No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S REPLY TO WYOMING'S, COLORADO'S, AND THE UNITED STATES' BRIEFS IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

November 25, 1991

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S REPLY TO WYOMING'S, COLORADO'S, AND THE UNITED STATES' BRIEFS IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

INTRODUCTION

There is a point at which judicious argument, *i.e.*, the attempt to persuade by reason and proof, becomes baseless polemic. In their briefs in opposition to Nebraska's motion for leave to apportion the unstored, non-irrigation season flows of the North Platte River, the United States, Colorado, and Wyoming have gone well beyond that point. Each argues that Nebraska is seeking a reapportionment and amendment of the 1945 Decree. Absolutely nothing in the amended petition can be reasonably or responsibly construed to seek a change in the existing apportionment. Nothing in the amended petition can be responsibly construed to expand the scope, character, or complexity of the pending issues. Nothing would enlarge or change the nature of the claims asserted in 1986. Nothing would complicate or delay the resolution of the matters pending before the Special Master. Absolutely nothing in the amended petition is outside the scope of the Court's traditional and

guarded exercise of its original jurisdiction and responsibilities under U.S. CONST. art. III, § 2.

The North Platte River projects consist of approximately 2,400,000 acre feet of usable storage capacity, averaging approximately 1,500,000 acre feet annually of actual accrual. The storage is controlled by the Bureau of Reclamation and is distributed to irrigators in Wyoming and Nebraska pursuant to contracts. Paragraph III of the Decree does not technically apportion the water stored during each year, though "the relative storage rights" of the system's reservoirs are "defined and fixed" thereby. *Nebraska v. Wyoming*, 325 U.S. 589, 666 (1945), *modified*, 345 U.S. 981, 983-84 (1953); Nebraska's Amended Petition at 3. Nebraska does not seek to alter the storage and distribution in any way.

Additionally, the Decree apportions to Wyoming the right to store water in reservoirs above Pathfinder Reservoir in ¶ II(b), the right to irrigate 168,000 acres during the irrigation season above Guernsey Reservoir in ¶ II(a), sets the priorities of storage accruals in ¶¶ III and IV, and apportions the natural flow during the irrigation season between Whalen Dam and Tri-State Dam in ¶ V, 75% to Nebraska and 25% to Wyoming. 325 U.S. at 665-69, *modified*, 345 U.S. at 984-87. During the non-irrigation season, an annual average of 197,400 acre feet passed Tri-State Dam or crossed the state line between 1946 and 1987 as inchannel flows not controlled by the Decree.[1] Given what is already apportioned or controlled by the Decree during the irrigation and non-irrigation seasons, the unappropriated, non-irrigation season flows amount to less than

---

[1]In *Colorado v. New Mexico*, 459 U.S. 176 (1982), the most recent equitable apportionment case, a total of 4,000 acre feet was in dispute. *See also Colorado v. New Mexico*, 467 U.S. 310 (1984).

10% of the previously apportioned flows.[2] These flows are critical to the continued exercise of irrigation, hydroelectric power generation, recreation, and fish and wildlife uses in Nebraska, which have relied on the flows since the entry of the Decree.

In seeking to have these flows apportioned to protect existing equities in Nebraska from upstream development in Wyoming, Nebraska is seeking an apportionment of less than 10% of the flows of the North Platte River addressed by the Decree in 1945, *i.e.*, the flows that were not addressed. Nebraska is not, as Colorado irresponsibly argues, seeking to "reopen the Decree and expand the scope of what began as a straightforward enforcement action against Wyoming into a full-blown equitable apportionment proceeding to increase Nebraska's water supply from the North Platte River." Colorado's Brief in Opposition at 2. Nebraska is not, as Wyoming argues, "seeking to reapportion the North Platte by attempting to impose new injunctions on Wyoming which the Court found previously unnecessary." Wyoming's Brief in Opposition at 18. We do seek an equitable apportionment, but we are not, as the United States asserts, seeking "to formulate an amended decree" which would redraw the 1945 Decree in Nebraska's image. The repetitive arguments that Nebraska is attempting to reapportion the North Platte River are deceptive, misleading, and absurd.

