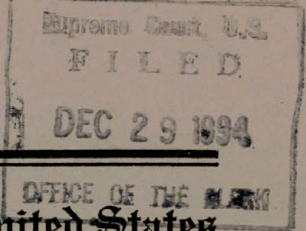


No. 108, Original



In the Supreme Court of the United States

OCTOBER TERM, 1894

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD
INTERIM REPORT OF THE SPECIAL MASTER

**BRIEF FOR THE UNITED STATES OPPOSING
EXCEPTIONS OF THE STATE OF WYOMING**

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QUESTIONS PRESENTED

1. Whether this Court should adjudicate Wyoming's request, contained in its proposed First Counterclaim and First Cross-Claim, to impose "beneficial use" limitations on Nebraska's existing apportionment of the North Platte River.

2. Whether this Court should allow the Special Master to consider Nebraska's allegations of downstream injury to endangered species and wildlife habitat in examining Nebraska's challenges, contained in Counts I and III of its proposed amended petition, to Wyoming's tributary developments.

3. Whether this Court should adjudicate Nebraska's claim, contained in Count I of its proposed amended petition, challenging Wyoming's utilization of Horse Creek, a North Platte tributary originating in Wyoming.

4. Whether this Court should adjudicate Nebraska's claim, contained in Count I of Nebraska's proposed amended petition, requesting limitations on groundwater use within Wyoming.

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STATEMENT

This Court has invited the parties to file exceptions to the Special Master's Third Interim Report, which addresses motions by the States of Nebraska and Wyoming to amend their pleadings. See 115 S. Ct. 308 (1994). The United States and Nebraska have excepted to the Special Master's recommendation that the Court allow Wyoming's Fourth Cross-Claim. Wyoming has excepted to the Special Master's recommendations that the Court disallow portions of Wyoming's First Counterclaim and First Cross-Claim and allow various portions of Nebraska's claims. The United States submits this brief in response to Wyoming's exceptions.

1. The origins of this suit are described in this Court's decision on the Special Master's First and

Second Interim Reports and in our brief supporting the United States' exception to the Special Master's Third Interim Report. See *Nebraska v. Wyoming*, 113 S. Ct. 1689, 1693-1694 (1993); U.S. Except. Br. 1-13. As explained therein, Nebraska brought an original action against Wyoming in 1934 seeking an interstate apportionment of the North Platte River. The Court issued a decision in 1945, relying on Special Master Doherty's extensive analysis of the water supply, existing and proposed uses, their water requirements, their priorities compared to other rights, and the downstream effect of upstream limitations. *Nebraska v. Wyoming*, 325 U.S. 589. See *Nebraska v. Wyoming*, 113 S. Ct. at 1693; U.S. Except. Br. 2-3.

The Court's 1945 decision has three prominent features. First, the Court allowed the continuation of existing diversions in the upper reaches of the North Platte River in Colorado and in Wyoming above Pathfinder Reservoir; second, it fixed priorities among the federal reservoirs in Wyoming and certain irrigation canals that divert water in Wyoming for Nebraska's use during the irrigation season; and third, it established a percentage apportionment of the natural flow of the North Platte River in the 40-mile reach between the Whalen Diversion Dam in Wyoming and the Tri-State Diversion Dam in Nebraska. The decision granted 75% of the natural flow in that "pivotal" reach to Nebraska and 25% of the natural flow to Wyoming. *Nebraska v. Wyoming*, 325 U.S. at 621-654. See *Nebraska v. Wyoming*, 113 S. Ct. at 1693; U.S. Except. Br. 3-4 & n.2.

The Court entered the North Platte Decree to implement its decision. See *Nebraska v. Wyoming*, 325

U.S. at 665-672. Reflecting the Court's understanding that the decision was designed to "deal with conditions as they obtain today," 325 U.S. at 620, the Decree included a "reopener" provision, Paragraph XIII, which allows the parties to seek modification of the Decree in response to substantial changes in conditions, including changes in water supply and water needs. Decree ¶ XIII, 325 U.S. at 671-672. The parties have since invoked Paragraph XIII to modify the Decree by stipulation to account for the Bureau of Reclamation's construction of the Glendo Unit of the Pick-Sloan Missouri Basin Program. *Nebraska v. Wyoming*, 345 U.S. 981 (1953). See *Nebraska v. Wyoming*, 113 S. Ct. at 1693-1694; U.S. Except. Br. 4-5 & n.4.

