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In The
SUPREME COURT OF THE UNITED STATES

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No. 6 Original, October Term, 1945.

THE STATE OF NEBRASKA, COMPLAINANT,

V.

THE STATE OF WYOMING, DEFENDANT,

AND

THE STATE OF COLORADO, IMPLEADED
DEFENDANT.

THE UNITED STATES OF AMERICA, INTERVENOR.

OBJECTIONS OF STATE OF NEBRASKA TO JOINT
PROPOSAL FOR DECREE FILED BY STATE OF
WYOMING, DEFENDANT, STATE OF COLORADO,
IMPLEADED DEFENDANT, AND UNITED STATES
OF AMERICA, INTERVENOR.

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I.

INTRODUCTORY.

As requested, pages 14 to 15, in the proposed form of decree, proposed by Nebraska, we hereby present our objections to the form of decree as proposed jointly by the other parties to this suit. Nearly half of the document filed as the form of decree jointly proposed consists of criticisms of the Nebraska proposal and of argument purporting to explain why the joint proposal is superior. We believe that the court will agree that fairness requires that Nebraska be permitted to present its reasons in support of its form of decree and to point out wherein the joint proposal departs from the opinion. Therefore, even though we have not received express permission, we present the following as our objections and criticisms of the joint proposal.

II.

OBJECTIONS AND CRITICISM OF JOINT PROPOSAL.

A.

Nebraska Paragraph I (B)**Joint Paragraph I (B)**

1. The figure of "17,060" appearing in the second line of the paragraph as proposed by the State of Nebraska is a typographical error, and the joint proposal properly corrects it to conform to the opinion of the court page 24, and the Master's Report, page 177, so that it will read "17,000."

2. The joint proposal inserts in the fore part of this paragraph after the word "water" the phrase "for irriga-

tion puposes." This qualification does not appear either in the opinion, page 24, or the Master's Report, page 177, where this phase of the controversy is discussed. Complainant feels that the omission was deliberate and that both the Master's Report and the opinion means what it says in limiting the storage for all purposes. Our reasons are as follows:

(a) While the controversy primarily pertains to the use of water for irrigation purposes, uses and disposition of water upstream interfere with the availability of water for irrigation in Nebraska just as much where the uses are for one purpose as another. Nebraska sought protection of its irrigation rights. When Colorado stores water for any purpose, this storage is to that extent an interference with the irrigation rights of Nebraska water users.

(b) It is contended that if this phrase is omitted, there is an inconsistency with Nebraska Paragraph X - Joint Paragraph XI. We feel that this complaint is hypercritical. Nebraska Paragraph X makes a blanket exception from the decree for all purposes, of water for ordinary and usual domestic, municipal and stock watering purposes. This exception does not need to be repeated in each paragraph of the decree which controls the actions of the upper states.

B.

Nebraska Paragraph I (C) Joint Paragraph I (C)

Complainant contends that the language included in Nebraska's Paragraph I (c) and in the last seven lines

of such paragraph constitutes a clarifying provision which makes unmistakable the manner of computing the "average of six thousand acre-feet computed over a period of ten years" (Opinion, p. 25).

C.

Nebraska Paragraph II (A)

Joint Paragraph II (A)

The joint proposal insists on adding to the language contained in the opinion, page 26, Master's Report, page 177, the qualification "in Wyoming" after the word "land" which does not appear either in the opinion or in the Master's Report. In connection with the insertion of this language, Nebraska does not object if it is so used as to control diversion of water in Wyoming which is all that Wyoming can control. Therefore, Nebraska is willing to have it inserted after the words "diversion of water" in the first two lines of this paragraph. Wyoming could, however, join with another state in a trans-mountain diversion to some other state for the irrigation of land in that other state thus creating the same damage to Nebraska as if the land watered were in Wyoming. Nebraska does not agree to the joint proposal, since it would permit Wyoming to divert more water for use on land in another state. It is probably wiser to follow the exact language of the opinion and the Master's Report, since the parties cannot agree upon any change.

D.

Nebraska Paragraph II (B)

Joint Paragraph II (B)

The comments under A. apply here.

E.

**Nebraska Paragraph III
Joint Paragraph III**

Nebraska's proposal follows the exact language contained in the opinion, page 33, Master's Report, page 178. We can see no advantage in the substitution of the word "use" for the word "administration."