---

[2]In *Nebraska v. Wyoming*, there was no attempt to apportion the non-irrigation season flows in 1945. They were outside the scope of the lawsuit.

ARGUMENT

POINT I

NEBRASKA HAS ATTEMPTED TO RESOLVE THE MATTERS ALLEGED IN THE AMENDED PETITION WITH WYOMING

While Wyoming suggests that Nebraska's claims "appear calculated to delay and prejudice resolution of Nebraska's original petition," Nebraska has struggled with the use and administration of the North Platte River since 1976. Wyoming's Brief in Opposition at 29. Since 1983, the dispute with Wyoming over the North Platte River has been addressed in thirty settlement negotiation meetings. The problems are not illusory. Nor were they manufactured to generate delay or prejudice.

Parties to interstate conflicts are encouraged to negotiate with one another in an attempt to resolve disputes before seeking to invoke the Court's original jurisdiction. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 575 (1983); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). Aware of its obligation in this regard, Nebraska has discussed each of the matters contained in the amended petition with Wyoming on numerous occasions. Wyoming, however, has described Nebraska's statement that it has attempted to resolve these matters before filing its amended petition as "false."

On February 8, 1990, Nebraska, Wyoming, Colorado, and the United States met for the 25th settlement conference between 1983 and 1991. At that conference, Nebraska and the United States submitted proposals to the other parties for settlement of the case. Without revealing details, Nebraska's proposal addressed the matter of Wyoming's use of its "surplus water statute." *See* ¶ 2(a) of Count II of Nebraska's Amended Petition. The settlement proposal also addressed ¶ 2(b) of Count II of Nebraska's Amended Petition, *i.e.*, the irrigation of more than 168,000 acres as allowed by the Decree. Tributary development between Whalen Dam and Pathfinder Dam was addressed in Ne-

braska's proposed settlement. *See* ¶ 2(f) of Count II of Nebraska's Amended Petition. Additionally, Nebraska has expressed a desire to negotiate the apportionment of the unapportioned, non-irrigation season flows, though Wyoming has shown no serious, continuing interest since October, 1990. *See* Count I of Nebraska's Amended Petition. Nebraska has also attempted to resolve many of the Decree violations with Wyoming at regular river operation meetings among Nebraska, Wyoming, and the United States. For instance, as early as the Natural Flow and Ownership Meeting of April 20, 1988, Nebraska brought to Wyoming's attention the matter of unauthorized depletions of storage water from the North Platte River in Wyoming. *See* ¶ 2(c) of Count II of Nebraska's Amended Petition.

In sum, the allegations in Nebraska's Amended Petition do not "lack credibility" or "substance." Nor are they "groundless." Wyoming's statement that we did not attempt to resolve these matters is either false or uninformed. Nebraska made a continuing, good faith effort to resolve these matters with Wyoming before proceeding with litigation. The controversy has not been drummed up. It is real and justiciable.

POINT II

THE NORTH PLATTE AND PLATTE RIVERS IN NEBRASKA ARE OVER-APPROPRIATED. PLANNED DEVELOPMENT IN WYOMING FURTHER THREATENS THE ALREADY INADEQUATE WATER SUPPLY

Wyoming contends that the motion for leave to file the amended petition should not be granted because the issues are too "speculative" and that Nebraska has not alleged facts which, if proven, would establish present injury to its apportionment or other equitable interests. Additionally, Wyoming represents that Nebraska's real motivation is to secure increased water at Wyoming's expense. These argu-

ments have been made and rejected before. In 1986, Wyoming filed its Brief in Opposition to Nebraska's Motion for Leave to File Petition, contending that the Court should not accept Nebraska's petition on the basis of no injury. Further, Wyoming stated that the "real relief that Nebraska seeks is . . . to secure greater rights than the existing Decree provides . . .." Wyoming's Brief in Opposition at 26. The Court rejected both arguments. In 1987, Wyoming filed a motion for summary judgment reiterating the same arguments. The Special Master denied Wyoming's motion, to which Wyoming took no exceptions. In relation to the pending cross-motions for summary judgment and Wyoming's brief in opposition to Nebraska's motion for leave to file its amended petition, Wyoming has made the same arguments a third and a fourth time, joined by Colorado.[3] The Court has rejected Wyoming's unfounded and repetitive arguments before and it should do so again.

