

MOTION FILED

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No. 108, Original

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

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

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR
LEAVE TO FILE AND MEMORANDUM IN RESPONSE TO
CERTAIN EXCEPTIONS TO THIRD INTERIM REPORT OF
THE SPECIAL MASTER

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FOR LEAVE TO FILE MEMORANDUM IN RESPONSE
TO CERTAIN EXCEPTIONS TO THE THIRD INTERIM
REPORT OF THE SPECIAL MASTER**

Basin Electric Power Cooperative (Basin) moves for leave to file the accompanying memorandum in response to certain exceptions to the Third Interim Report of the Special Master. In support of its motion Basin states:

1. Basin is the operator and, with five other consumer owned electric utilities, the owner of the Missouri Basin Power Project, the facilities of which include the

Grayrocks Dam and Reservoir and the 1500 megawatt Laramie River Power Station (Grayrocks) located on the Laramie River in Wyoming about ten miles above its confluence with the North Platte River. The owners of the project and their member distribution systems provide electric energy to about 1.2 million people in eight states.

2. Basin is an *amicus curiae* in the proceedings before the Special Master and twice before has been granted leave by the Court to file memoranda. 485 U.S. 931, (1988), Spec. Mast. Doc. No. 59; 117 L.Ed. 2d 102 (1992), Spec. Mast. Doc. No. 423. All *amici*, including Basin, were granted leave by the Court to file exceptions and replies in relation to the First and Second Interim Reports of the Special Master. 118 L.Ed 2d 538 (1992), Spec. Mast. Doc. No. 477.

3. Grayrocks controls the Laramie below the Wheatland Project and is operated in accordance with a Settlement Agreement and an exemption from the Endangered Species Act that limit Basin's diversions and require it to release certain minimum flows year round, during both the irrigation and non-irrigation seasons, for the benefit of the North Platte. See 113 S.Ct. at 1697.

4. The Special Master's Third Interim Report recommends that Nebraska be permitted to file her proposed Count III, which seeks to secure the inflows to Grayrocks essential to its operation in accordance with the Settlement Agreement and the Endangered Species Act exemption and to enjoin Wyoming from impounding or interfering with the passage to the North Platte of the water Basin is required to release. Third Int. Rpt. 44. Wyoming's Second Exception opposes the Special Master's recommendation to the extent

that, as Wyoming conceives, it contemplates consideration of injury to non-irrigation season uses and uses downstream of Tri-State Dam, including protection of endangered species and wildlife habitat. Nebraska's proposed Count III and Wyoming's opposition involve Basin's ability to operate Grayrocks in accordance with the Settlement Agreement and the order of the Endangered Species Act Committee.

5. The United States and Nebraska except to the Special Master's recommendation that Wyoming be permitted to file her Fourth Cross-Claim against the United States, which alleges that the United States is operating the federal reservoirs on the North Platte in violation of the governing laws and contracts. If the allegations of this claim are proved and the United States is required to operate the reservoirs in accordance with law, the pressure on Wyoming to increase diversions from the Laramie will be substantially reduced and Basin's ability to operate Grayrocks in accordance with the Settlement Agreement and the Endangered Species Act exemption will be bolstered.

Basin respectfully requests that its motion for leave to file the accompanying memorandum be granted and that the recommendations of the Special Master relating to Nebraska's Count III and Wyoming's Fourth Cross-Claim be accepted.

Respectfully submitted,

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COOPERATIVE IN RESPONSE TO CERTAIN
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STATEMENT

In his Third Interim Report, the Special Master recommends that Nebraska be allowed to amend her complaint to include her proposed Count III and that Wyoming be allowed to amend her pleadings to assert her proposed Fourth Cross-Claim.

