Equitable Apportionment: A Judicial Bridge over Troubled Waters

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Comment

Equitable Apportionment: A Judicial Bridge Over Troubled Waters

TABLE OF CONTENTS

I. Equitable Apportionment ................................ 735
   A. Forum and Constitutional Basis ...................... 735
   B. Federal Common Law ................................ 737
   C. Principles of Standing ................................ 738
      1. Missouri v. Illinois ................................ 738
      2. Connecticut v. Massachusetts ...................... 739
      3. Nebraska v. Wyoming .............................. 739
   D. Balancing the Equities ................................ 740
   E. Emergence of the Doctrine ............................ 741
   F. Equitable Apportionment Applied .................... 742
      1. Wyoming v. Colorado .............................. 742
   G. Current Status ........................................ 743
      1. Colorado v. New Mexico (Colorado I) .............. 743
      2. Colorado v. New Mexico (Colorado II) ............ 745

II. Equitable Apportionment and Nebraska v. Wyoming .... 747
   A. Background ........................................... 747
   B. Theories of the Case .................................. 749
   C. Resolution of the Case ................................ 750

III. The Present Controversy ................................ 751
   A. Background ........................................... 751
   B. Standing ............................................. 753
   C. Future Use and Conservation Measures .............. 756
   D. Evidentiary Standard ................................ 759

IV. Conclusion ................................................ 760

INTRODUCTION

“A river is more than an amenity, it is a treasure, it offers a necessity of life that must be rationed among those who have power over it.”


When a dispute arises between states over the use of water in an interstate stream, the United States Supreme Court has employed the doctrine of equitable apportionment to resolve the dispute. Equitable
apportionment requires the Court to determine the respective state’s rights to the use and benefit of the interstate water. A recurrent theme in equitable apportionment suits is the concept of injury. The focus of the Court’s analysis is to apportion the water so that each state receives maximum benefit from the use of the water with minimal injury to the other state. Typically, the Court has used a balancing test in dealing with competing demands on an over-appropriated water supply.

Early Supreme Court apportionment cases established the doctrine of equitable apportionment, relying mainly on state water law principles. Subsequent cases expanded the principles of apportionment to include not only the respective state’s water laws, but considerations of dependent economies, climatic conditions, conservation measures, and an in-depth analysis of the benefits and burdens of large-scale diversions and their impact on existing uses. Apportionment decrees have become more complex as a result of the Court’s multi-factored analysis. Although there are identifiable factors in the apportionment analysis, each case has been decided on an ad hoc basis, dependent upon the particular facts of the dispute.

This Comment will review the constitutional basis of the doctrine of equitable apportionment and will discuss the legal principles and public policy considerations underlying the equitable apportionment decisions of the United States Supreme Court. The Comment will then examine the background and resolution of the North Platte River dispute that gave rise to the Court’s equitable apportionment decree in Nebraska v. Wyoming. Finally, a discussion of the events preceding Nebraska’s petition to reopen the North Platte River Decree and an analysis of issues in the new controversy based on previous equitable apportionment cases will be presented.

I. EQUITABLE APPORTIONMENT

A. Forum and Constitutional Basis

The United States Constitution gives the Supreme Court original jurisdiction in disputes between states. The statute implementing the constitutional provision provides that suits by one state against another are within the original and exclusive jurisdiction of the Supreme Court. Since the states of the union are not free to wage war upon

1. 325 U.S. 589 (1945)
2. U.S. Const. art. III, § 2, cl. 2, provides in pertinent part, “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.”
3. The statute states in pertinent part, “Original jurisdiction. (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States. . . . ” 28 U.S.C. § 1251(a) (1982).
4. The usual tests of case or controversy, standing, political questions, and the like
each other, the need for the Court to act as a neutral tribunal is obvi-
ous. Controversies between states, which when the States were in-
derpendent would have been resolved by force or diplomatic
egotiation, are now peacefully settled by the Court.\(^5\) No consent of
the state is required. States are deemed to have consented to original
jurisdiction by virtue of the fact that they have adopted the Constitu-
tion, which grants jurisdiction of controversies between two or more
states.\(^6\)

In petitioning the Court to accept original jurisdiction, a state must
bring the suit in \textit{parens patriae} in order to overcome an eleventh
amendment challenge.\(^7\) Thus, the inquiry by the Court is whether the
state is suing to protect interests beyond the protection of private
rights.\(^8\) "\textit{Parens patriae} works because equitable apportionment suits
do not greatly strain the fiction that the state is asserting a sovereign
interest separate from the protection of private water rights."\(^9\)

A Special Master is appointed once the Court accepts jurisdiction.
The role of the Master is to collect evidence, preside over hearings,
take expert testimony and report the findings to the Court.\(^10\) The
Court, not the Master, enters judgment in the case. Usually, the find-
ings of the Master are given deference by the Court.\(^11\)

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5. Id. at 766.
6. Id.
7. [S]tates have been permitted to invoke the original jurisdiction in the
capacity of \textit{parens patriae}, asserting claims independent of those predi-
cated upon the state's proprietary interests. As \textit{parens patriae} the state
has been described as 'guardian of the health, welfare and prosperity of
its inhabitants.' The circumstances leading to recognition of a state as
\textit{parens patriae} arise from injury to the collective interests of a state's
citizens, but the right to sue as \textit{parens patriae} itself is independent of
and behind' those interests.

Note, \textit{The Original Jurisdiction of the United States Supreme Court}, 11 Stan. L.
8. Tarlock, \textit{Law of Equitable Apportionment Revisited, Updated, and Restated}, 56
9. Id. at 389.
11. The reason the Court usually gives considerable deference to factual findings of
Special Masters is that the record in equitable apportionment cases is usually
lengthy, complex, and technical. The reason for deference is best illustrated by
the following two examples: In Kansas v. Colorado, 206 U.S. 46 (1907), the Spe-
cial Master spent six years collecting evidence, resulting in 6,559 pages of testi-
mony, 122 exhibits and 347 witnesses. In Nebraska v. Wyoming, 325 U.S.
589 (1945), the Master was appointed in 1935 and submitted his final report in 1945.
The record constituted 29,500 pages of testimony and 1,288 exhibits. The Master's
Report alone was 273 pages long. On June 22, 1987, the Court appointed Owen
Olpin, Esq. of Los Angeles as Special Master in the present case, 55 U.S.L.W.
3852.
B. Federal Common Law

The doctrine of equitable apportionment is a form of federal common law. The concept of a federal common law in the context of resolving interstate water disputes is attributed to Justice Brandeis in *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.* "For whether the water of an interstate stream must apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." 

