

IN THE
Supreme Court of the United States
October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

**NEBRASKA'S RESPONSE TO WYOMING MOTION
FOR LEAVE TO FILE A REPLY BRIEF AND
WYOMING REPLY BRIEF IN SUPPORT OF
WYOMING'S EXCEPTIONS TO THE THIRD
INTERIM REPORT OF THE
SPECIAL MASTER**

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INTRODUCTION

The Court set the briefing schedule on exceptions to the Special Master's Third Interim Report on October 11, 1994, allowing briefs in support of exceptions and responses thereto.¹ *Nebraska v. Wyoming*, 115 S. Ct. 308 (1994). Reply briefs were not contemplated, presumably on the assumption that the issues would be delineated and the arguments aired in two rounds of briefs.

Wyoming's reply brief is not based on any alleged misstatement of fact, abuse of argumentative license, late authorities, newly enacted legislation, or any other inter-

¹ Owen Olpin, Special Master, Third Interim Report on Motions to Amend the Pleadings (Sept. 9, 1994) (Docket No. 699) ("Third Interim Report").

vening matter.² Instead, its filing was prompted by alleged “incorrect” arguments in Nebraska’s and the United States’ response briefs. Accordingly, the purpose of Wyoming’s reply brief is simply to supplement its argument on the merits of the exceptions.

In order to assure equality of treatment between Nebraska and Wyoming, Wyoming alone should not be allowed more argument or tactically advantaged argument. Consequently, the Court should deny Wyoming’s motion and reject Wyoming’s reply brief. In the alternative, if the Court grants Wyoming’s motion for leave to file its reply brief, the Court should accept for filing Nebraska’s response to Wyoming’s motion as well.³

ARGUMENT

POINT I

NEBRASKA DOES NOT NEED TO QUANTIFY ITS APPORTIONMENT TO SHOW INJURY FROM PROPOSED DEVELOPMENT IN WYOMING

In its reply brief, Wyoming argues that there is no basis upon which to distinguish between Wyoming’s First Counterclaim and First and Fourth Cross-Claims and Nebraska’s Counts I and III, urging that both sets of claims seek the same relief and are equally justiciable. Wyoming’s rationale purports to be a syllogism: 1) Nebraska must demonstrate by clear and convincing evidence that Wyoming’s proposed depletions of North Platte flows would

² Wyoming Motion for Leave to File a Reply Brief and Wyoming Reply Brief in Support of Wyoming’s Exceptions to the Third Interim Report of the Special Master (Jan. 30, 1995) (“Wyoming’s Reply Brief”).

³ Wyoming’s motion for leave to file its reply brief was tendered pursuant to S. Ct. R. 25.3. Nebraska’s response to Wyoming’s motion is being submitted pursuant to S. Ct. R. 21.4.

cause serious injury to its apportionment; 2) Nebraska does not claim that the new depletions would deprive it of its apportioned 75% of the natural flows in the pivotal reach, but claims instead that depletions of flows going into the pivotal reach would cause the water supply in the reach to be insufficient to satisfy Nebraska's equitable claims; 3) therefore, "Nebraska's claims are predicated on the concept that there is a threshold quantity of storage and natural flow water available in the pivotal reach that defines Nebraska's apportionment." Wyoming's Reply Brief at 3-4. Wyoming's conclusion, however, does not follow.

The conclusion does not follow for the same reason that the Court held that the case should not be dismissed in 1945. At the conclusion of Nebraska's case and again after all the evidence was in, Colorado moved to dismiss the suit on the ground that the evidence was insufficient to sustain any judgment in favor of or against any party. The basis of the motion was the lack of quantification of the water uses in Nebraska and the related legal assertion that "the case [was] not of such serious magnitude and the damage [was] not so fully and clearly proved as to warrant the intervention of [the] Court" *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945), *modified*, 345 U.S. 981 (1953); *see also* Brief for the State of Colorado, Impleaded Defendant at 22 (1944) ("Injury does not result from the deprivation of water for irrigation uses unless there is a showing of a need of the water for beneficial consumptive use . . ."). Justice Douglas explained that the Court recognized the elements of the burden of proof, but that "they [did] not stand in the way of an entry of a decree in this case." 325 U.S. at 608. He went on to state that "[t]he evidence supports the finding of the Special Master that the dependable natural flow of the river during the irrigation season [had] long been over-appropriated." *Id.* Agreeing that "[t]he various statistics with which the record abounds [were] inconclusive in showing the existence or extent of actual damage to Nebraska," the Court nonetheless concluded that any "deprivation of water in arid or semi-arid regions cannot help but be injurious." *Id.* at 610. *Cf. Wyo-*

ming v. Colorado, 259 U.S. 419 (1922) (the only showing of injury or threat of injury was the inadequacy of the supply to meet all appropriative rights). In 1945, the Court recognized that any exacerbation of the shortage of supply on an over-appropriated stream would necessarily constitute injury.

In sum, because the river has long been over-appropriated, Nebraska's Counts I and III do not require that Nebraska quantify its apportionment to show injury from proposed new depletions of the North Platte in Wyoming.

