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**NEBRASKA v. WYOMING AND COLORADO**  
**ALLOCATING WATER RIGHTS TO INTERSTATE RIVERS:**  
**EQUITABLE PRINCIPLES AND THE ROLE OF SUBSTANTIAL INJURY**

Humankind's proclivity to cry, "War," when sovereigns cannot allocate scarce resources by agreement has caused many confrontations on battlefields among nations, and in courtrooms among states. The arid and semi-arid conditions in the western region of the United States have caused the demand for water to rise above the volume that the waterways and climate can supply.<sup>1</sup> In response to this scarcity, federal and state governments have constructed irrigation systems to distribute and to maintain a dependable supply of water on which agricultural economies rely.<sup>2</sup> Although many states in this region have adopted variations of the doctrine of prior appropriation to allocate water rights among private landowners,<sup>3</sup> a plethora of litigation among states has arisen over the consumption of water flowing from interstate rivers.

Since its decision in *Kansas v. Colorado*,<sup>4</sup> discussed *infra*, the Supreme Court has uniformly applied equitable principles to apportion among states water rights to interstate rivers, and has declined to base its decisions on strict applications of hard and fast rules.<sup>5</sup> This Casenote illustrates the Court's use of equitable principles by analyzing *Nebraska v. Wyoming and Colorado*,<sup>6</sup> where water rights to an interstate river were contested. First, basic principles of property rights in water are considered, with particular attention given to how the availability of water has impacted the principles which states adopt. Second, the Supreme Court's prior decisions on allocating water rights between states are discussed. Finally, the Court's decision in *Nebraska v. Wyoming and Colorado*,<sup>7</sup> is analyzed, focusing on principles which the Court as consistently applied to maintain the integrity of its equitable decree over time.

The legal principles by which states divide among their citizens consumptive rights to rivers and streams is to some extent dependent upon the sufficiency of their water resources.<sup>8</sup> In states with abundant water resources, the riparian doctrine is the predominant principle of

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1. Lynda L. Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests*, 45 U. Pitt. L. Rev. 95, 102 n.13 (1985).

2. *Nebraska v. Wyoming*, 325 U.S. 589, 595 (1945) (discussing the construction of federal irrigation systems under the Reclamation Act of 1902, 43 U.S.C. § 372-616 (1992)).

3. See Butler, *supra* note 1, at 102 (listing various states that have adopted this doctrine).

4. 206 U.S. 46 (1906).

5. *Nebraska v. Wyoming*, 325 U.S. at 622.

6. — U.S. —, 113 S. Ct. 1689 (1993).

7. *Id.*

8. See *Nebraska v. Wyoming*, 325 U.S. at 594 (referring specifically to Colorado, Nebraska, and Wyoming); Butler, *supra* note 1, at 102.

allocation.<sup>9</sup> Although states may apply riparian rights differently, the crux of this common law doctrine remains intact, and entitles riparian landowners to consume water without regard to when their use was established.<sup>10</sup>

The riparian doctrine proved to be inefficient in allocating water rights in arid and semi-arid lands.<sup>11</sup> Each riparian owner would consume water for reasonable uses, causing the scarce supply of water to be depleted before each owner captured a sufficient volume.<sup>12</sup> States in arid regions therefore developed a doctrine that gives priority to those owners who are "first in time" to appropriate water for a beneficial use.<sup>13</sup> This principle, known as prior appropriation, allows landowners with superior water rights to consume as much water as is needed for the beneficial use, regardless of the effect on landowners with junior rights.<sup>14</sup>

Landowners establish their rights by diverting and applying water to a beneficial use.<sup>15</sup> Generally, beneficial use means that landowners may appropriate a sufficient amount of water to the extent that it serves a useful purpose to the land from which the water is extracted.<sup>16</sup> In 1902, Congress enacted the National Reclamation Act, which authorized the federal government to construct irrigation projects to reclaim water in arid regions of the West.<sup>17</sup> The Reclamation Act states that it shall not be interpreted to affect the rights of landowners to appropriate water from interstate streams, provided that the use of the water is appurtenant to the land irrigated.<sup>18</sup> Accordingly, appropriations of water acquired under this Act are limited by the beneficial use to which the water is placed.<sup>19</sup>

Allocation of water rights among states was first addressed by the Supreme Court in *Kansas v. Colorado*.<sup>20</sup> Kansas, a riparian state when the action was filed, sought an injunction to stop Colorado from diverting water from the Arkansas River for irrigation, a practice which

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9. Butler, *supra* note 1, at 102.

