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No. 108, Original

IN THE
Supreme Court of the United States

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, ET AL,

Defendants.

FINAL REPORT OF THE SPECIAL MASTER

OCTOBER 12, 2001

Owen Olpin
Special Master

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**GLOSSARY OF SELECTED TERMS AS USED IN
THE FINAL SETTLEMENT STIPULATION AND IN
THIS FINAL REPORT**

An “*acre foot*” is that quantity of water that will cover an acre of land to the depth of one foot. It is the equivalent of 43,560 cubic feet.

An “*allocation year*” is a water year in which the forecasted water supply for the North Platte Project, as determined by the U.S. Bureau of Reclamation pursuant to Appendix E to the Final Settlement Stipulation, is less than an irrigation demand of 1,100,000 acre feet.

A “*call*” is a demand made by or on behalf of senior water appropriators requesting that the holders of junior appropriation rights be precluded from diverting and using water until the seniors’ prior rights have been met.

There are references to the priorities, requirements, and supplies of “*canals*.” In such instances the word “*canal*” is used as representative of the lands under or served by the canal.

“*Consumptive use*” refers to the water diverted for irrigation and lost by evaporation and transpiration in the course of diversion and use.

The “*Final Settlement Stipulation*” is the stipulation dated March 13, 2001, executed by Nebraska, Wyoming, Colorado, the United States and Basin Electric Power Cooperative.

“*Irrigation requirement*” is the quantity of water (including unavoidable waste), exclusive of precipitation, that is required for crop production.

“*Irrigation season*” refers to the period between May 1 and September 30, inclusive, in any one year.

The “*Modified North Platte Decree*” or “*Modified Decree*” is the proposed equitable apportionment decree attached as Appendix A to the Final Settlement Stipulation. It is intended to replace the decree the Court entered on October 8, 1945, as modified and supplemented on June 15, 1953.

“*Natural flow*” or “*direct flow*” refers to all water in a stream except for storage water releases.

The “*North Platte Decree Committee*” or “*NPDC*” is the entity chartered by Nebraska, Wyoming, Colorado and the United States to assist in monitoring, administering and implementing the Modified North Platte Decree and the Final Settlement Stipulation.

The western law of “*prior appropriation*” is the body of water law adopted widely by arid western states, including Colorado, Wyoming and Nebraska, under which water rights are administered on a priority of appropriation basis with senior water rights holders able to seek their entitlements before junior rights come into priority.

“*Return flow*” is the residual water that returns to a stream after being diverted and used. It may be “visible” or “invisible”, depending upon whether it takes the form of surface flows or underground percolation.

“*Second foot*” is an abbreviated expression for the flow rate of “one cubic foot per second of time,” which equals approximately 1.98 acre-feet of water per twenty-four hour period.

The term “*storage water*,” as applied to releases from reservoirs owned and operated by the United States, is defined as any water released from reservoirs for use on lands under canals having storage contracts in addition to the water discharged through those reservoirs to meet natural flow uses permitted by the Modified Decree.

“Water year” is the twelve-month period between and including October 1 of each year and September 30 of the following year. This is the water year of Nebraska, Wyoming and Colorado, and is the standard water year employed by the United States Geological Survey.

IN THE
Supreme Court of the United States

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, ET AL,

Defendants.

**OWEN OLPIN, SPECIAL MASTER
FINAL REPORT**

OCTOBER 12, 2001

I. INTRODUCTION

In 1945, the Supreme Court issued a decree equitably apportioning the waters of the North Platte River among Colorado, Wyoming and Nebraska. The Court's decree resolved eleven years of litigation among those three states and the United States, as intervener.¹ The Court retained jurisdiction at the foot of the decree to allow for the

¹ In 1938 the Court granted the United States leave to intervene. *Nebraska v. Wyoming*, 304 U.S. 545 (1938). The United States is party to the present proceedings as well.

possibility of reviewing, among other things, changed conditions or additional developments that might require any “order, direction or modification” of the decree. *Nebraska v. Wyoming*, 325 U.S. 589, 671 (1945) (*Nebraska I*); Decree, para. XIII(Oct. 8, 1945).

Under that retained jurisdiction Nebraska petitioned to reopen the proceedings on October 6, 1986.² The Court granted Nebraska’s petition and subsequently appointed me Special Master on June 22, 1987. *Nebraska v. Wyoming*, 483 U.S. 1002 (1987). Since then I have submitted three interim reports to the Court. The Court docketed my first interim report as received and filed,³ and issued opinions in 1993 and 1995 following my second and third interim reports, respectively. *Nebraska v. Wyoming*, 507 U.S. 584 (1993) (*Nebraska II*) and *Nebraska v. Wyoming*, 515 U.S. 1 (1995) (*Nebraska III*). Those opinions established much of the framework for a settlement package that is now before the Court. Final Settlement Stipulation (Mar. 13, 2001)(Docket Item No. 1649a). The 1993 opinion set out the legal standards governing this case and resolved two substantive issues, and the 1995 opinion permitted the parties to amend their initial pleadings.

Increasing demands on the waters of the North Platte and clashing interpretations of the Court’s 1945 decree led to the present controversy. Although Nebraska’s theories of this case have shifted in the years since 1986, ultimately its core contention was that the 1945 decree froze Wyoming’s water consumption at 1945 levels. Wyoming’s position has consistently been that, as long as it does not violate the 1945

² Pet. for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) (“Nebraska Pet.”)(Docket Item No. 1).

³ Letter from Francis J. Lorson, Esq., Chief Deputy Clerk, Supreme Court of the United States, entering the notice of Receipt and Filing of First Interim Report of Special Master in U.S. Supreme Court (June 26, 1989)(Docket Item No. 143).

decree's express limitations and injunctions, it can make whatever new uses of water it wishes. The parties have spent years negotiating and working to close this formidable gap between their polar interpretations of the 1945 decree and to agree upon a fair and workable scheme for the future division and use of North Platte waters. They have now reached agreement as set forth in the settlement package that is before the Court. The settlement has been approved and executed by Colorado, Wyoming, Nebraska, the United States (which operates federal dams and reservoirs on the River), and Basin Electric Power Cooperative ("Basin Electric") (which operates a large reservoir on the Laramie River tributary).⁴

Because the settlement by its very nature is a compromise, the sole issue now before the Court is whether to approve that settlement. Were the Court not to approve the settlement package in its entirety, the compromise the parties have made would likely fall apart. The parties' comprehensive agreement resolves all of the outstanding issues in an equitable manner and lays out a program for future cooperation and oversight that is far-sighted, flexible and consistent with the Constitution and the laws of the United States and the Court's earlier decisions in this case. Thus, I recommend that the Court approve the Final Settlement Stipulation as written and issue the proposed Modified Decree attached to the Stipulation. I further recommend that, upon entry of the Modified Decree, the Court dismiss with prejudice all the parties' claims, counterclaims and cross-claims.

⁴Basin Electric was permitted to intervene in 1999. Seventeenth Mem. of Special Master on Pet. to Intervene of Basin Electric Power Cooperative (Apr. 2, 1999)(Docket Item No. 1352).

II. BACKGROUND

The topography of the Platte River Basin, and irrigation history over the past sixty years or so, have informed the settlement package that is before the Court, including the proceedings leading to the 1945 opinion and decree and the opinions of the Court in this action in 1993 and 1995. Also, in the background of the settlement are a number of other factors such as the historic effects on water users living under the terms of the 1945 decree, changing demographic and meteorological conditions, and changing agricultural activities, all of which the parties have been in the best possible position to assess and take into account in reaching their settlement.

A. Physical Setting

This controversy concerns the waters of the North Platte River, a non-navigable, interstate waterway that flows through Colorado, Wyoming and Nebraska. Its waters are fed principally by spring and early summer snowmelt from the mountain headwaters in Northern Colorado and Southeastern Wyoming. The snowmelt produces run-off that collects in the River's main upriver tributaries in Colorado and Wyoming. Smaller tributaries augment the river during its course farther downriver through Wyoming and into Nebraska. From its origins in North Park, Colorado, the North Platte follows a mostly northerly course east of the Continental Divide. It enters Southeastern Wyoming about eighty miles west of Cheyenne. Along its course to Casper, Wyoming, the North Platte gathers flows from several large tributaries, including the Medicine Bow and Sweetwater Rivers. Near Casper the North Platte bends to run southeasterly. It enters Nebraska about twenty miles upstream of Scottsbluff, Nebraska and continues eastward until it joins the South Platte to form the Platte River. The

drainage area of the North Platte, excluding the Laramie River, is about 28,000 square miles.⁵

The environmental *amici* participating in this case, the National Audubon Society and the Platte River Whooping Crane Critical Habitat Maintenance Trust (“the Platte River Trust”), claim that environmentally sensitive reaches of the North Platte River in Nebraska have undergone a change of face, from a generally wide and shallow river to a river of narrower and deeper channels with semi-permanent islands, sandbars and more dense vegetation. These changes in river structure and geomorphology allegedly result mainly from man-made factors, including water storage in reservoirs, changes in usage patterns, and changes in the states’ water administration policies.

B. Origins Of Water Uses

Competing demands on this western water source started as early as the 1860’s, lending early credence to the epigram sometimes credited to Mark Twain: “Water is for fighting; it’s whiskey that’s for drinking.”⁶ Major irrigation development occurred in the 1880-1890 period as irrigators

⁵ The North Platte River is about 688 miles long, 70 miles in Colorado, 435 miles in Wyoming and 183 miles in Nebraska. A map of the North Platte drainage basin is attached as Master’s Attachment I. The Court described the physical setting and the early development of the North Platte in detail in its 1945 opinion. See *Nebraska I*, 325 U.S. at 592-99.

⁶ The late Wallace Stegner wrote of the aridity of the North Platte region: Emigrants bound up the Platte Valley on their way to Oregon, California or Utah, the first targets of the westward migration, almost universally noted in their journals that a little beyond Grand Island their nostrils dried out and their lips cracked, their wagon wheels began to shrink and wobble, and their estimates of distance began to be ludicrously off the mark. W. Stegner, *The American West as Living Space* 18 (1987). See also W. Stegner, *Beyond the Hundredth Meridian* (1953).

in all three states started to assert priorities during the irrigation season.

In the early development years there was little storage capacity, and off-season flows were little used. That changed with the passage of the 1902 Federal Reclamation Act. Act of June 17, 1902, 32 Stats. 388. One of the earliest federal projects under that Act was the North Platte Project, which launched a regime of extensive year around management and utilization of the waters of the North Platte River. By way of illustration, the North Platte Project's Pathfinder Dam, completed in 1913, and Guernsey Dam, completed in 1927, impound the entire flow at certain times of the year, causing an essentially new river to rise from Project return flows below Guernsey Dam. Those return flows grew from negligible quantities to 700,000 acre-feet by 1927. *Nebraska I*, 325 U.S. at 596. The North Platte Project encompassed several other components,⁷ as did the more junior Kendrick Project and the Glendo Unit of the Pick Sloan Missouri Basin Project, other U.S. Bureau of Reclamation projects on the North Platte in Wyoming.

The conjunction of increasing irrigation demands and the onset of drought conditions precipitated Nebraska's suit in the original litigation. The Court noted that 1931 started "the driest cycle . . . in the North Platte and Platte River valleys of which there is any record." *Nebraska I*, 325 U.S. at 598. The resulting inadequacy of dependable flows moved Special Master Doherty, appointed by the Court to hear the original case, to observe:

The North Platte River has long been the subject of potential controversy between the three litigating States. This has been

⁷ Those additional components include the Inland Lakes, two main canals – the Interstate and Fort Laramie diverting at Whalen, Wyoming – and a third canal in Nebraska, the Northport, as well as hydroelectric plants.

due to the central fact that the dependable natural flow of the river during the irrigation season has long been over-appropriated.

Report of Michael J. Doherty, Special Master (Sept. 1944) (“Doherty Report”) at 37.

III. THE HISTORY OF THIS ACTION

A. The Original Proceedings

The Court first took jurisdiction over the North Platte controversy in 1934, when Nebraska complained about Wyoming’s uses of the waters of the North Platte River. Colorado was impleaded as a defendant and later the United States intervened. That proceeding, over which Special Master Michael Doherty presided for more than a decade, was a classic Western American set piece telling much about the arid lands lying west of the 100th meridian, a north-south map line that cuts Nebraska almost exactly in half. With the primary exception of the narrow, wet strip that is the U.S. Pacific Northwest, the nation’s lands west of that line usually receive less than the twenty inches of annual precipitation thought necessary to make agriculture feasible without irrigation.⁸

In 1944, Special Master Doherty recommended to the Court an equitable apportionment of the River. The Court overruled the exceptions of the parties to the Doherty Report on June 11, 1945, and entered a final decree on October 8, 1945. 325 U.S. at 657. The decree was modified in 1953, in

⁸ J.W. Powell, *Rep. on Survey of the Rocky Mtn. Region 3* (1879) (“The limit of successful agriculture without irrigation has been set at 20 inches. . .”).

response to a stipulation among the parties, addressing issues raised by the United States' construction of Glendo Reservoir. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

The 1945 Court based its equitable apportionment of the River largely on the doctrine of prior appropriation, which is followed by all three States in their intra-state water administrations. The Court observed, however, that "strict adherence to the priority rule may not be possible." 325 U.S. at 618. Taking into account several other factors, including climate, consumptive uses, established uses, return flows, storage water availability, waste and equity, the Court apportioned the natural flows during the irrigation season in the most critical reach of the River, just upstream of the Wyoming-Nebraska state line, 75% to Nebraska and 25% to Wyoming. *Id.* at 618, 637-54. This component of the apportionment was the heart of the 1945 decree.

