

North Platte Article 1

The purpose of this series is to summarize the provisions of the Settlement Agreement and Modified Decree that were entered by the United States Supreme Court to resolve *Nebraska v. Wyoming*. It is necessary, however, to first describe the original 1945 Decree as a critical backdrop to the Settlement Agreement and Modified Decree.

Following eleven years of litigation between Nebraska, Wyoming, and Colorado, and the U.S. Bureau of Reclamation, the United States Supreme Court entered the original North Platte Decree on October 8, 1945. While we do not intend to describe every aspect of the 1945 Decree, following is a summary of the more significant provisions. First, some basic facts: (1) the 1945 Decree generally only applied to the irrigation season (May 1 through September 30); (2) the 1945 Decree's geographical application is from North Park, Colorado to the Tri-State Dam, which is approximately one mile east of the Wyoming/Nebraska State line; and (3) the 1945 Decree applies to natural flow only; the water stored in the Federal Reservoirs is distributed by contract.

The three components of Paragraph I of the 1945 Decree were directed to Colorado's water use. First, Colorado was enjoined from irrigating more than a total of 135,000 acres of land in Jackson County, Colorado (this was increased to 145,000 acres as part of the 1953 Stipulation discussed below). Second, Colorado was enjoined from storing more than a total of 17,000 acre feet of water for irrigation purposes each water year in Jackson County. Lastly, Colorado was enjoined from exporting out of the North Platte River basin more than a total of 60,000 acre feet of water in any consecutive ten-year period.

Paragraph II of the 1945 Decree applied to Wyoming's use of the North Platte River upstream of Guernsey Reservoir. First, exclusive of the Kendrick Project, Wyoming was enjoined from irrigating more than 168,000 acres of land in the North Platte River basin on the mainstem above Guernsey and on the tributaries above Pathfinder Dam. Second, Wyoming was enjoined from storing more than a total of 18,000 acre feet of water for irrigation purposes each water year above Pathfinder Reservoir.

Paragraph IX of the 1945 Decree required Wyoming and Colorado to maintain complete and accurate records of the total area of land irrigated, and the storage and exportation of North Platte River water, within their respective jurisdictions covered by Paragraphs I and II. To satisfy these responsibilities, the Wyoming State Engineer's Office (WSEO) adopted a mapping and measurement program to document compliance with Paragraph II. In the early 1950's Wyoming began reporting its Paragraph II irrigated acreage and storage accruals. The lowest reported irrigated acreage was in 1954 (106,275) and the highest reported irrigated acreage was in 1999 (167,819). The lowest reported storage accruals were in 1983 (5,753.8 AF) and the highest accruals occurred in 1979 (17,552 AF).

Paragraphs III and IV of the 1945 Decree delineated the storage priorities among the North Platte reservoirs and the "State line canals." These paragraphs defined the order of priority, as well as the amount of water that could be "called through" pursuant to those priorities.

Paragraph V apportioned the natural flow in the Guernsey Dam to Tri-State Dam section of the North Platte River between May 1 and September 30 of each year twenty-five percent to Wyoming and seventy-five percent to Nebraska. At the time that the Supreme Court adopted the 1945 Decree, this 25/75 percentage split was one of the most innovative solutions to interstate water disputes that had ever been devised. It is still considered a hallmark in equitable apportionment cases. The 25/75 apportionment of Paragraph V is administered on a daily basis using complex accounting systems that are operated by the WSEO, the Nebraska Department of Water Resources, and the U.S. Bureau of Reclamation.

Various administrative matters were addressed in Paragraphs VI through VIII, X, and XIV through XVI of the 1945 Decree. Paragraph VI confirmed that only natural flow was apportioned and that storage water was unaffected by the Decree. Paragraph VII stated that if additional gages and measuring devices were needed, they would be constructed and maintained at the joint expense of Wyoming and Nebraska. Paragraphs VIII and XVI related to the Kendrick Project. Paragraph X stated that the 1945 Decree would not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado and Wyoming for ordinary and usual domestic, municipal and stock purposes and consumption. Paragraphs XIV and XV apportioned the costs of the action.

Paragraph XI of the 1945 Decree defined the irrigation season as being from May 1st to September 30th; storage water as being releases from U.S. Bureau of Reclamation reservoirs; and natural flow as being all water in the stream except storage water.

Paragraph XII stated that the 1945 Decree would not affect imported water, the apportionment previously made by the United States Supreme Court between Wyoming and Colorado of the waters of the Laramie River, and the compact between the states of Nebraska and Colorado for the South Platte.

The United States Supreme Court retained jurisdiction in Paragraph XIII of the 1945 Decree and identified the reasons that further relief could be sought, including, but not limited to, construction of additional storage facilities on the tributaries between Pathfinder and Guernsey Reservoirs and a “change in conditions.”

The North Platte Decree was modified on June 15, 1953 , to allow for the construction of Glendo Reservoir. Paragraph XVII was adopted to address the operation of this approximately 790,000 acre-foot reservoir in the North Platte system. The 1953 Modified Decree limited storage for irrigation purposes (including carryover storage) to 100,000 acre feet and allowed for distribution of 40,000 acre feet of that amount per year by contract. That 40,000 acre-feet was divided 25,000 acre-feet for use in Western Nebraska and 15,000 acre-feet for use in southeastern Wyoming below Guernsey Reservoir.

The second part of this series will describe Nebraska’s claims against Wyoming in the 1986 litigation, as well as Wyoming’s counterclaims against Nebraska and cross-claims against the United States.

North Platte Article 2a

The purpose of the next two articles in this series is to summarize the *Nebraska v. Wyoming* dispute that was filed by Nebraska in 1986. Nebraska's initial purpose for instituting that lawsuit was to prevent Wyoming from constructing Deer Creek Dam. Nebraska also challenged the operation of Grayrocks Reservoir on the Laramie River, and asserted that Wyoming was attempting to prevent the Bureau of Reclamation from diverting North Platte River waters for storage in the Inland Lakes in Nebraska.

