

---

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1994

---

STATE OF NEBRASKA,  
*Plaintiff,*  
v.

STATE OF WYOMING,  
*Defendant.*

---

UPON EXCEPTIONS TO THE THIRD INTERIM REPORT  
OF THE SPECIAL MASTER

---

**MOTION OF AMICUS CURIAE PLATTE RIVER TRUST  
FOR LEAVE TO FILE A RESPONSE TO WYOMING'S  
SECOND EXCEPTION TO THE SPECIAL MASTER'S  
THIRD INTERIM REPORT  
AND PROPOSED RESPONSE**

---

\*ABBE DAVID LOWELL  
SUE ELLEN RUSSELL  
NANETTE L. DAVIS  
\* Counsel of Record

Brand & Lowell, P.C.  
923 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 662-9700

December 30 1994



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1994

---

STATE OF NEBRASKA,  
*Plaintiff,*  
v.

STATE OF WYOMING,  
*Defendant.*

---

UPON EXCEPTIONS TO THE THIRD INTERIM  
REPORT OF THE SPECIAL MASTER

---

**MOTION OF AMICUS CURIAE PLATTE RIVER TRUST  
FOR LEAVE TO FILE REPLY BRIEF TO EXCEPTIONS  
FILED AS TO THE SPECIAL MASTER'S THIRD  
INTERIM REPORT**

---

The Platte River Whooping Crane Critical Habitat Maintenance Trust ("the Trust") submits this motion for leave to file a response to exceptions filed by the parties to the Special Master's Third Interim Report, accepted for filing by this Court on October 11, 1994. In support of its motion, the Trust states as follows:

1. The Trust is a non-profit organization whose mission is to protect and enhance the critical habitat for whooping crane and the habitat for other migratory and resident bird habitat regions of the Platte and North Platte Rivers. Since its organization in 1980, the Trust and its staff of scientists have been engaged in studying and reclaiming Platte River habitat.

2. A three-person Board of Trustees governs the Trust. The State of Nebraska, the Missouri Basin Power Project, and the National Wildlife Federation each appoint one trustee. The Trust has become an excellent source of objective scientific information based on its long-term direct studies and staff expertise.

3. On April 1, 1988, Special Master Owen Olpin granted the Trust *amicus curiae* status in this case, which concerns the apportionment of flows of the North Platte River among the States of Nebraska, Wyoming, Colorado, and the United States. On February 18, 1994, Nebraska and Wyoming filed respective motions to amend the pleadings. Following full briefing by the parties and *amici*, the Special Master issued his Third Interim Report, recommending various dispositions on the motions to amend.

4. In late November of 1994, Nebraska, Wyoming, and the United States filed exceptions to the Third Interim Report. (Colorado filed no exceptions.) Nebraska and the United States excepted to the Special Master's recommendation that Wyoming be granted leave to file her Fourth Cross-Claim against the United States, which alleges that it has failed to operate federal reservoirs in accordance with federal and state laws, and extant water service contracts.

5. Wyoming excepted to the following recommendations of the Special Master: (1) to deny Wyoming's First Counterclaim and First Cross-Claim with prejudice; (2) "to entertain Nebraska's claims of injury to non-irrigation season uses and uses downstream of the apportioned reach of the North Platte River, including endangered species and wildlife habitat uses;[;]" (3) "to entertain Nebraska's Horse Creek claim . . .;" and (4) "to entertain Nebraska's claims to impose interstate ground water regulation in Wyoming under standards that Nebraska refuses to apply intrastate to its own ground water use." Wyoming's Exceptions at 1-2.

6. Pursuant to Supreme Court Rule 37, the Trust seeks permission from this Court to file a response to the exceptions,

as it and other *amici* have done in the past in this case. Nebraska, the United States, and Colorado consent to the filing of a response by the Trust. *See* Letters attached as Exhibits 1, 2, and 3, respectively. Wyoming will not consent to the Trust's request for permission, thereby prompting this motion. *See* December 5, 1994 Letter of Dennis Cook, attached as Exhibit 4. Wyoming, however, does not oppose this motion. *See* December 6, 1994 Letter of Dennis Cook, attached as Exhibit 5.<sup>1</sup>

7. The granting of this motion would permit the Trust to be heard on the issues raised in the exceptions in a manner consistent with the role that it has played in this case heretofore as an *amicus*.

