No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER ON MOTIONS TO AMEND THE PLEADINGS AND BRIEF IN SUPPORT OF EXCEPTIONS

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November 22, 1994

Bowne of Phoenix, Inc., Law Printers (602) 223-4455

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The State of Nebraska takes exception to the recommendation in Special Master Olpin's Third Interim Report of September 9, 1994, that the Court should exercise jurisdiction over Wyoming's Fourth Cross-Claim against the United States, *viz.*, the alleged failure to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by the contracts governing water use from those reservoirs.

The State of Nebraska urges the Court to decline to exercise jurisdiction over Wyoming's Fourth Cross-Claim because by fixing canal requirements Wyoming seeks to effectively change ¶ V of the Decree from a percentage apportionment of natural flow to a mass allocation of natu-

ral flow and storage water. The Court expressly rejected a mass allocation in 1945.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Court should relitigate Wyoming's attempt in the original proceedings to replace the percentage apportionment in ¶ V of the Decree with a mass allocation of natural flow and storage water based on quantitative limitations on water uses in Nebraska?

2. Whether the Court can logically reject the imposition of quantitative limitations with respect to natural flow and accept them with respect to storage water?

3. Should the interpretation of storage water contracts between the Bureau of Reclamation and individual irrigation districts be construed in this Court's original jurisdiction or by the federal district court for the district of Wyoming?

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TABLE OF AUTHORITIES

PARTIES INVOLVED

This suit was commenced in 1934 by the State of Nebraska against the State of Wyoming. Following the denial of Wyoming's motion to dismiss, which was predicated on the indispensability of the State of Colorado and the United States of America, Colorado was impleaded as a defendant and the United States was granted leave to intervene. *Nebraska v. Wyoming,* 296 U.S. 553 (1935); *Nebraska v. Wyoming,* 304 U.S. 545 (1938). The Court entered its original opinion and decree in 1945. *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945); *Nebraska v. Wyoming,* 326 U.S. 683 (1945). The Decree has been modified once by stipulation of the parties.[1] *Nebraska v. Wyoming,* 345 U.S. 981 (1953).

On October 7, 1986, Nebraska filed its motion for leave to reopen the case, seeking relief solely against Wyoming. The motion was granted on January 20, 1987. *Nebraska v. Wyoming,* 479 U.S. 1051 (1987) (Docket No. 4a).[2] Wyoming filed an answer and a motion for leave to file a counterclaim which the Court granted on April 20, 1987. *Nebraska v. Wyoming,* 481 U.S. 1011 (1987). Colorado and the United States have participated as parties as they did in the original proceedings.

Five entities have actively participated in the litigation as *amici, viz.,* Basin Electric Power Cooperative ("Basin"), Central Nebraska Public Power and Irrigation District ("Central"), the Nebraska Public Power District ("NPPD"), the Platte River Whooping Crane Critical

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[1] As used in this brief, the "Decree" refers to the 1945 decree, 325 U.S. 665, as modified by the Court's order in 1953, 345 U.S. 981.

[2] By agreement of the parties and the Special Master, pleadings and documents contained in the Special Master's Docket are identified by docket number in parenthesis.

Habitat Maintenance Trust ("Trust"), and the National Audubon Society ("Audubon").[3]

JURISDICTION

The Decree in the original litigation was entered under Article III, Section 2, Clause 2, of the United States Constitution and the Judiciary Act, 28 U.S.C. § 1251(a) (1993). In 1986, the State of Nebraska invoked the original jurisdiction of the Court pursuant to ¶ XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified, Nebraska v. Wyoming*, 345 U.S. 981 (1953). Paragraph XIII retained the Court's jurisdiction "for the purpose of any order, direction, or modification of the decree" to address future developments or "[a]ny change in conditions making modification . . . or the granting of further relief necessary or appropriate." 325 U.S. at 671-72.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case does not directly involve constitutional or statutory provisions. The North Platte River Decree is reprinted in the Appendix. *See* A-1-15.