The decree also imposed injunctions, restrictions and obligations in support of the apportionment. The Court imposed limitations on storage and diversions for irrigated acreage by the upstream States, Colorado and Wyoming, and established the relative water right priorities of the federal storage reservoirs and certain senior Nebraska canals. *Id.* at 621-37. The Court then retained jurisdiction at the foot of the decree in Paragraph XIII, explaining that the decree was meant to "deal with conditions as they obtain today." *Id.* at 620.

The 1945 decree set out a regime that has governed water administration on the North Platte River for over a half-century through changing demographic, agricultural and political times. The legacy of the regime that the Court established in 1945 is evident in the settlement package now before the Court, which retains much of the same framework.

First, the settlement retains the regime recommended by Special Master Doherty and adopted by the Court, that treats

sections of the River differently. Master Doherty observed that “(n)o uniform principle or rule of apportionment could be devised that would be possible of application to the whole river.” Doherty Report at 41. He recommended separate consideration of six sections: (1) North Park, Colorado; (2) the Colorado-Wyoming State line to Pathfinder Reservoir; (3) Pathfinder to Whalen, Wyoming; (4) Whalen to the Tri-State Dam near the Nebraska State line; (5) Tri-State Dam to the Kingsley Reservoir, and, finally, (6) Kingsley Reservoir to Grand Island, Nebraska. *Id.* at 20-21. The last two sections were ultimately excluded from the 1945 equitable apportionment on the ground that canals in those sections were adequately supplied from return flows and other local sources. *Nebraska I*, 325 U.S. at 607, 654-55. Following suit, the present settlement addresses only the first four sections of the River.

Second, the settlement retains the 75%-25% apportionment between Nebraska and Wyoming adopted by the Court in the pivotal reach of the River where the major canal diversions occur. The pivotal reach is the fourth section of the River, consisting of the forty-three mile section from Whalen Dam in Wyoming to the Tri-State Dam, one mile below the Wyoming-Nebraska State line.

Third, the settlement retains a reopener clause in the proposed Modified Decree.

Fourth, the settlement essentially retains the 1945 scheme of injunctions against and restrictions on irrigated acreage, storage, and transbasin diversions in the upstream states.

Despite the familiar pattern, the settlement imposes many new limitations and additional water administration requirements in Wyoming and adds decree components in recognition of more complicated times on the River. The new concepts include new methods for allocating federal storage water during times of shortage, for limitations on

upstream consumptive uses parallel to acreage limitations, for addressing groundwater pumping, and for more precise accounting for Wyoming's irrigation storage water. There is a broader geographic scope, and additional sources of irrigation water are taken into account. Finally, the parties have formed a new institution, the North Platte Decree Committee ("NPDC"), to assist in monitoring, administering and implementing the terms of the settlement.⁹

B. The Current Proceedings

1. Phase I: The Players Identified And The Scope Of This Action Defined (1986-1993). Much has happened in this action since 1986, as evidenced by over 1,700 entries in the docket. While every brief, memorandum, order and hearing has contributed, certain events touched on below have had a major impact on the case and the settlement.

The State of Nebraska commenced this original action on October 6, 1986, by filing its motion for leave to file a complaint against the State of Wyoming and for an order to enforce the 1945 decree and for injunctive relief.¹⁰ Nebraska alleged that Wyoming was unlawfully depleting and threatening to deplete the flows of the North Platte River through actions and projects that were being developed or contemplated in Wyoming, including the manner in which releases from Grayrocks Dam on the Laramie River, a tributary of the North Platte in Wyoming, would be administered under Wyoming law; the intended construction by Wyoming of additional pumping, diversion and storage facilities near the confluence of the Laramie and the North

⁹ A map showing diversion dams and canals and the geographic scope of key settlement provisions within the pivotal reach is attached as Master's Attachment II.

¹⁰ Nebraska Pet.

Platte; the proposed construction of a storage reservoir on Deer Creek, another tributary in Wyoming; and efforts by Wyoming to constrain U.S. Bureau of Reclamation diversions to the Interstate Canal for storage in the off-stream Inland Lakes in Nebraska.

Wyoming's answer and counterclaim accused Nebraska of circumventing the 1945 decree by demanding natural flows for diversion by irrigation canals above the Tri-State Dam in excess of the irrigation requirements of Nebraska lands entitled to water under the decree and by diverting natural flow and storage water to unauthorized uses below that Dam.¹¹ Colorado and the United States, parties to the original litigation, also continued as parties in the new action.

There were five petitions to intervene, two from environmental groups, two from Nebraska irrigation districts, and one from Basin Electric. The National Audubon Society and The Platte River Trust¹² sought to intervene to protect wildlife and wildlife habitat in Central Nebraska. The Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District moved to intervene as downstream water users in Nebraska.¹³ Basin

¹¹ Wyoming Answer to Pet., Mot. for Leave to File Countercl. and Countercl. (Mar. 18, 1987) ("Wyo. Answer and Countercl.") (Docket Item No. 5).

¹² The Platte River Trust was established in 1978 by Basin Electric Power Cooperative under the terms of an agreement settling litigation concerning the construction of Grayrocks Dam in Wyoming. The Trust's mandate is to preserve Platte Basin habitat for migratory birds.

¹³ See generally: Mot. of Platte River Trust for Leave to Intervene as Pl. And Mem. in Supp. of Mot. and Compl. in Intervention (Mar. 20, 1987) (Docket Item No. 7); Mot. of the National Audubon Society for Leave to Intervene or to Participate as Litigating *Amicus Curiae* and Br. in Supp. of Mot. for Leave to Intervene or to Participate as Litigating *Amicus Curiae* (Mar. 23, 1987) (Docket Item No. 8); Mot. of Basin Electric Power Cooperative for Leave to Intervene and Mem. in Supp. of Mot.

Electric sought to protect its water rights in the Laramie River, a key tributary, associated with the Grayrocks Dam and Reservoir, operated in conjunction with Basin's large coal-fired power plant. I denied all the motions to intervene at the start of the case but permitted all the petitioners to participate actively as *amici*, including filing briefs and making oral presentations at hearings. Seventh Mem. of Special Master (Apr. 1, 1988)(Docket Item No. 60). Basin Electric has been an active player throughout and ultimately became a party for the purpose of litigating the Laramie River issues in this action,¹⁴ playing an important role both during its tenure as *amicus* and later as a party. Audubon was active for several years but drifted away some time ago. The two Nebraska power districts have been small players all along. The Platte River Trust has continued to play an active role as *amicus* and has offered useful comments on the settlement package now before the Court.

Wyoming moved for summary judgment on September 11, 1987, on all the issues raised by Nebraska's petition. The theory proffered by Wyoming was that, although Nebraska had accurately represented Wyoming's developments and proposed developments, Wyoming was not violating and was not threatening to violate the decree's express injunctions or limitations.¹⁵ I denied Wyoming's motion, finding that there were outstanding issues of material fact and filed my First Interim Report to the Court concerning the intervention motions and Wyoming's motion

and Answer (Apr. 13, 1987) (Docket Item No.14); Joint Mot. of Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District for Leave to File a Joint Compl. in Intervention and for Leave to Intervene as Pls., Joint Compl. in Intervention and Br. in Supp. of Joint Mot. for Leave to File a Joint Compl. in Intervention and for Leave to Intervene as Pls. (Apr. 15, 1987) (Docket Item No. 16).

¹⁴ *Supra.*, at 3.

¹⁵ Mot. of The State of Wyoming for Summ. Judgment and Br. in Supp. of Mot. (Sept. 11, 1987) (Docket Item No. 23).

for summary judgment.¹⁶ The Court received and filed my report.¹⁷

In 1988, Nebraska moved to amend its pleadings to seek injunctions against Wyoming, Colorado, and the United States prohibiting further depletions in order to protect wildlife habitat along the North Platte and Platte Rivers in Nebraska.¹⁸ The Court summarily denied Nebraska's Motion.¹⁹

During the 1990 irrigation season, my assistant, Saône B. Crocker,²⁰ and I took a week to view operations on the North Platte, to meet with parties and stakeholders and to verse ourselves in the operations of the federal projects and the areas of major dispute, including wildlife habitat areas. We subsequently made two additional field trips to the North Platte and Platte River Basins with the parties.

Following extended discovery and regular status conferences, I submitted my Second Interim Report to the Court on April 9, 1992. The immediate impetus for that report was a round of summary judgment motions by all of the parties.²¹ Nebraska also sought, for the first time, an

¹⁶ First Interim Report (June 14, 1989) (Docket Item No. 140).

¹⁷ Letter from Francis J. Lorson, Esquire, Chief Deputy Clerk of the Supreme Court, entering the Notice of Receipt and Filing of First Interim Report Of Special Master (June 26, 1989) (Docket Item No. 143).

¹⁸ Mot. to Amend Pet. for an Order Enforcing Decree and for Injunctive Relief (Jan. 11, 1988) (Docket Item No. 47).

¹⁹ *Nebraska v. Wyoming*, 485 U.S. 931 (1988).

²⁰ This is the right place to acknowledge the vital role that Ms. Crocker has played in this case, both for me and for the parties. One of my earliest and soundest decisions was to secure her services. In this respect I echo the kudos extended to Ms. Crocker by Special Master Paul Verkuil, who also benefited from Ms. Crocker's dedication and considerable gifts in *New Jersey v. New York*, No. 120, Original, Final Report of the Special Master at 17 n.9 (Mar. 31, 1997).

²¹ Wyoming's Second Mot. for Summ. Judgment and Br. in Supp. (Feb. 28, 1991) (Docket Item No. 294); Colorado's Mot. for Partial Summ.

apportionment of non-irrigation season flows for a number of uses, including fish and wildlife habitat.²² Following briefing and argument on the summary judgment motions in June of 1991, several of the *amici* filed renewed petitions to intervene,²³ which I again denied. My second report addressed the summary judgment motions, Nebraska's petition for a non-irrigation season apportionment, and the renewed intervention petitions. The parties briefed their exceptions, the Court held oral argument and then overruled the exceptions and issued an opinion setting forth the legal standards for this action and narrowing the issues for trial. *Nebraska II*, 507 U.S. 584 (1993).

The Court's 1993 opinion was a major turning point in this case. First, the Court established a Wyoming water right priority of December 6, 1904, for storage in the Inland Lakes, a component of the Bureau of Reclamation's North Platte Project, thereby resolving that question in favor of the United States and Nebraska. *Id.* at 595. Second, the Court

Judgment (Feb. 22, 1991) (Docket Item No. 292); Nebraska's Mot. for Partial Summ. Judgment (Mar. 1, 1991) (Docket Item No. 296); United States' Mot. for Summ. Judgment on The Inland Lakes (Mar. 5, 1991) (Docket Item No. 297).

²² Nebraska's Mot. to Recommend an Apportionment of Non-Irrigation Season Flows and Br. in Supp. Of Mot. (Mar. 13, 1991) (Docket Item No. 301); Mot. for Leave to File Amended Pet. for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims, Amended Pet. for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims and Br. in Supp. of Amended Pet. for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Oct. 9, 1991) (Docket Item No. 407).

²³ Mot. of Platte River Trust for a More Active Litigation Role or Recons. of the Issue of its Intervention (Aug. 9, 1991) (Docket Item No. 387); *Amicus Curiae* National Audubon Society's Petition for Recons. of Mot. for Leave to Intervene and Br. in Supp. of Pet. for Recons. (Aug. 2, 1991) (Docket Item No. 382); Mot. of The Central Nebraska Public Power and Irrigation District for Leave to Intervene as Pl., Compl. in Intervention, and Mem. in Supp. of Mot. for Leave to Intervene as Pl. (Aug. 2, 1991) (Docket Item No. 384).

ruled that Laramie River flows, while not “affirmatively apportion[ed]” in 1945, were counted, and that, therefore, Wyoming could not freely dewater the Laramie as it claimed, rejecting both Wyoming’s claim that the Laramie River had been completely apportioned between Wyoming and Colorado in the 1922 Laramie River Decree and Nebraska’s claim that some Laramie River flows were apportioned in the 1945 North Platte Decree. *Id.* at 597. The Court explained:

Since 1945, Laramie flows that actually have reached the North Platte have been included in the equitable apportionment, but neither Nebraska nor the United States has requested that Wyoming account for diversions above the confluence. *Id.*

The Court also ruled that the issue whether Wyoming could construct a new storage reservoir on Deer Creek, a tributary in Wyoming, could be tried in this action. *Id.* at 599-602. In addition, the Court ruled that there were no absolute ceilings under the 1945 decree on diversions to Nebraska state line canals taking water in the pivotal reach, thereby disposing of that issue in favor of Nebraska. *Id.* at 603.

With great impact on future developments in the case, the 1993 Court also addressed both the legal standards governing this case and the scope of this action. The Court explicitly opened the case to modification as well as enforcement issues, short-circuiting much debate that had taken place among the parties concerning whether the Court had granted Nebraska leave to seek a modification of the decree. The Court ruled that, while Nebraska “need not show injury” to the extent it merely sought *enforcement* of the 1945 decree, in order to *modify* the decree Nebraska “must make a showing of substantial injury to be entitled to relief.” *Id.* at 592-93. The Court identified both the Laramie

River and Deer Creek issues as Nebraska modification claims. *Id.* at 592.