Respectfully submitted,

\*ABBE DAVID LOWELL

Abbe David Lowell (SEF)

SUE ELLEN RUSSELL

NANETTE L. DAVIS

\* *Counsel of Record*

Brand & Lowell, P.C.

923 Fifteenth Street, N.W.

Washington, D.C. 20005

(202) 662-9700

*Of Counsel:*

EUGENE GRESSMAN

*Chapel Hill, North Carolina*

---

<sup>1</sup> This material has been lodged with the Clerk of the Court.



**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
SUMMARY OF ARGUMENT .....	2
ARGUMENT	
I. CONSIDERATION OF WILDLIFE EQUITIES IN THIS PROCEEDINGS IS ALTOGETHER APPROPRIATE .....	3
II. THAT WILDLIFE CONCERNS EXIST IN OTHER CASES DOES NOT NEGATE THE NEED TO CONSIDER THEM IN THIS PROCEEDING .....	10
CONCLUSION .....	14

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
Arizona v. California, 103 S. Ct. 1382 (1983) . . . . .	13
Nebraska v. Wyoming, 113 S. Ct. 1689 (1993). . . . .	5,6,7
Nebraska v. Wyoming, 113 S. Ct. 1941 (1993). . . . .	13
Nebraska v. Wyoming, 325 U.S. 589 (1945) . . . . .	6,7,8,9
Nebraska v. Wyoming, 345 U.S. 981 (1953) . . . . .	8
Nebraska v. Wyoming, 485 U.S. 931 (1998) . . . . .	3,12
Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d (D.C. Cir. 1989) . . . . .	3,4,10
Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d (D.C. Cir. 1992) . . . . .	11
<b>STATUTES AND REGULATIONS</b>	
Endangered Species Act,  16 U.S.C. § 1532(6) (1989). . . . .	3
16 U.S.C. § 1532(5)(A)(i) . . . . .	4



**REGULATIONS: (cont.)** **Page**

43 Fed. Reg. 20,938-42 (1978) . . . . . 4

**MISCELLANEOUS:**

The Platte River Ecology Study, Spec. Rept.  
Northern Prairie Wildlife Research Center (1981) . . . 5



No. 108, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

---

STATE OF NEBRASKA,  
*Plaintiff,*

v.

STATE OF WYOMING,  
*Defendant.*

---

UPON EXCEPTIONS TO THE THIRD INTERIM REPORT  
OF THE SPECIAL MASTER

---

**RESPONSE OF THE PLATTE RIVER TRUST TO THE  
EXCEPTION FILED BY WYOMING TO THE  
SPECIAL MASTER'S THIRD INTERIM REPORT  
AS TO THE PROPER ROLE OF WILDLIFE ISSUES  
IN THIS PROCEEDING**

---

**INTEREST OF *AMICUS CURIAE*  
PLATTE RIVER TRUST**

The Platte River Whooping Crane Critical Habitat Maintenance Trust ("the Trust") is a non-profit organization whose mission is to protect and enhance the Platte River critical habitat for whooping cranes and the habitat for other migratory birds on the Platte and North Platte Rivers. Decisions in other tribunals and studies by the Trust and others establish that the Platte River habitat is in immediate peril. Any further upstream depletions will necessarily decrease available water supplies in Nebraska and expose that habitat to

greater damage. Because of the import to the habitat carried by any decision in this original jurisdiction water apportionment case, and the Trust's role as habitat protectorate, the Trust has been granted status as an *amicus curiae*.