Equitable apportionment is federal common law because it is court created by a federal court, the United States Supreme Court. In *Kansas v. Colorado,* Chief Justice Fuller remarked "[s]itting, as it were, as an international, as well as a domestic, tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand." Therefore, the Court looks to a number of sources and factors in attempting to equitably apportion water rights between two contending states.

Implicit in the apportionment cases is the realization that each state has a federal common law right to use interstate waters, but usu-
ally not to the complete exclusion of another state. However, "equality of right" refers ... not to an equal division of the water, but to the equal level or plane on which all the states stand, in point of power and right, under our constitutional system." The states, therefore, come before the Court on equal footing and the Court must carefully weigh the interests of each state in resolving the dispute.

C. Principles of Standing

In an equitable apportionment case, the complaining state must meet a high standard of proof of injury in order for the Court to invoke jurisdiction. The following cases illustrate the requisite standard of proof in an equitable apportionment action.

1. Missouri v. Illinois

Missouri v. Illinois was the first case to set a high standard of injury as a prerequisite to Supreme Court relief. Missouri brought an original action to enjoin Illinois from discharging sewage from Chicago into the Illinois River, a tributary of the Mississippi. Missouri contended that the common law rule granting a riparian the right to the flow of a stream unimpaired in quality and quantity should control, thus entitling the state to an injunction. The Supreme Court, however, refused to grant Missouri an injunction due to the fact that Missouri had not met its burden of proof. "Before this court ought to intervene the case should be of serious magnitude clearly and fully proved, and the principle to be applied should be one of which the

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19. In Kansas v. Colorado, 206 U.S. 46, 96 (1907), the Court remarked: "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none."
21. 200 U.S. 496 (1906).
22. Id. at 517.
23. There are two basic doctrines governing water rights: the riparian doctrine, recognized largely by states east of the hundredth meridian and the doctrine of prior appropriation, recognized in most of the western states. The riparian doctrine has two distinct theories of water use: the natural flow theory and the reasonable use theory. Under the former, riparian landowners may use the waters of a stream so long as that use does not affect either the quantity or quality of the streamflow. The reasonable use theory entitles riparians to the reasonable use of the streamflow for normal consumptive purposes and the discharge of wastes. Under the prior appropriation doctrine, water rights may be acquired by diverting water and using it for a beneficial purpose. The rule of priority determines the relative rights of appropriators, whose appropriations are ranked in the order of their seniority. 1 W. Hutchins, Waters and Water Rights §§ 16, 18, 19 (1967).
court is prepared deliberately to maintain against all considerations on the other side.”

2. Connecticut v. Massachusetts

In Connecticut v. Massachusetts, the Court considered for the first time an interstate water dispute between two riparian states. Connecticut sued to prohibit the diversion of water from two tributaries of the Connecticut River to the city of Boston. Connecticut contended that the proposed diversion would divert water out of the watershed, impair the navigability of the Connecticut River, and take flood waters which agricultural interests relied on for irrigation purposes. Connecticut also argued that since both were riparian states the riparian doctrine’s natural flow theory should be the guiding principle in the Court’s decision. The Court declined to strictly apply the riparian rule reasoning that although local water law is a persuasive consideration, “federal, state and international law is to be considered and applied... as the exigencies of the particular case may require.” The Court refused to issue the injunction noting “this Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence.”

3. Nebraska v. Wyoming

In Nebraska v. Wyoming, Nebraska brought an original action alleging that irrigators in Colorado and Wyoming were violating the rule of prior appropriation in force in the three states and asked the Court to equitably apportion the waters of the North Platte River. The Court denied Colorado’s motion to dismiss over a vigorous dissent by Justice Roberts. Justice Douglas, writing for the majority,
noted that the dependable natural flow of the river during the irrigation season had long been over-appropriated. Douglas also found it persuasive that the States had not been able to negotiate an agreement, that the areas involved were arid or semi-arid and that deprivation of water in those areas could not help but be injurious. The majority, analogizing to the Court's previous decision in Wyoming v. Colorado, said, "There the only showing of injury or threat of injury was the inadequacy of the supply of water to meet all appropriative rights. As much if not more is shown here." Thus, in Nebraska v. Wyoming sufficient proof of injury was found in the fact that the North Platte historically had been over-appropriated and any new diversion would add to the problem.

D. Balancing the Equities

In equitable apportionment cases, the Court seeks to apportion the water with a sense of fairness to both states so that each state benefits from the use of the water. Although equitable apportionment cases are few, some broad principles have emerged. The issue to be resolved is whether the benefit received by a state diverting water from an interstate stream outweighs the harm done to the complaining state. As demonstrated by case law, the equitable apportionment doctrine has been applied in a flexible manner, with each case determined on its particular facts.

In Nebraska v. Wyoming, Justice Douglas considered the nature and amount of return flows, climatic conditions, environmental factors, the importance of established uses, economies dependent upon regular supplies of water, the amount of waste, and the availability of threatened damage of substantial magnitude in order to be granted relief. The dissent's argument was based in part on the following quotation from the Master's report: "The statistics, taken all in all, are, to say the least, inconclusive as to the existence or extent of damage to Nebraska by reason of the drought or by reason of any deprivation of water by wrongful uses in Wyoming or Colorado." Id. at 661-62 (Roberts, J., dissenting). In what has proven to be a prophetic statement, Justice Roberts observed: "I am sure that, on the showing in the present record, none of the states is entitled to a declaration of rights. The precedent now made will arise to plague this court not only in the present suit but in others. Id. at 657-58 (Roberts, J., dissenting).

36. Id. at 608.
37. Id. at 610.
38. 259 U.S. 419 (1922).
40. The Court held, "Where the claims to the water of a river exceed the supply, a controversy exists appropriate for judicial determination." Id.
41. See Wyoming v. Colorado, 259 U.S. 419, 464 (1922). The Court apportions the available water based on "the particular facts disclosed and the local law of the two states."
42. 325 U.S. 589 (1945).
The Supreme Court has recently held that it is appropriate to consider whether reasonable conservation measures in the downstream state might negate any injuries suffered by the upstream diversion. Thus, the Court engages in a multi-factored analysis in balancing the competing interests of the respective states.

E. Emergence of the Doctrine

1. Kansas v. Colorado

The United States Supreme Court first announced its power to equitably apportion an interstate stream in Kansas v. Colorado. In that case, Kansas brought an original action to restrain Colorado appropriators from diverting waters from the Arkansas River. Kansas argued it had a right to the natural and customary flow of the river under the natural flow theory of the riparian doctrine. Colorado, an appropriation doctrine state, claimed it had a sovereign right to use the river's entire flow for its entire benefit, regardless of any injury such use might cause downstream users. Because each state had rejected the water rights doctrine adopted by the other, the Court declined to resolve the dispute by strictly applying the principles of either doctrine. The Court, however, noted that some appropriation principles were recognized under Kansas law. After reviewing the

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43. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But 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, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. Id. at 618.