STATEMENT OF THE CASE

Nebraska v. Wyoming was initially docketed as No. 6, Original. The case was redocketed as No. 108, Original, when it

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[3] Special Master Olpin has twice denied motions to intervene by various *amici*. *See* Owen Olpin, Special Master, First Interim Report at 6-14 (June 14, 1989) (Docket No. 140) ("First Interim Report"); Owen Olpin, Special Master, Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 101-09 (Apr. 9, 1992) (Docket No. 463) ("Second Interim Report").

was reopened on January 20, 1987.[4] *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). On June 22, 1987, the Court appointed the Honorable Owen Olpin as Special Master. *Nebraska v. Wyoming*, 483 U.S. 1002 (1987) (Docket No. 20a).

Shortly after the suit was filed, Wyoming filed a motion for summary judgment seeking to dispose of the case in its entirety, except for its counterclaim.[5] Master Olpin denied Wyoming's motion in his First Interim Report on June 14, 1989. *See* First Interim Report. Following discovery, Colorado, Wyoming, Nebraska, and the United States filed cross-motions for summary judgment in February and March of 1991.[6] After briefing and oral argument, Master Olpin recommended that portions of Nebraska's and the United States' motions for summary judgment be granted. *See* Second Interim Report. He also recommended that the Court deny all aspects of Wyoming's and Colorado's motions. *Id.*

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[4] For a summary of the federal common law of equitable apportionment, the doctrine of priority of appropriation, a general physical description of the North Platte River basin and its major features, the original litigation, aspects of post-Decree administration, and what precipitated the current litigation, *see* Nebraska's Exceptions to the First and Second Interim Reports of the Special Master and Brief in Support of Exceptions at 4-14 (July 1, 1992) (Docket No. 491).

[5] *See* Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion (Sept. 11, 1987) (Docket No. 23).

[6] *See* Colorado's Motion for Partial Summary Judgment (Feb. 22, 1991) (Docket No. 292); Wyoming Second Motion for Summary Judgment and Brief in Support (Feb. 22, 1991) (Docket No. 294); Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296); and United States Motion for Summary Judgment on the Inland Lakes and Brief in Support of Motion (Mar. 4, 1991) (Docket No. 297).

The Court allowed the parties and the *amici* the opportunity to file exceptions to Master Olpin's First and Second Interim Reports. *Nebraska v. Wyoming*, 112 S. Ct. 1930 (1992) (Docket No. 477). Wyoming, Colorado, Basin Electric, and Nebraska filed exceptions.[7] On January 13, 1993, oral argument was heard before the Court, and the Court's decision was released on April 20, 1993. *Nebraska v. Wyoming*, 113 S. Ct. 1689 (1993) (Docket No. 533).

Following the Court's decision on the cross-motions for summary judgment, the Special Master inquired of the parties whether they intended to amend their pleadings. At a status conference convened in June, 1993, Nebraska and Wyoming were asked by the Master to file briefs clarifying certain claims.[8] Based on the Court's decision, the clarifying briefs, and the parties' on-going discovery, Nebraska and Wyoming filed motions for leave to file amended pleadings.

Nebraska filed a motion for leave to file an amended petition on February 18, 1994.[9] It contains four counts —

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[7] *See* Exceptions of Basin Electric Power Cooperative to Second Interim Report of Special Master and Brief in Support of Exceptions (July 1, 1992) (Docket No. 490); Nebraska's Exceptions to the First and Second Interim Reports of the Special Master and Brief in Support of Exceptions (July 1, 1992) (Docket No. 491); Exceptions of the State of Wyoming to the First and Second Interim Reports of the Special Master and Brief in Support (July 2, 1992) (Docket No. 492); and Colorado's Exception to Special Master's First and Second Interim Reports (July 1, 1992) (Docket No. 493).

[8] *See* Nebraska's Memorandum on the Status of the Laramie River Claims (Nov. 12, 1993) (Docket No. 591); Wyoming Memorandum Describing the Administration of Water Rights in the North Platte Basin (Sept. 17, 1993) (Docket No. 565).

[9] *See* Nebraska's Motion for Leave to File Amended Petition, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River below Wheatland and to Apportion the Unapportioned Natural Flows

continued

three against Wyoming and one against the United States. Count I is a restatement and elaboration of Nebraska's primary injury claim against Wyoming. It alleges actual and threatened depletions of the North Platte River and its tributaries. Nebraska's Amended Petition at 2-6. Count II alleges that the United States has contracted for Glendo Reservoir storage water in violation of the Decree. *Id.* at 7-8.

