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When states collide: Allocating the waters of the North Platte River

by Robert H. Abrams

State of Nebraska

v.

State of Wyoming, et al.
(Docket No. 108, Original)

Argument Date: January 13, 1993

This litigation comes to the United States Supreme Court as part of its constitutionally mandated original jurisdiction involving cases wherein one state sues a sister state. *See*, U.S. Const., art. III, § 2 and 28 U.S.C. § 1251(a). This particular head of jurisdiction has served as a vehicle for resolving competing claims of two or more states that share the beneficial use of the waters of an interstate river. The Court engages in what is termed an “equitable apportionment” of the contested waters.

This case involves the allocation of the waters of the North Platte River. The North Platte rises in the mountains of northern Colorado and then flows north along the eastern slope of the Continental Divide into Wyoming before taking a southeasterly course into Nebraska, where it eventually joins the Missouri River near Omaha. In 1945 the North Platte had, after eleven years of litigation, been the subject of a United States Supreme Court decree (“Decree”) making an equitable apportionment of the use of its waters among the three states, Colorado, Wyoming and Nebraska. The Decree had in it explicit terms relating to “changed conditions” and a “reopener” provision. The Court specifically retained jurisdiction of the controversy for the purpose of entering any “order, direction, or modification” of the 1945 Decree that the Court found was appropriate.

The current proceedings arose when Nebraska petitioned the Court in 1986 to enforce the Decree via injunctive relief directed to the upstream states and their water users. Wyoming answered and counterclaimed, seeking a change in the Decree. As is the norm in equitable-apportionment cases, the Court referred the matter to a Special Master, in this instance Owen Olpin, a private attorney. Olpin conducted several hearings and has, to this date, issued two “Interim Reports” to which the three affected states and the United States have taken objections. The case currently before the

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Court is intended to review and act on recommendations of the Special Master in light of the parties’ objections.

ISSUES

(1) Is Nebraska entitled to make non-irrigation-season diversions from the North Platte River that are stored in reservoirs and later used during the irrigation season without having that water “charged” against its apportioned share of the river’s irrigation-season waters?

(2) Is Wyoming permitted to divert water of the Laramie River that is tributary to the North Platte before that water reaches the North Platte River without violating the decreed obligation to leave a specific share of the North Platte’s irrigation-season flow for use downstream in Nebraska?

(3) Is Wyoming permitted to divert North Platte River water before it reaches that section of the North Platte that is subject to Nebraska’s specific call on the river, or is that water also subject to apportionment between Wyoming and Nebraska?

(4) Does Nebraska have a right to insist on the maintenance of a certain level of streamflow (supported primarily by return flow from upstream irrigation) in a segment of the North Platte River that was not specifically apportioned, where those flows were present and adequate to meet Nebraska’s entire set of claims at the time of entry of the 1945 Decree?

FACTS

As suggested by the unusual prefatory section of this Preview outlining the context of the controversy, the facts here are every bit as complicated as one might expect in a multi-party battle over the right to use the water of a major interstate stream in an arid portion of the nation. There is, simply stated, not enough water to support all of the uses that the states and the water users in the region wish to make, and the Court is obliged to apportion (or reapportion) these inadequate supplies in an equitable fashion.

The starting place for analysis in this case is the 1945 Decree and the accompanying United States Supreme Court opinion. The thrust of the earlier controversy was whether junior-in-time users in the upstream states (Colorado and Wyoming) were wrongfully depriving senior-in-time appropriators in Nebraska of North Platte waters. In previous equitable-apportionment cases, the Court had often stated in dicta that seniority of appropriation was not the only basis for apportioning water among the users of an interstate stream. In the 1945 Decree the Court finally acted upon those broader notions of equity.

Describing equitable apportionment as a flexible doctrine that calls for “the exercise of an informed judgment on a consideration of many factors” to secure a “just and equitable” allocation, the Court listed several factors, including “physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.” *Nebraska v. Wyoming*, 325 U.S. 589, 618. The Court went on to establish a set of interstate entitlements, not all of which relied on priority in time, thereby giving more than mere lip service to the multifactor approach to equitable apportionment.