The 1993 opinion motivated the parties to step up efforts to settle. Not only did it narrow the issues for trial and decision, but, by laying out the legal standards, it forced the parties, in particular Nebraska, to take a hard look at the evidence assembled during an intense discovery phase following the Court's ruling. Shortly thereafter, the Court summarily denied Nebraska's motion to file an amended petition for an apportionment of non-irrigation season flows and for the assertion of new claims.²⁴

2. Phase II: Issues Consolidated And Continuing Settlement Talks (1994-1995). In 1994, I submitted my Third Interim Report to the Court on the parties' motions to amend their pleadings. Third Interim Report on Motions to Amend the Pleadings ("Third Interim Report") (Sept. 9, 1994). The Court issued another opinion and this action reached a critical new juncture, as the Court consolidated the issues for trial and brought groundwater issues and federal storage water administration into the case. *Nebraska III*, 515 U.S. 1. After the 1995 opinion the scope of the case had essentially gelled. Moreover, by defining most of the outstanding claims as claims for modification of the 1945 decree, the 1995 opinion very likely catalyzed more intense settlement talks.

The Court permitted Nebraska to amend its pleadings to encompass three counts. The first concerned Wyoming's alleged depletion of natural flows by the addition of storage capacity on the tributaries and the pumping of hydrologically connected groundwater wells. Third Interim Report at D-2-7. Nebraska's other counts urged,

²⁴ Letter from Francis J. Lorson, Esquire to the Special Master, entering the Court's Order to Deny The State of Nebraska's Mot. for Leave to File Amended Pet. for an Apportionment of Non-Irrigation Season Flows and for The Assertion of New Claims (Apr. 26, 1993) (Docket Item No. 535).

respectively, that the United States was operating Glendo Reservoir in violation of the decree and that the Laramie River's contributions to the North Platte below Wheatland were a component of the equitable apportionment of the natural flows in the pivotal reach of the North Platte. *Id.* at D-7-12. For the second time, the Court denied Nebraska leave to seek an equitable apportionment of the non-irrigation season flows of the North Platte. 515 U.S. at 13. The Court agreed with my proposal to hear evidence on a broad array of downstream interests in the context of Nebraska's first count, including evidence of injury to wildlife and wildlife habitat. *Id.* at 20-22.

The Court permitted Wyoming to amend its pleadings to substitute three counterclaims and four cross-claims. The Court, however, did not permit Wyoming to substitute its first amended counterclaim against Nebraska and its related cross-claim against the United States, which would have essentially replaced the 1945 scheme of proportionate allocation of natural flows in the pivotal reach with beneficial use limitations on Nebraska's irrigators. Wyoming's second and third counterclaims and cross-claims sought, in the alternative, either injunctions against alleged violations by Nebraska and the United States in Glendo storage water uses or elimination of the restrictions in Paragraph XVII of the decree on those uses. *See* Third Interim Report at 64-65. The Court also permitted Wyoming to amend its pleadings to substitute its fourth counterclaim and fifth cross-claim to reform Paragraph V of the decree respecting the procedures for determining reservoir evaporation and carriage losses and to substitute its fourth cross-claim against the United States concerning the operation of federal reservoirs and the administration of federal storage water contracts. *Id.* at 67-68.

The 1995 opinion was another major milestone in the case. First, it defined the issues that would go to trial if not

settled. Second, it opened the door to consideration of evidence beyond the scope of the 1945 apportionment, specifically on wildlife issues. Third, Nebraska was allowed to introduce evidence of depletions from hydrologically connected groundwater wells. Fourth, the Court continued to confine the apportionment to irrigation season flows. Fifth, the actions of the Federal Government in the context of its storage water contracting were brought squarely into the case. Finally, it was manifest after 1995 that Nebraska's case necessarily would be almost entirely one for modification of the 1945 decree instead of for decree enforcement.

3. Phase III: Intensified Settlement Efforts (1995-1998). The parties intensified their efforts to settle following the 1995 opinion. On September 18, 1996, I granted a joint motion for a three-month stay of all proceedings to focus on settlement. Joint Mot. for Three-Month Stay of All Proceedings (Sept. 18, 1996) (Docket Item No. 920). Following a hearing in January 1997, and a progress report on the settlement discussions, I extended the stay, ordering all parties to submit progress reports by the end of March 1997. Preparations for trial and pre-trial orders proceeded simultaneously with settlement discussions.

The settlement talks were encouragingly productive. At a status conference in September 1997, the parties moved for acceptance of settlement stipulations on four discrete issues and those stipulations have been merged into the total settlement package that is now before the Court. They include a stipulation on procedures for Wyoming storage accounting under Paragraph II (b) of the 1945 decree (Paragraph II(e) of the Modified Decree), a stipulation amending the 1953 order on permissible uses of Glendo storage water, a stipulation amending the 1945 decree's method of calculating reservoir evaporation and river carriage losses, and a stipulation providing for the

modification of Pathfinder Reservoir to reclaim storage capacity lost to historic sedimentation. United States' Mot. for Expedited Consideration and Acceptance of Four Settlement Stipulations (Sept. 10, 1997) (Docket Item No. 993). Settlement negotiations on other issues continued as the parties concurrently prepared for trial. In June 1998, Nebraska, Wyoming and the United States agreed to a further stipulation relating to the allocation of federal storage water during periods of shortage.²⁵ That stipulation, executed on December 18, 1998, is also included in the settlement package.²⁶

4. Phase IV: This Action Confirmed As Almost Entirely One For Modification And Movement Toward Trial (1998-1999). The final milestone in this action before trial or settlement involved a flurry of dispositive motions brought at the end of 1998 under the terms of my pre-trial order. Wyoming filed a motion to dismiss counts I and III of Nebraska's amended petition and a motion for summary judgment.²⁷ I denied these motions with prejudice. They were based, at bottom, upon Wyoming's assertion that Nebraska was attempting to clothe a modification case as an enforcement case.²⁸ Because the Court in both 1993 and

²⁵ Letter from Andrew F. Walch and Charles W. Findlay Enclosing the Final Version of the "Stipulation Among the State of Wyoming, the State of Nebraska and The United States Relating to the Allocation of Water During Periods of Shortage." (June 30, 1998) (Docket Item No. 1191).

²⁶ Letter from Andrew F. Walch re A Fully Executed "Stipulation Among the State of Wyoming, the State of Nebraska, and the United States Relating to the Allocation of Water During Periods of Shortage." (Dec. 18, 1998) (Docket Item No. 1309).

²⁷ State of Wyoming's Mot. to Dismiss Pursuant To Fed. R. Civ. P. 12(b)(1) and (12)(b)(6) and Mot. for Summ. Judgment Pursuant to Fed. R. Civ. P. 56(c) (Oct. 6, 1998) (Docket Item No. 1261).

²⁸ Br. in Supp. of Wyoming's Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and Mot. for Summ. Judgment Pursuant to Fed. R. Civ. P. 56(c) (Oct. 6, 1998) (Docket Item No. 1261).

1995 had unequivocally opened the door to potential modification, and since Nebraska's evidence had not been presented, I determined that Nebraska should have its day in court.

At the same time, Nebraska was pressing a creative thesis that this case was, after all, an enforcement action, not a modification action, because Nebraska was seeking injunctions "in aid of the existing apportionment."²⁹ This came several months after Nebraska had filed a motion to bifurcate the proceedings, hoping to try first "threshold issues" concerning which elements of its case were enforcement issues and which were modification issues.³⁰ After briefing and a hearing on June 4, 1998, I denied the motion to bifurcate without opinion. Order (June 10, 1998) (Docket Item No. 1180). The motion lacked merit because both the 1993 and the 1995 opinions had already drawn the map on which issues would be modification issues and which enforcement issues. Such a bifurcated proceeding would, therefore, have been redundant and only cause delay.

To press this point, in my memorandum decision on Wyoming's motions to dismiss and for summary judgment, I mapped out the case that would be tried in order to put an end to "conceptual anarchy."³¹ I advised Nebraska that its putative case for modification of the decree in aid of the

²⁹ Nebraska's Resp. to the State of Wyoming's Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and Mot. for Summ. Judgment Pursuant to Fed. R. Civ. P. 56(c) at 5 (Dec. 5, 1998) (Docket Item No. 1303).

³⁰ State of Nebraska's Mot. to Bifurcate Proceedings and Br. in Supp. Thereof (Apr. 23, 1998) (Docket Item No. 1142).

³¹ Eighteenth Mem. of Special Master on the State of Wyoming's Mot. to Dismiss and Mot. for Summ. Judgment at 27 (May 7, 1999) (Docket Item No. 1365).

apportionment would invoke the substantial injury test that the Court had set out in 1993 for a modification case.³²

In March of 1999, I finally permitted Basin Electric to intervene as a party for the limited purpose of protecting its interests in the Laramie River, where it operates the Grayrocks Reservoir and its associated electric generating station. Order (Mar. 26, 1999) (Docket Item No. 1348). I found that Basin Electric was no longer adequately represented by any of the parties as it was then “caught in the crossfire of litigation theories and strategies between the parties.”³³ Had this action gone to trial, Basin Electric would have played a key role on the Laramie River issues, which became important after the 1993 Court opened the door to possible relief for Nebraska on the lower Laramie. *Nebraska II*, 507 U.S. at 597-98.³⁴

During this period the United States moved to dismiss, on ripeness grounds, Nebraska’s claims concerning threatened developments on the Laramie and Deer Creek tributaries and for summary judgment with respect to the proposed Corn Creek project on the Laramie.³⁵ I denied the

³² *Id.* at 28-29.

³³ Seventeenth Mem. of Special Master on Pet. to Intervene of Basin Electric Power Cooperative at 3 (Apr. 2, 1999) (Docket Item No. 1352).

³⁴ The 1978 Agreement of Settlement and Compromise was signed by several parties, including the United States, Nebraska and Basin Electric, but not by Wyoming. The text of that agreement is attached to Wyoming’s 1987 Mot. for Summary Judgment. (See Docket Item No. 23.)

³⁵ United States’ Mot. to Dismiss Nebraska’s Claims Relative to Tributary Development on the Basis of Ripeness and Br. in Supp. Thereof (July 1, 1998) (Docket Item No. 1193). Wyoming’s proposed Corn Creek project would have pumped water near the confluence of the Laramie and North Platte Rivers. It would have included several components, including a surface-water diversion system, a pump station, an offstream storage reservoir, and a pipeline distribution system. It would have irrigated lands currently used for dryland farming and grazing in Wyoming. See Sixteenth Mem. of Special Master on the

United States' motion to dismiss based on principles adopted by this Court in 1945. *Nebraska I*, 325 U.S. at 607-10. After analyzing ripeness concerns, the 1945 Court concluded "where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination." *Id.* at 610. However, I granted the United States' motion for summary judgment on Corn Creek. With respect to the Laramie River, there had been an important development since the 1993 opinion. Basin Electric had secured from Wyoming a secondary water permit ensuring that releases from Grayrocks would be protected to the mouth of the Laramie. As Wyoming was not a party to the 1978 Agreement of Settlement and Compromise,³⁶ there had always been a question in this case whether Wyoming water users would be obligated to respect its terms under Wyoming State law.³⁷ Thus, the secondary permit was a breakthrough, removing any argument that Nebraska would be substantially injured if Corn Creek were constructed since Nebraska was a signatory to the 1978 settlement agreement, which spelled out in detail the consequences that would ensue from that project's construction. *See Sixteenth Mem.* at 26, 31.³⁸

United States' Mot. to Dismiss and Mot. for Summ. Judgment at 5-6, 7 (Mar. 26, 1999) ("Sixteenth Mem.") (Docket Item No. 1347).

³⁶ The 1978 Agreement of Settlement and Compromise (1978 Settlement Agreement) was the settlement reached in *Nebraska v. Basin Electric*, 78-1775 (D. Neb.).

³⁷ *See* Second Interim Report at 65-67 (Docket Item No. 463). Earlier Wyoming had repeatedly refused to assure Nebraska and Basin Electric on the record that its water users would be constrained by the 1978 Settlement Agreement.

³⁸ Basin Electric filed a Motion for Summary Judgment against Nebraska on all Laramie River issues, which I denied on November 24, 1999. *See* Basin Electric Power Cooperative's Mot. for Summ. Judgment Against Nebraska on All Laramie River Issues (June 4, 1999) (Docket Item No. 1390).

5. Phase V: Final Trial Preparation (1999-2000). By the end of 1999 the issues were joined and the parties were actively preparing for trial scheduled to open on May 10, 2000, all the while continuing their settlement talks on a parallel track. It took thirteen years of effort to get to the point of trial readiness, but this was not a film in slow motion. At all times, counsel for the parties have worked diligently to define and prepare their cases and have provided unstinting support to the office of the Special Master with a view to submitting the case to the Court in either a post-trial or settlement posture. As this abbreviated procedural history shows, however, this action has been highly complex, as western water cases are wont to be, involving many parties and stakeholders and multiple issues. Each phase of this action has been critical in reaching a historic settlement.³⁹

IV. THE SETTLEMENT

In a dramatic moment at the start of trial, on May 10, 2000, the parties to this case announced that in the late hours of the previous night they reached an agreement in principle settling all remaining issues. Accordingly, I granted the parties' joint motion for a six month stay to document the complex elements of their settlement and to confer with their stakeholders. After an extended stay of proceedings, the accompanying hefty settlement package was presented to me on March 15, 2001.

³⁹ Original jurisdiction water cases have often been lengthy affairs. See *Kansas v. Colorado*, __ U.S. __, 121 S. Ct. 2023, 2032 (2001) (“Despite the diligence of the parties and the Special Master, over 15 years have elapsed since the complaint was filed.”).