By her proposed Count III, Nebraska seeks to secure the inflows necessary to enable Grayrocks to be operated in accordance with the Settlement Agreement and the Endangered Species Act exemption and to enjoin Wyoming from impeding or interfering with the releases Basin is required to make from Grayrocks for the benefit of the North Platte. By her proposed Fourth Cross-Claim Wyoming seeks to require the United States to operate the North Platte reservoirs in accordance with the laws and contracts applying thereto.

Basin supports both of these recommendations. The recommendation that Nebraska be allowed to pursue her proposed Count III is supported also by the United States and the Audubon Society. It is opposed in part by Wyoming. The recommendation that Wyoming be allowed to pursue her Fourth Cross-Claim is opposed by the United States and Nebraska.

Basin is vitally interested in protecting its ability to operate Grayrocks in accordance with the Settlement Agreement and the Endangered Species Act exemption, in assuring that flows of the Laramie above Grayrocks are not depleted to the extent that Basin's ability to operate the project and make the required releases is impaired, and in assuring that the releases reach the North Platte. Basin is also vitally interested in preventing the Bureau of Reclamation from improperly operating the North Platte reservoirs in ways that diminish the natural flow, disturb the apportionment prescribed by the decree, and increase demands on the Laramie.

In 1993, addressing exceptions to the First and Second Interim Reports of the Special Master, the Court

observed that "it is undisputed that Wyoming is not currently interfering with those flows [that Basin is required to maintain under the Settlement Agreement]" and that, "Other than Corn Creek, Nebraska points to no proposed development that might deplete releases from Grayrocks." 113 S. Ct. at 1698.

This is no longer the case. Shortly after the Court's 1993 opinion came down, it was discovered that Wyoming has supplied funds to the Goshen Irrigation District, which has an old water right on the Laramie supplemental to its rights on the North Platte, to install new pumps that will enable Goshen to divert a much larger quantity of water than it was ever formerly able to do and to interfere substantially with the passage downstream of the releases Basin is required to make from Grayrocks. Additionally, it appears that groundwater pumping in Wyoming is depleting surface flows in the Laramie between the foot of the Wheatland Project and Grayrocks.

Substantial evidence has also come to light indicating that the Bureau of Reclamation, among other improprieties in the operation of the North Platte reservoirs, routinely impounds water that constitutes natural flow to which, as such, holders of water rights on the river are entitled and of which they are deprived by the Bureau's malfeasance. To the extent that the government shorts Goshen of water to which it is entitled under its natural flow rights on the North Platte, Goshen looks to the Laramie and claims to be entitled to tap the flows Basin is obligated to maintain to the North Platte under the Settlement Agreement and the exemption granted by the Endangered Species Act Committee.

ARGUMENT

I.

Allowing Nebraska To Pursue Her Count III Is Entirely Consistent with the Existing Apportionment

In its 1993 opinion, the Court held that the Laramie below Wheatland had not been apportioned to Wyoming and that the 1945 decree assumed that the Laramie would contribute to the natural flow in the Whelan to Tri-State section of the North Platte apportioned between Wyoming and Nebraska. The Court indicated that Nebraska would be entitled to relief if, in the future, Wyoming threatened to interfere with the releases called for by the Settlement Agreement. The Court declined to adopt the Special Master's recommendation that Paragraph XIII of the decree be amended to provide specifically for such relief "Because we do not believe such an amendment would add to our authority under subparagraph (f)." 113 S. Ct. at 1698.

Nebraska has now made a persuasive showing that, by activities both above and below Grayrocks, Wyoming is threatening to interfere substantially with the ability of Basin to operate the project as required by the Settlement Agreement and the Endangered Species Act exemption, to make the releases called for, and to secure the passage of the water to the North Platte. Subject to proving the threat, Nebraska is entitled to have her rights to the releases and to inflows from the Laramie protected by modification of the decree. To allow Nebraska to pursue her proposed Count III to secure her rights in the Laramie and the releases Basin is required to make engenders no modification of the existing apportionment (as distinguished from modification of the

existing decree to secure the apportionment) and is by no stretch tantamount to allowing Nebraska through the back door to press claims to obtain water for wildlife and non-irrigation season purposes, like those she has twice previously been denied the right to file. Wyo. Except's & Br. 28-31. Here, again, by her proposed Count IV, Nebraska sought leave to amend her complaint to press a claim for a general non-irrigation season apportionment. The Special Master recommended against allowing her to do so, Third Int. Rpt. 35-36, 47, and Nebraska has not excepted to this recommendation.