Wyoming filed a counterclaim in 1987 alleging that Nebraska was demanding natural flow water in excess of its beneficial use requirements. Wyoming also asserted that Nebraska was violating the Decree by demanding natural flow and storage water from sources above Tri-State Dam and by-passing such flows for uses below Tri-State Dam. Wyoming's final counterclaim related to Nebraska's use of Glendo Reservoir water below Tri-State Dam and its use of that water for other than irrigation purposes.

Because *Nebraska v. Wyoming* was a lawsuit between two states, it was filed (pursuant to Article III of the United States Constitution) as an "original jurisdiction action" with the United States Supreme Court (Supreme Court). Although the Supreme Court was the ultimate decision-maker, it rarely sits as a trial court. To oversee the actual lawsuit, the Supreme Court appointed Owen Olpin, an attorney from Pasadena, California, to serve as the Special Master. Master Olpin handled all of the pretrial matters, held hearings, resolved disputes, made recommendations to the Supreme Court, and carried out the trial judge responsibilities throughout during the 14-year *Nebraska v. Wyoming* litigation.

Nebraska, Wyoming and the Bureau of Reclamation filed cross motions for summary judgment in 1991. The United States Supreme Court ruled on those motions in 1993. (*Nebraska v. Wyoming*, 507 U.S. 584 (1993)). The Court held that because Nebraska had no pre-existing right recognized by the 1945 Decree with regard to the Laramie River and the tributaries that enter the river below Pathfinder Reservoir (i.e., Deer Creek), Nebraska was seeking to modify the 1945 Decree, rather than enforce it. The Court then defined the burden of proof, and held that the 1945 Decree would not be modified unless Nebraska could establish by "clear and convincing evidence" that it would suffer "substantial injury" as a result of Wyoming's Laramie River use and the construction of Deer Creek Dam. The Court also ruled that the parties' claims with regard to the "below-Tri-State issues" were too theoretical and insufficiently developed to be susceptible of summary resolution. Finally, the Court held that 1945 Decree did not impose absolute ceilings on diversions by "State line canals" (that water diverted between Whalen Dam and Tri-State Dam), and granted Nebraska partial summary judgment on that issue.

In 1994 both Wyoming and Nebraska sought leave to amend their claims. The Court ruled upon those motions in *Nebraska v. Wyoming*, 515 U.S. 1 (1995). The Court allowed Nebraska to proceed with the following claims: (1) Wyoming's use of the Laramie River; (2) Wyoming's development on the tributaries that enter the mainstem below Pathfinder Reservoir; (3) Wyoming's groundwater development throughout the basin; and (4) Wyoming's use of Horse Creek. The Court confirmed, however, that Nebraska would be required to meet the higher burden of proof before it would consider modifying the 1945 Decree. The Court also accepted

Wyoming's counterclaims and cross-claims as they related to the following: (1) by-pass of flows below Tri-State Dam in circumvention of the Decree, (2) the inaccuracy of the Bureau of Reclamation's conveyance loss calculations, (3) Nebraska's use of Glendo Reservoir, (4) Warren Act compliance (contracts between the U.S. Bureau of Reclamation and irrigation districts in Eastern Wyoming and Western Nebraska); and (5) apportionment of flows during water short years (also called allocation years). In that opinion, the Supreme Court also rejected Nebraska's call for a year-round apportionment and Wyoming's request that a beneficial use limitation be imposed against Nebraska.

The Supreme Court's 1995 decision framed the issues that continued to be in dispute. The next step in the litigation process was the filing of the parties' "Affirmative Case Disclosures" on May 30, 1997.

Nebraska's affirmative case disclosure identified the expert and lay witnesses it intended to call during trial. Nebraska also submitted twenty expert reports that were prepared to support its claims against Wyoming. Nebraska's expert witnesses hailed from such fields as agricultural engineering, economics, environmental analysis, hydrology, and history.

Wyoming's affirmative case disclosure identified those lay and expert witnesses it intended to call during trial. As stated above, Nebraska is the party that filed suit. Consequently, Wyoming's counter-claims against Nebraska and cross-claims against the Bureau of Reclamation were fairly narrow in scope. Wyoming identified five expert witnesses to support its affirmative case and submitted various reports related to their specific fields of expertise, including hydrology, computer modeling, economics, and agriculture engineering.

Wyoming began depositions of Nebraska's expert and lay witnesses in August, 1997. Those depositions took place on an approximate weekly basis through mid-December, 1997, at which time Nebraska sought to amend most of its expert witness reports. Master Olpin allowed the Nebraska expert witnesses to correct and amend their reports. As a result, the entire pre-trial process, including discovery, the completion and filing of Wyoming's "Defensive Case" Discovery, and the trial schedule, were delayed for several months. Following the filing of Nebraska's revised reports, another round of depositions of Nebraska's expert witnesses were conducted. Wyoming completed its discovery of Nebraska's expert witnesses in April, 1998.

Nebraska's discovery of Wyoming's affirmative case proceeded concurrently with Wyoming's discovery of Nebraska's claims. Nebraska completed the depositions of Wyoming's witnesses in April, 1998.

The next article in this series will address the parties' "Defensive Cases," and the activities and procedures that took place leading up to the trial that was scheduled to begin on May 10, 2000 in Pasadena, California. We will also describe how Nebraska's case evolved over

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time, and how that evolution impacted the parties' respective trial preparation and strategy.

North Platte Article 2b

This article is the third in a series regarding the litigation and settlement of *Nebraska v. Wyoming*. In last week's article, we began describing the claims, counter-claims and cross-claims that were addressed as part of the 1986 litigation. The purpose of this article is to continue that discussion.

The parties were required to file their "Defensive Case Disclosures" on or before July 24, 1998. Wyoming's Defensive Case was developed to carry out two separate but related purposes: (1) to provide a direct technical rebuttal to Nebraska's affirmative claims; and (2) to show that the 1945 Decree should not be modified as demanded by Nebraska. Wyoming identified twenty-three expert witnesses, submitted twenty-six expert reports and identified over 150 lay witnesses.

According to the Fourth Pretrial Order, discovery related to the parties' Defensive Cases was to be completed by January 12, 1999. On November 23, 1998, however, having undertaken no discovery in the previous four months, Nebraska filed a motion requesting additional time. Although Wyoming opposed Nebraska's request, Special Master Olpin granted Nebraska an extension of the discovery period through June 11, 1999. Of his own accord, Master Olpin eventually extended the deadline to June 30, 1999.