10. Butler, *supra* note 1, at 102.

11. Butler, *supra* note 1, at 102.

12. Butler, *supra* note 1, at 102.

13. Butler, *supra* note 1, at 102 (citing various states that follow common law or statutory versions of the doctrine of prior appropriation, including Colorado, Idaho, Kansas, Nebraska, Oregon, and Wyoming).

14. Butler, *supra* note 1, at 102.

15. *Nebraska v. Wyoming*, 325 U.S. at 614.

16. Butler, *supra* note 1, at 102 (citing *State v. McLean*, 308 P.2d 983, 988 (1957)).

17. *Wyoming v. Colorado*, 259 U.S. 419, 463 (1922).

18. *Id.* at 463 (quoting the Reclamation Act, 43 U.S.C. Sec. 372-616 (1988) which reads, in part: [N]othing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to use of the water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.).

19. *Id.* at 463.

20. 206 U.S. at 46.

reduced its average and natural flow in Kansas.<sup>21</sup> In applying the doctrine of equitable apportionment, the Court declared that each state had an equal right to the water, and that the an apportionment must reflect Colorado's relative need for irrigation and Kansas' need for a flowing stream.<sup>22</sup> This doctrine was derived from rules which governed disputes among private riparian owners.<sup>23</sup> Although a decree was not granted to Kansas because failed to show that Colorado's diversion detrimentally impacted Kansas' landowners, principles for allocating interstate rivers were established.<sup>24</sup>

In *Wyoming v. Colorado*,<sup>25</sup> the Supreme Court issued a decree which apportioned between these states water rights to the Laramie River. The Court gave two reasons for its use of the doctrine of prior appropriation to allocate the river. First, both states codified the doctrine of prior appropriation into their constitutions, thereby entitling their respective landowners to appropriate water to the extent of its beneficial use.<sup>26</sup> Second, the Court stated that courts in arid states universally hold that the priority of appropriation gives individuals the priority of right to divert waters from interstate streams.<sup>27</sup> Holding that Wyoming's appropriations were superior to Colorado's diversions, the Court provided relief to Wyoming in a decree which restricted Colorado's use of the waters in the Laramie River.<sup>28</sup>

In *Nebraska v. Wyoming and Colorado*, Nebraska petitioned the Supreme Court to enforce its decree and issue an injunction to prevent Wyoming from diverting excessive amounts of water from the North Platte River.<sup>29</sup> Disputes among these states over water rights to the North Platte River began with *Nebraska v. Wyoming*, where each state requested the Court for an equitable apportionment.<sup>30</sup> The North Platte is a non-navigable stream which rises in North Park, Colorado, flows northerly for seventy miles into Wyoming, and continues its northerly path before bending eastward towards the Pathfinder Reservoir near Casper, Wyoming.<sup>31</sup> The river maintains its eastward course to Whalen, Wyoming.<sup>32</sup> Approximately forty miles before the Nebraska line, the North Platte is joined by the Laramie River, and flows

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21. *Colorado v. Kansas*, 320 U.S. 383, 384 (1943).

22. *Id.* at 385.

23. *Wyoming v. Colorado*, 259 U.S. at 429 (citing *Kansas v. Colorado*, 206, U.S. at 46).

24. *Id.*

25. *Id.* at 419.

26. *Id.* at 424.

27. *Id.* at 423 (citing *Taylor v. Hulett*, 15 Idaho 265 (1908), *Conant v. Deep Creek Co.*, 23 Utah 627 (1901), and other cases where water rights to streams wholly within one state were apportioned).

28. *Wyoming v. Colorado*, 259 U.S. at 470-97 (where the Court applies its equitable apportionment analysis).

29. 113 S. Ct. at 1691.

30. *Nebraska v. Wyoming*, 325 U.S. at 592.

31. *Id.* at 592-93.