In 1986, Nebraska invoked Paragraph XIII to initiate this proceeding against Wyoming to enforce rights and obtain injunctive relief under the North Platte Decree. Wyoming later filed a counterclaim against Nebraska. This Court granted the parties leave to file their claims and referred the matter to Special Master Olpin. See *Nebraska v. Wyoming*, 479 U.S. 1051 (1987); 481 U.S. 1011 (1987); 483 U.S. 1002 (1987). After extensive briefing, Special Master Olpin submitted his First and Second Interim Reports, which contained his recommendations on the parties' competing claims for summary judgment. See 492 U.S. 903 (1989); 112 S. Ct. 1930 (1992). This Court considered exceptions to those Reports and adopted the Special Master's recommendations that the motions for summary judgment be granted in part and denied in part. See 113 S. Ct. at 1694-1701. Thereafter, the parties requested an opportunity to amend their pleadings. See 114 S. Ct. 1290 (1994). The Special Master's Third Interim Report contains his recommendations concerning the pro-

posed amendments. The United States' brief supporting an exception to that Report summarizes the proposed amendments and the Special Master's recommendations. See U.S. Except. Br. 9-13.

2. The United States and Nebraska have excepted to the Special Master's recommendation that the Court allow Wyoming's proposed Fourth Cross-Claim, which alleges that the United States has failed to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by water service contracts governing use of water from those reservoirs. See Third Interim Rep. 67-71. The United States and Nebraska are in substantial agreement that Wyoming's proposed claim is not an appropriate matter for resolution through this original action. See U.S. Except. Br. 16-30; Neb. Except. Br. 9-21.

Wyoming presents four exceptions to the Special Master's Third Interim Report. See Wyo. Except. 1-2. First, Wyoming objects to the Special Master's recommendation that this Court deny in significant part Wyoming's proposed First Counterclaim and First Cross-Claim, which seek to impose "beneficial use" limitations on Nebraska's existing apportionment of the North Platte River. See Third Interim Rep. 55-64. Second, Wyoming objects to the Special Master's stated intention to consider Nebraska's allegations of downstream injury to endangered species and wildlife habitat when examining Nebraska's challenges, contained in Counts I and III of its proposed amended petition, to future tributary developments in Wyoming. See *id.* at 14, 19-20, 49-51. Third, Wyoming objects to the Special Master's recommendation that this Court allow Nebraska's claim, contained in Count I of its proposed amended peti-

tion, challenging Wyoming's utilization of Horse Creek, a North Platte tributary originating in Wyoming. See *id.* at 41-43. Finally, Wyoming challenges the Special Master's recommendation that this Court allow Nebraska's claim, contained in Count I of Nebraska's proposed amended petition, requesting limitations on groundwater use within Wyoming. See *id.* at 38-41.

SUMMARY OF ARGUMENT

Wyoming's exceptions to the Special Master's Third Interim Report should be rejected. Wyoming's threshold argument that "the purpose of this case is to define and protect the existing apportionment" reflects a fundamental misunderstanding of the current proceedings. Wyo. Except. Br. 13. This Court has previously declined "to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings." *Nebraska v. Wyoming*, 113 S. Ct. 1689, 1695 (1993). The Court has made clear that any party to the North Platte Decree may invoke Paragraph XIII—the Decree's "reopener" provision—to obtain modification of the existing apportionment, provided that the party can satisfy the Court that the facts and circumstances warrant a "reweighing of equities and an injunction declaring new rights and responsibilities." *Id.* at 1696.