While Grayrocks was under construction, Nebraska and several environmental organizations brought suit in the federal district court in Nebraska challenging the issuance by the Corps of Engineers of the 404 permit for the project and the undertaking of the REA to assist in its financing as in violation of federal environmental laws. *Nebraska v. REA*, 12 Env. Rep. Cases (BNA) 1156 (D. Neb. 1978), *judgment vacated and appeal dismissed*, 594 F.2d 870 (8th Cir. 1979). After protracted negotiations, Nebraska, Basin, and the other parties to the litigation, including the Department of Justice, the Corps of Engineers, and the Rural Electrification Administration, entered into the Settlement Agreement. Among other things, the Settlement Agreement prescribes conditions for the use, storage, and release of water by Grayrocks.

The obligations the Settlement Agreement imposes on Grayrocks were incorporated as conditions of the exemption for the project granted by the Endangered Species Act Committee. See 16 U.S.C. § 1536(e)-(p). The releases Basin is required to make from Grayrocks for the benefit of

the North Platte were found by the Secretary of the Interior to be necessary to meet the requirements of the Endangered Species Act and, independently of the Settlement Agreement, are mandated by the order of the Endangered Species Act Committee granting the exemption for Grayrocks.

The only issue respecting Grayrocks to be determined pursuant to Nebraska's Count III is whether, as a matter of fact, Wyoming's actions on the Laramie pose a substantial threat of interfering with the ability of Basin to operate the project as required by the Settlement Agreement and the Endangered Species Act exemption and with the passage to the North Platte of the releases Basin is required to make from Grayrocks.

Although Wyoming is not formally a party to the Settlement Agreement, she actively participated in its negotiation and sought and applauded its achievement. In equity she cannot be heard to say that she is not bound by it and may, with impunity, frustrate or impair its execution.

When Nebraska and Basin reached an impasse in their efforts to reach a settlement, the Governor of Wyoming joined the Governor of Nebraska in convening the round of negotiations which finally succeeded in producing the Settlement Agreement. The final negotiating session at which the terms of the agreement were settled upon, subject to approval by the principals of the parties, was conducted under the auspices of the Governor of Wyoming in his office in Cheyenne in early November 1978. The Governors of Wyoming and Nebraska jointly announced on November 3, 1978 that the settlement had been reached and the Governor of Wyoming stated that it secured the interests of both Wyoming and Nebraska.

After the agreement had been cleared by all the signatory parties and on the eve of its being submitted to the Eighth Circuit, the Attorney General of Wyoming, in a letter of December 28, 1978, to Basin's counsel, questioned Basin's authority under Wyoming law to make the releases contemplated by the Settlement Agreement. Significantly, the Attorney General's letter noted that he had delayed raising the point "until all federal actions re approval were cleared." The letter is reproduced in the Appendix to Basin's motion for leave to intervene filed herein on April 13, 1987. Spec. Mast. Doc. No. 14.

Grayrocks' exemption from the Endangered Species Act was granted by unanimous vote of the Endangered Species Act Committee, of which, by his request to the President to be appointed, the Governor of Wyoming was a member.

II.

This Case Is Uniquely Appropriate for Determining Wyoming's Fourth Cross-Claim that the United States Is Disturbing the Apportionment by Violating the Laws and Contracts that Govern the Operation of the North Platte Reservoirs

By her proposed Fourth Cross-Claim, Wyoming charges that the United States, through the Bureau of Reclamation, is violating the laws and contracts that govern the operation of the North Platte reservoirs by, among other things, capturing and using natural flow in derogation of the apportionment made by the decree. She asks simply that the government be required to comply with the applicable laws and contracts.