During the course of hearings⁴⁰ scheduled to flesh out the settlement, the parties detailed the technical and legal bases for their agreement and answered written as well as oral questions about how the settlement was fashioned to resolve the litigation equitably and to provide a workable regime for future North Platte River operations. The settlement package the parties presented is manifestly a product of give and take that honors the Court's 1945 admonition that "mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." *Nebraska I*, 325 U.S. at 616 (quoting *Colorado v. Kansas*, 320 U.S. 383, 392 (1943)). The parties reported that they made the necessary compromises to their litigation positions, "not because they thought their positions were wrong or weak, but in the spirit of trying to get a conclusion of this settlement package." Tr. of Proceedings of Apr. 12, 2001, at 11. Thus, they unanimously urge that I recommend that the Court approve their settlement package as a whole, including all of its numerous and interdependent parts.

If approved by the Court, the Final Settlement Stipulation would result in dismissal with prejudice of "all claims of any party to this case against another party" and waive and forever bar "[c]laims for which leave to file was or could have been sought in this case with respect to activities or conditions occurring before the effective date of this

⁴⁰ At the time of the March 19, 2001 hearing federal review of the settlement was ongoing and so the settlement documents had not yet been signed by the United States. Tr. of Proceedings of Mar. 19, 2001, at 40 (Docket Item No. 1649b). The United States had approved and signed the settlement by the time of the subsequent April hearing. Tr. of Proceedings of Apr. 12, 2001, at 67 (Docket Item No. 1677a). The United States also administered the very final touch on September 19, 2001, when it joined the other parties in approving a technical correction of the settlement package.

stipulation.”⁴¹ Like the Court’s 1945 decree, the Modified Decree would contain a reopener provision. The proposed catch-all retention of jurisdiction in Paragraph XIII (f) for “[a]ny change of conditions making modification of the Modified Decree or the granting of further relief necessary or appropriate” would, in the view of the parties, have application only to changes of conditions, “that occur after entry of the Modified Decree.” As it is solely prospective, it does not conflict with the dismissal of the parties’ claims with prejudice.

The settlement incorporates the Court’s final rulings in its 1993 and 1995 opinions in this case and resolves the issues that were framed for trial by the pleadings and the Court’s two opinions. Thus, the settlement recognizes the priority date of December 4, 1904, set by the Court’s 1993 determination that the Inland Lakes in Nebraska are an integral part of the Bureau of Reclamation’s North Platte Project. *Nebraska II*, 507 U.S. at 593-95. The settlement also adheres to the Court’s 1993 determination that certain state-line canals serving Nebraska irrigators are not subject to absolute ceilings or other restrictions on the quantities of water they may divert. *Id.* at 602-03; *Nebraska III*, 515 U.S. at 10-11.

The advantages of consensual resolution over trial afforded the parties opportunities to address water administration concerns and to craft solutions to problems beyond the legal issues in the case. The outcome is thus both consistent with the Court’s rulings and compatible with the parties’ practical needs more than a half century after the 1945 decree and fourteen years after Nebraska’s 1986 petition to reopen the proceedings.

⁴¹ The Stipulation excepts only possible use of pre-settlement matters as affirmative defenses in future proceedings. Final Settlement Stipulation, I. C.-D.

Basic structural components of the Court's 1945 decree are preserved in the settlement even while technical and administrative procedures are added to address the concerns that have arisen over time. In addition to preserving the natural geographic segments of the North Platte identified by Special Master Doherty and the Court,⁴² the parties have addressed concerns within the "pivotal" forty-three mile fourth section of the River from Whalen Diversion Dam in Wyoming to Tri-State Diversion Dam, just one mile downstream of the state line in Nebraska.⁴³ In this section are found the headgates of the large canals diverting for Wyoming and Nebraska irrigators that collectively place a total irrigation demand on the river as great "as in the entire preceding 415 miles from North Park to Whalen" and a total consumptive use far exceeding that of the upper sections combined. *Nebraska I*, 325 U.S. at 604.

In 1945 the Court adopted Special Master Doherty's recommendation in apportioning the natural flow in the pivotal reach, during the May 1 to September 30 irrigation season, 25% to Wyoming and 75% to Nebraska and in imposing injunctions against Colorado and Wyoming that have the effect of limiting upstream water uses to protect natural flows into that 25%-75% regime. In the first River section and its tributaries in North Park, Colorado, the 1945 decree imposed on Colorado limitations on irrigated acreage, water storage, and transbasin diversions, and, in the second and third sections, the decree imposed comparable limitations on Wyoming. The injunctions entered against Wyoming in section two, from the Colorado–Wyoming State

⁴² *Nebraska I*, 325 U.S. at 593. *See also supra*, at 9.

⁴³ Generally, in marking the division between the River's third and fourth sections the parties and the Court have referred interchangeably to Whalen Diversion Dam and the Bureau of Reclamation's Guernsey Dam and Reservoir, a short distance upriver from Whalen. That practice is also followed in this report except when specific differentiation of those two points in the River is required.

line to Pathfinder Reservoir, covered both the mainstem and tributaries, but the Court agreed with Special Master Doherty that section three, from Pathfinder Reservoir to Whelan, Wyoming, required limits only on uses of the mainstem and not the less significant tributaries joining the river in that section. The Special Master had concluded that, “the run-off of the tributaries becomes so far exhausted before any shortage of water occurs in the main river that any regulation of the tributary diversions would be of no material benefit.” *Id.* at 624.⁴⁴

**A. Protecting Upstream Flows Into The
“Pivotal” River Section**

Nebraska perceived unacceptable gaps in the upriver injunctions against Colorado and Wyoming. While Nebraska did not formally challenge the existing injunctions constraining Colorado’s uses in the high-altitude headwaters, the settlement negotiations with Wyoming focused on crafting additional protections of flows moving toward the apportioned pivotal reach – protections that in the end go far beyond the limited injunctions contained in the 1945 decree. Nebraska, Wyoming and Basin Electric also negotiated a compromise filling a void respecting the Laramie River tributary, which to all intents and purposes was ignored in the 1945 proceedings.

1. **Colorado.** As indicated, the parties have agreed that the 1945 injunctions against Colorado in the first River section need not be changed. The Modified Decree, therefore, continues the existing limits, enjoining Colorado from irrigating more than 145,000 acres in North Park during

⁴⁴ As indicated below, those tributaries have been brought into the comprehensive settlement package that is now before the Court.

any irrigation season,⁴⁵ from storing more than 17,000 acre feet of water in any water year, and from exporting out of the North Platte Basin more than 60,000 acre feet of water in any period of ten years, reckoned in continuing progressive series. Modified Decree, para. I.⁴⁶

2. Colorado State Line To Pathfinder And Pathfinder to Guernsey. The only 1945 decree limitation that remains unchanged in these North Platte reaches is the injunction barring Wyoming from storing more than a total of 18,000 acre feet of water for irrigation in the River's second section in any water year, exclusive of the Kendrick Project's Seminole Reservoir. Modified Decree, para. II(e).⁴⁷

The Modified Decree will continue to impose irrigated acreage limitations, but these will be more expansive than the 1945 decree's limitations. In addition to increased acreage limitations, the Modified Decree will impose new, simultaneously operating injunctions on total water consumption from irrigation uses during the irrigation season. The increased acreage limitations and the new consumptive use limitations will take account of irrigation

⁴⁵ This limitation was 135,000 acres in 1945. The 1953 Glendo stipulation added 10,000 acres. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

⁴⁶ The Final Settlement Stipulation recites that Colorado's consent to the settlement is not an admission "that any measures undertaken by any other party would be reasonable or appropriate within Colorado." Final Settlement Stipulation, para. I.B.

⁴⁷ The settlement resolves a dispute over Nebraska's claim that Wyoming's accounting for the permitted storage in section two above Pathfinder, required by paragraph IX of the 1945 decree, was inadequate and incomplete. The parties' September 12, 1997 stipulation (*supra*, at 18) resolved that dispute by Wyoming's undertaking to follow detailed procedures in measuring and reporting estimated annual water storage above Pathfinder. The stipulation is attached as Appendix D to the Final Settlement Stipulation.

by storage water⁴⁸ and by pumping of hydrologically connected groundwater wells, as well as surface water diversions. The new limitations will extend even to non-irrigation uses of certain past and future Wyoming water rights transfers from irrigation to non-irrigation uses.

The new acreage limitations for sections two and three of the River will be expanded to include the tributaries below Pathfinder that were omitted from the 1945 decree's coverage, and the combined limitation for both sections for the first ten years after entry of the Modified Decree will be 226,000 acres. Modified Decree, para. II(c). The enlargement from the 1945 decree's 168,000 acres to the new total of 226,000 acres is accounted for by two factors: the coverage of tributary acreage between Pathfinder and Guernsey Reservoirs and the addition of lands irrigated solely by water sources other than surface water diversions. After ten years of administration under the Modified Decree, Wyoming is to designate separate acreage limitations for these two sections of the River as long as the total for both does not exceed the 226,000 acre maximum. Wyoming will make this division in its sole discretion, the Court will be notified of the separate acreage limitations, and the Modified Decree will then to be amended accordingly. *Ibid.*⁴⁹

⁴⁸ This refers to storage by Wyoming, not to storage water in the federal reservoirs.

⁴⁹ Wyoming has made it clear, however, that the parties do not intend to accomplish a decree modification without order of the Court: "[A]s a practical matter, what we contemplated is that that notice to the Court would be in the form of a joint motion to modify the Decree and some action of the Court would be required." Tr. of Proceedings of Apr. 12, 2001, at 115. The contemplated decree changes for both acreage and consumptive use limitations (discussed below) will involve the application of scientific principles and engineering practices and, therefore, will not involve the application of legal or equitable rules that are the particular province of courts. *Id.* at 117-19.

The newly imposed consumptive use limitations in sections two and three will limit Wyoming's future total irrigation consumption in any ten consecutive years, reckoned in continuing progressive series, to no more than the "largest amount of water consumed for irrigation . . . in any ten consecutive year period between 1952 and 1999, inclusive." Modified Decree, para. II(a)-(b). The parties have agreed upon technical determinations fixing the initial ten year consumptive use limit for section two of the River, above Pathfinder (exclusive of the Kendrick Project)⁵⁰ at 1,280,000 acre feet and fixing the ten year limit for section three, below Pathfinder, at 890,000 acre feet. *Ibid.* They have further agreed:

"that after ten years of administration, accounting and reporting under this injunction, the methodology and the ten consecutive year limit will be reviewed . . . pursuant to the procedures approved and adopted in the Final Settlement Stipulation to determine if there is a better methodology for calculating the largest amount of water consumed for irrigation in such ten consecutive year period and for determining compliance." *Ibid.*⁵¹

Upon future agreement by Nebraska, Wyoming and the United States on a revised methodology and revised

⁵⁰ The Bureau of Reclamation's Kendrick project, which serves acreage near Casper, Wyoming, holds relatively junior priority Wyoming water rights. Under the settlement the project remains partially suspended until an adequate water supply becomes available and certain other conditions are satisfied. Final Settlement Stipulation, para. VII.

⁵¹ There should be no incentive for either Wyoming or Nebraska to attempt to make the future ten year limit either higher or lower as the same methodology that fixes the highest ten year number from the past will be employed to determine future compliance. Tr. of Proceedings of Apr. 12, 2001, at 34-38.

consumptive use limits, the parties will notify the Court and the Modified Decree will then be modified accordingly. Modified Decree, para. II(a)-(b).

Both the revised irrigated acre limitation and the new consumptive use limitations will, for the first time, expressly take account of irrigation water sources in addition to surface water diversions.

With respect to groundwater pumping, the Court's 1995 decision allowed Nebraska to add a case for injunctive relief against Wyoming's depletion of groundwater sources found to be hydrologically connected to the North Platte River and its tributaries. *Nebraska III*, 515 U.S. at 14-15. The settlement negotiations, therefore, specifically addressed that groundwater pumping concern, and the parties agreed on a definition of a "hydrologically connected groundwater well" as a well "so located and constructed that if water were intentionally withdrawn continuously for 40 years, the cumulative stream depletion would be greater than or equal to 28% of the total groundwater withdrawn by that well." NPDC Charter, Ex. 4, para. III.D.2.b.⁵²

In determining compliance with the 226,000 irrigated acre limitation, the settlement includes in the limitation acres irrigated solely by pumping of hydrologically connected groundwater wells, acres irrigated solely by stored water, and "equivalent" acres administratively determined to have formed the basis of certain water rights transfers from irrigation to non-irrigation uses after the 1945 decree.⁵³

⁵² In response to questioning at the hearing on April 12, 2001, the parties explained that the 28% stream depletion element of the test referred to that percentage of total water withdrawn from a well, not taking account of return flows. Tr. of Proceedings of Apr. 12, 2001, at 50-51.

⁵³ More precisely, "equivalent" acres are acres "found by order of the Wyoming State Board of Control to have been historically irrigated and that formed the basis for the transfer of water rights . . . from an irrigation use to another use." Modified Decree, para. II(c)(5)-(6). For the newly

In a comparable manner, for the purpose of determining compliance with the new consumptive use limitations, irrigation consumption from pumping hydrologically connected groundwater wells, from stored water,⁵⁴ and from water consumed for non-irrigation uses under water rights transferred from irrigation uses after the 1945 decree are added to consumption from surface water diversions. The total irrigation consumption so calculated for any ten consecutive year period for sections two and three may not exceed the ten consecutive year consumptive use limitations fixed for those sections. *Id.*, para. II(a)-(b).