In Count III, Nebraska seeks to establish an entitlement to the unapportioned flows of the Laramie River. *Id.* at 8-11. In its decision on the cross-motions for summary judgment, the Court determined that all of the waters of the Laramie River had not been apportioned by the Laramie Decree. The Court also held that the contribution of the Laramie River to the North Platte River had not been apportioned by the North Platte Decree, though it had been expected that theses Laramie flows would continue to contribute to the natural flows of the North Platte River available for apportionment. 113 S. Ct. at 1697-98. Count III seeks to clarify the status of the Laramie River inflows to the North Platte. Count IV requests an equitable apportionment of previously unapportioned nonirrigation season flows of the North Platte River. Nebraska's Amended Petition at 11-15. Counts III and IV seek injunctive relief against Wyoming to curtail depletions in violation of Nebraska's equitable share of the natural flows.

Master Olpin recommended that the Court grant Nebraska's motion for leave to file with respect to Counts I, II, and III, and that the Court deny without prejudice Nebraska's motion with respect to Count IV. *See* Owen Olpin, Special Master, Third Interim Report on Motions to Amend the Pleadings at 36-55 (Sept. 9, 1994) ("Third Interim Report").

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of the North Platte River, and Brief in Support of Motion for Leave to File Amended Petition (Feb. 18, 1994) (Docket No. 623) ("Nebraska's Amended Petition" or "Nebraska's Brief in Support of Amended Petition").

Wyoming filed a motion for leave to file an amended counterclaim against Nebraska and, for the first time, cross-claims against the United States and Colorado.[10] Four of the five cross-claims against the United States essentially mirror the four counterclaims against Nebraska. The two cross-claims against Colorado involve proposed modifications of the Decree.

Wyoming's First Counterclaim and First Cross-Claim contain allegations and requests for relief against Nebraska and the United States which would place new restrictions on Nebraska's apportioned share of natural flow. Wyoming's Amended Counterclaims and Cross-Claims at 3-6, 9-11. By filing these claims, Wyoming seeks to relitigate the apportionment of natural flow in ¶ V of the Decree.

Wyoming's Second and Third Counterclaims and Second and Third Cross-Claims contain allegations against Nebraska and the United States, respectively, relating to Glendo Reservoir storage water.[11] *Id.* at 6-7, 11-12. The Second Counterclaim and Second Cross-Claim seek enforcement of the Decree, and in the alternative, the Third Counterclaim and Third Cross-Claim seek modification of the Decree to ease certain restrictions on the use of the Glendo storage water.

Wyoming's Fourth Counterclaim and Fifth Cross-Claim are alleged against Nebraska, the United States, and Colorado. *Id.* at 8-9, 13. Wyoming seeks modification of the Decree to allegedly provide a more accurate determination of transportation losses.

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[10] *See* Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims (Feb. 18, 1994) (Docket No. 624) ("Wyoming's Amended Counterclaims and Cross-Claims" or "Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims").

[11] The Third Cross-Claim is also asserted against Colorado.

Finally, in its Fourth Cross-Claim against the United States, Wyoming asserts violations of its equitable apportionment and of state and federal law in the use and administration of storage water.[12] *Id.* at 12-13. Like Wyoming's First Counterclaim and First Cross-Claim, the relief Wyoming seeks in its Fourth Cross-Claim would result in a mass allocation to Nebraska, thereby reducing the amount of water available for users in Nebraska.

Master Olpin recommended that the Court grant Wyoming's motion for leave to file with respect to the Second, Third, and Fourth Counterclaims, and the Second, Third, Fourth, and Fifth Cross-Claims. *See* Third Interim Report at 55-71. He recommended that the Court deny with prejudice Wyoming's motion for leave to file its First Counterclaim and First Cross-Claim. *Id.* at 36.

The Court allowed the parties the opportunity to file exceptions to the Master's Third Interim Report on October 11, 1994. *Nebraska v. Wyoming*, 63 U.S.L.W. 3292 (1994). Nebraska takes exception to the Master's recommendation that the Court grant Wyoming's motion for leave to file with respect to its Fourth Cross-Claim.