During the course of these proceedings substantial evidence has come to light indicating that the Bureau of Reclamation routinely impounds water in its North Platte reservoirs that constitutes natural flow to which, as such, holders of water rights on the river are entitled and of which they are being systematically and wrongfully deprived. The Bureau treats this improperly impounded natural flow as storage water for which, upon subsequent distribution, it charges both project entrymen, who were entitled to the water without charge as natural flow, and others, such as Warren Act contractors, who were not so entitled.

The Goshen Irrigation District has natural flow rights on the North Platte and claims to have supplemental natural flow rights on the Laramie. To the extent that the government shorts Goshen of water to which it is entitled under its rights on the North Platte, Goshen looks to the Laramie, where it claims the right to tap the flows that Basin is obligated to maintain under the Settlement Agreement and the order of the Endangered Species Act Committee.

The United States and Nebraska except to the recommendation of the Special Master that Wyoming be permitted to pursue her Fourth Cross-Claim on the same grounds they laid before the Special Master and he found unpersuasive, namely: that the claim seeks an apportionment of storage water and would interfere with the Bureau of Reclamation's administration of the reservoirs; that Wyoming is not a proper party to seek enforcement of the contract rights of entrymen on the North Platte Project; and that the Bureau's violations of the laws and contracts governing the capture and use of water by the project reservoirs should be challenged in other fora.

All of these objections to the allowance of Wyoming's Fourth Cross-Claim misrepresent the claim and the effects of granting the relief Wyoming seeks.

1. Wyoming does not seek an apportionment of storage water nor to interfere in any way with the proper and lawful operation of the North Platte reservoirs but only to compel the government, to the extent it is shown to be doing otherwise, to operate the reservoirs and to release and distribute water from them in conformity with the applicable laws and contracts. Requiring the Bureau of Reclamation to obey the laws and contracts governing its administration of the North Platte Project would hardly constitute "interfere[nce] with the operation of federal water storage facilities" or an "apportionment" of storage water. Govt. Except's & Br. 17-18 (Nov. 1994); Neb. Except's & Br. 9-15 (Nov. 22, 1994).

2. While it is true that an ingredient of Wyoming's Fourth Cross-Claim is that, in contravention of the controlling laws and contracts, the Bureau is distributing storage water to Warren Act contractors on an equal basis with North Platte Project entrymen, a more fundamental ingredient of the claim is that the Bureau is capturing water in the reservoirs that is properly natural flow and treating it as storage water, in violation of the rights of all who have entitlements to the natural flow, the subject of the apportionment.

Focusing exclusively on the former ingredient of the claim and wholly ignoring the latter, the Government suggests that the claim ought not be allowed because "Wyoming is not the appropriate party to challenge the federal government's allocation of storage water." Govt.

Except's & Br. 24. Averring that Wyoming has no direct interest in storage water apart from the interests of her citizens who have rights thereto, the Government suggests that Wyoming's claim is "concerned solely with the Bureau of Reclamation's method of 'allocat[ing] storage water' among Nebraska and Wyoming water users." *Id.* at 24-25.

But Wyoming's claim is not concerned "solely" or, indeed, at all, with the Bureau's method of allocating storage water "among Nebraska and Wyoming water users." It is concerned primarily with the Bureau's capturing and treating as storage water natural flow that ought to be passed through the federal reservoirs, to the injury of all who have rights in such flow, the substance of the apportionment. Secondly, the claim is concerned with the Bureau's distributing storage water to Warren Act contractors on an equal basis with North Platte Project entrymen, when the law is clear that only storage excess to the requirements of the latter can be made available to the former. 43 U.S.C. § 523; *see* Third Int. Rpt. 67-70.