32. *Id.* at 593.

into Nebraska and through the Tri-State Dam.<sup>33</sup> This section of the river is called the “pivotal reach” because the demand for its water equals the aggregate demand for water from North Park, Colorado to Whalen, Wyoming.<sup>34</sup>

The arid climate of the river basins in Colorado and Wyoming make these states dependent upon irrigation from the North Platte River.<sup>35</sup> Although crops are grown without irrigation in middle Nebraska’s sub-humid climate, Western Nebraska is partially arid, thereby making agriculture in this section dependent upon irrigation from the North Platte River, as well.<sup>36</sup> Irrigation projects, consisting of canals and reservoirs, were constructed throughout Wyoming and Nebraska to reduce wasted and unused water and to distribute the water.<sup>37</sup> The North Platte Project was constructed in 1904 under the National Reclamation Act.<sup>38</sup> The project’s storage plants and diversion works are located in Wyoming; however, Nebraska receives most of the project’s beneficial use, thereby making Nebraska’s agricultural industry dependent upon Wyoming’s regulation of the water supply.<sup>39</sup>

Tensions between Nebraska, Colorado, and Wyoming over water consumption heightened during a dry cycle which began in 1931 and lasted for thirteen years.<sup>40</sup> During this drought, the water flowing in the North Platte equaled the average flows of previous years in only one year.<sup>41</sup> Consequently, the water was over-appropriated between the states. Later, relations between Nebraska and Wyoming were further strained when Wyoming proposed to utilize the Kendrick Project, a federal irrigation system using North Platte River water that was developed to provide water to Western Wyoming.<sup>42</sup> The Kendrick Project was constructed in 1940, but had not been utilized because the dry cycle prevented the project’s reservoirs and canals from exercising their junior water rights.<sup>43</sup>

Nebraska, Colorado, and Wyoming had adopted the prior appropriation doctrine through their legislatures,<sup>44</sup> and requested the Supreme Court to equitably apportion the waters of the North Platte River.<sup>45</sup> The Court stated that a strict application of the priority rule would be

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33. *Id.*

34. *Id.*

35. *Nebraska v. Wyoming*, 325 U.S. 589, 594 (1945).

36. *Id.*

37. *Id.* at 595.

38. *Id.* at 594.

39. *Id.* at 596-97.

40. *Nebraska v. Wyoming*, 325 U.S. 589, 598 (1945).

41. *Id.* at 599.

42. *Id.* at 597, 599.

43. *Id.* at 597.

44. *Id.* at 599.

45. *Nebraska v. Wyoming*, 325 U.S. 589, 592 (1945).

unjust, and noted that the doctrine of prior appropriation serves as a guideline for apportioning interstate water rights.<sup>46</sup> To make the allocation equitable and informed, the Court considered other factors, including climate, consumption of water from various sections of the river, nature and magnitude of return flows, effect of wasted water on downstream lands, costs and benefits of restricting upstream consumption, extent and nature of current uses, and the supply of storage water.<sup>47</sup>

Equitable apportionment of the North Platte was set forth in a 1945 decree.<sup>48</sup> The Court's decree restricted storage and diversion rights of Colorado and Wyoming, prioritized water rights to federal reservoirs and Nebraska canals, and apportioned the natural flows of the pivotal reach during irrigation seasons.<sup>49</sup> To construct and utilize the Glendo Dam and Reservoir, Nebraska and Wyoming moved for approval of a stipulation and to amend the decree accordingly.<sup>50</sup> These motions were granted by the Supreme Court in 1953.<sup>51</sup>

In *Nebraska v. Wyoming and Colorado*, Nebraska objected to Wyoming's Grayrock Reservoir and Corn Creek Project, two new developments along the Laramie River above the pivotal reach.<sup>52</sup> Nebraska argued that these developments would violate the North Platte decree and that the decree apportioned to Nebraska seventy-five percent of the flows in the pivotal reach, which have historically included waters from the Laramie River.<sup>53</sup> Wyoming insisted that the Laramie River Decree entitled it to use these facilities along the Laramie River.<sup>54</sup> The Court held that the North Platte Decree did not specifically apportion Laramie flows to Nebraska, even though the Court expected that Laramie waters would flow into the pivotal reach.<sup>55</sup> Accordingly, the Court treated Nebraska's objections as a request to modify the Decree, and required Nebraska to show substantial injury.<sup>56</sup>

Nebraska also challenged Wyoming's plans to construct a reservoir on Deer Creek, a tributary located above the pivotal reach.<sup>57</sup> Because the North Platte Decree did not restrict Wyoming's use of Deer Creek, Nebraska was required to show that a genuine issue of material

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46. *Id.* at 618.