44. Colorado v. New Mexico, 459 U.S. 176, 187-88 (1982) (footnote omitted). Under some circumstances . . . the countervailing equities supporting a diversion for future use in one State may justify the detriment to existing users in another State. This may be the case, for example, where the State seeking a diversion demonstrates by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that might result. In the determination of whether the State proposing the diversion has carried this burden, an important consideration is whether the existing users could offset the diversion by reasonable conservation measures to prevent waste. This approach comports with our emphasis on flexibility in equitable apportionment and also accords sufficient protection to existing uses.

45. 206 U.S. 46 (1907)
46. Id. at 47.
47. Id. at 58-60.
48. Id.
49. Id. at 104-05.
50. Id. at 104-05. "As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable
evidence, the Court acknowledged that the Colorado diversions had caused some perceptible injury but concluded that the benefits of the diversions to Colorado outweighed the injury to Kansas. Due to the fact that Kansas was unable to prove substantial injury under either riparian or appropriation principles, there was no reason to enjoin Colorado's appropriation.

F. Equitable Apportionment Applied

1. Wyoming v. Colorado

In Wyoming v. Colorado, the Court first considered the role of a common water law doctrine in an equitable apportionment action. This case also marks the first time the Court's application of equitable apportionment principles resulted in an actual division of water in an interstate river between two contending states. Both Colorado and Wyoming had adopted the doctrine of prior appropriation for water rights. Wyoming brought suit against Colorado and two Colorado corporations to enjoin the defendants from diverting water from the Laramie River. Wyoming argued that diverters in Wyoming had prior and superior right to the water and that Colorado's proposed diversion would not leave enough water in the river to satisfy the senior

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51. Id. at 113-14.

52. 259 U.S. 419 (1922).

53. The Court also has made an actual division of water in two other cases. Nebraska v. Wyoming, 325 U.S. 589 (1945). See infra pp. 814-818 and accompanying notes.


55. Id. at 455.
After finding that both states had adopted the doctrine of prior appropriation, the Court held there was neither a need to balance competing state interests nor a need to develop new principles of equitable apportionment since both states followed nearly identical laws. The doctrine of prior appropriation "furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is."\(^{57}\) The analysis of the Court in *Wyoming v. Colorado* led Professor Robert Clark to remark:

(W)hen litigant states follow substantially identical laws, the Supreme Court can avoid the search for a reason to prefer the law of one state over that of another, or the usually more difficult task of shaping a rule different from that which any of the litigant states apply internally. The solution is substantially to ignore the existence of a state boundary.\(^{58}\)

Several considerations persuaded the Court to apply the prior appropriation doctrine interstate.

Each of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. Both States pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either State came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned.\(^{59}\)

The Court found that senior Wyoming appropriators held 181,500 acres of land. The Court then determined that the amount of water reasonably required to irrigate that amount of land was 272,500 acre-feet. The Court subtracted this amount from the available supply of the river which was 288,000 acre-feet. The remainder was 15,500 acre-feet. Therefore, the Court reasoned that the proposed Colorado diversion could not exceed 15,500 acre-feet.\(^{60}\)

G. Current Status

1. **Colorado v. New Mexico (Colorado I)**\(^{61}\)

*Colorado v. New Mexico* involved a suit by Colorado for apportionment of the Vermejo River.\(^{62}\) At the time of the suit, there were no

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56. Id. at 457.
57. Id. at 470.
58. 2 R. Clark, supra § 132.3 at 331.
60. Id. at 496.
62. The Vermejo River is a small, nonnavigable river that originates in the moun-
uses of the river's water in Colorado and no use or diversion had ever been made in Colorado. The waters of the Vermejo had been fully appropriated by four New Mexico users. In 1975, a Colorado corporation obtained a conditional water right to appropriate water from the headwaters of the Vermejo River. Upon learning of the conditional water right, the four New Mexico appropriators filed suit in the United States District Court for the District of New Mexico to enjoin the proposed diversion. The District Court enjoined the proposed Colorado use on the basis that the New Mexico users were entitled to have their needs satisfied first because their appropriations were prior in time.

In June 1978, Colorado filed suit in the Supreme Court for equitable apportionment of the river. The Court appointed a Special Master in the case. The Master determined that most of the water of the Vermejo was consumed in New Mexico and if the rule of priority was strictly applied, Colorado could not be allowed to divert because the entire flow was required to satisfy the demands of the New Mexico users. Nevertheless, the master applied the doctrine of equitable apportionment and recommended that Colorado be allowed to divert 4,000 acre-feet of water annually from the headwaters of the river. The Master's recommendation was based on two findings: (1) New Mexico could compensate for some or all of Colorado's planned diversion through reasonable conservation measures, and (2) Colorado's benefit would outweigh New Mexico's injury from the diversion. The Master found that the Vermejo Conservancy District would be the only major user to be injured because there was adequate water for the other New Mexico users.

The Court acknowledged that when "both States recognize the doctrine of prior appropriation, priority becomes the 'guiding principle' in an allocation between competing States." The Court, however, rejected New Mexico's argument that the rule of priority should control the Court's decision. "[T]he just apportionment of interstate

63. Id. at 178.
64. The four major appropriators were Phelps Dodge Corp., Kaiser Steel Corp., Vermejo Park Co., and the Vermejo Conservancy District. Id.
65. Id. at 178.
66. Id.
67. Id. at 178-79.
68. Id. at 179-80.
69. Id. at 180.
70. Id.
71. Id. at 181.
72. Id. at 180.
73. Id. at 182-84.
74. Id. at 182-83.
waters is a question of federal law that depends upon a consideration of the pertinent laws of the contending States and all other relevant facts." \(^{75}\)

The Court in *Colorado I* focused attention on waste and inefficiency in the use of interstate waters. After noting that waste or inefficient use should not be protected\(^{76}\) the Court said: "We have invoked equitable apportionment not only to require the reasonable efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." \(^{77}\) The Court found that the Master's findings were not sufficient to determine "the correctness of the Special Master's application of the principle of equitable apportionment to the facts of this case." \(^{78}\) The Court remanded to the Special Master to make further findings of fact. \(^{79}\)

2. *Colorado v. New Mexico (Colorado II)* \(^{80}\)

On remand the Special Master denied New Mexico's motion to submit new evidence. After a review of the previous evidence, the Master developed additional findings of fact and reaffirmed his original recommendation that Colorado be allowed to divert 4,000 acre-feet from the Vermejo River. \(^{81}\) New Mexico filed exceptions to the Master's second report and the case was argued to the Court on January 9, 1984. Justice O'Connor, writing for an eight-member majority, sustained New Mexico's exceptions and dismissed the case. \(^{82}\)

The Court's rejection of the Master's factual findings in *Colorado II*

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\(^{75}\) Id. at 184 (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931)).