On January 13, 1999, Nebraska served thirty Requests for Production of Documents seeking essentially all of the documents in the possession of Wyoming's expert witnesses. Because of the preparation work that was completed by Wyoming's attorneys during the fall of 1998, Wyoming was able to immediately respond to Nebraska's request. During a five-week period beginning on February 17, 1999, Wyoming produced at five separate locations over two hundred boxes of documents, maps, technical data, and electronic materials.

Nebraska began deposing Wyoming's expert witnesses on April 8, 1999, with depositions being held every week thereafter until June 30, 1999. On May 27, 1999, Nebraska filed yet another Motion for Extension of Time to complete discovery. Nebraska also notified the Court for the first time that it wanted to depose thirty-three lay witnesses in Wyoming. Despite Wyoming's opposition, Special Master Olpin granted Nebraska's motion.

In addition to the ever changing deadlines and schedule, Nebraska's claims against Wyoming were also a constant moving target. Despite having filed the lawsuit in 1986, despite having two different United States Supreme Court opinions that defined the issues, and despite Wyoming's constant efforts to pin it down, Nebraska continued to change its theories and claims well into 1999.

As explained in our last article, the Supreme Court in 1993 and 1995 rejected Nebraska's claim that construction of Deer Creek Dam, Wyoming's use of the Laramie River, Wyoming's use of Horse Creek, and Wyoming's groundwater pumping, violated the 1945 Decree. The Supreme Court also held that Nebraska would succeed only if it could establish by "clear and convincing evidence" that it would suffer "substantial injury" if the 1945 Decree was not modified. Because Nebraska recognized the difficulty of meeting that burden, it spent literally

thousands of hours of attorney and expert witness time attempting to avoid the Supreme Court's ruling. In essence, Nebraska argued that the 1945 Decree did not mean what it said and that Wyoming was prohibited from using water in excess of what was being used during the dust bowl of the 1930's. Nebraska retained a historian and hydrologist to act as "expert" witnesses to try to bolster its claims as to what the Supreme Court really meant in the 1945 Decree.

The primary significance of whether Nebraska sought to "modify" or "enforce" the Decree was two-fold. First, Nebraska's burden of proof for modifying the 1945 Decree was substantially higher than for enforcement, thereby making it more difficult to prove its claims. Second, Nebraska could not recover monetary damages in a modification action because, by its very nature, a modification claim had nothing to do with Wyoming violating the Decree. Nebraska, however, was seeking damages well in excess of \$100,000,00.00.

Because Nebraska insisted on pursuing claims that had been rejected by the Supreme Court, Wyoming was forced to file yet another Motion to Dismiss and Motion for Summary Judgment in October, 1998. Wyoming's Motions were supported by Colorado and the United States and requested the Special Master to prohibit Nebraska from attempting to resurrect "enforcement" claims that had already been rejected by the Supreme Court. It was necessary to take such a step to prevent Nebraska from presenting testimony and evidence that had no bearing on the modification case that was before the Court.

On May 7, 1999, Master Olpin issued the Eighteenth Memorandum and acknowledged that Wyoming was justifiably frustrated with Nebraska's ever-changing theories. Master Olpin also held that, with the possible exception of Wyoming's groundwater pumping that withdrew irrigation water directly from the North Platte River between Whalen Dam and Tri-State Dam, Nebraska's case would be tried as one for modification of the Decree. Master Olpin concluded that, because it was not possible to determine through a summary judgment motion whether Wyoming was taking more than its 25% share of the natural flow through the use of groundwater pumping, specific definition of the groundwater issue would have to wait presentation of evidence at trial. As to Nebraska's other arguments, the Master held that because Nebraska sought to impose new injunctions, there would have to be a clear and convincing showing of substantial injury upon a weighing of the equities.

Following completion of Defensive Case discovery and the issuance of the Master's Eighteenth Memorandum, a status conference was held in Pasadena, California on September 30, 1999 to develop a Final Pretrial Order. The Final Pretrial Order was issued by the Special Master with his Nineteenth Memorandum on November 1, 1999. The purpose of that Order was to define the trial procedure, to set the schedule, and to define the process for the exchange of information related to exhibits and witnesses.

The next article in this series will describe specific trial preparation activities, as well as the development of the final settlement negotiations that began in the summer of 1999.

North Platte Article 3

This article describes the parties' trial preparation activities, as well as the settlement negotiations that began in the summer of 1999 that ultimately produced the Settlement Agreement.

Upon completing discovery in July, 1999, Wyoming focused its efforts towards trial preparation. During the spring and summer of 1999, Wyoming worked with Bill Grunkemeyer to film the important features of the North Platte and Central Platte Rivers. Wyoming hired a helicopter with a nose-mount camera to fly the Platte River from its headwaters (near Walden, Colorado) to Grand Island, Nebraska. The resulting film showed every measuring point on the River, the terrain and geography, and the numerous differences between Wyoming and Nebraska. The film also contained "on the ground" activities," including headgates, waste and seepage, and different types of irrigation.

The Final Pretrial Order (entered on November 1, 1999) covered many topics, including jurisdiction and scope of the case, party status, a brief history of past deadlines, status conference dates, and the trial preparation that remained. The Order also set May 10, 2000 for trial commencement, and identified the trial phases for presentation of Nebraska's Affirmative Case. Nebraska defined its trial phases as follows: Phase 1 - Physical/administrative system; Phase 2 - Original litigation; Phase 3 - Post-Decree increases in consumptive use in Wyoming below Guernsey Reservoir; Phase 4 - Post-Decree increases in consumptive use in Wyoming above Guernsey Reservoir; Phase 5 - Depletion of natural flow and related hydrologic effects; and Phase 6 - Impacts on Nebraska. The Final Pretrial Order required Nebraska to produce exhibits sixty days before each trial segment and Wyoming was to provide its responsive exhibits thirty days thereafter.