Wyoming's first exception, which asks this Court to reject the Special Master's recommendation against allowance of Wyoming's First Counterclaim and First Cross-Claim, actually seeks the sort of relief that Wyoming's threshold argument condemns. The Special Master recommended that this Court disallow Wyoming's First Counterclaim and First Cross-Claim insofar as those claims seek to modify the basic ap-

portionment by replacing the percentage-based apportionment formula that this Court adopted in 1945 with a mass allocation scheme. See Third Interim Rep. 36, 55-64. As the Special Master explained, the Court considered and rejected Wyoming's mass allocation approach in 1945, and Wyoming has not provided a sufficient justification for altering the percentage-based formula, which has now been utilized for nearly half a century. See *ibid.*

Wyoming's second exception, which challenges the Special Master's stated intention to consider evidence of detriments to endangered species and wildlife habitat, is without merit. Nebraska seeks equitable relief in Counts I and III of its proposed amended petition on the ground that Wyoming's future water resource developments on North Platte tributaries, such as Deer Creek and the Laramie River, would harm Nebraska's downstream interests. The Special Master properly concluded that he has discretion to consider a broad range of alleged harm—irrespective of whether that harm occurs to agricultural or environmental interests, during or outside of the irrigation season, and above or below the Tri-State Diversion Dam—when he examines Nebraska's claims for equitable relief.

Wyoming's third exception, which objects to the Special Master's recommendation that Nebraska be allowed to challenge Wyoming's utilization of Horse Creek, also lacks merit. The United States initially objected to inclusion of the Horse Creek dispute in this litigation on the ground that the matter was one of relatively minor consequence. The Special Master reasoned, however, that this Court had taken into account Horse Creek's contributions to the North Platte River in determining the 1945 apportionment

and that Nebraska was therefore entitled to show that Wyoming's actions would significantly diminish Horse Creek's historic contributions. Wyoming's contention that the Special Master's decision would "expand the geographic scope of the apportionment" (Wyo. Except. Br. 34) does not provide an adequate justification for overruling the Special Master's decision to examine the matter.

Finally, Wyoming's fourth exception, which objects to the Special Master's recommendation that this Court entertain Nebraska's request to impose limitations on Wyoming's groundwater use, is unpersuasive. Wyoming contends that Nebraska is precluded as a matter of equity from seeking to impose those limitations on Wyoming, because Nebraska does not regulate groundwater within its own borders. The Special Master properly concluded that Nebraska's failure thus far to adopt intrastate groundwater regulations does not necessarily pose an equitable bar to its request for interstate relief. As the Special Master noted, Wyoming has not demonstrated that Nebraska's conduct has had the adverse consequence—namely, depletion of a downstream State's decreed apportionment of surface flow—that Nebraska ascribes to Wyoming's conduct.

ARGUMENT

A. WYOMING IS MISTAKEN IN CONTENDING THAT THE “PURPOSE OF THIS CASE” IS SOLELY “TO DEFINE AND PROTECT THE EXISTING APPORTIONMENT”

Wyoming argues at the outset that the Special Master’s recommendations regarding the States’ proposed pleading amendments reflect an incorrect understanding of the objective of these proceedings. Wyo. Except. Br. 13-17. Wyoming contends that “[t]he purpose of this case is to define and protect the existing apportionment, not to adjudicate a new apportionment or enlarge the geographic limit of the apportionment.” *Id.* at 13. According to Wyoming, this Court should “limit any claims for modification of the Decree to those for the purpose of carrying out and giving effect to the existing equitable apportionment.” *Id.* at 14. Wyoming’s theory finds no support in the North Platte Decree or in the prior decisions of this Court.

Paragraph XIII of the North Platte Decree expressly authorizes a party to seek modifications of the Decree that go beyond merely “carrying out” or “giving effect to” the existing apportionment. Paragraph XIII states at the outset:

Any of the parties may apply at the foot of this decree for its amendment or for further relief * * *.

325 U.S. at 671, as modified by 345 U.S. at 981 (reprinted at Third Interim Rep. App. C8). Paragraph XIII additionally states:

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.