\(^{76}\) The court said, "Especially in those Western States where water is scarce, 'there must be no waste . . . of the 'treasure' of a river . . . Only diligence and good faith will keep the privilege alive.'" Id. at 184 (quoting *Washington v. Oregon*, 297 U.S. 517, 527 (1936)).


\(^{78}\) Id. at 183.

\(^{79}\) Id. at 189-90. Remand was for specific findings showing:

1. Historical water shortages or the failure of existing users to develop their uses diligently;
2. The available supply of water from the Vermejo River . . . needs of current users for a continuous supply. The possibilities of equalizing and enhancing the water supply through water storage and conservation, and the availability of substitute sources of water. . . .;
3. The extent to which reasonable conservation measures in both States might eliminate waste and inefficiency;
4. The precise nature of the . . . use in Colorado. . . . and the benefits that would result. . . .
5. The injury . . . that New Mexico would likely suffer as a result of . . . such diversion, taking into account the extent to which reasonable conservation measures could offset the diversion.

\(^{80}\) 467 U.S. 310 (1984)

\(^{81}\) Id. at 315.

\(^{82}\) Id. at 324.
is the first equitable apportionment suit in which the Court totally rejected the Master's findings of fact and conclusions of law. In addressing the findings of the Special Master, Justice O'Connor said "though the Master's findings . . . deserve respect and a tacit presumption of correctness, the ultimate responsibility for deciding what are correct findings of fact remains with us." The majority found that Colorado's evidence was not specific enough in identifying financially or physically feasible conservation measures to correct existing inefficiencies in water usage or the future benefits and efficiencies associated with the proposed diversion.

In his dissent, Justice Stevens criticized the majority's standard of "tacit presumption of correctness." Justice Stevens acknowledged that a Master's Report is simply a recommendation and no law requires the Court to give special deference to the Master's findings and recommendations. In this case, however, Stevens reasoned "[T]he cause of justice is more likely to be well served by according considerable deference to the Master's factual determinations. The record in cases such as this is typically lengthy, technical, and complex." In *Colorado II*, Justice O'Connor explained why the Court applied the clear and convincing standard to Colorado's evidence. The Court reasoned that the proposed diverter should bear most, but not all the risks of erroneous decisions, because the harm to established uses is more certain, while benefits of a proposed diversion may be speculative. The Court explained that imposition of "the clear-and-convincing-evidence standard accommodates society's competing interests in increasing the stability of property rights and in putting resources to their most efficient uses." The Court noted, "A State can carry its burden of proof in an equitable apportionment action only with specific evidence about how existing uses might be improved, or with clear evidence that a project is far less efficient than most other projects." The Court concluded that Colorado's proposed diversion would meet the standard if the evidence showed the high probability of future benefits or actual inefficiencies in present uses. The Court, however, found that Colorado had not presented evidence showing it had taken any reasonable step to minimize the amount of diversion required.

83. Id. at 317.
84. Id. at 317-19.
85. Id. at 326. (Stevens, J., dissenting).
86. Id. (Stevens, J., dissenting).
88. Id.
89. Id.
90. Id. at 320.
91. Id. at 317.
92. Id. at 320.
passed since the diversion was first proposed and yet no alternatives for substitute sources were considered or proposed.\textsuperscript{93}

In imposing the clear-and-convincing standard, the Court held that the proponent of the diversion (Colorado) "must bear the risk of error from the inadequacy of the information available."\textsuperscript{94} In the Court's view, Colorado had not "committed itself to any long-term use for which future benefits can be studied and predicted."\textsuperscript{95} Colorado had only established that a steel corporation wanted water for "some unidentified use in the future."\textsuperscript{96} In dismissing the case and upholding the existing uses in New Mexico, the Court explained that the requirement of long-range planning and analysis will "reduce the uncertainties with which equitable apportionment judgments are made."\textsuperscript{97}

\textit{Colorado I} and \textit{Colorado II} indicate that the Court will impose more stringent conservation measures on both Nebraska and Wyoming in the present controversy. At the minimum, the Court will require that both states prove water is being or will be put to a maximum efficient use.

\section*{II. EQUITABLE APPORTIONMENT AND NEBRASKA V. WYOMING} \textsuperscript{98}

In 1934, Nebraska brought an original action in the Supreme Court for an equitable apportionment of the waters of the North Platte River. Nebraska brought the suit against Wyoming alleging that diversions of water by irrigators in Wyoming were violating the rule of prior appropriation and depriving Nebraska of water to which appropriators in that state were entitled.\textsuperscript{99} Colorado was impleaded as a defendant and the United States was granted leave to intervene.\textsuperscript{100} \textit{Nebraska v. Wyoming} is considered the most complex equitable apportionment case. For that reason, a historical sketch of the events preceding the litigation is presented.

\subsection*{A. Background}

The North Platte originates in the North Park region of Colorado and flows through Wyoming and Nebraska before entering the Missouri River at Plattsmouth, Nebraska.\textsuperscript{101} Climatic conditions in the river basin range from arid in Colorado and Wyoming to arid and

\begin{flushleft}
\textsuperscript{93} \textit{Id.} \\
\textsuperscript{94} \textit{Id.} at 323. \\
\textsuperscript{95} \textit{Id.} at 321. \\
\textsuperscript{96} \textit{Id.} at 322. \\
\textsuperscript{97} \textit{Id.} \\
\textsuperscript{98} 325 U.S. 589 (1945). \\
\textsuperscript{99} \textit{Id.} at 591-92. \\
\textsuperscript{100} \textit{Id.} \\
\textsuperscript{101} \textit{Id.} at 593-94.
\end{flushleft}
semi-arid in western Nebraska. Some crops in the basin can be raised without irrigation, but, for the most part, irrigation is indispensable to the agricultural economy.

Irrigation in the river basin began around 1865, with development more rapid in Colorado and Wyoming until 1909. From 1910 to 1940, the acreage under irrigation in Colorado increased 14% that of Wyoming 31%, and that of Nebraska 100%. The 100% increase in irrigated Nebraska acres can be attributed to the North Platte Project. The North Platte Project consisted of Pathfinder Reservoir, Guernsey Reservoir located at Whalen, Wyoming and two small reservoirs located in Nebraska known as Lake Alice and Lake Minatare. Also included in the Project are two main supply canals: the Interstate and Ft. Laramie Canals which divert water from the North Platte at Guernsey Reservoir in Wyoming. The net result of the North Platte Project was that water available for irrigation was greatly increased. Although the net result has been an increase in available water, the Project complicated the problem of administration of the water between Nebraska and Wyoming. The storage and diversion works are in Wyoming while most of the beneficial use is in Nebraska. Thus, appropriators in Nebraska are dependent on control and regulation in Wyoming.