Over Wyoming's strenuous objections, Master Olpin ruled that the trial would be held in Pasadena, California. Wyoming objected to Pasadena on many grounds, including the fact that such a locale substantially increased costs, there were numerous logistical problems with moving a case of this magnitude, and because it made it substantially more difficult for Wyoming's water users to attend. Master Olpin denied Wyoming's requests to reconsider. Wyoming began moving its trial operations to Pasadena in the spring of 2000. Trial was expected to last one to two years.

While the attorneys and expert witnesses prepared for trial, Nebraska, Wyoming and the United States began another round of settlement negotiations in July, 1999. A new format was adopted for these discussions in that each party sent two negotiators and no lawyers participated in the actual meetings. The "Gang of 6," consisting of Jeff Fassett and Mike Purcell (Wyoming), John Lawson and Ken Randolph (Bureau of Reclamation), and Roger Patterson and Ann Bleed (Nebraska), met on a regular basis between July, 1999 and May, 2000.

Late on the evening of May 9, 2000, the parties reached an "Agreement in Principle" to settle the case. Although opening statements were scheduled for May 10, 2000, the parties instead used that day to inform the Special Master that a conceptual agreement had been reached

and to request additional time to finalize the details. Special Master Olpin stayed the proceedings to allow the parties to prepare the final settlement documents.

During the next nine months, the parties (attorneys were included) held numerous meetings and conference calls to hammer out the details of the settlement agreement. As the parties proceeded through this process they made substantial changes to the May 9, 2000 Agreement in Principle. For example, the provisions regarding administration of water use above Pathfinder Reservoir were changed. The parties also modified the agreement in relation to the Wyoming groundwater users in the “triangle” area that is subject to the 25/75 apportionment of natural flow (e.g., the area between Whalen Dam and the State line). The parties also modified several conceptual provisions in an effort to simplify Wyoming’s administration requirements. In all, Wyoming continued to better its position as the details were worked out.

As summarized in an earlier article, Nebraska was requesting the Supreme Court to order Wyoming to deliver at least 100,000 acre-feet of additional water at the State line. Nebraska also sought a minimum of \$100 million in damages. In light of those demands, Wyoming’s negotiators had two primary goals in the settlement negotiations with Nebraska. First, Wyoming sought to protect all existing permitted uses, including those that were developed following entry of the 1945 Decree (e.g., many of the groundwater wells in the “triangle”). Second, Wyoming sought to minimize the amount of water that it would be required to deliver to Nebraska. This second goal has often been referred to as “exchanging paper for water.” In other words, while Wyoming agreed to provide Nebraska with additional information regarding water use, Wyoming substantially minimized the amount of “wet water” that it would deliver to Nebraska pursuant to the Settlement Agreement.

There has been some misunderstanding as to how certain provisions of the Settlement Agreement were developed. For example, there has been much speculation as to why water use in the Wheatland Irrigation District was not restricted. There are several responses, the first and primary being that WID’s water use is part of the “Upper Laramie River Basin” and is controlled by the 1922 Laramie River Decree that was entered by the United States Supreme Court (*Wyoming v. Colorado*, No. 3 Original (1922), modified 1935, 1957). As stated in the 1945 North Platte Decree, “This decree shall not affect . . . the apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River.” Paragraph XII(d). The second reason is that the Wyoming negotiators did an excellent job of protecting Wyoming’s interests in the Laramie River. The same is true of Horse Creek, another tributary of the North Platte River. Again, although Nebraska sought an affirmative apportionment of that stream, the Wyoming negotiators simply refused. In summary, Wyoming’s negotiators worked hard to limit the geographic scope of the Settlement Agreement to the geographic scope of the 1945 Decree.

Next week’s article will describe the specific provisions of the Settlement Agreement and its approval process.

North Platte Article 4

While the last article enumerated the provisions of the Settlement Agreement, we felt that it was important to provide some context regarding how and why Wyoming chose to settle *Nebraska v. Wyoming*. While it is not possible to be all inclusive, suffice it to say that Wyoming was concerned about the Special Master's ability to comprehend the extremely complex technical and legal issues involved, as well as his ability to enter an administratable decision. Those concerns were exacerbated by several of the rulings that he made throughout the history of the case, as well as his management of the lawsuit. Wyoming also recognized that Master Olpin, being from Southern California, may not understand or appreciate Wyoming's agricultural and municipal interests in comparison to other issues, such as Nebraska's endangered species claims. Another concern related to his decision, over Wyoming's strenuous objections, to hold the trial in Pasadena, California. Wyoming objected to Pasadena on many grounds, including the fact that it substantially increased costs, there were numerous logistical problems with moving a case of this magnitude, and because it made it substantially more difficult for Wyoming's water users to attend. Master Olpin denied all of Wyoming's requests to reconsider his decision, commenting that the flowers were quite beautiful there in February.

Given the Master's decision, Wyoming began moving its trial operations to Pasadena in the spring of 2000. Trial was expected to last one to two years and cost approximately \$450,000.00 per month. Wyoming's projection for the cost of an eighteen month trial was approximately \$8 million.

Wyoming's Goals in Settlement Discussions

Because there appears to be some misunderstanding as to how certain provisions of the Settlement Agreement were developed, as well as what they mean, we believe that it is helpful to provide a brief summary of Wyoming's overall goals related to the decision to settle *Nebraska v. Wyoming*. As summarized in an earlier article, Nebraska was requesting the Supreme Court to order Wyoming to deliver at least 100,000 acre-feet of additional water at the State line. Nebraska also sought a minimum of \$100 million in damages. In light of those demands, Wyoming's negotiators had two primary goals in the settlement negotiations with Nebraska. First, Wyoming sought to protect all existing permitted uses, including those that were developed following entry of the 1945 Decree (e.g., many of the groundwater wells in the "triangle"). Second, Wyoming sought to minimize the amount of water that it would be required to deliver to Nebraska. This second goal has often been referred to as "exchanging paper for water" - while Wyoming agreed to provide Nebraska with additional documentation regarding water use, Wyoming minimized the amount of "wet water" delivered to Nebraska pursuant to the Settlement Agreement.