## SUMMARY OF ARGUMENT

Wyoming incorrectly argues that wildlife issues are not an equity that can be considered in this proceeding. In support of her statements, Wyoming both misstates the recommendations of the Special Master and ignores the law of the case. Contrary to Wyoming's assertions, the Special Master has not determined that a water requirement for endangered species is necessary. Rather, he has stated simply that wildlife is an equity that cannot continue to be ignored in the claims presented in this case. Moreover, this Court has not in its previous opinions made any statement that can be construed as a limitation on the introduction of the evidence of injury to Nebraska's wildlife in the context of the Deer Creek and Laramie River claims. Finally, there is no adequate alternative forum to address the wildlife equities extant in this case. Therefore, Wyoming's second exception to the Special Master's Third Interim Report should be overruled.

## ARGUMENT

The Trust hereby submits its response to the exceptions filed to the Third Interim Report of the Special Master on the Motions to Amend the Pleadings ("Third Interim Report"). The Trust concurs with the exceptions taken by the United States and the State of Nebraska to the recommendation of the Special Master to grant the inclusion of the State of Wyoming's Fourth Cross-Claim for the reasons offered in the briefs of the United States and Nebraska. However, the Trust believes that the Special Master properly recommended that wildlife issues be accounted for as an equity in the trial on Counts I and III, and therefore disagrees with the exceptions taken by Wyoming as to those Counts. The Trust respectfully offers the following extended remarks as to the latter.

## I. CONSIDERATION OF WILDLIFE EQUITIES IN THIS PROCEEDING IS ALTOGETHER APPROPRIATE.

Wyoming's argument on her second exception in essence is that, because this Court has denied Nebraska leave to amend the complaint to include a specific apportionment for wildlife,<sup>1</sup> *all* consideration of wildlife issues are barred from this proceeding. See Wyoming's Exceptions at 28-34. In doing so, Wyoming suggests that allegations of injury to wildlife and wildlife habitat "are based on mere speculation." *Id.* at 32. To the contrary, the wildlife equities, which include the critical and essential habitat of numerous endangered species,<sup>2</sup> are in dire and worsening shape by virtue of upstream development on the Platte River. Moreover, the approach proposed by the Special Master on the Deer Creek and Laramie issues simply permits evidence of injury to wildlife and their habitats from development upstream in Wyoming to be considered along with the evidence of injuries to other equities, such as agriculture and municipal needs. It is not, contrary to the assertions of Wyoming, "a claim for an apportionment for such wildlife uses." Wyoming's Exceptions at 31.

As Wyoming well knows, "[t]he banks of the Platte River . . . are home to a number of endangered species of wildlife, including the whooping crane." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 110 (D.C. Cir. 1989) ("Platte I"). Accordingly, the Department of the Interior has designated the 53-mile-long Big Bend reach of the Platte River (from Lexington to Denman in central Nebraska) a "critical habitat" for the

---

<sup>1</sup> *Nebraska v. Wyoming*, 485 U.S. 931 (1998).

<sup>2</sup> An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." *Endangered Species Act*, 16 U.S.C. § 1532(6) (1989). Listed species on the Platte include the whooping crane, bald eagle, least tern, peregrine falcon, eskimo curlew, piping plover, western prairie fringed orchid, American burying beetle, and pallid sturgeon.

whooping crane.<sup>3</sup> 43 Fed. Reg. 20,938-42 (1978). The Department has also designated two areas of the Platte River as "Resource Category 1" habitat for Sandhill Cranes and Greater White-fronted Geese, acknowledging that habitat to be "unique and irreplaceable." The Platte I court also noted, "[Federal Energy Regulatory Commission s]taff concluded that the existing licensed projects in combination with other water projects along the Platte River have contributed to the cumulative flow depletion accruing within the river system." 876 F.2d at 116 (quoting 39 F.E.R.C. at 63,016-17).

The Trust has detailed the nature of wildlife conditions on the Platte River in numerous submissions to this Court and the Special Master. *See, e.g.*, May 2, 1994 Brief of Amicus Curiae Platte River Trust in Support of Nebraska's Motion for Leave to File Amended Petition. There, the Trust proffered to the Court:

Only a few reaches of the Platte River retain [its original] habitat characteristics. Upstream consumptive use of the natural flow of the North Platte system -- in both the irrigation and non-irrigation season -- has significantly altered the character of the Platte River and the habitat it can offer wildlife. The Platte River channel has lost many of its natural contours as inflows have decreased and the natural (seasonal) variance in flow levels has been disrupted. In some reaches, the Platte River channel has become narrow and deep with large trees growing on former sandbars and along its banks. Cranes and other species have abandoned entire portions of the river because 100 percent of the roosting habitat has been lost in those reaches. The Platte River Trust estimates that at least 80 percent of the historic roosting habitat in central Nebraska has been lost. In the "best" reaches less than 50 percent remains.