The Decree that emerged was described by Special Master Olpin as relying on a fairly simple concept: “The Decree’s polestar is its allocation of waters in the North Platte mainstream between Guernsey Dam (in Wyoming) and the Tri-State Diversion Dam (just downstream of the Wyoming-Nebraska state line). During the May 1 through September 30 irrigation season, all natural flows in this region of the mainstream are apportioned 75% to Nebraska and 25% to Wyoming.”

The initial claims in the current litigation all begin with the Decree as their underpinning. Nebraska attacked Wyoming (1) for violating (or threatening to violate) the Decree by her operation (and planned operation) of dams and proposed diversion and storage facilities on Wyoming tributaries of the North Platte, and (2) for attempting to prevent the federal Bureau of Reclamation from continuing to divert North Platte River water in Wyoming for storage and use in Nebraska. Wyoming answered and counterclaimed, alleging that Nebraska is circumventing the Decree (1) by using more water than is necessary to irrigate the lands benefited by the Decree, and (2) demanding water for uses downstream of the Tri-State Dam that are not recognized or authorized by the Decree.

The Special Master (and to a lesser extent the Court itself) has tried to avoid a proliferation of the issues and parties in the litigation. To the extent that the present dispute involves the exercise of continuing jurisdiction over the earlier litigation, Colorado and the United States (on behalf of the Bureau of Reclamation) are already parties to the litigation and have remained involved. Beyond that, however, even before appointing the Special Master, the Court denied without explanation a motion by Nebraska seeking leave to amend her petition for relief to include a request for reformulation of the Decree to explicitly recognize the environmentally important use of the North Platte’s instream flows “for the development and protection of critical wildlife habitat.” Thereafter, the Special Master rejected motions for intervention from numerous private parties, granting them amicus status instead. The entities thus kept on the sidelines included environmental groups (the Platte River Trust and the National Audubon Society), Basin Electric (a Wyoming

power cooperative with an interest in waters that are tributary to the North Platte), and two Nebraska Power Districts (public-utility districts having hydropower interests in the waters of the North Platte system).

Special Master Olpin issued two “Interim Reports,” the second of which was released on April 2, 1992. In large measure the second report supersedes the earlier one because it revisits most of the prior issues, now aided by a more complete factual record. The Interim Reports announce a series of recommended determinations covering an array of water use and procedural issues in the case. The most prominent recommendations include the following:

(1) An appropriation of approximately 46,000 acre-feet per year of water historically diverted by United States Bureau of Reclamation projects in Wyoming during the non-irrigation season for the benefit Nebraska lands north of the North Platte River and stored in the Inland Lakes (a series of four reservoirs) for delivery during the irrigation season shall retain its historic priority date for seniority purposes and shall not be counted against the Nebraska share under the Decree because that water is not diverted during the irrigation season.

(2) Natural irrigation-season flows of the Laramie River, because that river empties into the North Platte between the Guernsey and Tri-State Dams, are subject to the 75 percent/25 percent Nebraska/Wyoming allocation set forth in the Decree. At the present time, however, no Supreme Court action is necessary because neither Wyoming’s Grayrocks Project as it is being operated, nor its proposed Corn Creek Project are causing any present violation of the Decree.

(3) Wyoming’s proposed Deer Creek Project, capable of storing 60,000 acre-feet of water that might otherwise enter the North Platte below Pathfinder Dam but upstream of Guernsey Dam, involves water that is not governed directly by the Decree’s 75 percent/25 percent allocation. That water was expressly noted in the Decree as being a potential subject for allocation in the event that its use was to “disturb the delicate balance of the river.” 325 U.S. at 625. Accordingly, a plenary review of the Deer Creek Project is required to determine its effects on the river’s balance and to see if the proposed Wyoming uses qualify as “ordinary municipal” uses that are granted to Wyoming by a separate provision (§ 10) of the Decree.