Although an "agreement in principle" was adopted on May 9, 2000, that agreement was a framework only. As the parties proceeded through the negotiating process, they made numerous changes. For example, the parties agreed to change the provisions for administration of water above Pathfinder Reservoir. The parties also modified the agreement in relation to the Wyoming groundwater users in the "triangle" area that is subject to the 25/75 apportionment of natural flow (e.g., the area between Whalen Dam and the State line). The parties also modified several

conceptual provisions to simplify Wyoming's administration requirements. Wyoming pursued the goals described above and improved its position as specific details were worked out.

General Provisions of the Settlement Agreement

To provide a better understanding of how it works, certain general provisions of the Settlement Agreement are described below. Next week's article will continue this discussion, and address the Settlement Agreement in relation to specific geographical sections of the river.

As previously explained, the Settlement Agreement established the North Platte Decree Committee (NPDC), which is made up of four members: Wyoming's State Engineer (currently Patrick Tyrrell), Nebraska's Director of Natural Resources (currently Roger Patterson), Colorado's State Engineer (currently Hal Simpson), and the Wyoming Area Manager of the United States Bureau of Reclamation (USBR) (currently John Lawson). The NPDC meets in the fall and in April of each year. Agendas are prepared, the meetings are open to the public, and minutes are approved by the parties.

The parties created the NPDC in large part to provide a forum for addressing complaints and concerns about water use and administration in the States of Colorado, Wyoming and Nebraska, in terms of management of the USBR projects. The idea is that, through better communication and understanding, the parties can avoid another *Nebraska v. Wyoming*. One of the functions of the NPDC is to adopt the yearly "Natural Flow and Ownership Procedures" (Exhibit 2 to Appendix G) for the purpose of describing the accounting for the River.

Another important aspect of the Settlement Agreement is that the parties reached consensus on the definition of certain terms to ensure clarity. For example, the parties have defined a "hydrologically connected ground water well" as "one that is so located and constructed that if water were intentionally withdrawn by the well continuously for 40 years, the cumulative stream depletion would be greater than or equal to 28% of the total groundwater withdrawn by that well." (Exhibit 4 to Appendix G at III.D.2.b.) By adopting a technical definition of hydrologically connected ground water wells, Wyoming will be able to evaluate future development opportunities. Another important definition in the Settlement Agreement relates to "intentionally irrigated acreage" for the purpose of Wyoming's acreage accounting requirements. Wyoming's previous irrigated acreage accounting requirements were not similarly limited. Under the Settlement Agreement, Wyoming is required to count only those acres that receive irrigation water through the "efforts of man using a ditch delivery system or pump . . ." (Exhibit 4 to Appendix G at III.A.6.)

When contacted by the Wyoming Livestock Roundup to describe the *Nebraska v. Wyoming* litigation and settlement, we thought we could do so in a series of five articles. We have learned that to do it justice, additional articles are needed. We will be back next week to continue this discussion.

North Platte Article 5

Last week's article concluded with a summary of certain general provisions of the Settlement Agreement. This week's article will continue that discussion, as well as describe the Settlement Agreement as it applies to the area upstream of Guernsey Reservoir.

General Provisions

The Settlement Agreement identifies the uses that are not within the purview of the Modified Decree. For example, "de minimis uses" are excluded. (Modified Decree at XII(f)). The Horse Creek basin has also been excluded.

The Settlement Agreement requires Wyoming to acquire the rights pertaining to the development of Corn Creek Irrigation Project. (Final Settlement Stipulation at VI.A). Wyoming is also required to "acquire the rights and facilities associated with the Goshen Irrigation District pump station." (*Id.* at VI.B).

Exhibits 14 and 15 of the Settlement Agreement require Wyoming to provide monthly reports concerning municipal, industrial and export water right applications (Exhibit 14 to Appendix G), and all water right applications received for the construction of new dams or enlargements of existing dams (Exhibit 15 to Appendix G). These provisions were added in the spirit of communication to avoid future litigation.

Upstream of Guernsey Reservoir

An informal moratorium on new irrigation permits on the mainstem of the North Platte River in this geographic area (for both direct flow diversions and irrigation reservoirs) has existed since approximately the mid-1950's. That informal moratorium existed to avoid a violation of the acreage and reservoir storage limitations imposed by the 1945 Decree.

The area above Guernsey Reservoir continues to have an acreage limitation. The Settlement Agreement increased the limitation to 226,000 acres to account for an expansion of the geographic area (to include the tributaries between Pathfinder and Guernsey), and to include those acres that are irrigated by hydrologically connected irrigation ground water wells (beginning with the 2004 irrigation season). Wyoming is required to provide an acreage report to the other parties by March 1st of each year. The first report was submitted in 2003 for the 2002 irrigation season.

In the year 2011, the 226,000-acre injunction will be replaced with two injunctions: one that limits the number of acres that can be irrigated above Pathfinder Dam and one that limits the number of acres that can be irrigated in the area between Pathfinder Dam and Guernsey Reservoir. The total irrigated acreage will still be limited to 226,000 acres.

The parties agreed to two separate "consumptive use" limits for the area above Guernsey Reservoir – one for above Pathfinder and one for between Guernsey Reservoir and Pathfinder Dam. The consumptive use limitation was calculated as "the largest amount of water consumed

for irrigation . . . in any ten consecutive year period between 1952 and 1999 inclusive . . .” The limitation above Pathfinder Dam is 1,280,000 acre-feet in any ten year period, and between Pathfinder Dam and Guernsey Reservoir the limit is 890,000 acre-feet in any ten year period. Wyoming is required to provide a consumptive use report to the other parties on April 15th of each year. The first report was submitted in 2003 for the year 2002.

Over the next approximate eight years, the North Platte Decree Committee (NPDC) will be “investigat[ing] new methodologies to calculate the consumptive use of irrigation water.” The goal is to collect, analyze and review certain technical information (climate, irrigation, and diversion data) to evaluate consumptive use of irrigation water in the area above Guernsey Reservoir: The NPDC will also select a minimum of two study sites between Pathfinder Dam and Guernsey Reservoir and three sites above Pathfinder Dam for inflow/outflow monitoring.