---

<sup>3</sup> A "critical habitat" is "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

In 1981, the U.S. Fish and Wildlife Service observed that: "[w]ith approximately 70 percent of the Platte's annual flows diverted for various consumptive uses upstream in Colorado, Wyoming, and western Nebraska, channel width in many areas has been reduced to 10-20 percent of former size. Habitat conditions within the existing channel have also changed as a result of reduced scouring of sandbars and shifting of alluvial sediments. A broad band of mature deciduous woodland now occupies tens of thousands of acres that formerly were part of the river and numerous islands overgrown with woody vegetation exist within the channel." The Platte River Ecology Study, Spec. Rept. Northern Prairie Wildlife Research Center at i (1981). (Footnote omitted).

Id. at 6-7 & n.6. Any further depletions of water from the Platte River cannot be tolerated because the wildlife uses, including the needs of the habitat of numerous endangered species, are not met under the current regime. Thus, Wyoming's statement that Nebraska's allegations of injury to wildlife are "speculative" is contrary to the facts.<sup>4</sup>

Wyoming's position that this Court must exclude all evidence of wildlife equities from this case has no legal basis. For example, in 1993, this Court, in rejecting Wyoming's motion for summary judgment on the Deer Creek injury issue, did so based in part upon the April, 1991 affidavit of H. Lee Becker, a former state hydrologist for the Nebraska Department of Water Resources. Nebraska v. Wyoming, 113 S. Ct. 1689, 1700 (1993) ("[W]e think the Wilde and Becker affidavits raise a genuine issue of material fact sufficient to defeat Wyoming's summary judgment motion.") Although the Court's opinion rests primarily on Wyoming's manner of potential administration, the Court did not disavow the affidavit's discussion

---

<sup>4</sup> This is not to say that the parties, including Wyoming, should not have the opportunity to argue about the weight to be accorded to any evidence on the extent of Nebraska's injuries.

of the risk of the Deer Creek development to the habitat of endangered and threatened species in Nebraska. *Id.*

The Special's Master Second Interim Report reviewed the affidavit in more detail. Second Interim Report at 75-77. The Becker affidavit stated in part, "[w]ith greater impacts on flows below the Tri-State Dam there would be a greater likelihood that the Deer Creek project would jeopardize the habitat of the endangered and threatened species in Nebraska." April, 1991 Becker Affidavit at ¶ 3 (*cited in* Second Interim Report at 75-76). The Special Master concluded,

I therefore recommend that the Court deny Wyoming's motion. '[T]he facts specifically averred by [Nebraska] contradict facts specifically averred by [Wyoming].' . . . We shall therefore proceed to trial on the Deer Creek Project's effects on 'the delicate balance of the river,' 325 U.S. at 625, *unless* Wyoming can establish that the Deer Creek Project fits within the Decree's paragraph X municipal exemption.

Second Interim Report at 77 (citation omitted). Thus, this Court has already implicitly accepted that wildlife equities will be considered in the context of the Deer Creek issues.

Further, as to the Laramie issue, the Court rejected motions for summary judgment from both Nebraska and Wyoming. 113 S. Ct. at 1697-99. The Court cautioned that Nebraska must "come[] forward with evidence sufficient to establish that Corn Creek (or some other project on the Laramie) poses a threat of injury serious enough to warrant modification of the decree . . . ." *Id.* at 1698-99. The Court did not then proceed to exclude wildlife equities from the injuries allowed to be considered.