3. Lower Laramie River. The settlement resolves significant Laramie River issues framed by the Court's 1993 opinion. *See supra*, at 15. The Laramie, the largest tributary joining the North Platte within the pivotal reach, originates in northern Colorado and flows northward into Wyoming where it joins the North Platte a short distance downstream of Whalen Diversion Dam.⁵⁵ One task for the parties in the course of the Laramie negotiations was to weave into the settlement fabric the earlier 1978 Settlement Agreement reached by Nebraska, Basin Electric and other parties resolving litigation that challenged Basin Electric's proposal

covered tributaries in section three, equivalent acres include only those resulting from transfers after January 1, 2001. The number of equivalent acres counted for a given year may be reduced proportionately to the extent actual diversion and use of the transferred water is less than that allowed by the transfer orders. *Id.*

⁵⁴ The storage water to be taken into account in section two above Pathfinder Reservoir is Wyoming storage within the annual 18,000 acre foot limit in Paragraph II(e) of the Modified Decree, and that to be taken into account in section three is Wyoming storage in tributary reservoirs between Pathfinder Dam and Guernsey Reservoirs. *Id.*, para. II(a)(2) & II(b)(2).

⁵⁵ The Laramie River down to and including the Wheatland Project was previously apportioned between Wyoming and Colorado in 1922. *Wyoming v. Colorado*, 259 U.S. 419 (1922).

to construct its power plant and Grayrocks Reservoir. In that earlier settlement Basin Electric agreed to abide by specified water consumption limitations and to guarantee specified minimum flows from Grayrocks Reservoir to the mouth of the Laramie during both the irrigation and non-irrigation seasons. Wyoming was not a party to that earlier litigation or to the 1978 Settlement Agreement. *See supra*, at 22 and note 36.

Consistent with the Court's 1993 opinion, the settlement addresses Laramie flows only downstream of Wheatland Irrigation District's Tunnel No. 2, excluding the Wheatland Irrigation District lands. Within the remainder of the lower Laramie the Modified Decree enjoins Wyoming from permitting diversions for the irrigation of more than 39,000 acres during any one irrigation season.⁵⁶ Following the pattern of the irrigated acreage limitations in sections two and three of the North Platte, the Laramie acres to be counted include acres irrigated by surface diversions of natural flow, acres irrigated solely by stored water, acres irrigated solely from hydrologically connected groundwater wells,⁵⁷ and "equivalent acres" based on water rights transferred to non-irrigation uses after January 1, 2001. Modified Decree, para. II(d).⁵⁸

An early, vexing Laramie issue involved Wyoming's claim that it lacked legal authority to assure that its water users would not interfere with the minimum flows released by Basin Electric under its 1978 Settlement Agreement with

⁵⁶ Unlike in sections two and three of the North Platte, the Modified Decree imposes no parallel irrigation consumptive use limitation on the lower Laramie River.

⁵⁷ The definition of hydrologically connected groundwater wells is the same as for sections two and three of the main river. *See supra*, at 31.

⁵⁸ As with the North Platte, the counting of equivalent Laramie acres is qualified by a proviso allowing reduction of the equivalent transfer acres to the extent actual water diversion and use are less than that allowed by the transfer orders. *Id.*, para. II(d)4.

Nebraska. *See Nebraska II*, 507 U.S. at 598; *see supra*, at 22 and note 36. That problem was finally resolved when, during the course of this litigation, Basin Electric obtained from the Wyoming State Engineer a “secondary permit” protecting Grayrocks’ required flow releases as storage releases not available for diversion between Grayrocks Reservoir and the Ft. Laramie gauge, thus helping to assure that during the irrigation season those releases will reach the North Platte’s pivotal reach. The settlement takes the next step and requires Wyoming to protect these storage releases administratively to ensure their delivery to the North Platte River. Final Settlement Stipulation, para. V.B., NPDC Charter, Ex. 3. During the non-irrigation season, when the apportionment regime does not operate, the releases are nonetheless protected and “distributed either under state law or gravity to the downstream users.” Tr. of Proceedings of Mar. 19, 2001, at 34.

In many other respects the settlement will adjust water rights administration in the lower Laramie to protect its contribution to the North Platte’s pivotal reach and beyond into Nebraska. Important elements of that new order are Wyoming’s agreements to shelve permanently the long percolating – and at times seemingly moribund -- 15,000 acre Corn Creek Project and to eliminate large capacity surface pumps near the Laramie’s mouth currently operated by the Goshen Irrigation District. *See Nebraska II*, 507 U.S. at 596-98. *See also supra*, at 22. Wyoming has agreed, within three years of the Court’s approval of the settlement, to acquire and cancel the water rights of the Corn Creek Project and the water supply obligations of Basin Electric to the Corn Creek Project, and to acquire the water rights and facilities associated with Goshen’s pumps and seek administrative changes under state law allowing that water to flow downstream and supplement the natural flow in the pivotal reach. Final Settlement Stipulation, para. VI.

As Basin Electric is not a party to the North Platte Decree Committee (discussed below), the settlement documents provide that the water administration of the Lower Laramie River relating to Basin Electric's water rights cannot be amended in any respect without the consent of both that Committee and Basin Electric. *See* Final Settlement Stipulation, para. V.B.; NPDC Charter, Ex. 3, para. VIII.

B. Administering The Apportionment In The North Platte Pivotal Section

The 1945 Decree's 25%-75% apportionment in the pivotal reach was a linear concept in that it addressed only natural flow in the mainstem. In the settlement, by contrast, the parties have adopted a geometric concept, broadening the apportionment's coverage to enfold other Wyoming water withdrawals within what they have characterized as "triangle" zones or systems. Two different sized "triangles" are delineated by the Whalen Diversion Dam on the west, the Wyoming-Nebraska state line on the east, and connecting squiggling lines drawn with reference to the Ft. Laramie Canal on the south and the Interstate Canal on the north. Those canals divert at Whalen Diversion Dam and then meander generally easterly as they move water by gravity flow gradually away from the River and each other, delivering water first to irrigators in Wyoming and then far beyond the state line into Nebraska. Although the geometry is untidy (the former Wyoming State Engineer admitted that the shape is more "alligator mouth" than triangle), the idea of "triangles" is a useful way to describe the hydrologic zones below the canals envisaged by the parties. *Tr. of Proceedings of Apr. 12, 2001, at 74.*

Thus, the sweep of the apportionment on Wyoming's side of the pivotal reach will be broadened to include diversions from tributaries and drains within the smaller of

the two triangles formed by connecting Whalen Diversion Dam and the Wyoming-Nebraska state line by opposing lines meandering along the courses of the Fort Laramie and the Interstate Canals, excluding the basins of the Laramie River (treated above) and Horse Creek.⁵⁹ The included tributary and drain diversions will be administered and accounted as Wyoming diversions of pivotal reach natural flow unless their resulting depletions are replaced by Wyoming. Modified Decree, para. V(a). The settlement package sets forth detailed technical procedures for determining the amounts of such depletions and specifying the manner of their replacement. NPDC Charter, Ex. 11. This new regime is to be implemented in the first full irrigation season beginning two years after the Court approves the Final Settlement Stipulation and enters the Modified Decree. *Id.* at para. B.3.c.

The settlement also extends the apportionment's coverage to irrigation season depletions from groundwater wells with water right priorities dating between the 1945 Decree and December 31, 2000,⁶⁰ that are located within the larger triangle formed by connecting Whalen Diversion Dam and the Wyoming-Nebraska state line by meandering opposing lines 300 feet south of the Fort Laramie Canal and one mile north of the Interstate Canal. All post-decree groundwater wells within that second triangle are covered as

⁵⁹ Horse Creek is a small North Platte tributary rising in Wyoming that passes through part of the "triangle" before crossing the State line and entering the North Platte in Nebraska downstream of the Tri-State Diversion Dam. The Horse Creek basin surface waters, like surface waters in the Laramie basin, are excepted from the Modified Decree's tributary and drain provisions. There is no exception to the groundwater provisions of the Modified Decree, discussed below, for wells located inside the triangle portion of the Horse Creek basin. *Id.* at 70-73.

⁶⁰ Irrigation wells with rights antedating the 1945 Decree are to be administered by Wyoming without regard to the Modified Decree and the Final Settlement Stipulation. NPDC Charter, Ex. 10, B. 1-2.

the hydrologic connection test employed in the upper North Platte's sections does not apply. Tr. of Proceedings of Apr. 12, 2001, at 62. As stated in the Modified Decree:

To the extent the pumping of such wells results in depletions to the North Platte River between Whalen Diversion Dam and the state-line or to the portions of tributaries described in paragraph V(a) between May 1 and September 30, such depletions shall be replaced or the pumping shall be regulated to prevent such depletions, unless the depletions occur when the natural flow in the Guernsey Dam to Tri-State Diversion Dam reach exceeds irrigation demands in that reach.

Modified Decree, para. V(b). Pursuant to the procedures adopted by the parties, "[t]he replacement water requirement for the pumping of individual active ground water irrigation wells with priority dates on or between October 8, 1945 and December 31, 2000 will be 24.4 acre-feet per well" unless that number is modified by the parties. NPDC Charter, Ex. 10, C.1.a.; *see* Modified Decree, para. V(c).

Irrigation diversions by new triangle wells with water right priorities dating after December 31, 2000, give rise to a unit replacement obligation of 80 acre feet per well unless a specific new well applicant obtains a variance from the NPDC. The NPDC may grant such variance if prescribed technical criteria are demonstrated. NPDC Charter, Ex. 10, C.2.c.i.⁶¹

⁶¹ Nebraska and Wyoming have agreed only on the annual unit replacement number -- 80-acre feet per well -- for post - 2000 water right wells. They have not agreed on the conceptual foundation that underlies that number, particularly whether it takes account of depletions outside of

When replacement water obligations are triggered for groundwater wells, the replacement water must be made available during the next ensuing irrigation season between Whalen Diversion Dam and the state line when natural flow is insufficient to meet the demands of Wyoming and Nebraska irrigators diverting at or above Tri-State Dam. *Id.* at B.7.

C. Federal Reservoir Operations And Storage Water Contracts

Paragraph XII(b) of the 1945 decree states that federal water storage rights are “not affected” and, further, that it does not “in any way interfere with the ownership and operation” of federal storage facilities. *See Nebraska I*, 325 U.S. at 671. This reassurance to the Bureau of Reclamation came as the Court rejected Wyoming’s plea to have storage water as well as natural flow included in the apportionment. *Id.* at 638-40. Although Special Master Doherty thought storage water availability might bear on the States’ equities, the Court concluded that “the equities of the case support the failure to include storage water.” *Id.* at 639.

Despite Paragraph XII(b)’s reassurance, the propriety of the Bureau’s storage water administration entered this case. The Court’s 1995 opinion opened the door to Wyoming’s claims that the Bureau’s storage allocations were unlawful and, during years of shortage, were undermining the apportionment. *Nebraska III*, 515 U.S. at 15-22. As the distribution of storage water in accordance with contracts was a *predicate* of apportionment, the Court concluded Wyoming had alleged significant injury and a cognizable claim. *Id.* at 19.

the irrigation season. That dispute could become problematic when the NPDC revisits per well replacement obligations for new wells under the settlement’s technical procedures. NPCDC Charter, Ex. 10, C.2.c.i.

To resolve this problem the United States has made key contributions to the settlement by adjusting federal storage water deliveries from both the North Platte Project and Glendo Reservoirs. Going beyond addressing its alleged violations, the United States also participated in finding a potential solution to the controversy between Nebraska and Wyoming over proposed new Wyoming storage capacity on the Deer Creek tributary. A modification of Pathfinder Reservoir to increase its storage capacity became a potential alternative source for Wyoming municipal supplies in place of the proposed reservoir on Deer Creek.

1. *Pathfinder Reservoir Modification.* To resolve the Deer Creek controversy, the parties entered into a stipulation agreeing to pursue a different project that would eliminate Wyoming's need for the reservoir. That new project will increase the storage capacity of the Bureau's Pathfinder Reservoir by approximately 54,000 acre feet and thereby recapture storage space lost to sedimentation since Pathfinder began operations. This will be achieved by raising the elevation of Pathfinder's spillway approximately 2.39 feet through the installation of an inflatable bladder or some other means. The resulting additional storage will accrue to special accounts maintained to meet Wyoming's municipal water objectives, to meet Wyoming water replacement obligations under the Modified Decree, and to serve as a Wyoming contribution for endangered species in Central Nebraska on behalf of Wyoming's existing water users, including those of the federal storage water contractors located in Wyoming and Nebraska.

The proposed project contemplates that Wyoming will have the exclusive right to contract with the Bureau for 20,000 acre feet of the Pathfinder Modification's new capacity and that approximately 34,000 acre feet of the new capacity will accrue to a special environmental storage account to benefit endangered species. Pathfinder

Modification Stipulation, para. 3. Detailed procedures have been agreed upon for the administration of these new Pathfinder accounts, specifying how they will accrue water and be assessed evaporation losses as equal priority partners with other Pathfinder Reservoir uses. *Id.* at para. 2.a. & c., 3.a. & c.

Upon the completion of the proposed Pathfinder Modification Project, Wyoming is to release its Deer Creek Army Corps of Engineers Section 404 permit and related water rights and to transfer 470 acres of Wyoming-owned habitat lands in Central Nebraska to the U.S. Fish and Wildlife Service or other entities designated by the Service, while Nebraska is to dismiss related litigation, *Jess v. West*, No. 88-1-308 (D. Neb.). *Id.* at para. 10.