325 U.S. at 671 (reprinted at Third Interim Rep. App. C8). Paragraph XIII also contains a non-exclusive list of matters “with reference to which further relief may hereafter be sought,” including:

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

325 U.S. at 672 (reprinted at Third Interim Rep. App. C9). Thus, Paragraph XIII’s express language attests that parties may seek relief that goes beyond merely effectuating the “existing equitable apportionment.” The Paragraph contains no hint of Wyoming’s suggested limitation on the relief available in this proceeding.

The Court’s 1993 decision in this case also indicates that the parties in this proceeding are not limited to claims for relief that “define and protect the existing apportionment” (Wyo. Except. Br. 13). The Court recognized that a party may invoke Paragraph XIII of the North Platte Decree to obtain “*enforcement* of rights already recognized in the decree” or to seek “*modification* of the decree.” See *Nebraska v. Wyoming*, 113 S. Ct. at 1694 (emphasis in original). The Court concluded that Nebraska’s petition requested both forms of relief and rejected Wyoming’s attempt “to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings.” *Id.* at 1695. The Court made clear that Nebraska may invoke Paragraph XIII to seek modification of the existing apportionment, provided it can satisfy this Court that the facts and circumstances warrant a “reweighing of equities and

an injunction declaring new rights and responsibilities.” *Id.* at 1696.

In the face of the Court’s 1993 decision, Wyoming now acknowledges that Nebraska is entitled to seek modification of the Decree. But Wyoming seeks to limit the scope of the litigation to only those claims for modification that “carry out the apportionment,” and to exclude claims that would create a “new or expanded apportionment.” Wyo. Except. Br. 14. This Court’s decision allows no such distinction. The Court explained that it retained jurisdiction to:

modify the decree to answer unresolved questions and to accommodate “change[s] in conditions”— a phrase sufficiently broad to encompass not only changes in water supply * * * but also new development that threatens a party’s interests.

113 S. Ct. at 1695 (emphasis added). Hence, this Court’s 1993 decision does not bar Nebraska from seeking relief beyond that provided in the existing apportionment. Wyoming’s contrary argument, which provides the foundation for the State’s four specific exceptions that follow, is without support.

B. WYOMING’S FIRST COUNTERCLAIM AND FIRST CROSS-CLAIM SHOULD BE DENIED INsofar AS THEY SEEK TO REPLACE THIS COURT’S PERCENTAGE-BASED APPORTIONMENT FORMULA WITH A MASS ALLOCATION SCHEME

Wyoming’s first exception asks this Court to reject the Special Master’s recommendation against allowance of Wyoming’s First Counterclaim and First Cross-Claim. Wyo. Except. Br. 18-27. Wyoming contends that the Special Master’s recommendation “would prematurely limit the choice of remedies available to the Court upon proof that Nebraska and

the United States have circumvented the apportionment.” *Id.* at 18. The Special Master properly recommended that this Court disallow those claims insofar as they seek to modify the basic apportionment contained in the North Platte Decree by replacing the percentage-based apportionment formula that this Court adopted in 1945 with a mass allocation scheme. See Third Interim Rep. 36, 55-64. As the Special Master explained, the Court considered and rejected Wyoming’s mass allocation approach in 1945, and Wyoming has not advanced a sufficient justification for discontinuing the percentage-based formula, which has now been utilized for nearly half a century. See *ibid.*

1. Wyoming’s First Counterclaim and First Cross-Claim are most easily understood by reference to their evolution. In 1987, this Court granted Nebraska leave to file its original Petition for an Order Enforcing Decree and for Injunctive Relief, 479 U.S. 1051, and shortly thereafter Wyoming sought and received leave to file a counterclaim, 481 U.S. 1011. Wyoming’s counterclaim alleged as follows:

Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:

- (a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;
- (b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses

below Tri-State Dam that are not recognized or authorized by the Decree; and

(c) By using Glendo Reservoir water outside of the basin of the North Platte River in Western Nebraska, for uses other than irrigation and as a substitute for storage water previously available under permanent arrangements.

Wyo. Answer to Petition, Motion for Leave to File Counterclaim, and Counterclaim at 8-9 (Mar. 18, 1987). As subparagraph (a) indicates, Wyoming assumed that the North Platte Decree prohibited irrigation canals from diverting natural flow “in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree.” *Id.* at 8.