Until 1931, the supply of water for appropriators in Nebraska, Wyoming and Colorado was adequate. The year of 1931 ushered in the Dust Bowl years drought and the lowest available water supply in the basin.

A second federal irrigation project in Wyoming known as the Kendrick Project was commenced during this period. Its primary purpose was to provide irrigation water to 66,000 acres north and west of Casper, Wyoming. Nebraska was concerned that the dams constructed as part of the Kendrick Project would threaten the future water supply to western Nebraska. Despite the fact that the Kendrick Project

102. Id.
103. Id. at 594.
104. Id.
105. Id.
106. Id. at 594-95 Pathfinder was completed in 1913 and has a capacity of 1,045,000 acre-feet, which is 79 percent of the average annual run-off of the North Platte River at that point.
107. Id. at 595.
108. Id.
109. Id. at 596. Of the total 174,650 acre increase in Nebraska irrigated acres since 1910, 104,000 acres are North Platte Project lands. Id. at 595 n.5.
110. Id. at 597.
111. Id. at 598. The average mean flow measured at Pathfinder Dam for the period 1904 to 1940 was 1,315,500 acre-feet. From 1930 to 1940, only in one year (1932) did the flow exceed the mean.
112. Id. at 597.
was junior to virtually all appropriators downstream, Nebraska's fears were well-grounded because Wyoming did not recognize any extension of priorities across state lines. Thus, the controversy arose due to the construction of the Kendrick Project and the effects of a thirteen year drought on water supply in the basin.

B. Theories of the Case

In *Nebraska v. Wyoming*, Nebraska argued that the dispute should be resolved by applying the prior appropriation rule interstate as the Court had done in *Wyoming v. Colorado*. Essentially, Nebraska contended that junior appropriators in Wyoming and Colorado should be deprived of water for the benefit of senior appropriators in Nebraska through the operation of a day by day priority administration.

Wyoming urged the Court to make a mass allocation between the States, without the Court determining the priorities interstate of the appropriators in each state. The proposal entailed a distribution of both natural flow and storage water as a common fund to all users. Wyoming based her theory on the contention that there was sufficient water available for everyone.

In effect, the Court struck a balance between the positions advanced by Wyoming and Nebraska. The Court rejected Wyoming's mass allocation theory based on the Master's finding of an inadequate supply of water for all appropriators since 1931. The court, however, also rejected Nebraska's argument that the priority rule be literally applied. Relying on the balancing test enunciated in *Colorado v. Kansas*, Justice Douglas said, "[I]f an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible."

Explaining his reluctance to apply the appropriation rule literally, Douglas noted, "[T]he economy of a region may have been established on the basis of junior appropriations. So far as possible those estab-

113. *Id.* at 609.
114. *Id.* at 619.
117. *Id.*
118. *Id.*
120. 320 U.S. 383, 393-94 (1943). "[I]n determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all of the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."
lished uses should be protected though strict application of the appropriation rule might jeopardize them."  

Also persuasive was the Master's finding that due to the two to three week flowage time between Colorado and Nebraska, "if a canal in [Colorado] were closed... it would be highly speculative whether the water would reach the Nebraska appropriator in time or whether the closing of the Colorado canal would work more hardship there than it would bestow benefits in Nebraska."  

C. Resolution of the Case

The most difficult part of the case concerned the division of supply between Wyoming and Nebraska in connection with diversions made between Whalen, Wyoming, which is 40 miles west of the Nebraska border, and Tri-State Dam in Nebraska, which is one mile east of the border. In making an allocation between Nebraska and Wyoming, the Court had to cope with an extremely difficult and complicated situation arising from storage in the upper state for use in the downstream state, and the inter-related problems of priorities of reservoirs serving lands with 1904 and senior appropriations, and the Kendrick Project with 1931 and 1934 rights. In dealing with this problem, the Court entered a decree providing as follows with reference to Nebraska and Wyoming:

1. Wyoming was enjoined from irrigating more than 153,000 acres from the North Platte river and tributaries above Pathfinder Reservoir, and from irrigating more than 15,000 acres from the river between Pathfinder Reservoir and Whalen.

2. Wyoming was enjoined from storing more than 18,000 acre feet in reservoirs above Pathfinder Reservoir.

3. Wyoming was enjoined from diverting water into the Casper Canal for the Kendrick Project or from storing water in Seminoe or Alcova Reservoirs, other than in accordance with the priorities in relation to senior appropriations of Nebraska lands supplied by the State-line canals, all of which divert at or above Tri-State Dam in Nebraska.

The Court adopted the Master's recommendation that an apportionment in the Whalen to Tri-State section should be based on a distribution of natural flow on a percentage of daily flow basis. With reference to the percentage division of the natural flow, the Court found that if the supply were apportioned between Nebraska and Wyoming according to irrigated acres, twenty-seven percent would go to

122. Id. at 618.
123. Id. at 619.
124. Id. at 637-38.
125. Wehrli, supra note 115, at 16.
127. Id.
128. Id. at 625-26.
129. Id. at 640.
Wyoming and seventy-three percent to Nebraska; if the division were based upon acre feet of water historically used, twenty-three percent would go to Wyoming and seventy-seven percent to Nebraska.\textsuperscript{130} Thus, the Court apportioned the natural flow supply (storage being entirely omitted) seventy-five percent to Nebraska and twenty-five percent to Wyoming during each year for the period May 1 through September 30.\textsuperscript{131} The Decree also provided that gauging stations and measuring devices be installed so that the natural flow could be determined daily.

The Court permitted the existing Colorado diversions to continue. The decree enjoined Colorado from irrigating more than 135,000 acres in the North Park region of the basin, from storing more than 17,000 acre feet during any one season, and from transporting more than 60,000 feet out of the basin in any consecutive ten year period.\textsuperscript{132}

The Court's decree required an apportionment on a percentage basis of only the natural flow of water between Whalen, Wyoming and Tri-State Dam. Thus, the general effect of the Decree was to freeze both Colorado and Wyoming uses at their levels at the time of the suit.