A. The Waters of the North Platte and Platte Rivers in Nebraska are Over-Appropriated

At issue in Nebraska's petition for equitable apportionment is an annual average state line flow of 197,400 acre feet of water unapportioned by the 1945 Decree. This water passes Tri-State Dam near the Nebraska-Wyoming state line during the non-irrigation season, *i.e.*, October 31 to April 1. It represents less than 10% of the flows of the North Platte River apportioned by the 1945 Decree. Wyoming dismisses Nebraska's allegations of present and threatened injury as "speculative." Wyoming's Brief in Opposition at 19-26. To Nebraska water officials, charged with the daily administration of a fully appropriated interstate river, who must contend with the threat posed by upstream development in Wyoming, the allegations do not derive from speculation.

---

[3]The United States has previously supported Nebraska's position in this regard.

Nebraska's reliance on non-irrigation season flows developed over the period 1946-1987. The flows were not restricted institutionally and thus were available for appropriation to beneficial use in Nebraska. Although this reliance began gradually, the uses are now settled, and the need is acute. *See Washington v. Oregon*, 297 U.S. 517, 527-30 (1936) (equitable apportionment predicated on equitable reliance).

Wyoming would like the Court to believe that the North Platte and Platte rivers in Nebraska have an abundant supply of water to meet present and future needs.[4] The reality experienced by the downstream state is far different. Natural flow has been denied to appropriators in Nebraska from the state line to Lake McConaughy for all rights junior to 1894 in eight of the last ten years and to all rights junior

---

[4]Wyoming has repeatedly referred to the study by Bleed *et. al.* as stating that 400,000 acre feet of water could be diverted from the Platte River without adversely impacting fish and wildlife flows for endangered species. Conveniently, Wyoming does not indicate that this study was to develop a multi-objective screening model to select a preferred management option from over 4,000 alternatives and that instream flow requirements used in the model were crude and based on a preliminary assessment of related data. Since the report was published, revised estimates of flow requirements have been developed. In 1990, the Federal Energy Regulatory Commission required the Nebraska Public Power District to provide flows to meet endangered species' requirements that were 360,000 acre feet higher per year than those used in the model.

Wyoming also refers to a permit to divert water from the Platte River for the Catherland Project issued by the Nebraska Department of Water Resources in 1986. In granting that permit, the Director relied upon evidence presented at the hearing. Since 1986, there have been major advancements in the state of knowledge of the flow requirements of endangered species. Had such knowledge been available at the time of the Catherland hearing, the outcome would likely have been different. Furthermore, the permit was nullified by the Nebraska Supreme Court.

to 1884 in one of those years.[5] Blue Creek, one of the few tributaries to the North Platte River located between the state line and Lake McConaughy that does not rely on irrigation return flows, has been regulated every year during this same ten-year period. Additionally, Lake McConaughy, designed to hold 2,000,000 acre feet of water, is reaching all-time lows. On September 19, 1990, the level of Lake McConaughy dipped to 888,100 acre feet. A year later, on September 10, 1991, the storage content of Lake McConaughy fell to 823,988 acre feet. These are the lowest recorded levels in Lake McConaughy since 1956.

The impact has been felt by the equities asserted by Nebraska in its petition. For example, irrigators using natural flows have experienced water shortages and are threatened with further shortfalls. Adverse economic impacts have resulted. Hydroelectric power production in Nebraska has decreased. Recreational activities, both reservoir-based and stream-based, have sharply declined. Environmental groups claim that the needs of endangered species have not been met in 48 out of the last 50 years. During the last two summers, the Platte River has gone dry in certain reaches, resulting in major fish kills.

