No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON MOTION FOR LEAVE TO FILE AMENDED PETITION

BRIEF FOR THE UNITED STATES IN OPPOSITION

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STATEMENT

On October 7, 1986, the State of Nebraska sought leave from this Court to file a petition for an order enforcing the Court's decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), which established an interstate apportionment of the flow of the North Platte River. The United States (which is a party to the decree) responded that Nebraska appeared to identify a substantial interstate dispute and suggested that the Court grant the petition and appoint a Special Master to examine Nebraska's claims. No. 6, Orig. U.S. Mem. 3-4 (filed Dec. 19, 1986). On January 20, 1987, this Court granted Nebraska leave to file the petition and instructed the parties to file answers. 479 U.S. 1051. On June 22, 1987, the Court referred the case to a Special Master, before whom the case is pending. 483 U.S. 1002.

On January 11, 1988, Nebraska sought leave of this Court to amend its petition to seek a modification of the underlying decree. Nebraska wished to include, as a part of the decree, a new requirement that Nebraska, Wyoming, and Colorado share the burden of maintaining stream flows necessary for critical wildlife habitat along the Platte River. The United States observed that Nebraska's 1986 petition "purported to seek enforcement of an existing decree" and that Nebraska's motion to amend its petition, if granted, "would greatly expand the scope, character, and complexity of the present suit." U.S. Mem. 3 (filed Feb. 12, 1988). The Court denied Nebraska's motion. 485 U.S. 931 (1988).

On June 14, 1989, the Special Master filed his First Interim Report with the Court. In that Report, he denied the motions of certain groups to intervene, subject to reconsideration at a later date. First Interim Report 6-14. He also denied Wyoming's comprehensive motion for summary disposition of the case. *Id.* at 14-37. The Special Master indicated that he would allow factual development on each of Nebraska's claims, but left open the possibility of summary resolution following a period of discovery. *Id.* at 17-18.

In March, 1991, after extensive discovery, Nebraska, Wyoming, and the United States each filed motions for summary judgment on one or more claims. The United States moved for summary judgment on the so-called "Inland Lakes" issues, while Wyoming moved for summary judgment on the so-called "Deer Creek" and "Laramie River" issues and on part of its counterclaim. Nebraska moved for partial summary judgment seeking an interpretation of the decree. The Special Master is currently preparing his report as to those matters.

Nebraska now seeks, once again, to amend its petition to raise new matters. The proposed amended petition would present three claims:

(a) Count I seeks to amend the 1945 decree "to apportion the unapportioned, non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows." Para. 20. Count I does not specifically identify any additional proposed upstream development in Wyoming beyond that already identified in the 1986 petition, and it gives no indication of the significance or magnitude of any injury Nebraska will allegedly incur as a result of that development.

(b) Count II of the amended petition alleges that, "[s]ince the entry of the decree in 1945, the State of Wyoming has initiated and allowed changes in the legal and physical environment" to "adversely affect the equitable apportionment made to Nebraska." Para. 1. Count II appears to enlarge the claim for relief set forth in the 1986 petition. Compare 1986 Petition, at 3-4, with proposed 1991 Amended Petition, at 13. It charges that Wyoming has violated the existing decree through excessive use of natural flow and ground water for irrigation; depletion of storage water; depletion of return flows reaching the North Platte River; and excessive consumption of water on tributaries entering the North Platte River below Alcova Reservoir. Para. 2.

(c) Count III of the amended petition alleges that the United States is violating the decree by "contracting for the use of Glendo Reservoir water for other than authorized purposes" and "[a]llocating natural flows among its contractors

> in designated water-short years," in violation of paragraphs V, VI, and XII of the existing decree. Para. 2. Like Count I, Count III is entirely new. It raises, for the first time, a request by Nebraska for relief against the United States under the decree.

Nebraska has left unclear its intentions as to the future course of the claims, based on the 1986 petition, that are currently pending before the Special Master.