There are administrative hurdles to be cleared in order to realize the Pathfinder Modification. The Stipulation acknowledges that implementation requires both federal and state authorizations, including approval by the Wyoming State Legislature for the export of water downstream to Nebraska for environmental purposes, analysis under the National Environmental Policy Act, and consultation under the Endangered Species Act. *Id.* at para. 4. Although the parties have made no provision for a failure to construct the project for any reason, they have affirmed that project failure, for whatever reason, will not vitiate their settlement.⁶²

2. Allocation Of North Platte Project Storage Water During Periods Of Shortage. Wyoming's 1994 cross claims alleged that the United States was violating the 1945 apportionment by allocating storage water in a manner that upset the equitable balance upon which the 1945 apportionment was based, that resulted in the allocation of natural flow contrary to the apportionment, and that

⁶² Tr. of Proceedings of Apr. 12, 2001, at 139-41.

promoted inefficiency and waste contrary to federal and state law. Those Wyoming claims were resolved by the Allocation Stipulation dated December 17, 1998, signed by Wyoming, the United States, and Nebraska.⁶³ That stipulation prescribed a method for the Bureau of Reclamation to allocate North Platte Project storage water between its Wyoming contractors and its Nebraska contractors during shortage, designated “allocation years.” It also revised storage water accounting to create incentives to conserve water. Over two years later, in the Final Settlement Stipulation, the parties seized upon a further opportunity, provided by the allocation regime, to adopt additional measures to cope with allocation year shortages.

Under the new regime the Bureau will identify allocation years by determining the amount of water stored for the North Platte Project, assessing probable inflow conditions, and then comparing forecasted total water supply against an irrigation season demand of 1,100,000 acre feet. The process starts at the beginning of each water year in October, and, as additional data become available, the Bureau advises on a monthly basis on the potential need to declare an allocation year. An allocation year is formally triggered on the first release of Guernsey or Pathfinder storage ownership for diversion above Tri-State Dam if the supply forecast at that time is less than 1,100,000 acre feet. Allocation Stipulation, para. 1.

This regime’s core function in an allocation year is to allocate available storage water between the Bureau of Reclamation’s Wyoming and Nebraska North Platte Project contractors and not to address the intra-state division among

⁶³ Appendix E to the Final Settlement Stipulation titled “Stipulation Among the State of Wyoming, the State of Nebraska, and the United States Relating to the Allocation of Water During Periods of Shortage.”

either State's contractors.⁶⁴ If all of one State's contractors decline to take water not used by one of its contractors, however, the Bureau, in consultation with appropriate state officials, may allocate the unused water to the other State's contractors. Allocation Stipulation, para. 6.

Wyoming's complaints of inefficiencies and waste were grounded on allegedly flawed incentives built into historic storage water allocation practices. First, Wyoming argued that irrigators were calling for excessive storage water deliveries, knowing that the percentage of the water they were using would be employed to calculate their entitlements in water short years. Tr. of Proceedings of Apr. 12, 2001, at 15. Second, there was no meaningful incentive to save water because any water unused by a contractor at the end of a water short year would simply go into a general pool instead of being carried forward for the benefit of the saving contractor. *Id.* To address these problems, the Allocation Stipulation provides that, upon the occurrence of consecutive allocation years, any Bureau contractor may carry over to the succeeding allocation year the greater of its remaining balance from the previous year or the water saved during the current year. Allocation Stipulation, para. 7.

The Final Settlement Stipulation adopted a "spin-off" of the 1998 allocation year forecast mechanism. The United States and the other parties realized that the forecasting of shortages through the Allocation Stipulation process could also be used as a trigger for certain water rights administration measures. Tr. of Proceedings of Apr. 12, 2001, at 21. Accordingly, two such measures were added to

⁶⁴The water supplies initially to be allocated are specifically identified with the total being allocated 18.1% to Wyoming contractors and 81.9% to Nebraska contractors. Subsequent allocations are made weekly of a technically determined "system increase," which is divided 18.5% to Wyoming contractors and 81.5% to Nebraska contractors. Allocation Stipulation, Technical App. at 10.

the settlement. The first provides for automatic priority calls for the benefit of certain Bureau reservoirs before the irrigation season begins whenever the Bureau advises that there “is likely to be” an allocation year. The Wyoming State Engineer is then obligated to determine whether the automatic calls are valid and warrant regulation of upstream junior water rights. The Wyoming Engineer’s refusal to honor such calls, however, cannot be grounded in the Modified Decree, the Final Settlement Agreement, or the Settlement’s procedures. Final Settlement Stipulation, para. III. The second measure establishes ceilings on diversions under senior water rights whenever priority calls are in effect.⁶⁵

The Final Settlement Stipulation also requires Wyoming, during the irrigation season in an allocation year, to limit total mainstem direct flow diversions for irrigation purposes in the Pathfinder to Guernsey Reservoir reach to a maximum of 6,600 acre feet for each two week period. Counted toward that ceiling are water transfers of irrigation rights to non-irrigation uses approved by the Wyoming State Board of Control after January 1, 2001. *Id.*, para. III.c.

3. *Glendo Dam And Reservoir.* Glendo Reservoir, constructed by the U.S. Bureau of Reclamation in section three of the River just upriver from Guernsey Reservoir, has become a Bureau workhorse for numerous water relocation and re-regulation functions in addition to storing water for irrigation uses in Wyoming and Nebraska. In this action, both Nebraska and Wyoming claimed that the other, along with the Bureau, violated the 1953 Glendo decree modification’s use restrictions. Nebraska Pet., Count II,

⁶⁵ Senior diversions are limited to one second foot per 70 acres. However, when Guernsey Reservoir has filled but Glendo Reservoir has not, diversions with priorities senior to 1945 between Pathfinder and Guernsey Reservoirs are allowed up to two second feet per 70 acres. *Id.*, para. III.B.

Wyoming Cross-Cl. II. The modification had restricted Nebraska's use of its 25,000 acre foot contract allocation to irrigation uses in Western Nebraska and Wyoming's uses of its 15,000 acre foot allocation to irrigation uses in Southeastern Wyoming. *Nebraska v. Wyoming*, 345 U.S. 981 (1953). The two States and the Bureau ultimately determined that Glendo's forty-year plus operating history had shown the 1953 use restrictions to be unnecessary and an actual impediment to efficient uses of Glendo storage water. Accordingly, on April 5, 1998, the parties entered into a settlement stipulation, resolving their Glendo claims and requesting that I recommend that the Court remove those use restrictions.⁶⁶

The Modified Decree will free Nebraska and Wyoming to make use of their Glendo allocations anywhere within the Platte River Basin for any beneficial purposes,⁶⁷ including as a substitute or supplement for storage water obtained under other contractual arrangements. Modified Decree, para. XVII(c). Should Wyoming desire to use any of its Glendo storage water above Glendo Reservoir, by exchange or other means, however, it can do so only on the condition that, for every two acre feet diverted above Glendo, Wyoming arranges for timely release of an additional acre foot of Wyoming's Glendo water through the reservoir to the North

⁶⁶ The 1998 Glendo Stipulation is attached to the Final Settlement Stipulation as Appendix C.

⁶⁷ There is an apparent inconsistency between subparagraphs (b) and (c) of Paragraph XVII of the Modified Decree respecting whether Wyoming may make out-of-state uses of its contract amount of 15,000 acre feet annually. While subparagraph (b) states that its allocation may be used "for any beneficial purpose in Wyoming within the Platte River Basin," subparagraph (c) accords each state "unrestricted use of its respective storage allocation in Glendo Reservoir, so long as the use is below Glendo Reservoir and within the Platte River Basin." Subparagraphs (e) and (f) of Paragraph XVII, however, clearly establish Wyoming's right to use its allocation in Nebraska to satisfy environmental obligations or "for fish and wildlife purposes." *Id.*, para. XVII(f).

Platte River.⁶⁸ These additional storage releases are then considered natural flow subject to the 25%-75% apportionment unless they are released to satisfy requirements of federal environmental laws or for fish and wildlife purposes. In these latter events, the additional releases are not considered to be natural flow and are administered and protected as storage water releases within both Wyoming and Nebraska until the water is used for the intended purposes. Modified Decree, para. XVII (d)-(e).

The Modified Decree will also specifically confirm the Bureau's authority to continue past practices in using Glendo's large 340,000 acre foot relocation and re-regulation space flexibly in accordance with Glendo's Wyoming water permits. Tr. of Proceedings of Apr. 12, 2001, at 99. As stated in paragraph XVII(g) of the Modified Decree, "[t]he United States Bureau has the discretion to hold water in Glendo Reservoir in excess of the limitations stated in paragraph XVII(b) in accordance with the operation of the reregulation space in Glendo Reservoir" for, among other things, supplementing the natural flow that is available for apportionment pursuant to Paragraph V. Modified Decree, para. XVII(g).

D. Administering The Modified Decree

1. *The North Platte Decree Committee.* As part of the settlement, the parties seek Court approval of the chartering of the North Platte Decree Committee (NPDC) by Nebraska, Wyoming, Colorado and the United States to assist in

⁶⁸ An example offered to explain how this would work posited that if Wyoming wishes to use 100 acre feet above Glendo, Wyoming would have to call for 150 acre feet so that 50 acre feet could be released downriver. The impetus for requiring the downriver releases is the need to replace water that would otherwise have been expected to accrue to the River as return flows had the water been diverted below Glendo Reservoir. Tr. of Proceedings of Apr. 12, 2001, at 92-94.

monitoring, administering and implementing the Modified Decree.⁶⁹ In many respects this new entity formalizes the very organizational structure the parties utilized to settle the case. That experience taught that the NPDC might facilitate the resolution of future controversies and reduce the likelihood of future resort to the Court. The United States voiced a shared sentiment:

We think the NPDC is a great step forward. . . . [I]t's an institution that will help the parties resolve a great number of disputes informally among themselves without the need for judicial involvement and . . . will make for smooth relations among the states and smooth administration of the river.

Tr. of Proceedings of Mar. 19, 2001, at 51-52.

The NPDC had its genesis in annual natural flow and storage ownership accounting meetings that Wyoming, Nebraska and the Bureau have held for many years. Individuals who have participated in that annual process ultimately took the lead in working through the issues in this case and negotiating the technical approaches and administrative procedures required for their resolution. Much of the credit for the successful outcome is given to "The Gang of Six," made up of two principal negotiators each for Nebraska, Wyoming, and the United States. The Gang of Six included no lawyers.

The NPDC Charter, complete with its fifteen exhibits, has been presented as an integral part of the settlement

⁶⁹ Basin Electric is not a party to the NPDC Charter, but the Charter provides protection for Basin's interests by requiring Basin's consent to any modification to Charter Exhibit 3 dealing with water administration of the Lower Laramie River and with Basin's water rights. NPDC Charter, Art. V.A.10.

package. The exhibits, for the most part, deal with the technical administration of the provisions of the Final Settlement Stipulation and the Modified Decree. The NPDC is empowered to monitor irrigated acreage and consumptive uses in Wyoming, the reporting of which is required of Wyoming. The NPDC is given extensive powers to retain needed technical, engineering and clerical personnel, and to engage in studies and data collection and analysis relating to water supplies, stream flows, diversions, withdrawals, consumption, depletions, return flows, and storage and use of the waters of the North Platte River system. Power is even given to revise and supplement the procedures in the Charter's exhibits and to adopt new procedures as long as they are consistent with the Modified Decree, the Final Settlement Stipulation, the Charter, and applicable state and federal law.

While tasks and responsibilities assigned to the NPDC are extensive and important, its authority to take action or make decisions is carefully circumscribed. A negative vote by a representative of Nebraska, Wyoming or the United States prevents NPDC approval of any action or decision, and a negative vote by Colorado prevents the approval of any action in which Colorado has an "actual interest," as defined in the Charter. NPDC Charter, Art. IV.D. & III.H. The Charter's special provisions respecting Colorado betoken Colorado's lesser involvement and the much more extensive articulation of rights and obligations among Nebraska, Wyoming and the United States.⁷⁰

The NPDC is given critical but limited dispute resolution functions. Paragraph XIII of the Modified Decree obliges

⁷⁰ Another manifestation of Colorado's lesser NPDC role is the fact that the office of chairperson rotates only among the other three parties to the Charter. NPDC Charter, Art. II.D. It is also noteworthy that neither Colorado nor Basin was represented in the famous Gang of Six, but they were invited to participate on elements related to their interests

the parties to submit their disputes to the NPDC “before a party may seek leave of the Court to bring such dispute before the Court,” even though the Court “retains jurisdiction, upon a proper showing, to adjudicate all matters for which authority or responsibility is granted to” the NPDC. If the dispute cannot be resolved by the NPDC, it then decides whether to refer that dispute to alternative dispute resolution proceedings. Under the Charter’s voting provisions, however, a party cannot be forced into alternative dispute resolution, much less binding arbitration, without its consent. NPDC Charter, Art. VII.C.

2. Adjudication Of Wyoming Water Rights. The Final Settlement Stipulation obliges Wyoming, within five years after Court approval, to adjudicate unadjudicated Wyoming permitted surface and groundwater rights that directly pertain to the settlement. Final Settlement Stipulation, para. IV A-B. New groundwater permits in the Whalen to state-line section granted subsequent to the Court’s approval must be adjudicated within ten years after being permitted. With good reason, Wyoming regards this last formal state law step in proving up water rights as one that serves Wyoming’s interests, providing it with key information. That information tells Wyoming, as well as the other parties, which merely “paper” water rights may be cleared out and which firmed-up water rights need to be taken into account in administering the settlement. Tr. of Proceedings of Apr. 12, 2001, at 75-79.