These uses rise above mere individual interests into the collective equities which the State of Nebraska represents *parens patriae* in an equitable apportionment proceeding before the Court. Accordingly, while there are other proceedings relating to the use of the North Platte and Platte rivers, the issue raised by Nebraska's petition is one of

---

[5]Colorado argues that "[a]s far as downstream equities are concerned, Nebraska's position is . . . tenuous, since Nebraska's problems are largely of its own making." Colorado's Brief in Opposition at 9. Wyoming makes a similar assertion with respect to the use of surface flows to offset ground water depletions. Wyoming's Brief in Opposition at 9. Over-appropriation, however, is ordinarily what precipitates interstate compacts or decrees. Indeed, Wyoming's Deer Creek proposal results from the demands of downstream irrigators and industrial users against the junior priorities of the City of Casper.

equitable apportionment.[6] Equitable apportionment is "the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). As an interstate dispute under U.S. CONST. art. III, § 2, it falls within the Court's "original and exclusive" jurisdiction. *See* 28 U.S.C. § 1251(a) (1988); *Nebraska v. Wyoming*, 325 U.S. 589, 610-11 (1945); *Kansas v. Colorado*, 206 U.S. 46, 95-102 (1907). The preference for discretionary abstention in favor of an "alternative forum" does not apply. *See, e.g., United States v. Nevada*, 412 U.S. 534, 538 (1973). Nor does Wyoming's contention that the Court should decline jurisdiction because of the technical nature of the evidence. *See* Wyoming's Brief in Opposition at 14, 28. The issues of equitable apportionment of the non-irrigation season flows cannot be treated in ongoing state and federal administrative proceedings affecting the North Platte or Platte rivers. Nebraska's amended petition is in no way dependent on the outcome of those proceedings. Under 28 U.S.C. § 1251 (a), the Court's original jurisdiction over interstate issues is exclusive. *See Maryland v. Louisiana*, 451 U.S. 725 (1981).

---

[6]Wyoming represents that any deficiency in the water supply in Nebraska is uncertain because the ratio of supply and demand depends on the outcome of proceedings unrelated to this case. The outcome of these proceedings, however, can only exacerbate — not alleviate — the over-appropriated condition of the river. Notwithstanding the present inadequate water supply, every indication is that minimum instream flows for endangered and threatened species will be required through one or several state and federal proceedings. In relation to the FERC relicensing of Kingsley Dam, the Court of Appeals for the District of Columbia has already ordered that fish and wildlife interests must be considered in determining conditions for the annual interim licenses. Accordingly, FERC ordered such releases, which undermined already short irrigation supplies. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 876 F.2d 109 (D.C. Cir. 1989). While the parties await the decision from FERC on the final relicensing conditions, there is no suspense as to the outcome. At present, however, the river is over-appropriated, quite aside from the outcome of the FERC proceedings.

The existence of an over-appropriated, interstate river, where claims exceed supply, is the controlling factor.[7] *See Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *see generally Colorado v. New Mexico*, 459 U.S. 176, 183-84 (1982). Consequently, the Court does not decline to exercise its jurisdiction where two states claim the same property. The cases cited by Wyoming are inapposite. *New York v. Illinois*, 274 U.S. 488 (1927), was a standing case, the Court finding that the record "[did] not show that there [was] any present use of the waters [by the plaintiff] ... nor that there [was] any definite project for so using them which [was] being or [would] be affected." 274 U.S. at 489. The analogy to *Arizona v. California*, 283 U.S. 423, 462 (1931), also misses the point. With respect to each of the counts in Nebraska's amended petition — most importantly the need for an equitable apportionment of the non-irrigation season flows — Nebraska has expressly alleged injury. *See* Nebraska's Amended Petition at ¶¶ 1-39. The issue in *United States v. West Virginia*, 295 U.S. 463 (1935), is equally unrelated to Nebraska's specific allegations in this case. Wyoming has not made "a mere assertion of a right to build a dam." *Id.* at 475. Deer Creek Dam, which will cause depletions of both apportioned flows and unapportioned, non-irrigation season flows, has been designed, redesigned, and the Wyoming Water Development Commission is ready, willing, and able to build it. *See* ¶ 24(c) of Nebraska's Amended Petition.

---

[7]In 1944, Special Master Doherty determined that the North Platte River was over-appropriated. Doherty Report at 7, 37; *see also* 325 U.S. at 608. While that condition has worsened rather than improved, Doherty's determination was made in the context of non-irrigation storage supplies and the limited availability of natural flow during the irrigation season. The non-irrigation season flows now sought to be apportioned were not a part of Master Doherty's calculus.