The new allocation year procedures apply to the area above Guernsey Reservoir. An “allocation year” is defined in the Settlement Agreement as a year in which the Federal reservoirs (Pathfinder, Guernsey and the Inland Lakes) do not have a forecasted supply of 1.1 million acre-feet. The methodology for determining the forecasted supply is based on water stored in the reservoirs and probable inflow based on snow pack calculations. In February of each year, the Bureau begins making calculations as to whether it is anticipated that an allocation will be declared for the upcoming irrigation season. “When the Bureau has advised other NPDC representatives that the current water year is likely to be an allocation year,” the water rights in this section of the river are administered consistent with the prior appropriation doctrine. (Exhibit 5 to Appendix G). This is referred to as the “automatic call.” While the Bureau’s call may be “automatic”, the Wyoming State Engineer still retains the authority to determine whether such a call will be honored: “the Wyoming State Engineer shall determine whether the [Bureau’s] call is valid and warrants the regulation of water rights . . .” upstream of Guernsey Reservoir. Exhibit 5, I.A. If the Wyoming State Engineer determines the Bureau’s call for regulation is valid in the above Pathfinder section, he will “discontinue diversions under water rights junior to Pathfinder Reservoir [(1904)] and limit diversions under water rights senior to Pathfinder Reservoir to 1 cfs per 70 acres.” In the Pathfinder Dam to Guernsey Reservoir section of the river, a valid call will be administered by “discontinu[ing] diversions under junior water rights and to limit diversions under senior rights to 1 cfs per 70 acres, with the exception that if Guernsey Reservoir has filled and Glendo Ownership has not filled, water rights with priorities senior to March 1, 1945 will be allowed to divert up to 2 cfs per 70 acres.” *Id.*

Considering the extreme drought of 2002, it was unfortunate that the first irrigation season following the Settlement Agreement was an allocation year. We say “unfortunate” because it appears that many people believe that the 2002 water shortages resulted from the Settlement Agreement. They did not. Water rights were administered because there was insufficient water in the system. In fact, even before the Settlement Agreement, the Bureau, as a Wyoming water right holder with early priorities (e.g., 1904), had the ability to place a call on the North Platte River (and in fact did so in 1989). The Settlement Agreement did nothing more than formalize the priority administration process and provide certainty as to how water rights regulation will be handled in water short years. The Settlement Agreement did not cause the drought and did not cause a shortage in water supplies. It merely defined the procedure that would be followed when such conditions occur.

Next week's article will focus on the Settlement Agreement provisions for the Laramie River basin and the "Triangle" (Whalen Dam to the State-line).

North Platte Article 6

Last week's article summarized the Settlement Agreement as it relates to the North Platte River upstream of Guernsey Reservoir. This week we will focus on the Laramie River Basin.

The Laramie River Basin is generally divided into two sub-basins – the upper Laramie River basin and the lower Laramie River basin. Water use in the upper basin is governed by the Laramie River Decree entered by the United States Supreme Court in *Wyoming v. Colorado*, No. 3, Original (1922).

The 1945 North Platte Decree stated that, "This decree shall not affect . . . the apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." Paragraph XII(d). Although the 1945 Decree did not restrict Wyoming's Laramie River use, Nebraska argued in this case that the 1945 Supreme Court intended to limit Wyoming's Laramie River use to the dust-bowl of the 1930's to protect North Platte River inflows. In 1993 the Supreme Court rejected Nebraska's "implied injunction" theory, but granted Nebraska the right to present evidence to support its claim that Wyoming's Laramie River use should be restricted.

Nebraska sought to limit Wyoming's water use in both the upper and lower Laramie River. Because of the Laramie River Decree, Wyoming adamantly refused to restrict Wyoming's water use in the upper Laramie River. Recognizing the importance of the inflows of the Laramie River to the North Platte River, however, Wyoming agreed to an acreage cap on the lower Laramie River. That acreage cap was set at such a level to protect permitted acreage that was historically irrigated in the lower Laramie River basin.

Wyoming is enjoined "from diverting . . . water from the Laramie River and its tributaries, . . . downstream of the Wheatland Irrigation District's Tunnel No. 2, exclusive of the area within the Wheatland Irrigation District, for the intentional irrigation of more than a total of 39,000 acres of land in Wyoming during any one irrigation season." Modified Decree, Paragraph II(d). The acreage limitation includes lands irrigated by surface water, storage water and hydrologically connected ground water wells (beginning with the 2004 irrigation season). Wyoming is required to provide an acreage report by March 1st of each year. The first report was submitted in 2003 for the 2002 irrigation season.

The Settlement Agreement requires Wyoming to provide monthly reports for all permit applications and permits issued for irrigation ground water wells with priority dates after December 31, 2000. (Exhibit 13 to Appendix G). Wyoming also provides an annual report regarding the measured pumpage from post-year 2000 irrigation wells within the Wheatland Irrigation District (WID) (although there are no pumping limits). *Id.* All permits issued for

irrigation wells within WID after December 31, 2000, require water users to measure their annual use and to report that information to the Wyoming State Engineer's Office (WSEO).

There have been many rumors as to why water use in WID was not restricted, including a rumor that Governor Geringer stepped into the negotiation process to protect his irrigation rights. Those allegations are untrue and are legally invalid. Simply stated, WID's water use is included within the upper Laramie River and is within the purview of the 1922 Laramie River Decree described above. Because the Laramie River down to and including the Wheatland Project (e.g., WID) was apportioned by the Supreme Court in 1922, Wyoming steadfastly argued that such water use was outside of the North Platte River dispute with Nebraska.

The Wyoming negotiators also sought to limit the geographical scope of the Settlement Agreement. For example, the negotiators also fought Nebraska's demand for restrictions on water use in the Horse Creek Basin.

Another issue addressed in the lawsuit and negotiations related to the 1978 Settlement Agreement between Basin Electric Power Cooperative ("Basin Electric"), Nebraska, and others to resolve litigation regarding construction of Grayrocks Reservoir. The 1978 Settlement Agreement requires Basin Electric to maintain throughout the year certain flows from the reservoir outlet to the mouth of the Laramie River. An early issue in the litigation related to whether Wyoming appropriators were intercepting those required releases. Basin Electric obtained a "secondary permit" from the Wyoming State Engineer (WSEO) to protect those releases from diversion. As part of that permitting process, the WSEO and Basin Electric entered into an agreement titled, "Water Administration of the Lower Laramie River System Relating to the Basin Electric Power Cooperative's Water Rights." That Agreement was important in the settlement of Nebraska's Laramie River claims.