(4) Adjudication of the dispute over water for Nebraska irrigation below the Tri-state Dam is premature for want of an adequate evidentiary record demonstrating injury.

BACKGROUND AND SIGNIFICANCE

It is hard to overestimate the local importance of this case on the path of development in the affected regions of Wyoming and Nebraska. The areas involved are arid, and the North Platte system is the principal surface-water source. Although hydrologically independent groundwater is present in some parts of the region, the aquifers are overdrafted and in a state of decline. As a result, the outcome of this convoluted battle to maintain and/or extend the use of North Platte

waters is a pivotal determinant of economic development and change in the region.

Each of the first three major recommendations readily can be cast as a form of zero-sum game with fairly easy to identify antagonists. The Inland Lakes out-of-season storage “saves” Nebraska from having to use a part of its Decree-based rights to in-season flows to obtain the irrigation benefits that the water provides. Roughly 15,000 acres can be served by using that water as an adjunct to dry land (i.e., rainfall-supported) farming. On the second and third issues, Wyoming would hope to store and use water upstream of Guernsey Dam and in the Laramie River before its confluence with the North Platte. If that water never reaches the Decree-apportioned stretch, Wyoming obtains 100 percent of the beneficial use, rather than passing 75 percent of that use down to Nebraska under the Decree. Recalling that there are would-be water users in both states not receiving all of the North Platte water they can beneficially use, in each instance, one state’s water users’ gain is the other states’ water users’ loss.

The apparently bland fourth holding masks the importance of the legal issue that may eventually require decision in that facet of this case. The 1945 Decree found it unnecessary to award Nebraska any direct flow rights upstream of Tri-State Dam for the benefit of lands further downstream because of the magnitude of then-occurring return flows of roughly 700,000 acre-feet per year. (Return flow is, roughly speaking, the run off from irrigation activities that returns to the stream for potential reuse further downstream.) Here, in effect, Nebraska seeks protection of the “regimen of the river” including its historic high level of return flow. (See, Second Interim Report at 91.) This aspect of the case takes on significance due to the importance of instream flow below the Tri-State Dam in providing wildlife habitat for endangered or threatened species of cranes and other migratory birds.

As a welcome relief and contrast to the factual complexity and practical significance of the case, from a legal doctrine standpoint, this case is not particularly noteworthy. As should be evident, neither the basic equitable-apportionment concept, nor its usual adumbrations are under serious attack. The 1945 decision is treated as the landmark case that it was, treading new ground in an apportionment among prior appropriation states by saying that priority of use, though vital, is not wholly dispositive.

In this renewal of the case, the parties to the controversy view the principal issues as governed by either the letter of the 1945 Decree, controlled by its intended future extensions, or deliberately left unaffected by the prior decision. They dispute interpretation of the Decree and the application of both its concrete and fuzzy principles to highly fact-specific situations involving the present and future use of water in the region.

ARGUMENTS

For State of Nebraska (Counsel of Record, Richard A. Simms, Special Assistant Attorney General, Nebraska Department of Justice, 2115 State Capitol, Lincoln, NB

68509-8920; telephone (402) 471-2682):

1. Nebraska excepts to the Special Master’s finding that the Decree did not expressly allocate 75 percent of the Laramie River’s inflows to the North Platte to Nebraska.
2. The Special Master erroneously reads ¶ 10 of the Decree more broadly than its intended scope as an indication that the limitations placed by the Decree on irrigation uses do not apply to municipal uses with the same force.
3. Nebraska excepts to the Master’s view that the issues pertaining to diversions upstream of the Guernsey Dam are not ripe or properly before the Court at this time as a part of its expressly retained jurisdiction.

