would, indeed, cause anxiety in Colorado over potential prejudice for not having fully used the share allocated to her in paragraph I of the Decree. As she argued on summary judgment, Colorado "should not be placed in a 'use it or lose it' situation with regard to her apportionment." June 1991 Transcript at 156-57.

guess at the scope of the issues remaining for trial.

CONCLUSION

Colorado requests that her exception be granted and partial summary judgment be entered accordingly.

Respectfully submitted this ____ day of July, 1992.

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Second Interim Report at 91-92 n. 108.

APPENDIX A

No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

BEFORE THE HONORABLE OWEN OLPIN
SPECIAL MASTER

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

NEBRASKA'S ANSWERS TO COLORADO'S FIRST SET OF REQUESTS FOR ADMISSION (BELOW TRI-STATE DAM ISSUE)

COMES NOW the Plaintiff State of Nebraska and hereby responds to Colorado's First Set of Requests for Admission to the State of Nebraska (Below Tri-State Dam Issue).

GENERAL OBJECTIONS

The State of Nebraska objects to Colorado's First Set of Requests for Admission to the State of Nebraska (Below Tri-State Dam Issue) insofar as the definitions and instructions of those

Admissions purport to create any duty to respond which exceeds or is different from the duties imposed by Rules 26 and 33 of the Federal Rules of Civil Procedure.

The State of Nebraska further generally objects to Colorado's Request for Admission insofar as they seek to discover any privileged matter, including but not limited to the attorney client privilege and the attorney work product privilege.

ANSWERS TO REQUESTS

1. So long as Nebraska receives its Decree apportionment for uses above Tri-State Dam, the Decree affords Nebraska no right to any additional water for uses below Tri-State Dam.

Answer: Denied. Explicit in Article XIII of the Decree is the right of any party to petition the Court for appropriate relief as material changes in conditions on the North Platte River affect water uses maintained or developed since 1945. Article XIII protects equities that have come to rely on the regimen of the river. Changes in the regimen of the North Platte River which adversely affect historical flows are thus cognizable under the Decree.

Even though the Decree does not apportion a direct natural flow right to uses below Tri-State, the apportionment is expressly predicated on the fact that continued return flows from uses above Tri-State were required to satisfy demands below Tri-State. Special Master Doherty expressly considered the return flows below Tri-State as an independent entitlement in formulating the apportionment, recognizing the return flows as necessary.

Maintenance of return flows is not incidental to the apportionment of uses above Tri-State.

2. So long as Nebraska receives its Decree apportionment for uses above Tri-State Dam, Nebraska will suffer no injury that is cognizable under the Decree.

Answer: Denied. Development of additional uses of North Platte River supplies may reduce the natural flows which are subject to apportionment between Wyoming and Nebraska such that cognizable injuries are suffered. In addition, changes in the operations and regimen of the North Platte River which adversely affect historical return flows relied upon by equities below Tri-State can result in cognizable injury. See Answer to Request for Admission No. 1.

3. Counsel for Nebraska has stated:

> We have to be able to present to the Court the injury to all equities that rely on the apportionment, and many of those equities have developed as a result of the regimen of the river created by the apportionment.

First Interim Report at 34, quoting from Pasadena Transcript (May 12, 1989) at 98. Admit that the "equities" that Nebraska contends "have developed as a result of the regimen of the river created by the apportionment" do not entitle Nebraska to any natural flow water in addition to its Decree apportionment for uses above Tri-State Dam.

Answer: Denied. See Answer to Request for Admission No. 1.

4. If Nebraska has at times received flows in excess of its Decree apportionment for uses above Tri-State Dam, such excess flows have not enhanced Nebraska's apportionment under the Decree or created "equities" which would entitle Nebraska to the continued delivery of such excess water.

Answer: Denied. Nebraska denies that it has received flows in excess of its Decree apportionment. See also, Answer to Requests for Admission No. 1.

5. The Decree apportionment to Nebraska is limited in amount and timing to natural flow water reasonably required for uses above Tri-State Dam and, therefore, uses below Tri-State Dam, including the maintenance of migratory bird habitat in the "Big Bend" reach of the Platte River, which may be supplied by return flows from the apportionment have no independent entitlement to water under the Decree.

Answer: The Decree as written in 1945 does not provide for an independent apportionment for fish and wildlife habitat, and in particular endangered species. Article XIII does provide the power to protect such equities that have come to rely on the regimen of the river. See Answer to Requests for Admission No. 1. Nebraska has a right to maintain certain flows that have been recognized by the apportionment. Nebraska may not seek a separate apportionment for fish and wildlife uses in this proceeding, but it will ask the Special Master to consider such equities when formulating his decision of whether to modify, expand or enforce the Decree.

6. Nebraska's assertion of injury or prospective injury to uses below Tri-State Dam is based solely upon Wyoming's alleged violation(s) or prospective violation(s) of the Decree apportionment for uses above Tri-State Dam.

Answer: Denied. Nebraska asserts that equities below Tri-State may be injured by actions of any party which threaten the regimen of the river created by the apportionment under the Decree. While Nebraska's Petition is premised on violations or prospective violations of the Decree by Wyoming, Nebraska will not preclude its right under Article XIII of the Decree to seek relief based on changed needs as well as threatened injuries that could result from the actions of any party.

7. To the extent that uses below Tri-State Dam have benefited from return flows resulting from the Decree apportionment, Nebraska has no right under the Decree to the maintenance of such return flows except as they may incidentally result from the apportionment to uses above Tri-State Dam.

Answer: Denied. See Requests for Admission No. 1.

8. To the extent that uses below Tri-State Dam have benefited from surplus waters flowing past Tri-State Dam or from excessive diversions or bypasses by the Nebraska canals, Nebraska has no right under the Decree to the maintenance of such flows.

Answer: Denied. Nebraska does not admit that there have been excessive diversions or bypasses by the Nebraska canals. See also, Answer to Requests for Admission No. 1.

9. Under the Decree, Nebraska is not entitled to assert injury to uses below Tri-State Dam caused by changes in the regimen of the river, including reduced return flows, unless such changes result from violation of the Decree apportionment to uses above Tri-State Dam.

Answer: Denied. See Answer to Request for Admission No.

1.

10. If Nebraska asserts that there are "equities" which entitle it to flows in excess of the requirements for uses above Tri-State Dam recognized in the Decree, Nebraska's petition in this proceeding does not request the Court to expand or modify the Decree to protect such equities.

Answer: Denied. "The petition requests an order construing or clarifying the Decree, modifying it if necessary, and enforcing the Decree by enjoining Wyoming from increasing current depletions of the 'natural flow' of the North Platte River . . .." Nebraska's Response to Wyoming's Motion for Summary Judgment at 4. Special Master Olpin has confirmed that the Decree can be modified or expanded in this proceeding. See First Interim Report at 5-6.

Dated this 7th day of October, 1989.

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