Basin Electric was allowed to participate as an *amici* (e.g., "friend of the court") in *Nebraska v. Wyoming*, along with The National Audubon Society, The Platte River Trust, Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District. Basin Electric became a party in March, 1999, for the limited purpose of protecting its interests in the Laramie River. The Special Master had concluded 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.'" (Seventeenth Memorandum of Special Master).

As negotiations on the Laramie River progressed, Nebraska described concerns about whether Basin Electric's operation of Grayrocks Reservoir was consistent with the 1978 Settlement Agreement. For example, Nebraska complained that Basin Electric was not following the order of use defined in the 1978 Settlement Agreement. To address Nebraska's complaints, the North Platte Settlement Agreement incorporated a revised agreement between the WSEO and Basin Electric to describe administration of Basin Electric's water rights. (Exhibit 3 to Appendix G). The Settlement Agreement requires Wyoming to protect Grayrocks releases made pursuant to the 1978 Settlement Agreement, and to administer the Grayrocks Reservoir water rights pursuant to the revised agreement between Basin Electric and the WSEO. (Final Settlement Stipulation). The Settlement Agreement also states that "Exhibit 3 cannot be modified without the consent of the North Platte Decree Committee and Basin Electric." (Id.)

Next week's article will describe the Settlement Agreement provisions regarding the "Triangle" area (Whalen Dam to the State-line).

North Platte Article 8

This is our final article related to *Nebraska v. Wyoming*, and summarizes the parties' allocation settlement, and the procedures that were adopted for the implementation of the Settlement Agreement.

Allocation Year Procedures

An "allocation" year is declared by the Bureau of Reclamation whenever the forecasted supply for the North Platte Project and Warren Act contracts (those water users who divert between Whalen Dam and Tri-State Dam) is less than 1.1 million acre-feet. The most recent allocations were declared in 1989, 1990, 1992, 2002 and 2003. The Bureau's historical practice was to "allocate" water on a proportional percentage basis compared to what each individual irrigation district diverted during non-allocation years. In other words, the higher the diversions during non-allocation years, the higher the deliveries by the Bureau during allocation years. Wyoming challenged the Bureau's allocation year administration, arguing that it encouraged waste and caused a continuous decrease in the amount of water allocated to Wyoming's water users. The parties settled Wyoming's claims by adopting an allocation year procedure that grants each State a percentage of the water available. Therefore, wasteful practices by Nebraska water users will only hurt other Nebraska water users, as Wyoming now has its own "bucket" of water during allocation years – water that cannot be used by Nebraska.

Implementation

Shortly after the parties finalized the Settlement Agreement in March, 2001, Wyoming's North Platte Settlement Team (comprised of employees of the State Engineer's Office, the Attorney General's Office and the Water Development Commission along with technical and legal consultants), changed their mission and began developing an "implementation plan" to administer the Settlement Agreement. As explained in an earlier article, the Settlement Agreement is 365 pages, is generally organized on a geographical basis, and contains detailed information about numerous topics including irrigated acreage accounting, consumptive use of irrigation water, hydrologically connected groundwater, the 25/75 apportionment, and administration. The Team concluded that the most efficient way to organize and implement the provisions of the Settlement Agreement was to group them topically, not geographically, and developed thirteen separate implementation plans. Each plan identified tasks and attached time-lines and budgets.

The implementation plan budgets were combined to form the basis for an appropriation request from the Wyoming Legislature. The implementation plan budgets divided expenses into two categories: one-time expenses and continuing expenses. One-time expenses were those that

would occur only once, such as initial identification of hydrologically connected ground water wells. The one-time expenses were further divided into three categories depending on the agency primarily responsible for their implementation. For example, the Water Development Commission was allocated the funds for the modification of Pathfinder Reservoir, while money for the required adjudications was allocated to the Attorney General's Office. Most of the one-time tasks were assigned to Wyoming's legal and technical consultants, while continuing tasks were assigned to agency personnel.

Continuing expenses were those that were related to repeat tasks, such as the annual irrigated acreage accounting. Most of the funds requested for continuing expenses related to the hiring of additional employees in the Attorney General's Office and State Engineer's Office. The Legislative request included the addition of seven full-time and three part-time positions in the State Engineer's Office. The implementation plans contemplated the addition of three full-time employees for acreage accounting - one inspector in each of the following locations: Saratoga, Wheatland and Casper. The Board of Control also requested an additional position in the Cheyenne office to assist in processing the required adjudications. The Cheyenne SEO also created a North Platte coordinator position. The Torrington field office requested two full-time positions to assist with river accounting and ground water well inspections. The three part-time positions were requested for allocation years (Douglas), tributary diversions (Torrington) and computer technician (Torrington). The Attorney General's Office requested funding for a full-time attorney to monitor compliance and advise state agencies on North Platte issues. The Attorney General's Office also sought authorization to hire an "archiving" assistant to compile, organize and properly archive the millions of pages of documents from the *Nebraska v. Wyoming* litigation and related settlement discussions. Many of those documents come within the purview of the attorney-client privilege and attorney work product doctrine and must be properly handled to ensure that they remain protected.

The total request made to the 2002 Legislature was for \$31,127,000.00. After deducting previously-appropriated funds for the Deer Creek Project and the litigation, the three State agencies requested a total appropriation of \$16,127,000.00. The Legislature approved the request without modification, agreeing with the Geringer Administration that it was important for Wyoming to proactively implement the Settlement Agreement to minimize future litigation and to protect Wyoming's interests through documentation of conditions on the River. The philosophy at that time was that it was critical to ensure that all necessary data was gathered, that record-keeping and management was top notch, that the *Nebraska v. Wyoming* documents were properly handled and archived, and that Wyoming remained the leader in terms of North Platte issues.