Nebraska contested Wyoming’s assumption through a motion for summary judgment, and this Court resolved the matter in its 1993 decision. The Court concluded that “the decree does not impose absolute ceilings on diversions by canals taking in the pivotal reach.” *Nebraska v. Wyoming*, 113 S. Ct. at 1700. The Court explained that

Paragraph V of the decree, which sets forth the apportionment, makes no mention of diversion ceilings and expressly states that Nebraska is free to allocate its share among its canals as it sees fit.

113 S. Ct. at 1701. The Court additionally noted that although Paragraph IV “limits the extent to which the Nebraska canals may stop federal reservoirs from storing water, [it] does not place any ‘absolute ceilings’ or other restrictions

on the quantities of water those canals may actually divert.”

Ibid. (citation omitted). Hence, the Court’s 1993 decision eliminated an essential premise of Wyoming’s original counterclaim.

Wyoming has attempted to resuscitate the claim contained in subparagraph (a) through its proposed First Counterclaim and First Cross-Claim. Wyoming has replaced the language of the original counterclaim alleging that Nebraska has “circumvented and violated the Decree” with new language alleging that Nebraska has “circumvented and violated the equitable apportionment.” Third Interim Rep. App. E4 (para. 11), E8 (para. 26). Wyoming now contends that it is not seeking to enforce the Decree, but rather “to define Nebraska’s apportionment.” Wyo. Except. Br. 19. In essence, Wyoming suggests that when the Court equitably apportioned the North Platte River, it must have implicitly imposed “beneficial use” limitations on Nebraska that went unstated in the Decree. Consequently, Wyoming contends, the “wasteful practices by canals in the pivotal reach undermine or circumvent that apportionment.” *Ibid.*

2. As the Special Master explained, the Court’s 1993 decision “addressed the nature of Nebraska’s apportionment,” and its “holding and its rationale substantially undercut Wyoming’s proposed First Counterclaim and First Cross-Claim.” Third Interim Rep. 60. The 1993 decision granted partial summary judgment against Wyoming on the question of diversion ceilings, explaining that Paragraph V of the Decree: “sets forth the apportionment” in the pivotal reach of the North Platte River; “makes no

mention of diversion ceilings”; and “expressly states that Nebraska is free to allocate its share among its canals as it sees fit.” 113 S. Ct. at 1701. The Court properly viewed Paragraph V of the Decree as resolving the question of diversion ceilings. Wyoming cannot circumvent that ruling by recasting its claim as an action “to more completely define the apportionment.” See Wyo. Except. Br. 23.

The Special Master correctly recognized that what Wyoming actually requests is a modification of this Court’s apportionment formula. Wyoming “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.” Third Interim Rep. 55. Indeed, Wyoming seeks precisely the sort of relief—modification of the apportionment—that Wyoming’s threshold argument condemns. See pp. 8-10, *supra*. As we have explained, the North Platte Decree does not bar a State from seeking modification of the apportionment based upon changed circumstances. Wyoming, however, has failed to allege a sufficient basis for obtaining the relief it seeks.

This Court stated in its 1993 decision that “the interests of certainty and stability counsel strongly against reopening an apportionment of interstate water rights absent considerable justification.” *Nebraska v. Wyoming*, 113 S. Ct. at 1696. The Court explained that “when the plaintiff essentially seeks a reweighing of equities and an injunction declaring new rights and responsibilities, * * * the plaintiff still must make a showing of substantial injury to be entitled to relief.” *Ibid*. The plaintiff’s burden is

particularly heavy if the relief sought would require relitigating basic elements of the prior apportionment or would upset settled expectations among the parties respecting their water entitlements. See *Arizona v. California*, 460 U.S. 605, 615-628 (1983).