SUMMARY OF ARGUMENT

Wyoming's Fourth Cross-Claim, which relates only to storage waters, appears to be directed solely against the United States. Its purpose, however, is to impose quantitative limitations on the use of storage waters released from federal reservoirs for use on lands in Nebraska. The Fourth Cross-Claim is the flipside of Wyoming's First Counterclaim

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[12] Storage water was defined by the Court in 1945 "as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet the requirements of any canal as recognized in the decree." 325 U.S. at 631. The Court held that "[t]his definition does not adversely affect rights recognized in the decree." *Id.*

and First Cross-Claim, the latter two of which seek to transform the equitable apportionment in 1945 from a proportionate sharing of natural flows into a quantified apportionment that would limit Nebraska's share of natural flow by a newly imposed standard of beneficial use. In its First Counterclaim and First Cross-Claim, Wyoming seeks to impose a quantified limit on the use of natural flow waters; in its Fourth Cross-Claim, Wyoming seeks to impose the same quantified limit on storage waters. To do so would not only contravene the Court's rejection of Wyoming's identical proposal in 1945, but would also disturb the socio-economic dependence that has developed in reliance on the Court's resolution of the matter in 1945.

The Special Master has recommended that the Court decline to hear Wyoming's First Counterclaim and First Cross-Claim because they seek to place new constraints on Nebraska's use of natural flow through the imposition of beneficial use limitations on Nebraska's canal diversions. Wyoming's Fourth Cross-Claim, however, seeks the same relief with respect to the use of storage water. While Special Master Olpin has rejected the imposition of beneficial use limitations on Nebraska lands insofar as the application of natural flow is concerned, he recommends that such limitations be pursued with respect to the application of storage water on the same lands. All of the reasons for avoiding a new apportionment of natural flow, however, apply to avoiding a new apportionment of storage water. The Court should not reverse its decision in 1945 to apportion the waters of the North Platte on a percentage basis and adopt instead a mass allocation of natural flow and storage water based on beneficial use limitations.

While the principal issue raised by Wyoming's Fourth Cross-Claim turns on whether the Court is willing to replace the 1945 apportionment with a categorically different apportionment after the passage of 50 years, certain issues turn on an interpretation of the storage water contracts between the United States and various irrigation districts in Wyoming and Nebraska. In 1945, the Court determined

that the construction of the storage contracts was not embraced by the federal common law of equitable apportionment, but rather was a matter of unrelated state and federal law. To the extent these issues have any substance, they should be litigated in federal district court.

ARGUMENT

POINT I

WHILE WYOMING'S FOURTH CROSS-CLAIM IS ASSERTED AGAINST THE UNITED STATES, IT IS DESIGNED TO OBTAIN A NEW AND CONCEPTUALLY DIFFERENT APPORTIONMENT AS AGAINST NEBRASKA

In its Fourth Cross-Claim, Wyoming seeks to change the equitable apportionment in the guise of protecting the existing apportionment. Wyoming states that the United States has "allocated storage water in a manner which (a) upsets the equitable balance on which the apportionment of natural flow was based, [and] (b) results in the allocation of natural flow contrary to the provisions of the Decree and contrary to the equitable apportionment." Wyoming's Amended Counterclaims and Cross-Claims at 12 (¶ 31(a) & (b)). While the claim appears to seek protection of Wyoming's apportionment, the relief associated with the claim could only result in the prospect of a conceptually different apportionment.

Specifically, Wyoming contends that the United States has allocated storage water in a manner which:

> (c) promotes inefficiency and waste of water contrary to federal and state law, (d) violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. § 523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under any

> project" after "preserving a first right to lands and entrymen under the project" and (e) exceeds the limitations in the contracts under the Warren Act.

Id. at 12 (¶ 31(c), (d), & (e)). The actions which Wyoming alleges upset the apportionment, however, were either litigated in the original proceedings or are purely contractual matters appropriate for an alternative forum, *viz.*, a federal district court.

A. The Original Litigation.

When this case was originally litigated in the 1930s and 1940s, the fundamental dispute framed by the evidence was whether quantitative limits should be placed on the uses of the waters of the North Platte River in each state or whether the dependable water supply — which was over-appropriated — should be shared in proportion to historical demands.