47. *Id.*

48. *Id.* at 665-72 (listing the provisions of the decree).

49. *Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1691 (summarizing the 1945 North Platte Decree).

50. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

51. *Id.*

52. *Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1691.

53. *Id.* at 1697.

54. *Id.*

55. *Id.* at 1698.

56. *Id.* at 1698-99 (holding that Nebraska did not show substantial injury).

57. *Nebraska v. Wyoming and Colorado*, 113 S. Ct. 1689, 1699 (1993).

fact existed as to whether Nebraska would be substantially injured by diversions to the Deer Creek Reservoir.<sup>58</sup>

*Nebraska v. Wyoming and Colorado* demonstrates the Supreme Court's reliance on equitable principles to ensure that the fairness of its decree remains undiminished over time.<sup>59</sup> The integrity of an equitable decree is maintained primarily by distinguishing requests for modification of a decree from those actions which seek enforcement.<sup>60</sup> This distinction derives from the Supreme Court's insistence that its decrees reflect only current conditions.<sup>61</sup> Since *Kansas v. Colorado*, decrees apportioning water rights between states have been based on existing supplies of water, levels of consumption, and other factors, and have discounted circumstances which may arise in the future.<sup>62</sup> In *Idaho ex rel. Evans v. Oregon*, the Court stated that equitable apportionment is designed to provide injunctive relief from present conditions and prevent future injuries.<sup>63</sup> This principle is illustrated in *Nebraska v. Wyoming*, where the Supreme Court declined to base a decree on the average natural flow of water in the Laramie River, reasoning that an average which includes the natural flows of pre-drought years does not reliably reflect current conditions.<sup>64</sup> Moreover, this Court refused to regulate tributaries between the Pathfinder and Guernsey Reservoirs based solely on a possibility of future increases in storage on these tributaries.<sup>65</sup>

Future conditions, however, are not completely disregarded in an equitable apportionment.<sup>66</sup> Although the allocation of water rights is based on existing circumstances,<sup>67</sup> equitable decrees

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58. *Id.* at 1700 (holding that Nebraska's affidavit may raise a genuine issue of material fact with respect to substantial injury if the Deer Creek Reservoir is operated out of priority with Inland Lakes).

59. *See id.* (denying a petition to modify a decree absent a showing of evidence sufficient to raise a genuine issue of material fact as to whether Nebraska was substantially injured by changed conditions); *Wyoming v. Colorado*, 309 U.S. 572, 581 (1940) (quashing, as a defense to an enforcement action, Colorado's assertion that Wyoming was not injured by excessive diversions which violated the decree).

60. *See Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1691 (noting that a party seeking to modify a decree must show substantial injury); *Wyoming v. Colorado*, 309 U.S. at 581 (where the Court stated that no evidence of substantial injury is required in an action to enforce a decree).

61. *See Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1693 (stating that the modification provision of the North Platte Decree demonstrates that equitable apportionments reflect only current conditions); *Wyoming v. Colorado*, 309 U.S. at 581 (enforcing a decree absent a showing that conditions have changed, causing substantial injury).

62. *See Nebraska v. Wyoming*, 325 U.S. at 618, 620 (listing factors which ensure that the apportionment is equitable and refusing to base an allocation on a misleading calculation of the average flow of the Laramie River); *Connecticut v. Massachusetts*, 282 U.S. 660, 662 (1931) (permitting Connecticut to amend its complaint once substantial injury could be shown).

63. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1028 (1983) (where the Court was requested to apportion the rights to the anadromous fish, a resource which the Court considered as the equivalent of water for its analysis).

64. 325 U.S. at 620.

65. *Id.* at 624-25.

66. *See id.* at 620, 671 (decree entitling parties to request for a modification when conditions change).