In this case, as the Special Master explained, adjudication of Wyoming's new claims "would require relitigating matters that were litigated and determined in the original case in 1945 and largely reaffirmed in the Court's 1993 opinion." Third Interim Rep. 55. The Court's 1945 decision evaluated various proposed formulas for apportionment of the North Platte River within the pivotal Whalen-to-Tri-State reach and eventually settled on a proportional allocation granting 75% of the natural flow to Nebraska and 25% of the natural flow to Wyoming. See *Nebraska v. Wyoming*, 325 U.S. at 637-646. The Court expressly rejected Wyoming's proposal that Nebraska receive a fixed apportionment based on current irrigation needs, explaining that variations in the North Platte's annual flow made a mass allocation infeasible. *Id.* at 642; see Third Interim Rep. 56-57. Wyoming's request for diversion ceilings based on beneficial use principles would result in the same type of mass allocation scheme that this Court rejected nearly 50 years ago.

Wyoming has failed to demonstrate why this Court should entertain Wyoming's invitation to displace one of the most fundamental elements of the Court's 1945 apportionment—a percentage-based allocation of the available flow—and replace it with a mass allocation approach that the Court had previously considered and rejected as unworkable. Wyoming argued before Special Master Olpin that its proposed allocation

scheme was needed to provide greater “certainty” to Wyoming users. See Third Interim Rep. 56. This Court, however, considered and rejected similar arguments in 1945. For example, Wyoming argued at that time:

If the water supply of the North Platte River is to be beneficially utilized, w[i]thout needless waste of this valuable resource, uses must be limited to actual requirements, and the same limitations must be imposed upon Nebraska as are suggested for either Colorado or Wyoming.

Br. of Wyo. in *Nebraska v. Wyoming*, No. 6 Orig. (O.T. 1948), at 38 (filed Jan. 24, 1945). Wyoming objected to Special Master Doherty’s percentage-based allocation, complaining that

the Master’s approach to the problem is the imposition of partial injunctive measures based upon temporary conditions of water supply.

Id. at 80-81. Instead, Wyoming argued, the Court should “make a complete equitable apportionment between the three states.” *Id.* at 82. The Court considered those arguments, but nevertheless adopted the Special Master’s percentage-based formula, concluding that Wyoming’s approach was not feasible. 325 U.S. at 642, 655. Wyoming points to no changed circumstances warranting revision of the Court’s percentage-based apportionment.

Furthermore, Wyoming’s proposed “beneficial use” allocation scheme is fraught with practical problems. As the Special Master noted, diversion limits based on beneficial use would be exceedingly difficult to calculate and administer; they would “require far-reaching Court policing of water rights administration

within Nebraska"; and they could prevent Nebraska from applying its apportionment to important non-irrigation uses. See Third Interim Rep. 62-63. The Court properly declined Wyoming's invitation "to open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree." See *Arizona v. California*, 460 U.S. at 625.

3. Although the Special Master has recommended against allowance of Wyoming's First Counterclaim and First Cross-Claim insofar as they seek a "fixed and defined apportionment" based on principles of beneficial use, Third Interim Rep. 36, he indicated that that denial "should not foreclose Wyoming from litigating certain discrete issues contained within those pleading amendments." *Id.* at 63. The Special Master's analysis on that point answers Wyoming's objection that his recommendation prevents Wyoming from adjudicating claims that Nebraska has taken action "to circumvent the decree" (Wyo. Except. Br. 18-22) and has inequitably engaged in "waste" of water resources (*id.* at 22-27).

The Special Master's recommendation specifically allows Wyoming to assert those claims to the extent that they were not decided in prior litigation. For example, the Special Master stated that Wyoming is entitled to litigate its claim that "Nebraska has circumvented the decree by unlawfully calling for upstream flows for the use of irrigators diverting below Tri-State contrary to the geographic limitation in the 1945 apportionment." Third Interim Rep. 63. He also stated that "Wyoming should be allowed to defend against relevant Nebraska claims seeking to constrain Wyoming's upstream uses by introducing evidence of Nebraska's waste of water supplies which, if they were not wasted, might obviate the

need for Nebraska's upstream calls." *Id.* at 63-64. But the Special Master properly refused to allow claims that "amount to an attempt to relitigate the basic apportionment formula that was settled in 1945." *Id.* at 64. The Special Master drew an appropriate distinction between claims that arise from new or changed conditions and claims that were settled by prior decision.