\section*{III. THE PRESENT CONTROVERSY}

\textbf{A. Background}

In February, 1985, Wyoming Governor Ed Herschler signed into law a bill authorizing a $45 million appropriation for the development and construction of a reservoir to be located on Deer Creek, a tributary of the North Platte River.\textsuperscript{133} The purpose of the reservoir is to provide water supplies to the city of Casper and other communities along the North Platte River in southeastern Wyoming.\textsuperscript{134} Other benefits of the proposed reservoir include new recreation areas, flood control and an optional hydro-electric power station.\textsuperscript{135} The proposed reservoir would capture water on Deer Creek and would have a storage capacity of approximately 66,000 acre-feet.\textsuperscript{136} Depending upon op-

\begin{thebibliography}{99}
\bibitem{130} Id. at 640-41.
\bibitem{131} Id. at 646.
\bibitem{132} Id. at 621-22.
\bibitem{133} Neb. Dept. of Water Resources Fall 1985. \textit{Channels} pg. 2 (hereinafter \textit{Channels}).
\bibitem{134} The reservoir is being proposed principally for Casper. Other cities to be supplied include Evansville, Glenrock and Douglas, Wyoming. Although all four communities have a need for an additional water supply, Casper is expected to be the major user. Therefore only Casper's needs for an additional water supply will be discussed.
\bibitem{135} \textit{U.S. Army Corps of Engineers Final Environmental Impact Statement: Deer Creek Reservoir} (1987) at 1-3. (hereinafter \textit{Final EIS}). An environmental impact statement is required for Deer Creek pursuant to section 404 of the Clean Water Act of 1977, which regulates the discharge of dredged or fill material into waters of the United States.
\bibitem{136} \textit{Final EIS} at 1.03.
\end{thebibliography}
eration criteria, the reservoir would provide a firm annual yield of either 6,400 or 9,600 acre-feet of water. The reason for different operational criteria is that for several years, the operation of the Inland Lakes (Lake Alice and Lake Minatare) in Nebraska has been the subject of dispute between Nebraska, Wyoming and the United States Bureau of Reclamation [USBR]. The disputed issue is whether the Inland Lakes have a Wyoming water right to accrue the natural flow of the North Platte River in Wyoming. Wyoming contends that the USBR has never applied for or secured a permit under Wyoming law to divert the natural flow at Whalen for the Inland Lakes. The State of Wyoming petitioned the Federal District Court in Wyoming on October 24, 1986, to enjoin the USBR from diverting water for the Inland Lakes until the USBR perfects a Wyoming water right permit.

If the court denies Wyoming's request for an injunction, Scenario I would assume the USBR's North Platte Project would operate as it has in the past, including deliveries to the Inland Lakes. The Deer Creek Reservoir would be allowed to store water only after all senior water rights have been satisfied and after the Inland Lakes have been filled. The firm annual yield under this scenario would be 6,400 acre-feet.

Scenario 2 assumes that the USBR would have to obtain a water permit which would have the effect of making the Inland Lakes junior to the entire North Platte Project including Deer Creek. Thus, the Inland Lakes would accrue the natural flow of the North Platte River from surplus natural flow after all senior water rights, including Deer Creek, have been satisfied. If there is insufficient surplus water, then storage water in the North Platte Project reservoirs would be used. The Inland Lakes would receive the same amount of water as they have in the past. The firm annual yield under this scenario would be 9,600 acre-feet. The overall effect of Deer Creek is an average annual depletion to the North Platte River of 8,760 acre-feet under Scenario I and 11,940 acre-feet under Scenario 2.

Although Deer Creek will provide many benefits for Wyoming, both Nebraska water users and state government officials are concerned about the implications Deer Creek may have on Nebraska's North Platte river water rights. The concerns are two-fold. The first

137. Id.
138. The Inland lakes are part of the USBR's North Platte Project and store water for irrigation uses in Nebraska.
140. Final EIS at 3.31.
141. Id. at 2.80.
142. Id. at 3.33.
143. Id. at 2.80.
144. Id. at 4.295.
EQUITABLE APPORTIONMENT

concern involves the interpretation of the North Platte Decree. Nebraska generally considers the flows of all North Platte tributaries, as well as the North Platte itself, to be governed by the decree. Wyoming, on the other hand, contends that water collected in reservoirs on tributaries is not governed by the decree. Thus, Nebraska fears that if tributaries are not governed by the decree, the resultant decrease in water in the North Platte will reduce the total natural flow available to be divided between Nebraska and Wyoming according to the Decree's seventy-five percent - twenty-five percent formula. Another concern is if Deer Creek is constructed, it would set a dangerous precedent. In effect, Wyoming could construct reservoirs on any North Platte tributary and the reservoirs would greatly reduce the total natural flow in the North Platte River.

Nebraska and Wyoming officials have engaged in numerous meetings in an effort to reach a compromise, but have been unsuccessful in resolving the dispute over Deer Creek. As a result, the State of Nebraska filed a motion to reopen the original North Platte decree and a petition for an order enforcing the decree and for injunctive relief. The final part of this paper will discuss the issues raised as a result of Nebraska's petition to reopen the North Platte Decree.

B. Standing.

The Court has consistently required a higher standard of proof in water disputes between states than in disputes between individuals. In previous equitable apportionment cases, the Court set forth the requirement that the petitioning state show by clear and convincing evidence real and substantial injury from the proposed diversion. In Colorado I, the Court noted, "New Mexico has met its burden [of showing real or substantial injury] since any diversion by Colorado, unless offset by New Mexico at its own expense, [would] necessarily reduce the amount of water available to New Mexico users." On the basis of Colorado I, the Court appears willing to presume that the injury standard is met in any case involving a proposed diversion from an already appropriated stream. If this interpretation is correct, Nebraska should satisfy the real and substantial injury standard.

145. Interview with Michael Jess, Director of Nebraska Department of Water Resources (Oct. 16, 1986).
146. Id.
147. Id.
150. See supra notes 19-48 and accompanying text.
In *Nebraska v. Wyoming*, the Court found Nebraska had met her burden of establishing sufficient injury. The Court said, "The evidence supports the finding of the Special Master that the dependable natural flow of the river during the irrigation season has long been over-appropriated. A genuine controversy exists." Presumably, a similar finding will be made in the present case. Nebraska alleges significant economic damage amounting to "annual losses of $363,580.00 in increased power costs, $620,046.00 in lost farm income, $1,329,533.00, in the value of agricultural production, and $3,656,217 in statewide economic output." The alleged economic damage appears to place Nebraska within previous Court apportionment decisions that have considered damage to dependent economies as proof of real and substantial injury.

In the Original Decree, the Court provided for flexibility in the administration and enforcement of its provisions. In response to Colorado's argument that future North Platte projects might cause reductions in her water supply, the Court remarked, "If conditions of supply substantially change, any party can apply for modification of the decree. The decree will not necessarily be for all time. Provision will be made for its adjustment to meet substantially changed conditions."