Rather, in reference to injuries sufficient to warrant such modification, and in discussing the applicable legal standard, the Court stated,

As we have said, the Court in those sections [of the original decree] 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, see, e.g., *Nebraska v. Wyoming*, 325 U.S., at 620, 65 S.Ct., at 1351, but also new development that threatens a party's interests. . . . At least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment. See *Nebraska v. Wyoming*, 325 U.S., at 618, 65 S.Ct., at 1350 (listing equitable considerations).

113 S. Ct. at 1695. The Court expounded on that list of equitable considerations in 1945:

Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of apportionment is the guiding principle. But the physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas of a limitation is imposed on the former -- these are all relevant factors. *They are merely an illustrative not an exhaustive catalogue.* They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

325 U.S. at 618 (emphasis added). In short, this Court has not imposed any parameters on proof of injury to Nebraska's wildlife equities on the Deer Creek and Laramie issues. The Special Master's recommendation to hear evidence on wildlife equities is a reflection of the need to balance *all* the relevant interests.

Wyoming, however, suggests that "[t]here cannot be a *limited* inquiry into the endangered species and wildlife habitat issues that would apply only to requests for new injunctions against Wyoming." Wyoming's Exceptions at 30. While the Trust believes that a limited inquiry would be less useful than an examination that considers a

global year-round apportionment, *see* discussion of Count IV in Third Interim Report at 30 and 47-55.<sup>5</sup> Wyoming cites no legal authority for her bizarre position that "a trial would be required to determine initially whether and if so, what amount of, flows are essential to the conservation and recovery of the endangered species and their critical habitat." Wyoming's Exceptions at 30. As the Trust has already shown, a limitation on the proof of injuries to wildlife in the context of the Laramie and Deer Creek counts would be inconsistent with the law of this case.<sup>6</sup> That Nebraska will have to produce sufficient

---

<sup>5</sup> Although no party took exception to the Special Master's recommendation to deny inclusion of Count IV, requesting a global non-irrigation season apportionment, the Trust continues to believe that the time is indeed ripe to address the issue of a comprehensive, *year-round* equitable apportionment of the North Platte River. First and foremost, the wildlife equities, including the critical habitat of numerous endangered species, are in dire and worsening shape by virtue of actions on the Platte River that have already occurred in both the irrigation and non-irrigation seasons. Second, the approach proposed by the Special Master avoids an accounting of the cumulative impacts on wildlife from development upstream in Wyoming. Indeed, the Special Master conceded that Nebraska has alleged both over-appropriation and substantial injury of the Platte River in the non-irrigation season, Third Interim Report at 52-53, and that "[t]he 1945 opinion[, Nebraska v. Wyoming, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953),] certainly affords a ready rationale for the Court to grant Count IV and afford Nebraska the opportunity to present her evidence on whether the North Platte is overappropriated during the non-irrigation season." *Id.* at 53.

<sup>6</sup> Likewise, although the Special Master has recommended that Wyoming's First Counterclaim and First Cross-Claim be denied, "the denial of the First Counterclaim would not necessarily bar Wyoming from introducing evidence of waste in all circumstances of the case." Third Interim Report at 64 n.158.

evidence regarding her affected interests to justify her requested relief is not a novelty, but rather standard practice in any trial.<sup>7</sup>

"The Court [has] expressly retained jurisdiction at the foot of the decree in order to respond to changed circumstances." Special Master's Third Interim Report at 2 & n.3 (citing Paragraph XIII of the 1945 decree). Wyoming lost the battle to exclude any reopener clause from the 1945 decree, *see* 325 U.S. at 655, and should not be heard to prevent Nebraska from presenting evidence of changed circumstances as to the appropriate balance of equities for claims already accepted for filing by this Court. Here, a "new" interest has emerged since 1945, i.e., environmental impacts from upstream development.<sup>8</sup> If Nebraska is foreclosed from raising an important changed circumstance in the context of a petition to modify the decree, then Paragraph XIII would be rendered a nullity, contrary to the explicit intent of this Court.