C. THE SPECIAL MASTER IS ENTITLED TO CONSIDER EVIDENCE OF INJURY TO USES BELOW TRI-STATE DAM IN RESOLVING NEBRASKA'S CLAIMS

Wyoming's second exception challenges the Special Master's stated intention to consider evidence of "below-Tri-State" injury, including alleged harm to endangered species and wildlife habitat, when evaluating the claims that Nebraska asserts in Counts I and III of its proposed amended petition. Wyo. Exempt. Br. 28-34. Nebraska's Counts I and III seek equitable relief on the theory that Wyoming's proposed water resource developments on North Platte tributaries, such as Deer Creek and the Laramie River, would harm Nebraska's downstream interests. The Special Master properly concluded that he has discretion to consider evidence relating to a broad spectrum of alleged downstream harm—irrespective of whether that harm would occur to agricultural or environmental interests, during or outside of the irrigation season, and above or below the Tri-State Diversion Dam—when he examines Nebraska's claims for equitable relief. Third Interim Rep. 14, 19-20, 49-51.

Wyoming objects to the Special Master's intended course of action on the theory that an unrestricted examination of the evidence would transform this

case into "one for a new apportionment." Wyo. Except. Br. 28-31. Wyoming's concerns, however, are not well founded. The Special Master has properly concluded that a broad range of evidence—including evidence of harm to Nebraska's wildlife interests—may be relevant for the limited purpose of evaluating Nebraska's challenges to Wyoming's proposed upstream developments. At the same time, the Special Master has specifically disclaimed any intention to apportion non-irrigation season flows for wildlife uses at this juncture of the litigation. See Third Interim Rep. 47-55. The Special Master has simply recognized that he should consider a complete record on downstream effects—including Wyoming's claims that Nebraska has committed "waste" of its water resources, pp. 17-18, *supra*—so that he, and ultimately this Court, will have the facts necessary to determine whether and what relief is appropriate. See Third Interim Rep. 18-20.

Wyoming also contends that the Special Master should not consider evidence concerning downstream wildlife effects because those matters may depend on the outcome of "various pending proceedings under State or federal environmental laws." Wyo. Except. Br. 32-34. Wyoming's objection on that score, however, is premature. The Special Master has noted only that wildlife evidence should not be categorically excluded from this proceeding. He has not barred consideration of other proceedings, *cf. Nebraska v. Wyoming*, 113 S. Ct. at 1698-1699, or foreclosed Wyoming from challenging the relevance or admissibility of particular evidence at some later date based on appropriate evidentiary objections.

D. NEBRASKA'S CHALLENGE TO WYOMING'S UTILIZATION OF HORSE CREEK IS AN APPROPRIATE MATTER FOR RESOLUTION IN THIS PROCEEDING

Wyoming's third exception objects to the Special Master's recommendation that Nebraska be allowed to challenge Wyoming's utilization of Horse Creek, a tributary that rises in Wyoming and joins the North Platte River in Nebraska east of the Tri-State Diversion Dam. The United States initially objected to inclusion of the Horse Creek dispute in this litigation on the ground that the matter was one of relatively minor consequence. Special Master Olpin determined, however, that this Court had relied on Special Master Doherty's calculation of Horse Creek inflows to the "below Tri-State" reach in ruling that the "below Tri-State" water supplies were adequate to satisfy "below Tri-State" needs. Third Interim Rep. 43; see *Nebraska v. Wyoming*, 325 U.S. at 654-655. Special Master Olpin accordingly concluded that Nebraska should be allowed to proceed with its claim that Wyoming is improperly depleting Horse Creek's historic contributions to the North Platte River. Third Interim Rep. 43.

Wyoming objects to the Special Master's Horse Creek recommendation primarily on the ground that including the Horse Creek claim would expand the "geographic scope" of this proceeding. Wyo. Except. Br. 34-36. The Special Master correctly considered and rejected that argument. He recognized that Horse Creek inflows were not apportioned in the original proceeding, but he reasonably concluded that Nebraska's claim should be allowed to proceed because the continuation of those inflows was a "predicate" for the 1945 decision. Third Interim Rep. 43; cf.