In the original case, the United States contended that regulation of the tributaries between Pathfinder and Guernsey (Deer Creek is located between Pathfinder and Guernsey) was essential due to the possibility of future storage on the tributaries resulting in a reduction in tributary flows into the North Platte River. The Court, however, rejected the argument citing the Master's finding that "[i]n absence of evidence showing what . . . additional storage projects may be possible or what their effect might be . . . there [is] an insufficient basis for any present limitation on storage." The Court did, however, provide for a future resolution of the problem: "We find no evidence of any present threat to the water supply from this source. If such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction."

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152. 325 U.S. 589 (1945).
153. Id. at 608.
157. Id. at 624. The United States contended the reduction would adversely affect the amount of water available for storage in the Guernsey, Lake Alice, and Lake Minatare reservoirs.
158. Id. at 625.
159. Id.
Finally, the Court adopted the proposal of the Special Master that the Court retain jurisdiction. Article XIII of the Decree expressly provides for the Court's retention of jurisdiction to deal with changes in condition as well as specifically anticipated matters. Thus, both the Court's opinion and its Decree appear to provide that continuing jurisdiction may be invoked to resolve the alleged harm to Nebraska's apportionment.

The Court's retention of jurisdiction in the Original Decree appears to be consistent with precedent. In *Arizona v. California* the Court stated that its "purpose in retaining jurisdiction . . . can be gleaned from the respective reports of the Special Masters, which note the need for flexibility in light of changed conditions and questions which could not be disposed of at the time of an initial decree." Precedent for retention of jurisdiction was initially established by the Court in *Wyoming v. Colorado* in which Wyoming petitioned the Court to enjoin Colorado's diversions claimed to be in excess of that permitted by the prior decree.

In the Original Decree, the Court's retention of jurisdiction was based on the possibility of harm to downstream users as a result of potential development. Should the Court determine Wyoming's alleged present and threatened interference with Nebraska's share of the apportioned water does harm Nebraska appropriators, Nebraska should be successful in convincing the Court to exercise its retained jurisdiction.

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160. *Id.* at 655.
163. *Id.* at 624.
164. 259 U.S. 419 (1922).
166. The Court granted Nebraska's motion for leave to file a petition for an order enforcing the decree and for injunctive relief. 155 U.S.L.W. 3493, January 20, 1987.
C. Future Use and Conservation Measures

The Court in both Colorado I and Colorado II recognized that, under certain circumstances, the doctrine of equitable apportionment extends to future diversions even at the expense of existing economies.\textsuperscript{167} Prior to these two cases, the Court had never considered a future use as a basis for equitable apportionment other than a compelling need for municipal drinking water. In Connecticut v. Massachusetts\textsuperscript{168} and New Jersey v. New York,\textsuperscript{169} the Court permitted future diversions to supply Boston and New York City with additional drinking water. The precedent established in these two cases is important for Wyoming due to the fact that the purpose and need for the Deer Creek Reservoir is couched in terms of providing a "sufficient reliable, long-term municipal water supply for Casper and other communities."\textsuperscript{170}

Wyoming's decision to use waters of a North Platte tributary for a municipal water supply seem to be provided for in the language of the Nebraska v. Wyoming decision. The opinion notes:

> The Special Master reports that the parties are agreed that there should be no restriction upon the diversion ... of water for ordinary and usual domestic and municipal purposes and consumption and that nothing in the recommended decree is intended to or will interfere with such diversions and uses. Wyoming suggests that that provision cover not only diversions from the North Platte ... but also diversion from its tributaries in those States. ... We think those suggestions are appropriate ones. They will be adopted.\textsuperscript{171}

Although the language quoted above appears to bolster Wyoming's argument that diversions from tributaries are allowed for municipal water supply, Nebraska may contend Casper's compelling need for additional water can be mitigated by employing both reasonable conservation measures and by development of alternative water supplies.

Casper's need for an additional municipal water supply is compelling for a number of reasons. A below average water year in Casper is estimated to occur three out of five years.\textsuperscript{172} Because of the lack of early water rights for Casper and other communities, in water-short years, most of their water rights would be out of priority.\textsuperscript{173} If this would happen, only 1,460 acre-feet of water per year would be available. At 1,460 acre-feet per year, an immediate need exists for an additional firm supply of approximately 9,500 acre-feet of water per year. By the year 2000, the additional need would be approximately 10,400

\textsuperscript{168} 282 U.S. 660 (1931).
\textsuperscript{169} 283 U.S. 336 (1931).
\textsuperscript{170} Final EIS at 1.02.
\textsuperscript{171} Nebraska v. Wyoming, 325 U.S. 589, 656 (1945).
\textsuperscript{172} Final EIS at 1.30.
\textsuperscript{173} Id.
EQUITABLE APPORTIONMENT

acre-feet per year.\textsuperscript{174}

The greatest demand on Casper’s water system is during the summer months. Between 51 and 68 percent of monthly water use during the June through September period is for lawn, garden, and park irrigation.\textsuperscript{175} During the summer of 1981, total water use was reduced by approximately 17 percent due to implementation of a time-of-day restriction on lawn watering.\textsuperscript{176} The Final EIS concluded if conservation measures were employed on a strict basis to restrict lawn watering and other outside uses, the seasonal water demand could be reduced by 50 percent.\textsuperscript{177} The Final EIS also determined that pricing as a conservation measure could result in an estimated 20 percent decrease in water use.\textsuperscript{178} Despite these conservation savings, the Final EIS concluded that water conservation measures alone would not be sufficient to meet demand during a below-average water year.

The Final EIS found, however, that the development of ground water resources and the acquisition of agricultural water rights are alternatives within the capability of state of Wyoming.\textsuperscript{179} Casper could acquire the agricultural water rights either by purchase or condemnation as the need for additional water became necessary.\textsuperscript{180} The transfer of agricultural rights to municipal use is allowed by Wyoming law provided that the quantity of water transferred does not exceed the amount historically diverted or consumptively used.\textsuperscript{181} The alternative of acquiring agricultural water rights was predicated on the need for a storage facility to capture the flows during the spring run-off period. Without a storage facility, the effectiveness of this alternative would be lessened.\textsuperscript{182}

To provide for projected water needs through the year 2015, approximately 24,000 acres of agricultural land would be affected.\textsuperscript{183} Although the amount of land appears to be significant, the water rights could be acquired over a period of time. The firm annual water supply from this source would be approximately 54,000 acre-feet per year.\textsuperscript{184} Cost of acquiring the rights is projected to be $20 million, resulting in a cost of between $60.00 per acre foot of water.\textsuperscript{185} The cost of the Deer Creek Reservoir is estimated at $52 million, resulting in a

\begin{thebibliography}{99}
\bibitem{174} Id. at 1.37.
\bibitem{175} Id. at 1.11.
\bibitem{176} Id. at 2.146.
\bibitem{177} Id.
\bibitem{178} Id. at 2.148.
\bibitem{179} Id. 2.105.
\bibitem{180} Id. at 2.121.
\bibitem{181} Id.
\bibitem{182} Id. at 2.132.
\bibitem{183} Id. at 2.125.
\bibitem{184} Id. at 2.126.
\bibitem{185} Id.
\end{thebibliography}
cost per acre-foot of water of $718.00 for a 6,400 acre-foot yield, and $478 for a 9,600 acre-foot yield. Thus, the alternative of acquiring agricultural water rights would result in significantly less cost per acre-foot of water.