Wyoming took the position that the natural flow and storage water should be pooled and apportioned without distinction, urging a quantitative determination of the individual uses or requirements in each state. Only if this were done, according to Wyoming, could the storage supplies in the federal reservoirs be conserved over time. *See* Brief of Defendant, State of Wyoming at 37-38, 82 (Jan. 29, 1945). It was Wyoming's position that a "limitation to beneficial use [was] an integral part of the North Platte Project and Warren Act contracts." *Id.* at 52. Wyoming knew that without a mass allocation, the beneficial use limitations in the storage contracts would not be enforceable under the Decree. *Id.* at 54. Accordingly, Wyoming advocated that "[a] mass allocation of these [aggregate] requirements should be made, resulting in an allocation of 790,000 acre feet to Nebraska and . . . 405,000 to Wyoming." *Id.* at 37.

Instead of placing use limitations on the Nebraska canals for any purpose, including the conservation of storage water as Wyoming had argued, Special Master Doherty

declined "to define the rights of individual appropriators," either as to natural flow or storage water. *See* Doherty Report at 161. Refusing to pool storage water with natural flow, Master Doherty distinguished between the two, leaving the federal storage contracts intact, and apportioning the natural flow 75% to Nebraska and 25% to Wyoming. *Id.* at 148-62; *see also* 325 U.S. at 667 (¶ V). In doing so, Master Doherty understood the effect of not apportioning storage water on the concepts advanced by Wyoming, specifically individual canal limitations and beneficial use. The full text of the Master Doherty's report is important:

> This apportionment assumes that the distribution of storage water is controlled by the various storage contracts and that such water would be delivered in accordance with the terms of those contracts. In that connection the following question arises: All of the storage water contracts (Project and Warren Act) limit the total water, natural flow and storage, which the holder of any contract may demand, to that for which his land has beneficial use. In arriving at the equitable share of each State I have first determined for that purpose the *requirements* of the various canals or districts. Is this to be taken as a determination of the limits of beneficial use for the purpose of intra-state administration? If so, those limits would apply to both storage and natural flow water.
>
> Wyoming feels that such a limitation should be placed on the Nebraska State Line Canals for its effect upon the conservation of storage water. From a practical standpoint, and perhaps from an equitable standpoint, this might be a proper and desirable measure. From a legal standpoint, I doubt the jurisdiction of this Court to fix such limitations upon individual canals. The suit is between States and jurisdiction is invoked to determine the equitable rights of the States, that is, to determine the proper apportionment of water be-

> tween them. The requirements of individual appropriators in each State being one of the elements in the ascertainment of the State's equitable share, they are incidentally a proper matter for investigation and determination for their bearing on the ultimate issue. But it would be quite a different matter to undertake to define the rights of individual appropriators between each other or between them and their State, or to determine what portion of the State's share must be allocated to any appropriator or group of appropriators, or to place a limit upon the participation of any appropriator or group in such allocation. That, in the absence of the appropriators as parties, would, I apprehend, as to them amount to a denial of due process of law. Consequently, the findings herein as to *requirements* cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, *either as to natural flow or storage water*, nor do I think any such limitations can properly be imposed by the decree.

Doherty Report at 160-61 (third emphasis added). *See also id.* at 189-95.

Accordingly, Master Doherty concluded that neither the equitable apportionment nor the storage water contracts could limit individual canal diversions through the concept of beneficial use. The result of interpreting the storage water contracts in a different manner would be to completely undermine the equitable apportionment that Doherty recommended to the Court — to turn it into a mass allocation. In other words, it would have been inconsistent for Doherty to have stated that the Decree did not contain individual canal limitations, but that the storage water contracts did.

Confirming Master Doherty's recommendation in 1945, the Court expressly excluded the use and administration of storage water from the equitable apportionment. 325 U.S.

at 638-40. Initially, the Court paraphrased Wyoming's position:

> The argument is that each State should be restricted to the use of such supplies only as are necessary to provide their respective irrigators, including those receiving water under contracts, with such amounts as are necessary for beneficial use. The large excesses diverted by Nebraska are adverted to as showing the degree to which carry-over storage in the upper reservoirs has been diminished and the supply for Kendrick exhausted.

Id. at 638-39. Wyoming argued that unless beneficial use limitations were determined for the various canals, irrigators would not be encouraged to conserve storage water. Wyoming continued to believe that individual canal caps, combined with an apportionment of storage water, would result in less consumption of storage water and more carry-over storage in the upstream reservoirs, ultimately allowing Wyoming junior appropriators to come into priority sooner.