Nebraska v. Wyoming, 113 S. Ct. at 1698 (“the Court apparently expected that some Laramie water would contribute to the natural flows available for apportionment in the pivotal reach”). Wyoming also contends that the Horse Creek inflows are “too small” to justify including them within this proceeding. Wyo. Except. Br. 35. The Special Master properly rejected that contention based upon Nebraska’s evidence that those inflows amount to more than 21,000 acre feet per year. Third Interim Rep. 42.

Wyoming additionally contends that any injunction against Wyoming respecting Horse Creek would be inequitable because the Wyoming activities that Nebraska challenges—recapture and conservation of return flows—are permissible under Nebraska’s own laws. Wyo. Except. Br. 36. Wyoming’s assertion does not provide a basis for this Court to refuse to entertain Nebraska’s claim. Wyoming’s argument, which amounts to an equitable objection to injunctive relief, should be resolved on the merits in light of all of the equitable factors that bear on the subject. See *Colorado v. Kansas*, 320 U.S. 383, 393-394 (1943) (“in determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted”); see generally D. Dobbs, *Dobbs Law of Remedies* § 2.4 (2d ed. 1993).

E. NEBRASKA’S CHALLENGE TO WYOMING’S GROUNDWATER USE IS AN APPROPRIATE MATTER FOR RESOLUTION IN THIS PROCEEDING

Wyoming’s fourth exception objects to the Special Master’s recommendation that this Court entertain Nebraska’s request to impose limitations on Wyo-

ming's groundwater use. Nebraska alleges, in Counts I and III of its proposed amended petition, that groundwater pumping within Wyoming has depleted the natural flow of the North Platte River and diminished Nebraska's apportioned share. Wyoming concedes that North Platte surface flows are hydrologically linked to groundwater in the North Platte Basin, and it further acknowledges that groundwater pumping in Wyoming depletes the surface flow of the North Platte River, including the flow in the apportioned pivotal reach. Third Interim Rep. 38; Wyo. Except. Br. 39. Wyoming nevertheless contends that Nebraska is precluded as a matter of equity from requesting this Court to impose limitations on groundwater pumping in Wyoming, because Nebraska does not currently regulate groundwater within its own borders. Wyo. Except. Br. 37-41.

The Special Master properly concluded that Nebraska's failure to regulate groundwater intrastate does not necessarily pose an equitable bar to its request for interstate relief. As the Special Master noted, Wyoming has not demonstrated that Nebraska's conduct has had the alleged inequitable consequence that Nebraska ascribes to Wyoming's conduct, viz., depletion of a downstream State's decreed apportionment of surface flow. Third Interim Rep. 40-41. Wyoming additionally asserts that Nebraska's water law "should be taken to provide an equitable 'standard to which the defendant state has the right to appeal in an interstate dispute.'" Wyo. Except. Br. 40 (quoting *Missouri v. Illinois*, 200 U.S. 496, 522 (1906)). It is far from clear, however, that Nebraska's laws provide the appropriate equitable standard. Here, as in the case of the Horse Creek dispute, Wyoming's equitable objections should be

resolved on the merits in light of all the relevant factors bearing on the matter. See *Colorado v. Kansas*, 320 U.S. at 393-394; D. Dobbs, *Dobbs Law of Remedies* § 2.4 (2d ed. 1993).

We accordingly agree with the Special Master that “Nebraska should have the opportunity to present her injury case at trial respecting present and threatened Wyoming groundwater pumping.” Third Interim Rep. 41. By the same token, Wyoming should not be precluded from developing relevant evidence respecting the effects of Nebraska’s own groundwater pumping on the available water supply. See Wyo. Except. Br. 40-41. A full development of the record will ensure that the Special Master and this Court have an adequate factual basis upon which to decide what relief (if any) is appropriate.

CONCLUSION

The State of Wyoming’s exceptions to the Third Interim Report of the Special Master should be overruled.

Respectfully submitted.

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