3. Reservoir And Storage Evaporation And River Carriage Losses. An early and valued success of settlement negotiations was the parties’ agreement on revised methodologies for computing and assessing reservoir evaporation and transportation losses.⁷¹ The existing

⁷¹ Ascertaining water losses from reservoir evaporation and stream carriage is required for various administrative functions, among them

methodologies, set forth in Paragraph V of the 1945 decree, will be replaced by newly agreed methodologies spelled out in exhibits to the NPDC Charter. NPDC Charter, Ex. 8 & 9. Including these as part of the Charter subjects them to possible modification by the NPDC without further order of the Court, an outcome that is not inappropriate in light of the technical nature of the task and the Charter's requirement of unanimity in order to effect changes.⁷²

4. *De Minimis Uses.* The parties have, for the first time, agreed upon express *de minimis* exclusions from the Modified Decree's coverage for small ponds and wells not used for irrigated agriculture and for miscellaneous uses of less than 50 acre feet annually for a single project, other than stock watering, domestic, or irrigated agriculture. Modified Decree, para. XII(f).

V. WILDLIFE AND ENVIRONMENTAL COMPLIANCE

In the Nineteenth Century, the Big Bend Reach of the Platte and the North Platte in Nebraska, "two miles wide and one inch deep," *Nebraska I*, 325 U.S. at 593, was highly

separating natural flows from federal storage water. The complexity of such determinations – and the impossibility of absolute precision in making them – is evidenced by the settlement's technical correction mechanism to be used when the accounting and tracking system indicates "negative natural flow at Orin." NPDC Charter, Ex. 7. The Orin river gauge in Wyoming is approximately two days' water travel time below Gray Reef Reservoir.

⁷² It is noteworthy that evaporation and transportation loss methodologies set forth in Paragraph V of the 1945 decree were to be employed "unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula." *Nebraska I*, 325 U.S. at 667. The decree language suggests that the parties' unanimous agreement on another methodology would have sufficed to replace the one set forth in the 1945 decree.

useful to both man and beast. Platte historian Merrill Mattes wrote of its “broad avenue . . . made to order for ox- or mule-drawn covered wagons,”⁷³ but it was also well-suited for the annual migrations of sandhill cranes, the now endangered whooping cranes, and numerous other bird species. The shallow, braided channels and open expanses provided migrating birds with rich and secure habitat and open views of approaching predators.

With the advent of human settlements and irrigated agriculture, however, the river began to change. Small early irrigation diversions in time became dramatically larger ones with the construction of the Bureau of Reclamation’s North Platte Project. The environmental *amici* in this case, The National Audubon Society and The Platte River Trust, claimed that the increased water withdrawals and the taming of flood surges allowed vegetation gradually to take hold, and the river channels began to narrow and the open feeding areas to shrink.⁷⁴ *See supra*, at 5. Fears of further harm brought opposition to further water withdrawals by projects such as Basin Electric’s power plant and reservoir on the Laramie, built only after the 1978 settlement assured some downriver flows for wildlife as well as for Nebraska’s irrigators. Similar concerns have been raised in the present proceedings by the environmental *amici*, as well as by Nebraska and the United States.

In 1995, the Court concurred on the need, in passing on Nebraska’s claims in this case, “to consider a broad array of downstream interests . . . and to hear evidence of injury not only to downstream irrigators, but also to wildlife and wildlife habitat.” *Nebraska III*, 515 U.S. at 12. Heightened national environmental sensitivities and new federal laws

⁷³ M.J. Mattes, *The Great Platte River Road* 6 (1969).

⁷⁴ *See* The Platte River Whooping Crane Critical Habitat Maintenance Trust, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985).

passed subsequent to the 1945 decree amply support the opportunity the Court afforded Nebraska to present a wildlife injury case. The United States, too, was determined to address the wildlife concerns of the United States Fish and Wildlife Service along with very different concerns of the Bureau of Reclamation. Wildlife issues would have been part of the trial had there been no settlement.

While the settlement's Pathfinder Modification⁷⁵ and Glendo⁷⁶ stipulations have the potential to provide some water flows for wildlife, at the end of the day the wildlife issues are being addressed systematically in another forum. Nebraska reported during the April 2001 hearing that the quest for wildlife habitat solutions was ongoing pursuant to a July 1997 cooperative agreement among the parties and other stakeholders and that wildlife concerns and settlement proceedings in this case were "truly on separate and parallel paths." Tr. of Proceedings of Apr. 12, 2001, at 106. The present goal in the cooperative agreement process is ultimately to protect and maintain 10,000 habitat acres in the Central Platte Basin and provide an annual 130,000 to 150,000 acre-feet of water to reduce shortages in the habitat area and meet the mandate of the federal Endangered Species Act. *Id.* at 107-14.

Even though the environmental issues are now being addressed elsewhere, *amicus* Platte River Trust has urged that the Court add a provision to the Modified Decree confirming that its provisions do not afford exemptions from the Endangered Species Act and other federal environmental laws.⁷⁷ The Trust's fear is that explicit language in the decree reciting the need to comply with environmental laws

⁷⁵ The Pathfinder Modification is discussed above at 39-40.

⁷⁶ The Glendo Stipulation is discussed above at 43-45.

⁷⁷ Mem. of Platte River Whooping Crane Habitat Maintenance Trust Commenting on Proposed Settlement at 17-18 (Apr. 9, 2001) ("Platte River Memorandum") (Docket Item No. 1671).

in connection with the Pathfinder Modification and Glendo might be invoked in support of contentions that the absence of like provisions in other settlement contexts indicates that in those other contexts federal environmental laws do not apply.

The parties unanimously oppose the Trust's suggestion as being both unnecessary and undesirable. While agreeing that the Modified Decree does not, in fact, grant implied exemptions from environmental laws, they contend that the decree as written cannot reasonably be interpreted to the contrary as the Trust fears. At best, the parties regard the addition the Trust seeks to be superfluous, but the United States went further in worrying that the change proposed by the Trust "may create an implication that any decree by the Supreme Court having application to the Federal Government would require such a statement in the decree that the Federal Government is subject to federal law." Tr. of Proceedings of Apr. 13, 2001, at 14-15.

Were the Court to rule that this or any other provision *must* be added, that would present the very real problem of securing unanimous agreement of the parties to alter their very complicated settlement package. Such a burden should not be lightly imposed. In this regard the Trust's proposal falls far short of the mark.

For these reasons, I do not recommend adoption of the Trust's suggested addition to the Modified Decree.

VI. CONSTITUTIONAL AND LEGAL CONCERNS

A. Article III And The Compact Clause

The settlement does not present the Article III problems that divided the Court in *New Hampshire v. Maine*, 426 U.S.

363 (1976). There, contrary to the Special Master's recommendation, a majority of the Court accepted a proposed consent decree resolving a state boundary dispute. The States, in settling their dispute, had interpreted a "middle of the river" boundary designation in a 1740 decree of King George II of England to mean, "the middle of the main channel of navigation," a legally suspect interpretation. 426 U.S. at 370-71. The question dividing the Justices was whether they should defer to the States' compromise. The Special Master believed that acceptance of the settlement would be inconsistent with the performance of the Court's Article III duty to decide, based on applicable legal principles, the precise boundary fixed by the 1740 document. The majority disagreed, ruling that Article III "does not proscribe the acceptance of settlements . . . that merely have the effect, as here, of reasonably investing imprecise terms with definitions that give effect to a decree that permanently fixed the boundary between the States." *Id.* at 369. The dissent agreed with the Special Master, contending that Article III obliged the Court to fix the boundary "in accordance with legal principles, not by agreements of convenience." *Id.* at 371.

Even under the premise of the *New Hampshire v. Maine* dissent, the parties here cannot plausibly be charged with asking the Court to put its imprimatur on an attempt to circumvent relevant legal principles. The central task is not the correct application of purely legal principles because Nebraska was granted leave to make a showing of substantial injury, potentially warranting "a reweighing of equities and an injunction *declaring new rights and responsibilities.*" *Nebraska II*, 507 U.S. at 593 (emphasis added). There is nothing in the dissent to suggest that a consensual resolution by agreement on different and additional North Platte injunctions presents an Article III problem or raises any other constitutional issue in the "mutual accommodation" that the Court in 1945 endorsed as what should, "if possible,

be the medium of settlement, instead of invocation of our adjudicatory power.” *Nebraska I*, 325 U.S. at 616.

A problem analogous to that in *New Hampshire v. Maine* might have been presented had the settlement in this case failed to respect the Court’s prior legal rulings—for example, the Court’s 1993 determination that the Inland Lakes in Nebraska have a lawful 1904 Wyoming water right. That, however, the settlement does not do. On the contrary, the parties meticulously incorporated the Court’s legal rulings into the settlement and then resolved the remaining issues as they were framed by the pleadings and by the Court’s 1993 and 1995 opinions.

A second contention in *New Hampshire v. Maine* was that it would violate the Compact Clause, Art. I, Sec. 10, cl.3, for the Court to accept the consent decree without independently assessing the validity of the underlying legal principles. 426 U.S. at 369. That contention was summarily rejected by the Court based on prior opinions limiting the application of the Compact Clause to “the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.” *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). The Court perceived no such tendency in the boundary settlement between New Hampshire and Maine, and none exists in the proposed settlement of the contending claims to the waters of the North Platte. It cannot reasonably be argued in either circumstance that there is any tendency to the “increase of the political power or influence of the States affected [that] encroach[es] . . . upon the full and free exercise of Federal authority.” *Id.* at 520. Indeed, given that the constitutional concern is for the supremacy of the Federal Government, it is telling (though, of course, not dispositive) that the United States is both a party to this case and a co-architect of the settlement. The Solicitor General of the United States has

reviewed the proposed settlement and concluded that it does not create problems under either Article III or the Compact Clause. *See* Tr. of Proceedings of Mar. 19, 2001, at 51. That conclusion is sound in light of the Court's rulings in *Virginia v. Tennessee* and *New Hampshire v. Maine*.

B. Chartering The North Platte Decree Committee

Finally, the creation of the NPDC does not present the constitutional concerns that moved the Court to decline to appoint a second special master in *Vermont v. New York*, 417 U.S. 270 (1974). There the proposal was that a "South Lake Master" be appointed by the Court to "police the execution" of a consent decree settling pollution claims impacting Lake Champlain and Ticonderoga Creek and to "pass on to this Court his proposed resolution of contested issues that the future might bring forth." 417 U.S. at 277. The Court decided that the role it was being asked to perform through such a master "would materially change the function of the Court in these interstate contests," causing it to act "more in an arbitral rather than a judicial manner." *Id.*

By contrast, the powers to be conferred on the NPDC, while substantial, are of an entirely different order than those proposed to be given a South Lake Master in *Vermont v. New York*. Not only is the NPDC a creature of the parties and not the Court, but it will have no power to police the Modified Decree and, while it is to play an initial role in facilitating consensual dispute resolution, it will not possess power to resolve disputes, to oblige parties to submit to binding arbitration, or to recommend resolutions to the Court. Its function, rather, is simply to assist the parties in administration and implementation in entirely non-coercive ways. Thus, the prospect of protracted Court supervision

over decrees and associated federalism concerns that underlay the Court's concerns in *Vermont* is not implicated.⁷⁸

Moreover, Paragraph XIII's imposition of an obligation to submit disputes to the NPDC "before a party may seek leave of the Court to bring such dispute before the Court" does not trigger Article III concerns that the Modified Decree might somehow operate as a limitation on the original jurisdiction of this Court. This is so because Paragraph XIII explicitly states that this Court "retains jurisdiction, upon a proper showing, to adjudicate all matters for which authority or responsibility is granted to" the NPDC. So, for example, were a party to violate the Modified Decree by not first submitting a dispute to the NPDC, the legal remedy would surely lie in a cause of action for breach against the party allegedly in violation, and this Court would not be bound to refuse to hear the case. The parties expressed this understanding of the meaning of Paragraph XIII in response to the question whether there was an intent to "deprive the Court of jurisdiction in this kind of setting":

No, I don't think so, Your Honor, and I can say I don't believe that was the parties' intent, that we did not feel we could define the Court's original jurisdiction, and we did not intend this as a matter of subject matter jurisdiction . . .

”

Tr. of Proceedings of Apr. 12, 2001, at 129-30.

⁷⁸ See Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 313 (4th ed. 1996) (referring to "evident political sensitivities and practical difficulties involved in enforcing a judgment against a state" and "[c]oncerns about enforcement" that "were visible in the Court's decision in *Vermont v. New York*").

VII. CONCLUSION AND RECOMMENDATION

The proposed settlement now before the Court promises greater certainty of water entitlements for all of the parties and a reduced likelihood of future litigation. The parties have resolved their clashing interpretations of the Court's 1945 decree and their conflicting views of the relevant facts by agreeing upon a settlement package that is fair, equitable and more workable at a practical level than is the existing regime on the River. I recommend, therefore, that the Court enter an order, in the form accompanying this report, approving the Final Settlement Stipulation, issuing the Modified Decree and dismissing with prejudice the parties' respective claims, counterclaims and cross-claims in this action.

It is noteworthy that in this case the parties ultimately did not seek to overturn the basic division of North Platte waters ordered by the Court in 1945.⁷⁹ Rather, their contending positions sought relief, by way of either enforcement or decree modification, to carry out their differing views of the full effect of that division. Likewise, in their settlement negotiations the parties worked to find common ground in devising administrative and technical solutions designed to carry out the 1945 apportionment scheme and not to transform it in fundamental ways.