B. Depletions in Wyoming Will Adversely Affect Existing Uses in Nebraska

Wyoming makes no direct response to Nebraska's contentions of planned development on the North Platte River in Wyoming. Instead, it couches its argument in terms of the allegedly "speculative" or "vague" nature of Nebraska's allegations. *See* Wyoming's Brief in Opposition at 16-24. Nebraska's allegations, however, are clear. The Deer Creek Dam and Reservoir will deplete the non-irrigation season supply. The Corn Creek Project will have the same effect. Wyoming will invade non-irrigation season flows guaranteed by the Grayrocks settlement agreement that Wyoming was not a party to and refuses to honor. Additionally, discovery has revealed a series of proposed projects in Wyoming in various stages of planning, some of which would deplete the non-irrigation season flows of the North Platte River to the detriment of established uses in Nebraska. Yet Wyoming has remained conspicuously silent on the question of its planned uses of the North Platte River, while simultaneously resisting any attempt to allocate the non-irrigation season flows.[8]

From a factual standpoint, some of the projects that will deplete the non-irrigation season flows are already before the Court. It is uncontroverted that the proposed Deer Creek project would cause depletions to the North Platte River during the irrigation season and during the non-irrigation season.[9] Depending on how the equities are bal-

---

[8]In prior pleadings, Wyoming has told the Master and the Court that it needs certainty and finality with respect to its entitlements to the North Platte River so that it can proceed with its "future water development." Wyoming Motion for Summary Judgment, September 11, 1987 at 107-108.

[9]Wyoming has even argued that the depletions that would be caused by Deer Creek will occur to flows below Tri-State Dam during the non-irrigation season, characterizing these flows as "surplus or flood flows." Wyoming Reply Brief in Support of Second Motion for Summary Judgment, May 24, 1991 at 60.

anced to equitably apportion the non-irrigation season flows, Wyoming may or may not be entitled to deplete the winter flows past Tri-State Dam. Following resolution of the pending issues on the Deer Creek controversy, there will still remain the question of the effects of the proposed Deer Creek Project on the non-irrigation season flows.

Additionally, cross-motions for summary judgment have been filed by Nebraska and Wyoming on entitlement to the Laramie. The precise dispute is each state's entitlement to the Laramie during the irrigation season. The resolution of the pending matters, including the cross-motions for summary judgment, will address only the irrigation season flows.[10] To ignore the non-irrigation season flows of the Laramie would therefore address only part of the problem. While Nebraska was successful in securing non-irrigation season releases in the Grayrocks Settlement of December 4, 1978, Wyoming refused to become a party to the settlement, leaving the future in doubt.[11] *See* ¶¶ 26-27 of Nebraska's Amended Petition.

---

[10]Wyoming argues that "the respective rights of the states to the Laramie River are presently at issue before the Special Master." Wyoming's Brief in Opposition at 7; *see also id.* at 20-23. The relative rights of the states are not before the Special Master, however, with respect to the non-irrigation season flows.

[11]As a measure of atonement, Wyoming tries to portray itself as water efficient while not having been able to use all of the water apportioned to it under the Decree. In particular, Wyoming touts the Kendrick Project as a big success in "saving" water. Wyoming's Brief in Opposition at 8. In reality, Kendrick is one of the most inefficient water projects in the West. The Kendrick Project was originally built to irrigate over 60,000 acres with an annual net depletion of 72,000 acre feet. Wyoming's Brief in Opposition at 8. Since the project's initiation 50 years ago, only 24,000 acres have been developed for irrigation. The remainder of the project will likely never be built because it is not economically feasible to develop the land for irrigation. The unused water does not run down the river to Nebraska, as Wyoming argues. Instead, the Kendrick Project losses to the river system over 70,000 acre feet of water each year through evaporation from the project reservoirs. As much water is lost in evaporation as the originally contemplated, annual net depletion.

While Nebraska's existing equities arising from the use of the non-irrigation season flows are being injured by present upstream depletions, the Court has held that future uses could be considered in the interstate apportionment of water: "The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote. Under such circumstances, however, the countervailing equities supporting a diversion for future use in one State may justify the detriment to existing users in another State." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982). The Court was responding to New Mexico's argument that a planned, future use of water could not be considered in equitable apportionment proceedings against an established economy. While the case was ultimately decided on the basis of burden of proof, the principle remains. *See Colorado v. New Mexico*, 467 U. S. 310 (1984).