67. *Id.* at 620; *Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1693.

also provide states with an avenue of relief when conditions substantially change.<sup>68</sup> These provisions entitle parties to request a modification of the decree to reflect the new circumstances.<sup>69</sup> Unlike enforcing a decree, modification involves a rebalancing of the equities, and, accordingly, burdens petitioning states by requiring proof of substantial injury caused by a change in conditions.<sup>70</sup> Consequently, the Court's insistence that equitable decrees reflect only present conditions plays a significant role in determining whether a party may request relief or avoid liability.<sup>71</sup>

In *Wyoming v. Colorado*, for example, Colorado diverted more water than permitted by the Lamarie River Decree.<sup>72</sup> Seeking to avoid enforcement of the Decree, Colorado asserted that the excessive diversions had not substantially injured Wyoming and that Wyoming was therefore not entitled to relief.<sup>73</sup> In maintaining the fairness and integrity of its decree, the Court held that Colorado was bound by the Decree, and that absence of injury to Wyoming was not a defense to an enforcement action.<sup>74</sup>

Similarly, in *Nebraska v. Wyoming and Colorado*, Nebraska sought enforcement under Paragraph XIII(c) of the North Platte Decree, which allows the parties to request relief from the Supreme Court regarding the effect of newly constructed storage plants that did not exist when the decree was entered.<sup>75</sup> While erroneously assuming that the waters above the pivotal reach were apportioned by the North Platte Decree, Nebraska offered no evidence of substantial injury in pleading that development of the Grayrock and Corn Creek Reservoirs would violate the Decree.<sup>76</sup> The Court held that Nebraska's assumption was erroneous, and that the proper avenue for relief was Paragraph XIII(f), which permits parties to petition for relief from changes in conditions which make modification of the Decree appropriate.<sup>77</sup>

68. *Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1693. See *Nebraska v. Wyoming*, 325 U.S. at 620, 671.

69. *Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1693; *Nebraska v. Wyoming*, 325 U.S. at 620.

70. *Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1691.

71. See *id.* at 1698-99 (Nebraska denied relief in seeking enforcement of issues not addressed in the decree).

72. *Wyoming v. Colorado*, 309 U.S. at 574 (a third dispute between Wyoming and Colorado over the waters of the Lamarie River).

73. *Id.*

74. *Id.* at 581.

75. *Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1693 (quoting Paragraph XIII of the North Platte Decree, which states, in part:

Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following: . . . (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir.).

76. *Id.* at 1698-99.

77. See *id.* at 1693, 1698 (citing Paragraph XIII(f), which states, "Any change in conditions making modification of the decree or granting of further relief necessary or appropriate.").



Through its errors Nebraska was denied relief,<sup>78</sup> confirming the importance of the distinction between modification and enforcement.

Allocation of interstate waters among states is a constant source of litigation. The Supreme Court has recognized the importance of a dependable water supply to the agricultural industries in arid and semi-arid regions.<sup>79</sup> The inefficiency of riparian ownership in these regions opened the doors for a new doctrine based on priority of appropriation.<sup>80</sup> Rather than strictly applying the doctrine of prior appropriation to apportion interstate waters, the Court uses this theory as a guideline, and supplements it with principles of equity.<sup>81</sup> One theme on which the equitable factors are inherently based is that the decree should reflect only current conditions, such as existing levels of consumption and volumes of flowing and stored water.<sup>82</sup> While ensuring that the decree addresses only existing injuries, this requirement transcends the final resolution of the dispute and resurfaces when further action is made pursuant to the decree.<sup>83</sup>

As time passes, the distinction between actions seeking modification of a decree and petitions requesting enforcement secures the integrity of the decree.<sup>84</sup> While a state requesting enforcement of the decree is not burdened with providing evidence of its injury, a showing of substantial injury from changed circumstances is required before a decree is modified,<sup>85</sup> thereby, upholding the integrity of the decree and providing an equitable means for resolving disputes of the nature that have caused many nations to cry, "War."

*Charles M. Courtney*

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78. *See id.* at 1699.

79. *See Kansas v. Colorado*, 206 U.S. at 46 (allocating waters of the Arkansas River); *Wyoming v. Colorado*, 259 U.S. at 419 (dispute over diversions from the Laramie River); *Nebraska v. Wyoming*, 325 U.S. at 589 (apportioning waters to the Laramie River).

80. *Butler*, *supra* note 1, at 102.

81. *Nebraska v. Wyoming*, 325 U.S. at 622.

82. *See Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1689; *Wyoming v. Colorado*, 309 U.S. at 572.

83. *See Nebraska v. Wyoming and Colorado*, 113 S. Ct. at 1691, 1698.

84. *See id.* at 1698-99; *Wyoming and Colorado*, 309 U.S. at 581.

85. *Nebraska v. Colorado and Wyoming*, 113 S. Ct. at 1691.