We believe that the court and the Master deliberately confined the restriction to Nebraska canals for the following reasons:

(a) The paragraph constitutes an injunction against the State of Wyoming, its officers, agents and employees. There is no need to enjoin them against action which might harm Wyoming's own appropriators since Wyoming laws control those officers, etc. and since Wyoming has both the legal and physical power to take any action that may be necessary for the benefit of Wyoming appropriators, subject to the restrictions contained in the decree.

(b) An injunction against Wyoming for the benefit of Wyoming appropriators is beyond the scope and jurisdiction of this court in an interstate suit. Such an injunction would constitute an unwarranted interference with the powers of a state.

F.

**Nebraska Paragraph IV
Joint Paragraph IV**

The provisos following the table appear neither in the opinion, pages 27 to 28, nor in the Master's Report, pages

177 to 178. The possibility of provisos similar to (1) and (2) is discussed, pages 28 to 30, in the opinion, and the court specifically says (p. 30):

"We do not believe, however, that any revision of this part of the proposed decree need be made. We cannot assume that Nebraska will undertake to circumvent the decree. Moreover, the proposed revision offers difficulties. As Nebraska points out, when a junior Nebraska canal having storage rights is closed to natural flow due to operation of Nebraska priorities, it should be allowed to make up the deficiency in its supply in relation to its requirements by asking for storage water under such contracts as it may have with the United States. The United States does not repudiate those contracts. We conclude that it would unduly complicate the decree to recast its provisions so as to take them into account."

We cannot see that Subdivision (3) of the proposed provisos is needed since the decree must provide for the elimination of storage water from the control of the decree, and in different language, both the Nebraska proposal and the joint proposal attempt to carry this into effect (Nebraska Paragraph VI - Joint Paragraph VII). Thus, when water once acquires the characteristic of storage water, it can obviously be re-stored as well as used.

G.

Nebraska Paragraph V Joint Paragraph V

The differences between the Nebraska proposal and the joint proposal are two:

(a) The Nebraska proposal follows the opinion, pages 37 to 38, Master's Report, page 179, in granting an injunction against Wyoming alone. The joint proposal suggests an injunction against Nebraska as well. It is obvious that the lower state does not have the physical power to control diversions above the state line, and, therefore, no injunction is necessary to prevent Nebraska from doing what it has no power to do. Nebraska gets only such water as Wyoming allows to pass the state line, and when that water has come into Nebraska, it obviously cannot be made available for Wyoming appropriators. Thus, Wyoming has no interest in what disposition is made of the water after it has passed the state line. We can see no good reason for departing from the opinion and the Master's Report.

(b) Following the formula taken from United States' Exhibit 204 A., both proposals include provisions with reference to the time interval for the passage of water from point to point, which is an element in determining the effect of transmission losses at any particular time. Nebraska is willing to have a provision made that this time interval shall be determined by agreement by Nebraska, Wyoming and the United States, and this is in harmony with the opinion, marginal note 19, page 38. The joint proposal is that in the absence of such agreement, the manager of the government reservoirs shall have the sole and uncontrolled power to declare what that time interval is. Admittedly, this power is not given either by the Master's Report or by the opinion. Obviously, the United States is an interested party in this question, since it vitally

affects storage water which the United States is to have available for the fulfillment of its contracts. The United States proposes in this joint proposal that it have the sole power to decide a vital question in which it is so deeply interested. Obviously, the representative of the United States in a conference convened in an attempt to arrive at an agreement can disagree to anything proposed by the other parties, thus withdrawing the decision to his own exclusive judgment. He can thus force upon the parties a wholly arbitrary and unreasonable decision against which they have no remedy. It is contrary to all principles of equity and fairness that the interested party should be the judge in his own case.

Nebraska most earnestly objects to this change which the other parties propose in the decision of the court and in the Master's Report.

H.

Joint Paragraph VI

The Master's Report does not recommend and the opinion does not indicate that any such provision as Joint Paragraph VI should be included in the decree. We refer the court to the discussion found above under Paragraph F. hereof, Nebraska Paragraph IV - Joint Paragraph IV. As above pointed out, the opinion, page 30, specifically rejects a proposal that the Master's proposed decree should be revised to cover this item. Joint Paragraph VI takes no account of the storage contracts with the United States for storage water from Pathfinder

to be diverted below the Tri-State Dam. The court in its opinion, page 30, says they should be protected, but that it would unduly complicate the decree to recast its provisions so as to take such contracts into account.