Accordingly, the forum for resolving these questions is before the Court in the pending case. While it is not unusual for an upstream state to resist an equitable apportionment action, the Court may find it odd for Wyoming to go to the extreme length of disavowing its own equities. Nevertheless, Wyoming cannot plan the development of shared water resources by virtue of its position as the upstream state and simultaneously defeat efforts to reconcile the conflicts its plans have created. As the Court held in a similar context: "The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained." *See Wyoming v. Colorado*, 259 U.S. 419 (1922).

POINT III

THE COURT DOES NOT APPLY THE BURDEN OF PROOF FOR DECISION ON THE MERITS IN DECIDING WHETHER TO ACCEPT A CASE IN ITS ORIGINAL JURISDICTION

Wyoming's discussion of the principles governing the Court's exercise of original jurisdiction rests on the fallacy that the standard for taking a case is identical to that for relief on the merits. *See* Wyoming's Brief in Opposition at 14-16. The two are not the same. Relief on the merits in an equitable apportionment action is properly governed by a standard of clear and convincing burden of proof. *See Colorado v. New Mexico*, 459 U.S. 176, 187-88 n.13 (1982). In a compact enforcement case or a case involving construction of a decree, the evidentiary standard is one of preponderance. *See* Report of Jerome C. Muys, Special Master, *Oklahoma & Texas v. New Mexico*, No. 109, Original at 86-88. The three equitable apportionment cases cited by Wyoming affirm that the equitable apportionment standard is one of clear and convincing evidence. *See Idaho v. Oregon*, 462 U.S. 1017 (1983); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921). Each case construes the power of the Court to enjoin the activities of a state at the conclusion of trial. The cases cited do not address the question of whether or not there should be a trial by pre-judging evidence not yet in the record.

It is correct that the Court has proceeded cautiously in the exercise of its original jurisdiction and has adopted the procedure of SUP. CT. R. 17.3 to limit its original jurisdiction to "appropriate cases." *See Arizona v. New Mexico*, 425 U.S. 794 (1976); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). The question of injury is a factor. In *Alabama v. Arizona*, 291 U.S. 286 (1934), the Court properly questioned highly abstract allegations of injury resulting from the enforcement by five states of statutes against the mar-

keting of products from prison labor.[12] The same issue does not arise in a complaint for equitable apportionment unless the complaint is shown to be factually inadequate. Wyoming has made no such showing. Wyoming's statement that "Nebraska suggests that a well-pleaded complaint in the ordinary sense under the Federal Rules of Civil Procedure should be accepted by the Court as a matter of course" misstates Nebraska's position.[13] Wyoming's Brief in Opposition at 15. Nebraska argued that "a well pleaded action for equitable apportionment meets the Court's test for justiciability because it necessarily includes the concepts of an 'imminent threat' of 'serious injury.' " *See* Nebraska's Brief in Support of Amended Petition at 31.

Nebraska's statement was made in the context of an over-appropriated interstate river. Under these circumstances, the decisions of the Court clearly demonstrate that conflicting interstate claims to an over-appropriated river present an "imminent threat" of "serious injury."[14] In any event, Nebraska made such allegations expressly. *See* Nebraska's Amended Petition at (I) ¶¶ 37, 39; (II) ¶¶ 3, 5; (III) ¶¶ 3, 5. In *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the Court

---

[12]Wyoming has overplayed *Alabama v. Arizona*, 291 U.S. 286 (1934). The passage repeatedly quoted states that the allegations of threatened injury must be of serious magnitude and imminent. Wyoming's Brief in Opposition at 15. Both are expressed in the allegations in Nebraska's complaint for equitable apportionment. Nebraska's Amended Petition at (I) ¶¶ 37, 39; (II) ¶¶ 3, 5; (III) ¶¶ 3, 5.

[13]For its part, Colorado adopts the same over-simplification, attributing to Nebraska the argument that the Court is bound to accept a case "simply because it is phrased in terms of an equitable apportionment." Colorado's Brief in Opposition at 15.