That the parties did not frontally challenge the 1945 division is not to gainsay the breadth of the gulf that

⁷⁹ It must be noted, however, that Nebraska did make two attempts to expand the scope of the 1945 apportionment, both of which were summarily rebuffed by the Court. In 1988, the Court denied Nebraska's motion to amend its pleadings to seek injunctions against Wyoming, Colorado and the United States prohibiting further depletions to the North Platte to protect wildlife habitat. *See supra* at 13 and note 19. In 1991, Nebraska moved for an apportionment of non-irrigation season flows, which the Court denied in April, 1993. *See supra* at 13-14, 16, and note 24.

separated their litigation positions. At the extreme, as noted in this report, was the Nebraska contention that, “in-aid-of” Nebraska’s apportionment, the 1945 decree should be read to freeze Wyoming’s upstream depletions at 1945 levels, a position sharply contrasting with Wyoming’s claimed right to initiate new depletions at will so long as express injunctions in the decree are not transgressed. Nebraska approached creativity’s outer limits in arguing that specific numeric ceilings on Wyoming’s irrigated acreage should be read as also imposing absolute ceilings on Wyoming’s irrigation consumptive uses even though no reference is made to consumptive uses in the decree.

Against this backdrop, it is a singular achievement that Nebraska, Wyoming and the other parties to this action have succeeded in finding common ground on a global settlement. It nonetheless remains accurate to say that the proposed Modified Decree, with all of its new sophisticated administrative and technical accompaniments, still speaks to implementing, more accurately and more fairly, the Court’s basic 1945 scheme.

The settlement’s lynchpin is its resolution of the opposing claims of Nebraska and Wyoming, once again the principal North Platte protagonists. The two states have agreed upon specified and secure upstream irrigated acreage and consumptive use rights for Wyoming in exchange for more far-reaching and more comprehensive injunctions protecting Nebraska from uses exceeding Wyoming’s specified entitlements. A noteworthy component brings Wyoming’s hydrologically connected groundwater pumping into the settlement on a par with other irrigation water sources. Further, the two states have agreed that Wyoming’s withdrawals of water from the apportioned fourth river section must take account of tributary and drain diversions and groundwater pumping in proximity to the River along with canal diversions. These trade-offs are reasonable and

appropriate and entirely compatible with equitable apportionment principles, the basic 1945 scheme, and the Court's opinions in this case.

Colorado's concerns throughout the current proceedings focused on the prospect of future demands that might one day be made on its water users for the benefit of downstream wildlife and wildlife habitat. When the parties determined to address those wildlife issues in another forum, Colorado concentrated its attention in that forum while continuing to monitor these proceedings. Driven by those circumstances, the settlement appropriately leaves Colorado's water use rights as they were established in the 1945 decree.

Claims asserted by Wyoming and Nebraska against the United States were resolved by agreements to make substantial adjustments in Bureau of Reclamation storage water contracting and deliveries. Those changes will translate into greater flexibility in using federal storage water supplies and in the inauguration of a new regime for allocating storage water between the two States' contractors during periods of shortage. Those changes will enable vital storage water supplies to be administered in useful conjunction with natural flows under the terms of the Modified Decree.

The intervention of Basin Electric as a party in 1999 facilitated the resolution of thorny disputes over the contributions of the Laramie River tributary. Most important, Wyoming's revised water administration will finally accommodate secure implementation of the 1978 settlement agreement that enabled the construction and operation of Basin Electric's Grayrocks Reservoir on the Laramie. That final puzzle piece completed the work of folding the lower Laramie River's contributions into the apportionment regime.

My recommendation that the Court approve the entire settlement package is grounded in significant part on the

merits of the detailed rigorous implementing procedures that have been incorporated into that package. Data gathering, monitoring, and administering mechanisms will greatly enhance the parties' ability to live with the Modified Decree. The most promising of these mechanisms is the North Platte Decree Committee, which the parties have chartered to assist them in decree administration. The NPDC has the potential to aid the parties in many ways in accomplishing the necessary tasks to make the Modified Decree work, and it will assist them in resolving the future disputes that will surely arise. The parties are justified in their optimism that the NPDC will greatly reduce the likelihood of their future resort to the Court.

VIII. PROPOSED ORDER

I recommend that the Court issue the following Proposed Order.

Respectfully submitted,

Owen Olpin
Special Master

October 12, 2001

STATE OF NEBRASKA
v.
STATE OF WYOMING, et al.
No. 108, Original

[PROPOSED] ORDER

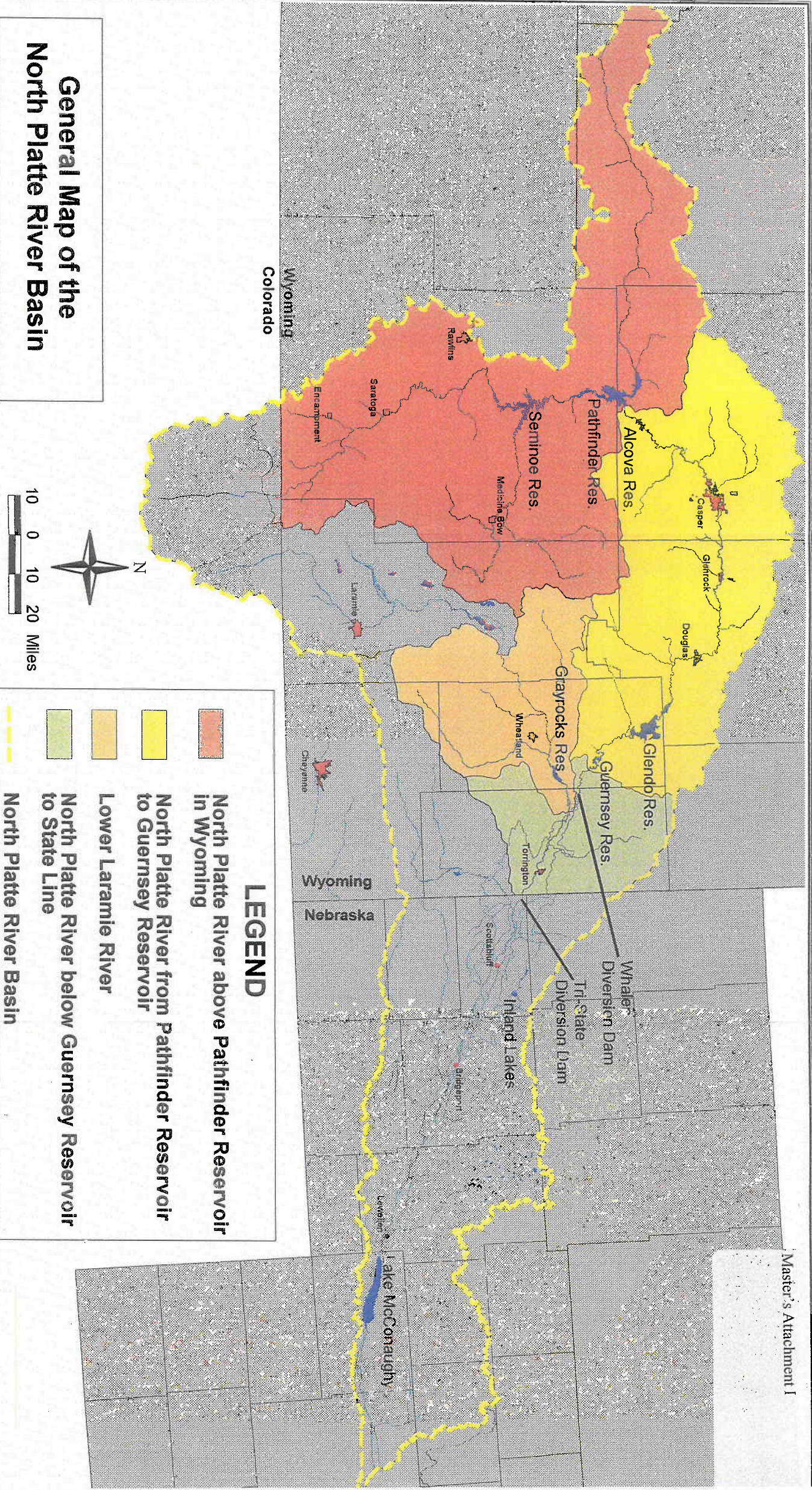
Decided _____

Order Entered _____

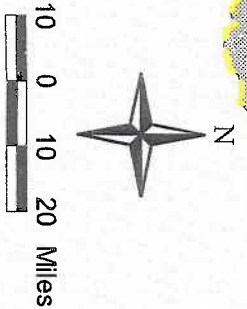
This cause, having come to be heard on the Final Report of the Special Master appointed by the Court, IT IS HEREBY ORDERED THAT:

1. The Final Settlement Stipulation executed by all of the parties to this case and presented to the Special Master on March 15, 2001, is approved;
2. The proposed Modified Decree submitted as Appendix A to the Final Settlement Stipulation is entered, replacing the decree originally entered in this case on October 8, 1945, as modified on June 15, 1953;
3. All claims, counterclaims and cross-claims brought in this case are hereby dismissed with prejudice; and
4. The parties shall share in the cost of this litigation in the manner that this Court shall order following the entry of the Modified Decree.

MASTER'S ATTACHMENTS



**General Map of the
North Platte River Basin**



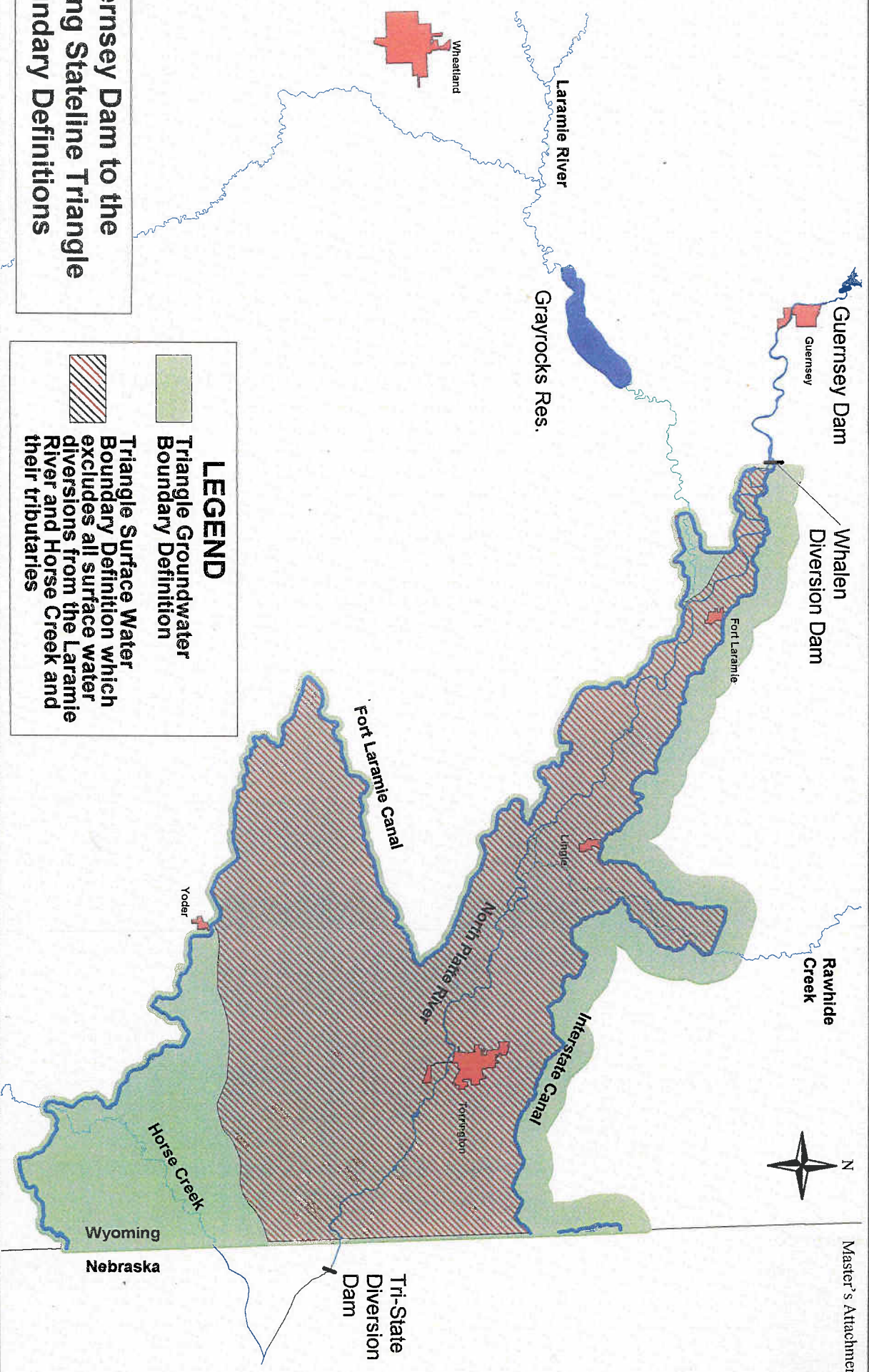
LEGEND

- North Platte River above Pathfinder Reservoir in Wyoming
- North Platte River from Pathfinder Reservoir to Guernsey Reservoir
- Lower Laramie River
- North Platte River below Guernsey Reservoir to State Line
- North Platte River Basin

Guernsey Dam to the Wyoming Stateline Triangle Boundary Definitions

LEGEND

-  Triangle Groundwater Boundary Definition
-  Triangle Surface Water Boundary Definition which excludes all surface water diversions from the Laramie River and Horse Creek and their tributaries



Master's Attachment II