The decree was formulated on the assumption that the government would operate the North Platte Project and store and deliver water in accordance with the laws and contracts applicable thereto. *See* Third Int. Rpt. 70. To the extent that the project is not operated in accordance with this assumption, the apportionment provided for by the decree is disturbed.

The Government's suggestions that allowing Wyoming to prosecute its Fourth Cross-Claim will complicate the proceedings and may necessitate allowance of interventions by parties to the "water contracts at issue," Govt. Except's & Br. 25-26, are gossamer. Assuming, as

Basin does, that the Government will be truthful and forthcoming about the Bureau's administration of the North Platte reservoirs, the issue of whether the Bureau is operating them in accordance with law will be one of law -- and not a particularly complex one at that. And, where the conduct of the government is challenged as in violation of law, the notion that third parties who are incidental beneficiaries of the government's malfeasance need be let in as parties before the government's wrongdoing can be remedied, has the virtue of novelty, but none other.

3. The gravamen of Wyoming's Fourth Cross-Claim is that the Bureau of Reclamation's operation of the North Platte reservoirs in contravention of the law of the river is disturbing the apportionment, not, as Nebraska and the Government mischaracterize it, that the Bureau's misconduct is violating particular water users' rights. Govt. Except's & Br. 28; Neb. Except's & Br. 19.

It is apparent from the Goshen Irrigation District's complaint in the federal district court, Govt. Except's & Br. Appendix, that the claim Goshen is prosecuting against the Bureau of Reclamation there does not touch or concern the apportionment here in any way. Goshen's claim is simply that the Bureau is not providing it with the quantity of water to which it is entitled under its contract. It is just not true that the claims Goshen is pursuing in the district court "are essentially identical to those Wyoming presses here." Govt. Except's & Br. 28. Wyoming's claims are fundamentally different and much broader. Wyoming seeks to require the Bureau to abide by the laws and contracts governing the administration of the North Platte reservoirs because the

assumption that it would do so is built into the North Platte decree and the apportionment is skewed if it does not.

After this case was commenced by Nebraska in 1934, the Court held that the Secretary of the Interior was not a necessary party because, as an appropriator of water under the reclamation laws, he is no different from any other appropriator under state law. 395 U.S. 40 (1935). In 1938, the United States sought and was granted leave to intervene. In its motion, the government contended that, for the protection of its interests in the irrigation works it had constructed at great cost in the North Platte basin, it should not be required to rely on any state, even if, legally, its position is no different from that of a private appropriator.

While asserting here that the proper forum for challenging the propriety of the Bureau's administration of the North Platte reservoirs is the district court -- where, it asserts, the Goshen Irrigation District is currently so doing -- the Government there is seeking to dismiss Goshen's suit on the ground of sovereign immunity. Third Int. Rpt. 71, n.173; Govt. Except's & Br. 29, n.16. And, while the Government all but concedes here that its challenge to the jurisdiction of the district court is not well founded, it does not indicate that it intends to withdraw its motion to dismiss. *Id.* On the contrary, it ventures that "a meritorious sovereign immunity defense would bar suit in this Court as well as in the district court." *Id.*

This, of course, is not true. Having voluntarily come into this case, after the Court had determined it was not a necessary party, for the express purpose of litigating its rights in relation to its irrigation works on the North Platte, the government waived any immunity it may otherwise have

had from examination in this case of the propriety of its administration of those works.

This case is preeminently the proper and appropriate forum in which to hear and determine Wyoming's claims that the government is interfering with the apportionment by operating the North Platte reservoirs in violation of the laws and contracts governing their use.

CONCLUSION

For the foregoing reasons, the Court should adopt the Special Master's recommendations that Nebraska be allowed to amend her complaint to pursue her proposed Count III and that Wyoming be allowed to amend her pleadings to pursue her proposed Fourth Cross-Claim.

Respectfully submitted,

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