[14]Wyoming agrees that a controversy over "an over-appropriated and water-short interstate system is generally appropriate for the exercise of the Court's original jurisdiction." Wyoming's Brief in Opposition at 16.

affirmed *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922) to the effect that:

> . . . *Wyoming v. Colorado, supra*, indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. If there were a surplus of unapportioned water, different considerations would be applicable. *Cf. Arizona v. California*, 298 U.S. 558. But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States, we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

325 U.S. at 610. The Court does not robotically accept every claim containing the phrase "equitable apportionment." Evaluation is necessary. That is the purpose of the procedure established by SUP. CT. R. 17.3, which in equitable apportionment cases is designed to allow a facial determination of whether claims exceed supply. *See Nebraska v. Wyoming, supra.* Parties opposing the petition are therefore required to present evidence or credible argument on the point. Wyoming and Colorado have not done so. Accordingly, the complaint is well pleaded and presents factual issues framing an "appropriate case" for decision under U.S. CONST. art. III, § 2. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Kansas v. Colorado*, 206 U.S. 46 (1907).

The Court has also held that the exercise of its jurisdiction is appropriate when a petition for equitable apportionment makes a *prima facie* showing of interstate competition for the waters of a fully appropriated river. In its petition in *Colorado v. New Mexico*, No. 80, Original, Colorado alleged that the exercise of an undeveloped, inchoate water right awarded to C.F. & I. Steel Corporation in Colorado had been enjoined in the United States District Court for the

District of New Mexico.[15] *See* Colorado Complaint, July 18, 1978 at ¶¶ 7, 8. New Mexico's Brief in Opposition pointed out that the Vermejo River was fully appropriated in New Mexico. *See* New Mexico's Brief in Opposition to Motion for Leave to File Complaint, October 11, 1978 at 12-31. The Court accepted jurisdiction, presumably because of interstate competition over a fully appropriated interstate river, notwithstanding that the "competing" right in Colorado did not exist in fact but merely as a possibility. In this case, the North Platte is clearly over-appropriated. The only distinction between this case and *Colorado v. New Mexico* is that here one of the upstream projects has been constructed, the construction of a second — which bears on the irrigation and non-irrigation season flows — has been delayed pending a determination of whether it can be constructed under the Decree, and Wyoming has filed a lawsuit in federal district court in an attempt to end-run the previous apportionment of 46,000 acre feet annually of non-irrigation season flows to Nebraska. Otherwise, Wyoming, like Colorado in *Colorado v. New Mexico*, has not one but numerous planned projects for future development.

POINT IV

THE ISSUES PENDING AS THE CASE IS PRESENTLY POSTURED WILL BE RESOLVED FORTHWITH WHETHER OR NOT LEAVE TO FILE THE AMENDED PETITION IS GRANTED

Wyoming and Colorado suggest that if the Court grants Nebraska's motion for leave to file its amended petition, the resolution of the pending matters raised in the original petition will somehow be interrupted. They go so far as to suggest that Nebraska is intentionally trying to "avoid or postpone resolution of the pending issues by amending her petition." *E.g.*, Wyoming's Brief in Opposition at 13. Fur-

---

[15]The transmountain diversion works needed to exercise the alleged "right" had neither been constructed nor designed.

ther, Wyoming claims that the matters raised in Court II "appear calculated to delay and prejudice resolution of Nebraska's original petition." Wyoming's Brief in Opposition at 29; *see also id.* at 19, 21, 31-32. Neither the apportionment of unapportioned, non-irrigation season flows nor the additional claims of Decree violations by Wyoming will delay the resolution of the pending issues, including the cross-motions for summary judgment. Contrary to Wyoming's assertion, it is in Nebraska's best interest to obtain an expeditious resolution of the cross-motions for summary judgment.

Equitably apportioning the non-irrigation season flows involves determining the unapportioned, non-irrigation season water supply available for apportionment and determining the equities in each state and their water needs. The pending issues relate to interpretation and enforcement of a Decree that apportions water for irrigation uses. An apportionment of the unappropriated, non-irrigation season flows will not affect the waters apportioned by the Decree.