ARGUMENT

The United States opposes Nebraska's motion for leave to file an amended petition. Nebraska's revised petition would transform the current proceeding from an action "to enforce the Decree and restrain further violations," 1986 Petition, para. 7, into an action to formulate an amended decree. That course would greatly expand the technical complexity of this suit and would derail the efforts made during the past four years to narrow the issues in the case and prepare for trial. Moreover, it is not clear that there is any need to amend the existing decree. Nebraska's proposals to modify the decree should await completion of proceedings on Nebraska's 1986 petition to enforce the decree, which may clarify or eliminate the need for modifications.

This Court's decision in *Nebraska* v. *Wyoming*, *supra*, resulted in the formulation of a decree apportioning the waters of the North Platte River among the States of Nebraska, Wyoming, and Colorado for irrigation. See 325 U.S. at 610. Nebraska's 1986 petition contended that Wyoming was "violating and threatening to violate the State of Nebraska's equitable apportionment established by the Decree." 1986

Petition, para. 3. Nebraska's proposed amended petition, however, presents three new claims that go well beyond its original aim of enforcing the existing decree. The petition would require an apportionment of non-irrigation season flows and regulation of stored water—matters that, as Nebraska admits, the existing decree leaves largely unaffected. See Decree paras. V and VI, 325 U.S. at 667-669.

The Court should exercise great caution in reopening existing decrees. There is a compelling need for certainty and stability in the administration of water rights. Cf. *Arizona* v. *California*, 460 U.S. 605, 615-628 (1983). Those concerns are directly relevant here. As an initial matter, Nebraska's motion to amend its petition, if granted, would greatly complicate and enlarge proceedings that have already proven to be far more complex than was originally envisioned. The current proceedings have been pending before the Special Master for more than four years, during which time the parties have devoted considerable effort and incurred substantial expense in identifying, clarifying, and narrowing the issues for trial. The Special Master is currently preparing his decision on the fully briefed and argued motions of Nebraska, Wyoming, and the United States seeking summary resolution of some of the claims raised by the 1986 petition. Any amendment of the pleadings at this time would disrupt the orderly resolution of those claims.

Furthermore, the claims presented in the proposed amended petition have the potential to be far more complicated to resolve than the claims presented in the 1986 petition. The 1986 petition alleged four discrete violations of the existing decree. 1986 Peti-

tion, para. 3.* The proposed amended petition seeks an entirely new apportionment based not on the interstate demand for irrigation water—which formed the basis for the 1945 decree, see 325 U.S. at 591-592—but on a far broader demand for water for a myriad of municipal, industrial, recreational, and other uses in Nebraska. Those demands will not be easy to quantify.

In the earlier litigation, which spanned 11 years, Special Master Doherty relied heavily on data derived from detailed irrigation records to determine the relative equities among the States. See, *e.g.*, 325 U.S. at 640-654. It will prove far more difficult and time-consuming to obtain comparable information in support of the other water uses Nebraska seeks to protect. Moreover, it is far from clear that any further apportionment is necessary. Resolution of the claims that Nebraska presented in its 1986 petition may adequately satisfy Nebraska's concerns.

Finally, Nebraska's amended petition does not specifically identify any activity of Wyoming, beyond the activity identified in the pending proceedings, that poses a concrete threat to Nebraska's interests. Furthermore, Nebraska's brief in support of its proposed amended petition indicates that there are a

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* Nebraska specifically alleged that Wyoming was unlawfully restricting the flow of the North Platte River by its operation of the Grayrocks Reservoir on the Laramie River; by its proposed construction of additional pumping, diversion and storage facilities at the confluence of the Laramie and North Platte Rivers; by its proposed construction of storage capacity on certain tributaries entering the North Platte River; and by its attempts to "prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska." 1986 Petition, para. 3.

number of proceedings in progress in Nebraska to determine competing demands for water from North Platte storage facilities. Neb. Br. 35. Any determination of additional entitlement to water in proceedings in this case should await the determinations in those proceedings. There is no justification for further complicating and delaying the resolution of the claims currently pending before the Special Master. Should the proceedings before the Special Master demonstrate a compelling need to enlarge the issues in this case, Nebraska can renew its request at a later time.

CONCLUSION

The motion for leave to file an amended petition should be denied.

Respectfully submitted.

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