---

<sup>7</sup> Wyoming in fact has proffered a similar response as to her proposed First Counterclaim and First Cross-Claim, where she seeks a mass allocation to replace the existing proportionate allocation of irrigation flows:

When asked at oral argument whether Wyoming seeks freedom to use everything except that which might be defined as the Nebraska apportionment and then subtracted from the total flows, counsel for Wyoming responded, "That's the very heart of it. It may not be a specific amount that applies year to year. It may depend on meteorological conditions, snow packs. *But that goes to our proof and our evidence.*"

Third Interim Report at 56 n.141 (quoting July 27, 1994 hearing transcript at 258-59) (emphasis added).

<sup>8</sup> The Special Master recognized that, "since none of the now highly relevant federal environmental laws were in effect at that time [in 1945], the important wildlife resources in the Big Bend reach in central Nebraska were entirely unaccounted-for." Third Interim Report at 9.

Perhaps most telling is that Wyoming characterizes the recommendation of the Special Master to hear at trial the environmental impacts of Wyoming's development as a "presum[ption of] a water requirement for endangered species." Wyoming's Exceptions at 33 n.16 (citing Third Interim Report at 20). Contrary to Wyoming's intimations, the Special Master has *not* yet heard the evidence and decided the appropriate balance of equities. His plain words were, "I do not doubt that wildlife issues must be considered in, and evidence of the needs of these uses admitted into, this case in the context of the controversies of the Laramie River and Deer Creek." Third Interim Report at 19-20. Wyoming's statements may be more a Freudian grant of her fear of what the proof will show if permitted than they are an accurate recital of the Special Master's recommendation.

## **II. THAT WILDLIFE CONCERNS EXIST IN OTHER CASES DOES NOT NEGATE THE NEED TO CONSIDER THEM IN THIS PROCEEDING.**

Wyoming also takes exception to the Special Master's rejection of the argument that other proceedings will adequately address the wildlife interests extant in this case. *See* Wyoming's Exceptions at 32-34 & n.16 (citing Third Interim Report at 26-28 n.72.) The Trust agrees with the Special Master. First, the adequacy of the cited alternative fora remains dubious. The FERC relicensing proceeding for Kingsley Dam and related facilities is a ten-year-old proceeding on licenses that expired in 1987 that has not resulted in any protection for wildlife and whose end is nowhere in sight.

Indeed, the Trust has twice been forced to initiate litigation against FERC to have wildlife issues considered in the relicensing proceeding. In *Platte I*, 876 F.2d at 116, the D.C. Circuit ordered FERC to determine whether the interim operations of the Kingsley Dam projects without protective conditions (a) threaten the continued existence of any endangered or threatened wildlife species such as the whooping crane, least tern, or piping plover, or (b) were likely to

adversely modify the whooping crane critical habitat.<sup>9</sup> FERC subsequently determined that "absent interim measures, project operations will continue to adversely affect Platte River habitat, impeding the recovery of endangered or threatened bird species populations, . . . and thereby may affect the continued existence of these species and result in irreversible environmental damage." Interim License Conditions Order, 50 F.E.R.C. ¶ 61,180, 61,531-32 (1990). However, in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27, 32 (D.C. Cir. 1992) ("Platte II"), the D.C. Circuit refused to impose those interim protective conditions because of the absence of a reopener clause in one of the project's licenses.

While FERC finally has begun to consider the environmental impacts of the Kingsley Dam projects, that process is revealing as well. The first draft environmental impact statement ("EIS") was roundly criticized by many of the interested parties and resulted in the publication of a revised draft EIS. Further criticism resulted in a supplement to the revised draft EIS, which was released this December. The Trust's scientific analysis shows that the staff alternative for operations proposed to be adopted by FERC does not meet the requirements of the Endangered Species Act (particularly in light of new recommendations issued by the U.S. Fish and Wildlife Service, which establish the long-term need for even higher flows than had originally been recommended). Not only does it appear that the FERC relicensing will not provide adequate protection to the habitat, but the process is far from over, with the formal consultation on endangered and threatened species impact just beginning. In short, the Trust has ten years of experience to be highly skeptical that the relicensing proceeding is an adequate alternative forum, as Wyoming suggests.