The Court understood that Wyoming wanted to pool natural flow and storage water into a common fund and then allocate to Nebraska a specified amount of water. It also knew that excessive or improper use of storage water could decrease the total water supply. Nonetheless, the Court believed that the use of storage water had to be governed by the applicable contracts that were in place. The Court found that the United States owned the storage water and that its use and administration were a matter of state and federal law as opposed to the federal common law of equitable apportionment. *Id.* at 629-30. Specifically, the Court stated: "Nor will the decree interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities." *Id.* at 630. Additionally, the Court found that "an apportionment of storage water would disrupt the system of water administration which ha[d] become established pursuant to the mandate of Congress in § 8 of the Reclamation Act that the Secretary of the Interior in the construction of these

federal projects should proceed in conformity with state law."[13] *Id.* at 639.

B. Wyoming's Present Position.

Wyoming's Fourth Cross-Claim reasserts the position that Wyoming took in the original litigation which was rejected by the Court with respect to storage water. The cross-claim alleges "inefficiency and waste of water," *i.e.*, the lack of beneficial use. Wyoming's Amended Counterclaims and Cross-Claims at 12 (¶ 31(c)). It alleges that limitations in the contracts are not being followed. *Id.* at 12 (¶ 31(e)). Basically, Wyoming still asserts that beneficial use is the controlling principle in each of the North Platte Project contracts, as well as the Warren Act contracts. Through its Fourth Cross-Claim, Wyoming seeks to discard the existing apportionment, which is based on a percentage distribution

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[13] The Court continued:

> In pursuance thereto all of the storage water is disposed of under contracts with project users and Warren Act canals. It appears that under that system of administration of storage water no State and no water users within a State are entitled to the use of storage facilities or storage water unless they contract for the use. See Wyo. Rev. Stats. (1931), §§ 122-1504, 122-1508, 122-1602. If storage water is not segregated, storage water contractors in times of shortage of the total supply will be deprived of the use of a part of the storage supply for which they pay. If storage water is not segregated, those who have not contracted for the storage supply will receive at the expense of those who have contracted for it a substantial increment to the natural flow supply which, as we have seen, has been insufficient to go around. In *Wyoming v. Colorado, supra,* the Court did not apportion storage water. It apportioned natural flow only. It took into account when it made that apportionment the effects of storage in equalizing natural flow in Wyoming. We think no more should be done here to effect an equitable apportionment.

325 U.S. at 639-40.

of daily natural flow, and to replace it with a division of water based on beneficial use, *i.e.*, to set fixed limitations on individual canal diversions. Wyoming's Fourth Cross-Claim necessarily seeks to pool storage water with natural flow in "defining" the respective rights of the states.[14]

The issues presently raised by Wyoming were raised by Wyoming in the original litigation, considered by the Court, and rejected in the Court's determination that a mass allocation was not appropriate. Instead, the Court adopted Special Master Doherty's recommendation of an equitable apportionment based on a proportionate sharing of the fluctuating supply.

Since the Decree was entered in 1945, the percentage apportionment of the natural flows of the North Platte River has been administered on a daily basis, premised on the segregation of natural flow and storage water. Storage water has been distributed separately pursuant to contracts between the United States and irrigation districts in Wyoming and Nebraska. For fifty years, the regional economy has been dependant on this regimen of the river. In combination with Wyoming's First Counterclaim and First Cross-Claim, Wyoming's Fourth Cross-Claim seeks to change the apportionment created in 1945 and to cause a radical shift in the equitable benefits of the North Platte River.

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[14] Wyoming states that it does not seek "to go beyond the confines of the existing apportionment," but rather to further "define" or "fully carry out" the existing apportionment. Wyoming's Motion for Leave to File Amended Counterclaims and Cross-Claims at 1-2. In reality, however, Wyoming is asking the Court to permit it to pursue a categorically different apportionment.