For State of Wyoming (Counsel of Record, Dennis C. Cook, Senior Assistant Attorney General of Wyoming, 123 Capitol Building, Cheyenne, WY 82002; telephone (307) 777-7841):

1. The Special Master erred by refusing to limit Nebraska’s Decree-based rights to water necessary for operation of canals in the Guernsey Dam to Tri-State Dam section of the river.
2. The Special Master erred in concluding that Nebraska’s claims for water to be used below the Tri-State Dam present triable issues.
3. Nebraska has not produced sufficient evidence of potential violation of the Decree to warrant a trial on her claims that Wyoming’s intended Deer Creek Project (upstream of the Guernsey Dam) must be the subject of new injunctions.
4. Municipal use is totally exempt from restriction under the Decree.
5. Nebraska’s Inland Lakes have no priority for storage and must rely on Nebraska’s direct-flow allocation under the Decree for all water diverted by those facilities.
6. The Laramie River was excluded from apportionment under the Decree.

For State of Colorado (Counsel of Record, Wendy C. Weiss, First Assistant Attorney General of Colorado, 110 Sixteenth Street, 10th Floor, Denver CO 80202; telephone (303) 620-4730):

1. The Decree does not protect uses below the Tri-State Dam.
2. Nebraska has failed to articulate a violation of the Decree as to uses below the Tri-State Dam.

For the United States (Counsel of Record, Andrew F. Walch & Patricia L. Weiss, Department of Justice, Washington, DC, 20530; telephone (202) 514-2217):

1. The United States is in substantial agreement with the Special Master.

AMICUS BRIEFS

For Basin Electric Power Cooperative (Counsel of Record, Edward Weinberg; Duncan, Weinberg, Miller & Pembroke, 1615 M Street, NW, STE 800, Washington, DC 20036; telephone (202) 467-6370):

1. Action on a previous equitable-apportionment decree involves equities as well as "rights."
2. Wyoming is entitled to a judgment that projects upstream in the Laramie River do not violate Nebraska's rights under the Decree and to a declaration that the Laramie is wholly appropriated between Wyoming and Colorado leaving Nebraska no entitlement to that water.
3. Nebraska's right to North Platte water above the Tri-State Dam is expressly limited to her right to take water for specific canals as set forth in ¶ 5 of the Decree.

Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District (*Counsel of Record, Tom Watson; Crowell & Moring, 1001 Pennsylvania Avenue, NW, Washington, DC 20004; telephone (202) 624-2500*):

1. Any modification of the Decree must take into account the flow conditions below the Tri-state Dam that must be maintained in order to protect federally licensed power generation interests.

For National Audubon Society and Platte River Whooping Crane Critical Habitat Maintenance Trust (*Counsel of Record, Peter A.A. Berle, 950 Third Avenue, New York, NY 10022; telephone (212) 546-9100*):

1. The Special Master properly recommended denial of the upstream states' motion for summary judgment that Nebraska could state no claim for water for use downstream of the Tri-State Dam.
2. New projects on tributaries of the North Platte may require new injunctive relief, including protection of Nebraska equities below the Tri-State Dam that may be adversely affected by upstream development.

JANUARY ARGUMENT SESSION

Monday, January 11

1. Local 144 Nursing Home Fund v. Demisay (91-610) (*Preview 164-167*)
2. Barr v. Catholic Social Services (91-1826) (*Preview 170-172*)
3. Negonsott v. Samuels, Warden (91-5397) (*Preview 173-175*)
4. Conroy v. Aniskoff (91-1353) (*Preview 188-189*)

Tuesday, January 12

5. CSX Transportation v. Easterwood (91-790), Easterwood v. CSX Transportation (91-1206) (Consol.-1 hour) (*Preview 182-183*)
6. Alexander v. United States (91-1526) (*Preview 184-187*)
7. Leatherman v. Tarrant County Narcotics (91-1657) (*Preview 161-163*)

Wednesday, January 13

8. Helling v. McKinney (91-1958) (*Preview 179-181*)
9. Hazen Paper v. Biggins (91-1600) (*Preview 176-178*)
10. Nebraska v. Wyoming (108 Orig.) (*Preview 190-193*)

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Nebraska v. Wyoming (108 Orig.) (*Preview* 190-193)



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