---

<sup>9</sup> Not surprisingly, Wyoming submitted comments to FERC that stated, "Wyoming does not believe the evidence before the Commission supports the need for interim conditions." December 6, 1989 Comments of the State of Wyoming on Requests for Interim Terms and Conditions on Annual Licenses at 9-10.

Second, as the Special Master observed, the so-called "Recovery Plan" appears threatened from the start. *See* Third Interim Report at 27 n.72. Nebraska, Wyoming, Colorado and the United States propose to institute a basin-wide plan for the recovery of endangered species of the Platte River and their habitat. The parties have thus far not been eager to pony up their respective allocations of water. *See, e.g., id.* (citing June 10, 1994 Letter from Governor Romer of Colorado to the Honorable Bruce Babbitt, Secretary of the Interior, "declaring that Colorado was not obliged by the Memorandum of Agreement 'to deliver any more water at the Colorado-Nebraska State line than is provided by interstate compact.'"). If the Recovery Plan indeed will address the basin-wide use of water by Nebraska, Wyoming, Colorado, and the United States, then the Plan counsels as much for delay of this *entire* proceeding than for the exclusion of only wildlife interests from the balance of equities.<sup>10</sup> The states' participation in the Recovery Plan could perhaps result in a concrete agreement over water allocations for wildlife. Given the speculative nature of that result, though, it would be better to allow any possible Recovery Plan initiative to inform these proceedings, and not to act as a mechanism to silence the voice of wildlife interests.<sup>11</sup>

Wyoming invites this Court to read much into its previous summary denials of Nebraska's motion to provide for a wildlife apportionment, *Nebraska v. Wyoming*, 485 U.S. 931 (1988), and of amendments that would allow a year-round global apportionment, not

---

<sup>10</sup> Although the parties in this proceeding are the same as in the Recovery Plan initiative, the only aspect of this proceeding that parties have argued ought to be obviated is consideration of wildlife equities. Neither Wyoming nor Nebraska has argued that resolution of her claims should be delayed pending the outcome of the Recovery Plan initiative.

<sup>11</sup> Wyoming "believes that this Court should encourage [the Recovery Plan] effort to resolve the endangered species concerns within the existing apportionment." Wyoming's Exceptions at 33 n.16. In doing so, however, Wyoming entirely preterms the issue of how the fair conduct of this proceeding, with wildlife issues, would constitute a discouragement of the Recovery Plan process.

just for wildlife but for the totality of relevant interests, *Nebraska v. Wyoming*, 113 S. Ct. 1941 (1993). Wyoming states, "The Court's denial of Nebraska's previous amendments evidenced not only a reluctance to expand this case into one for a new apportionment but also a recognition that endangered species issues must be addressed in the first instance under the statutes enacted by Congress for that purpose." Wyoming's Exceptions at 32. This Court's decisions on those motions were without opinion. While they might evince this Court's reluctance to expand the apportionment proceeding, the summary decisions cannot appropriately be read as support for Wyoming's argument that wildlife issues have *no* place at trial.

Moreover, the longevity of any resulting apportionment counsels for inclusion of wildlife equities. The history of equitable apportionment cases shows that, once any apportionment is set on account of various projects like Deer Creek, revisiting that apportionment may be well nigh impossible, even if later reflection demonstrates that a particular Wyoming use received more than its fair share of attention. Cf. Arizona v. California, 103 S. Ct. 1382 (1983) (rejecting Indian tribes' request for recalculation of irrigable acreage on grounds that previous amount was in error because of need for finality). Finally, because this case is the only proceeding that answers the question of "how much" (water over the state line), then no other proceeding will suffice as an alternative forum for the

consideration of wildlife equities.

### CONCLUSION

In short, the time is ripe in this proceeding to count wildlife as an equity in the balance. Therefore, and for the foregoing reasons, this Court should overrule Wyoming's second exception to the Special Master's recommendations.

Respectfully submitted,

\*Abbe David Lowell

Abbe David Lowell

Sue Ellen Russell

Nanette L. Davis

\* Counsel of Record

Brand & Lowell

(A Professional Corporation)

923 Fifteenth Street, N.W.

Washington, D.C. 20005

(202) 662-9700

December 30, 1994