Development of groundwater sources would result in a firm annual yield of approximately 14,000 acre-feet per year. Development of a groundwater source would require the construction of six wells and 65 miles of pipeline. Although the project cost would be $52 million, which is higher than either Deer Creek or the cost of agricultural rights, the cost per acre-foot would be approximately $370 which is less than Deer Creek's cost per acre foot of water.

On the basis of cost comparison, Nebraska has a credible argument that reasonable conservation efforts and alternative water supplies are readily feasible alternatives to the Deer Creek project. The duty to conserve water resources, however, is not imposed without qualification. In Colorado I, the court held that required conservation measures were limited to those measures that are "financially and physically feasible" and "within practicable limits". On the basis of Colorado I, the alternatives discussed in the Final EIS will be measured by economic and practicable feasibility.

The precedent of Colorado I permits a state's harm to be offset by reasonable conservation measures. In effect, the decision implies that the Court will not consider harm that occurs due to inadequate conservation. The duty to conserve extends to both states. Thus, the Court's decision in the present controversy will be influenced by whether Nebraska can use reasonable conservation measures to offset the loss of water due to Wyoming's diversion. Even though the equities supporting the protection of established, senior uses in Nebraska may be substantial, the Court will consider possible conservation measures by both Nebraska and Wyoming when balancing the harm and benefit that might result from the diversion sought by Wyoming.

186. Id. at 2.102.
187. Id. at 2.119.
188. Id. at 2.118.
189. Id. at 2.119.
192. In discussing the imposition of reasonable conservation measures the Court in Colorado v. New Mexico, 459 U.S. 176, 186 (1982), said,

   [I]t is entirely appropriate to consider the extent to which reasonable conservation measures by New Mexico might offset the proposed Colorado diversion and thereby minimize any injury to New Mexico users. Similarly, it is appropriate to consider whether Colorado has undertaken reasonable steps to minimize the amount of diversion that will be required.
D. Evidentiary Standard

In Colorado II, the Court further developed the evidentiary standard applicable in an equitable apportionment case. In Colorado II, the Court required New Mexico to show by clear and convincing evidence real and substantial injury from the proposed Colorado diversion.\(^{193}\) The Court will likely require Nebraska to prove the same. Thus, Nebraska must bear the initial burden of showing that a diversion by Wyoming will cause substantial injury to the interests of Nebraska. Nebraska will likely meet this burden, since any upstream diversion by Wyoming, unless offset by Nebraska through conservation measures, or reduced use by diverters, will inevitably reduce the amount of water available to Nebraska users.

Colorado II requires that once Nebraska proves sufficient injury, the burden shifts to Wyoming to prove by clear and convincing evidence that reasonable conservation measures could compensate for some or all of the proposed diversion and that Nebraska's injury would be outweighed by the benefits to Wyoming resulting from the diversion. This high standard of proof is justified because existing economies should be protected and harm to "established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote."\(^{194}\)

In order to carry its burden of proof, Wyoming will need to present specific evidence proving that existing uses in Nebraska might be improved or that the diversions in Nebraska are far less efficient than diversions elsewhere. In presenting this evidence, Wyoming must be able to identify "financial and physically feasible" means by which Nebraska can eliminate or reduce inefficiency.\(^{195}\)

In Colorado II, the Court was impressed with the fact that New Mexico had commissioned independent economists to determine both the direct and indirect effects that the proposed Colorado diversion would have on New Mexico's population.\(^{196}\) While acknowledging that the analysis involved prediction and speculation, the Court believed that New Mexico had taken concrete steps toward determining effects, while Colorado had not made any specific efforts to determine impacts.\(^{197}\) The Court explained, "Long range planning and analysis will, we believe, reduce the uncertainties with which equitable apportionment judgments are made."\(^{198}\) Even though Wyoming has the burden of proof with regard to the proposed use, Nebraska should de-

\(^{194}\) Id. at 316. (quoting Colorado v. New Mexico, 459 U.S. 176, 187 (1982)).
\(^{196}\) Id. at 322.
\(^{197}\) Id.
\(^{198}\) Id.
Wyoming must also present evidence of long-range planning as well as an analysis of the benefits and harms of the diversion. Specifically, Wyoming must show the need for the diversion, its impact on the North Platte, and the conservation measures that will be utilized. Based on the reasoning in *Colorado II*, Deer Creek Reservoir will be allowed only if Wyoming is successful in proving actual inefficiencies in present Nebraska uses or that future benefits from Deer Creek are highly probable and outweigh any harm to Nebraska uses.

**CONCLUSION**

Many of the Final EIS findings and conclusions were included in an effort to analyze how the Court will likely address various issues in the case. Although there is no assurance that a Master will make similar findings of facts and conclusions, a review of apportionment case law indicates it is likely that similar evidence and issues will be presented to the Court for its consideration.

In applying the doctrine of equitable apportionment in an interstate water rights dispute, the Court attempts to resolve the dispute in a manner that is equitable to all parties involved. Initially applied, the apportionment analysis simply consisted of an application and analysis of the contending state's water laws. As state populations increased, increasing demands were made on the available water supply. Consequently, the Court has found it necessary to search beyond the pertinent water laws of the contending states in an effort to equitably balance the benefits and harms resulting from competing demands.

The search for, and application of, multiple factors considered by the Court in the apportionment analysis is best illustrated by the Court’s decisions in *Colorado I* and *Colorado II*. The two cases will have significant impact on both Wyoming and Nebraska in the present controversy. Once Nebraska meets her burden of proving real and substantial injury, the burden will shift to Wyoming to prove by clear and convincing evidence that the benefits of the proposed diversion outweigh injury suffered by Nebraska users. *Colorado I* and *II* indicate that the Court may allow Wyoming’s proposed diversion if waste and inefficiency in present Nebraska uses can be proven. Nebraska and Wyoming will be required to show proof of comprehensive planning and study to justify existing uses and that efforts are being made to efficiently manage water resources. Further, the outcome of the present controversy will likely depend upon evidence presented concerning conservation methods and measures developed by the two.

199. *Id.*
200. *Id.* at 317-23.
states and the emphasis the Court places on the conservation factors in its apportionment analysis. Judged by *Colorado I* and *II*, the emphasis is likely to be great.

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