POINT II

THE COURT CANNOT REJECT THE IMPOSITION OF QUANTITATIVE LIMITATIONS WITH RESPECT TO NATURAL FLOW AND ACCEPT THEM WITH RESPECT TO STORAGE WATER

In its First Counterclaim and First Cross-Claim, which relate to natural flow only, Wyoming seeks to place new constraints on Nebraska's use of its natural flow through the imposition of beneficial use limitations on individual canal diversions. In his Third Interim Report, Special Master Olpin recommended that the Court deny Wyoming's motion "to add her proposed First Counterclaim and First Cross-Claim . . .." Third Interim Report at 55. His recommendation was based on sound reasoning:

> Wyoming's First Counterclaim against Nebraska essentially seeks to transform the 1945 equitable apportionment in the pivotal reach from a proportionate sharing of the natural flows into a defined and quantified apportionment that would limit Nebraska's share by a beneficial use standard. This would amount to much more than a modified decree; it would require relitigating matters that were litigated and determined in the original case in 1945 and largely reaffirmed in the Court's 1993 opinion. Similarly, Wyoming's proposed First Cross-Claim against the United States is premised on imposing new beneficial use limitations on Nebraska's apportionment.
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> * * *
>
> Wyoming defends her proposed amendments as a quest for "a clearer definition of Nebraska's apportionment" so that Wyoming will not continue to face uncertainty and costly litigation threats whenever Wyoming water users "propose some change of use or new development in the North Platte Basin. That quest for certainty is, in actuality, a plea for restructuring the decree in ways that

> were considered and expressly rejected in the original proceedings. Further, if the relief requested by Wyoming were to be granted, there would necessarily be an intrusion by the Court into Nebraska's intrastate water administration far beyond what the Court was willing to consider in 1945.

Id. at 55, 56 (footnotes omitted).

The underlying cause of action stated in Wyoming's Fourth Cross-Claim, which relates to storage water only, is the same as the cause of action stated in its First Counterclaim and First Cross-Claim, *i.e.*, that "[t]he equitable apportionment . . . was intended to protect the supply of irrigation water to meet the reasonable beneficial use requirements of the Nebraska lands . . .." *See* Wyoming's Amended Counterclaims and Cross-Claims at 3 (¶ 5). Wyoming states that "[t]he fourth cross-claim is an extension of the first counterclaim . . .," under which the United States must operate the federal reservoirs "in accordance with the storage contracts and applicable federal and state laws." Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims at 26. Through its Fourth Cross-Claim, Wyoming seeks the same relief as to storage water that the First Counterclaim and First Cross-Claim seek with regard to natural flow, *i.e.*, the imposition of beneficial use limitations on individual canal diversions. While Special Master Olpin has rejected the imposition of beneficial use limitations on Nebraska lands insofar as the application of natural flow is concerned, he recommends that such limitations be examined with respect to the application of storage water on the same lands. That his recommendations are inconsistent is illustrated by the fact that "beneficial use" is conceptually blind to a distinction between natural flow and storage water.

In recommending denial of Wyoming's First Counterclaim and First Cross-Claim, Master Olpin stated: "Practical and policy considerations also counsel against imposing mass allocation, beneficial use, or kindred ceilings on Nebraska's apportionment." Third Interim Report at 62.

These same considerations apply equally to the Fourth Cross-Claim. First, in recommending denial of Wyoming's motion for leave to file its First Counterclaim and First Cross-Claim, the Master believed that he could not assess beneficial use by considering the use of natural flow in a vacuum. *Id.* Relief could not be fashioned relating only to natural flow. The same logic explains why it would not be possible to attempt to assess the beneficial use of storage water alone. Second, Master Olpin reasoned that any limitation of natural flow based on beneficial use would require the Court to become involved in Nebraska's intrastate water administration, directly contrary to the Court's previous holdings. *Id.* The Master's logic applies equally to limitations on storage water. The relief Wyoming requests in its Fourth Cross-Claim would deprive Nebraska of its freedom of intrastate administration and place the federal government in a position of imposing standards for water use in Nebraska. Third, Master Olpin believed that limitations on natural flow grounded solely on beneficial use requirements would ignore nonirrigation season water uses that are incidentally served. *Id.* at 63. The same is true for storage water. In sum, the logic that the Master used to recommend denial of Wyoming's First Counterclaim and First Cross-Claim counsels against granting Wyoming's Fourth Cross-Claim.