While a few of the positions remain unfilled, most of the new employees have been hired. The attorney currently responsible for implementing the Settlement Agreement was hired out of law school in August, 2001, after the Settlement Agreement was . The North Platte Coordinator joined the team in January, 2003. It is critical that experienced agency personnel and the remaining consultants continue to follow the implementation plans to ensure compliance with the Settlement Agreement. As of March 28, 2003, the implementation tasks were on schedule and under budget.

We have enjoyed writing these articles for the readers of the Wyoming Livestock Roundup. We hope that they have been educational in understanding the complex issues surrounding the North Platte River. We would like to dedicate this series to four of the Wyoming Team members that passed away within the last year: Jeff Hanson (Acreage Coordinator, Torrington Field Office), Dr. Robert Burman (Professor of Agricultural Engineering at the University of Wyoming), Tom Quinn (Administrator, Groundwater Division of the SEO), and Bill Grunkemeyer (who was hired by Wyoming to film the important features of the North Platte and Central Platte Rivers.). Their dedication to Wyoming and devotion to their chosen professions will never be forgotten.

North Platte Article Final

While the last article enumerated the provisions of the Settlement Agreement, we felt that it was important to provide some context regarding how and why Wyoming chose to settle *Nebraska v. Wyoming*. While it is not possible to be all inclusive, suffice it to say that Wyoming was concerned about the Special Master's ability to comprehend the extremely complex technical and legal issues involved, as well as his ability to enter an administratable decision. Those concerns were exacerbated by several of the rulings that he made throughout the history of the case, as well as his management of the lawsuit. Wyoming also recognized that Master Olpin, being from Southern California, may not understand or appreciate Wyoming's agricultural and municipal interests in comparison to other issues, such as Nebraska's endangered species claims. Another concern related to his decision, over Wyoming's strenuous objections, to hold the trial in Pasadena, California. Wyoming objected to Pasadena on many grounds, including the fact that it substantially increased costs, there were numerous logistical problems with moving a case of this magnitude, and because it made it substantially more difficult for Wyoming's water users to attend. Master Olpin denied all of Wyoming's requests to reconsider his decision, commenting that the flowers were quite beautiful there in February.

Given the Master's decision, Wyoming began moving its trial operations to Pasadena in the spring of 2000. Trial was expected to last one to two years and cost approximately \$450,000.00 per month. Wyoming's projection for the cost of an eighteen month trial was approximately \$8 million.

Wyoming's Goals in Settlement Discussions

Because there appears to be some misunderstanding as to how certain provisions of the Settlement Agreement were developed, as well as what they mean, we believe that it is helpful to provide a brief summary of Wyoming's overall goals related to the decision to settle *Nebraska v. Wyoming*. As summarized in an earlier article, Nebraska was requesting the Supreme Court to order Wyoming to deliver at least 100,000 acre-feet of additional water at the State line. Nebraska also sought a minimum of \$100 million in damages. In light of those demands, Wyoming's negotiators had two primary goals in the settlement negotiations with Nebraska. First, Wyoming sought to protect all existing permitted uses, including those that were developed

following entry of the 1945 Decree (e.g., many of the groundwater wells in the “triangle”). Second, Wyoming sought to minimize the amount of water that it would be required to deliver to Nebraska. This second goal has often been referred to as “exchanging paper for water” - while Wyoming agreed to provide Nebraska with additional documentation regarding water use, Wyoming minimized the amount of “wet water” delivered to Nebraska pursuant to the Settlement Agreement.

Although an “agreement in principle” was adopted on May 9, 2000, that agreement was a framework only. As the parties proceeded through the negotiating process, they made numerous changes. For example, the parties agreed to change the provisions for administration of water above Pathfinder Reservoir. The parties also modified the agreement in relation to the Wyoming groundwater users in the “triangle” area that is subject to the 25/75 apportionment of natural flow (e.g., the area between Whalen Dam and the State line). The parties also modified several conceptual provisions to simplify Wyoming’s administration requirements. Wyoming pursued the goals described above and improved its position as specific details were worked out.

General Provisions of the Settlement Agreement

To provide a better understanding of how it works, certain general provisions of the Settlement Agreement are described below. Next week’s article will continue this discussion, and address the Settlement Agreement in relation to specific geographical sections of the river.

As previously explained, the Settlement Agreement established the North Platte Decree Committee (NPDC), which is made up of four members: Wyoming’s State Engineer (currently Patrick Tyrrell), Nebraska’s Director of Natural Resources (currently Roger Patterson), Colorado’s State Engineer (currently Hal Simpson), and the Wyoming Area Manager of the United States Bureau of Reclamation (USBR) (currently John Lawson). The NPDC meets in the fall and in April of each year. Agendas are prepared, the meetings are open to the public, and minutes are approved by the parties.

The parties created the NPDC in large part to provide a forum for addressing complaints and concerns about water use and administration in the States of Colorado, Wyoming and Nebraska, in terms of management of the USBR projects. The idea is that, through better communication and understanding, the parties can avoid another *Nebraska v. Wyoming*. One of the functions of the NPDC is to adopt the yearly “Natural Flow and Ownership Procedures” (Exhibit 2 to Appendix G) for the purpose of describing the accounting for the River.

Another important aspect of the Settlement Agreement is that the parties reached consensus on the definition of certain terms to ensure clarity. For example, the parties have defined a “hydrologically connected ground water well” as “one that is so located and constructed that if water were intentionally withdrawn by the well continuously for 40 years, the cumulative stream depletion would be greater than or equal to 28% of the total groundwater withdrawn by that well.” (Exhibit 4 to Appendix G at III.D.2.b.) By adopting a technical definition of hydrologically connected ground water wells, Wyoming will be able to evaluate future development opportunities. Another important definition in the Settlement Agreement relates to “intentionally irrigated acreage” for the purpose of Wyoming’s acreage accounting

requirements. Wyoming's previous irrigated acreage accounting requirements were not similarly limited. Under the Settlement Agreement, Wyoming is required to count only those acres that receive irrigation water through the "efforts of man using a ditch delivery system or pump . . ." (Exhibit 4 to Appendix G at III.A.6.)

When contacted by the Wyoming Livestock Roundup to describe the *Nebraska v. Wyoming* litigation and settlement, we thought we could do so in a series of five articles. We have learned that to do it justice, additional articles are needed. We will be back next week to continue this discussion.