The relief requested in Nebraska's Counts I and III is also fundamentally different from the relief requested by Wyoming's First Counterclaim and First and Fourth Cross-Claims because Nebraska does not seek to replace the existing apportionment with a categorically different apportionment. Nebraska seeks to address post-1945 development as contemplated in ¶ XIII of the Decree to protect the status quo. Wyoming wants to relitigate the Court's existing apportionment to change the status quo. Principles of finality and repose, however, militate against considering Wyoming's First Counterclaim and First and Fourth Cross-Claims because the Court rejected a quantification of Nebraska's rights in 1945 and Wyoming's argument then that Nebraska's uses should be governed by the beneficial use provisions in the Reclamation Act of 1902, 43 U.S.C. §372 (1988), the North Platte Project contracts, and the Warren Act contracts. Accordingly, Wyoming is "incorrect" when it argues that its First Counterclaim and First and Fourth Cross-Claims and Nebraska's Counts I and III are equally justiciable.⁴

⁴ Wyoming also mischaracterizes the Court's 1993 opinion regarding the scope of evidence for Nebraska's success on the merits of Counts I and III. Wyoming states:

The Court in 1993 denied Wyoming summary judgment because it found a genuine issue of fact as to whether Wyoming's Deer Creek and Laramie River depletions would so
(*cont'd*)

POINT II

THE NONIRRIGATION SEASON IMPACTS OF IRRIGATION SEASON PROJECTS IN WYOMING ARE NECESSARILY IN THE CASE

Wyoming argues that “neither the United States nor Nebraska acknowledge[s] that by declining to take exception to the Special Master’s recommendation to deny Nebraska’s proposed Count IV for ‘lack of ripeness,’ they concede that Count IV is not ripe.” Wyoming’s Reply Brief at 8. Based on this alleged concession, Wyoming concludes that consideration of any evidence of post-Decree equities below Tri-State Dam “would constitute a new apportionment and such claims have been specifically rejected by the Special Master and the Court.” *Id.* at 9. Wyoming’s argument, however, misstates the status of the matter.

Nebraska’s Count IV sought an apportionment of the nonirrigation flows of the North Platte. The Special Master has recommended that the Court decline to hear Count IV at this time, to which neither Nebraska nor the United States has taken exception. *See* Third Interim Report at 19-20, 35-36, 47-55.

reduce storage in the federal reservoirs and natural flows in the pivotal reach as to injure Nebraska users under the canals in the pivotal reach.

Wyoming’s Reply Brief at 2. Similarly, Wyoming characterized the Court’s 1993 decision as requiring Nebraska to prove by clear and convincing evidence that new depletions in Wyoming will cause serious injury “to Nebraska’s apportionment.” *Id.* at 3. The Court did not limit the scope of injury as Wyoming states. Instead, with respect to Deer Creek, the Court stated the inquiry at trial will be whether the proposed project will “injure Nebraska.” *Nebraska v. Wyoming*, 507 U.S. ____; 113 S. Ct. 1689, 1700 (1993). With respect to the Laramie, the Court stated that Nebraska must produce evidence that Laramie depletions pose “a threat of injury serious enough to warrant modification of the decree . . .” *Id.* at 1699. Nowhere did the Court limit the scope of Nebraska’s evidence to the pivotal reach as Wyoming suggests.

In declining to recommend that the Court hear Count IV now, the Special Master observed that “[a]part from the Laramie River and Deer Creek projects already in the case, . . . Nebraska makes no allegations that any of the enumerated projects [in Wyoming] will actually be implemented . . .” *Id.* at 49. Accordingly, the Master concluded that “Nebraska has made no meaningful showing of changed circumstances since the Court denied her previous amendment on April 26, 1993.” *Id.*

The Master did not, however, preclude the consideration of nonirrigation season impacts in relation to issues already in the case. For example:

With respect to the Laramie, Nebraska has already identified three issues with the potential for near-term significant impacts on year around flows. First, the Grayrocks Settlement Agreement requires Basin Electric to deliver minimum flows downstream to the North Platte mainstem throughout the year. Wyoming, not a party to the 1978 agreement, does not concede that the settlement constrains her water users. The case on the Laramie would examine whether Wyoming should be enjoined from actions that impede or interfere with Basin Electric’s guaranteed deliveries in all twelve months. In addition, the proposed Corn Creek and Goshen Irrigation District projects on the Laramie will be examined for their potential to cause year around injury to Nebraska.

Id. at 50-51 (footnotes omitted).⁵

The Court has held that Nebraska may 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 . . .” 113 S. Ct. at 1699. Pursuant to the burden of proof articu-

⁵The inflows of the Laramie River during the nonirrigation season constitute the bulk of the nonirrigation season flows.

lated by the Court in 1945 and 1993, Nebraska will have to establish again that the North Platte River has long been over-appropriated. Doing so will necessarily involve an appreciation of all of the demands on the river against which the threat of injury would be posed. With respect to proposed irrigation season projects, the impacts of which would extend to the nonirrigation season, nonirrigation season uses are necessarily in the case. As the Special Master has recognized, Wyoming cannot pursue post-Decree projects which would upset the balance of the river without allowing Nebraska to account for the post-Decree equities that currently rely on the water Wyoming would take. *See* Third Interim Report at 47.

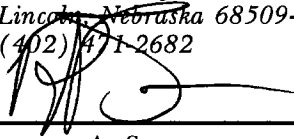
CONCLUSION

Wyoming's reply brief does not reply to Nebraska's and the United States' response briefs, but rather attempts to synthesize and supplement prior argument on the merits of the exceptions. Accordingly, the Court should deny Wyoming's motion for leave to file. Alternatively, if the Court grants Wyoming's motion for leave, the Court should accept Nebraska's response as well. Neither party alone should be given the opportunity to further argue the matter simply because it believes that the opposing party's position is incorrect.

Respectfully submitted,

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