I.

Nebraska Paragraph VI Joint Paragraph VII

The joint proposal asks the court to insert in the decree one of the basic grounds upon which the court reached its conclusion, namely, that apportionment of storage water is unnecessary to prevent a recurrence of the practice of making diversions in excess of requirements. This is from page 39 of the opinion. However, this is only one of the places wherein the court discusses the question of whether storage water should be included in the apportionment. The question is also discussed on pages 24, 29, 31, 38 and 53. If the theory of the joint proposal is correct, then all of the basic reasons for eliminating storage water should be given. The reason given on page 39 is not the only one. For example, on page 38, it is stated that the decree must recognize the obligations of the contracts for disposition of storage water. Likewise, on page 39, it is stated that if an apportionment of storage water is made, it would disrupt the established system of water administration; and that if storage water is not segregated, storage water contractors will in time of shortage, be deprived of the use of a part of the storage supply for which they pay.

We can see no proper reason for inclusion in the decree of all of the basic reasons for a particular provision,

since if this were done, the decree would be merely a repetition of the opinion.

J.

Nebraska Paragraph IX
Joint Paragraph X

The proviso eliminating the water uses excepted in the next succeeding paragraph, from the requirement as to measurements and records, we believe is unnecessary and is not included in the opinion, pages 52 to 53.

K.

Nebraska Paragraph X
Joint Paragraph XI

The opinion, page 52, Master's Report, page 180, excepts from the restrictions of the decree water for ordinary and usual domestic and municipal purposes and consumption. Now, as an afterthought, it is proposed that recreational uses should also be excepted. This term is of such broad import that we believe it should not be permitted. Under it, either Colorado or Wyoming might construct an artificial lake for boating purposes containing many thousands of acre-feet of water. While recreation has its place, we do not believe that recreational uses are in the same class as domestic, municipal and stock watering purposes, and we believe that they should not take precedence over irrigation. The exception as to recreational purposes is not found in either the opinion or the Master's Report.

L.

Nebraska Paragraph XII

Nebraska's proposal (which has no counterpart in the joint proposal) is based upon the opinion, page 48. Since it has to do with the operation of the Northport Canal in relation to the drains intercepted by Tri-State Canal, and the effect of the case of *United States v. Tilley*, (C. C. A. 8th, 124 Fed. [2d] 850), we believe it properly finds its place in the decree.

M.

Nebraska Paragraph XIII (A)**Joint Paragraph XIII (A)**

As we construe the provisions of page 25 of the opinion, in connection with pages 42 to 44, the court does not intend to affect the relative rights of the water users within any of the affected states except as may be specifically provided in the decree (Opinion, pp. 42-44). We believe that the joint proposal does not properly take into account the full effect of the opinion.

N.

Nebraska Paragraph XIV (G)

This is based upon the opinion, page 53, and merely constitutes a reservation of jurisdiction. The opinion states "all questions concerning the apportionment of such water will await the event." We believe that the court intended to include this among the questions which might be decided in the future if and when a question arises.

Nebraska Paragraph XIV (H)

This is based upon the exact language of the opinion, page 30:

“If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.”

Nebraska's proposal preserves the jurisdiction of the court in accordance with this language.

III.**CONCLUSION.**

In almost every respect wherein the joint proposal differs from the Nebraska proposal, the joint proposal attempts to make substantial changes in the opinion and to vary its natural effect. Counsel for the other three parties seem to conceive that in proposals for a decree they may do what would ordinarily be the function of a motion for rehearing or a compact among the parties. We particularly point to the provision in Joint Proposal Paragraph V attempting to give unrestrained power to the representative of the United States to determine one of the essential elements in the segregation of storage water from natural flow. We likewise point to the open disregard of the court's opinion contained in Joint Paragraph IV and Joint Paragraph VI. These are in direct conflict to the court's language, page 30, in which the court says “we do not believe, however, that any revision of this part of the proposed decree need be made.”

We further point to the attempt in Joint Paragraph XI to except recreational uses of water from the provisions of the decree.

Nebraska conceives that the proper function of these proposals now made by the parties should be an interpretation and application of the opinion and not its alteration.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska,

JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,

PAUL F. GOOD,
Special Counsel,
For Complainant.