Similarly, the allegations of Decree violations contained in Count II of the amended petition will not affect the resolution of the allegations contained in the original petition. Nebraska's original petition alleged that Wyoming was then violating and was threatening to violate Nebraska's equitable apportionment by depleting the flows of the Laramie, by constructing the proposed Deer Creek Project, and by actions of Wyoming officials to prevent the continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska.[16] Nebraska's amended petition alleges that Wyoming has depleted and continues to deplete the natural flow of the North Platte River by the use of its "surplus water

[16]*See* Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, October 6, 1986.

statute," by allowing ground water hydrologically connected to the North Platte River to be used in conjunction with surface water to irrigate more than 168,000 acres as permitted by the Decree, by additional consumption on tributaries of the North Platte River below Alcova Reservoir, by depletions of storage water for unauthorized uses, by depletions of return flows, and by failing to prepare and maintain complete and accurate records of irrigated acreage and storage waters. The additional claims are unrelated to the matters presently before the Court. They represent distinct and separate violations of the Decree.

In sum, resolution of the issues raised in the original petition is not a prerequisite to the consideration of the issues raised by the amended petition. The former can and should proceed without delay.

POINT V

THERE IS NO PREJUDICE AND THE AMENDED PETITION IS NOT UNTIMELY

Wyoming and Colorado also raise the defense of untimeliness. They argue that Nebraska's amended petition was filed five years after the initiation of the litigation, asserting that the time span is inherently prejudicial. Neither state explains how it has been prejudiced, however. As explained in Nebraska's Brief in Support of Amended Petition of October 9, 1991, "prejudice" has a specific meaning under FED. R. CIV. P. 15(a). It means that a party was "deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Heyl & Patterson Intern. v. F.D. Rich Housing*, 663 F.2d 419, 426 (3d Cir. 1981); *see also Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802, 806 (D. Del. 1986). Delay by itself is not prejudicial. *See, e.g., Davis v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir. 1980); *Cornell & Co., Inc. v. Occupational Safety and Health Review Commission*, 573 F.2d 820 (3d Cir. 1978); *Albee Homes, Inc. v. Lutman*, 47 F.R.D. 258 (E.D.

Pa. 1969); *see generally* 3 J.W. MOORE, R.D. FREER, MOORE'S FEDERAL PRACTICE ¶ 15.08[4] (2d ed. 1991).

As Nebraska pointed out in its opening brief, after the pending cross-motions for summary judgment are resolved, what will have taken place thus far is the separation of triable issues of fact from issues dispositive as a matter of law. Substantial time and resources have not been spent on the factual development of the case. While additional investigations will have to be made in defense of the amended petition, work already performed in relation to the pending claims will not somehow become moot or worthless merely because additional claims are made. The assertion of additional allegations at this point in the litigation does not deny Wyoming a fair opportunity to present its case or to defend against these claims or to offer evidence in its defense. *See Evans Products Co. v. West American Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984), *citing Universe Tankships, Inc. v. United States*, 528 F.2d 73, 76 (3d Cir. 1975).

Wyoming and Colorado have also intimated that the increased expense of litigating the matters raised in the amended petition is unreasonable. Increased expense caused by an upstream state's violations of a decree of equitable apportionment, however, is no defense to the violations.

CONCLUSION

Not granting Nebraska's motion for leave to file its amended petition to apportion the unapportioned, non-irrigation season flows would be tantamount to apportioning 100% of those flows to Wyoming. The Court's true choice is between an equitable distribution of the remaining 8% of the North Platte River or a *de facto* apportionment to the upstream state.

The amended petition demonstrates that there are existing uses of the unapportioned, non-irrigation season flows

in Nebraska for irrigation, hydroelectric power generation, recreation, and fish and wildlife purposes. The amended petition also demonstrates that the river is over-appropriated and that existing and planned developments in Wyoming threaten Nebraska's equitable interests. Accordingly, the controversy is justiciable under the law of equitable apportionment. The justiciability of Nebraska's amended petition is best reflected by the Court's decision in *Colorado v. New Mexico*, 459 U.S. 176 (1982). If an upstream state with no present or historical use of the waters of an over-appropriated interstate stream is entitled to avail itself of the original jurisdiction of the Court, it follows *a fortiori* that a downstream state is entitled to protection on an over-appropriated river against presently planned, identifiable development in an upstream state.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN
Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880