Given that Wyoming's First Counterclaim and Fourth Cross-Claim articulate the same cause of action, *i.e.*, that the use of North Platte waters should be governed by newly imposed quantitative limitations based solely on beneficial use standards, the Court should not exercise jurisdiction over the Fourth Cross-Claim. In other words, in the guise of protecting or defining the existing apportionment, the Court should not reverse its decision in 1945 to apportion the waters of the North Platte on a percentage basis and replace it with a mass allocation of natural flow and storage water based on beneficial use limitations.

POINT III

AN ALTERNATIVE FORUM EXISTS FOR ANY LEGITIMATE CONTRACTUAL DISPUTE CONTAINED IN WYOMING'S FOURTH CROSS-CLAIM

While Wyoming's Fourth Cross-Claim raises issues which were litigated in the original proceedings and are identical to issues raised in its First Counterclaim and its First Cross-Claim, it also raises a contractual issue which can and should be resolved in an alternative forum. In its Fourth Cross-Claim, Wyoming alleges that the United States:

> . . . violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. § 523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under any project" after "preserving a first right to lands and entrymen under the project".

Wyoming's Amended Counterclaims and Cross-Claims at 12 (¶ 31(d)). Wyoming argues that according to the language of the various contracts and one federal statute, a certain group of storage water users is entitled to water before another group of storage water users. *See* Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims at 27. Specifically, Wyoming states that the United States' practice of allocating storage water is "contrary to the plain language of the Warren Act contracts" and that the "interpretation and administration of the storage contracts is flatly contrary to the Warren Act." *Id.*

The Court does not exercise its original jurisdiction when an alternative forum is available. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). A federal district court is the appropriate judicial forum to resolve issues of contract interpretation. Indeed, the federal district court for the district of Wyoming has concluded trial among various storage water contractors and the United States on

one of the issues raised by Wyoming in its Fourth Cross-Claim, *viz.*, the allocation procedure between the North Platte Project contractors and the Warren Act contractors. *See Goshen Irrigation District v. United States*, Case No. C89-0161J (D. Wyo. complaint filed June 23, 1989). The matter has been submitted to the court and is pending decision. Judicial economy would not be served by litigating the matter twice.

In his Third Interim Report, Master Olpin concludes that the federal district court is not an adequate alternative forum because neither Wyoming nor Nebraska is a party to *Goshen Irrigation District*, leaving the district court without jurisdiction to consider the potential effects of the resolution of the storage contract issue on the equitable apportionment. Third Interim Report at 70-71. As explained in Point I, however, Wyoming's Fourth Cross-Claim seeks a reapportionment of flows previously apportioned as opposed to protection of the existing apportionment. Whether the existing apportionment should be replaced with one that was rejected in 1945 is a question that can only be decided by this Court. Issues which are purely matters of contract interpretation can be litigated before a lower court.

CONCLUSION

In considering whether the percentage apportionment adopted by the Court in 1945 should be replaced with an apportionment based on newly imposed quantitative limitations on Nebraska's diversions, the Court should not focus on the distinction between natural flow and storage water. Beneficial use is a concept that derives from the requirements of particular crops on particular lands under particular climatological conditions. It cuts across the administrative distinction between natural flow and storage water.

The reasons for declining to hear a case designed to overturn the Court's decision in 1945 apply to both natural flow and storage water. Accordingly, the Court should

decline to exercise jurisdiction over Wyoming's Fourth Cross-Claim. The Court should also decline to resolve contract disputes that can and should be heard in federal district court.

Respectfully submitted,

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APPENDIX

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NEBRASKA v. WYOMING
(325 U.S. 665)

DECREE.
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a

total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which

said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five percent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be com-

puted in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses
Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Losses-Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover..	8,360	53	76	87	76	56
Guernsey Res. to Whalen.....	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint

and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. 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;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

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

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the

rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two- fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, Original. Nebraska v. Wyoming (Colorado, Impleaded Defendant, and the United States, Intervenor.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado and Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the

basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the

priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjusted to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and denied, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring

Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the appropriation of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoir.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a coefficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Losses-Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,470	43	61	70	61	45
Guernsey Res. to Whalen ...	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off- set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head to Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be deter-

mined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash*, Assistant Attorney General, for the State of Nebraska, *Howard B. Black*, Attorney General, for the State of Wyoming, *Duke W. Dunbar*, Attorney General, *H. Lawrence Hinkley*, Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.