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### Interstate Allocation of the Platte River

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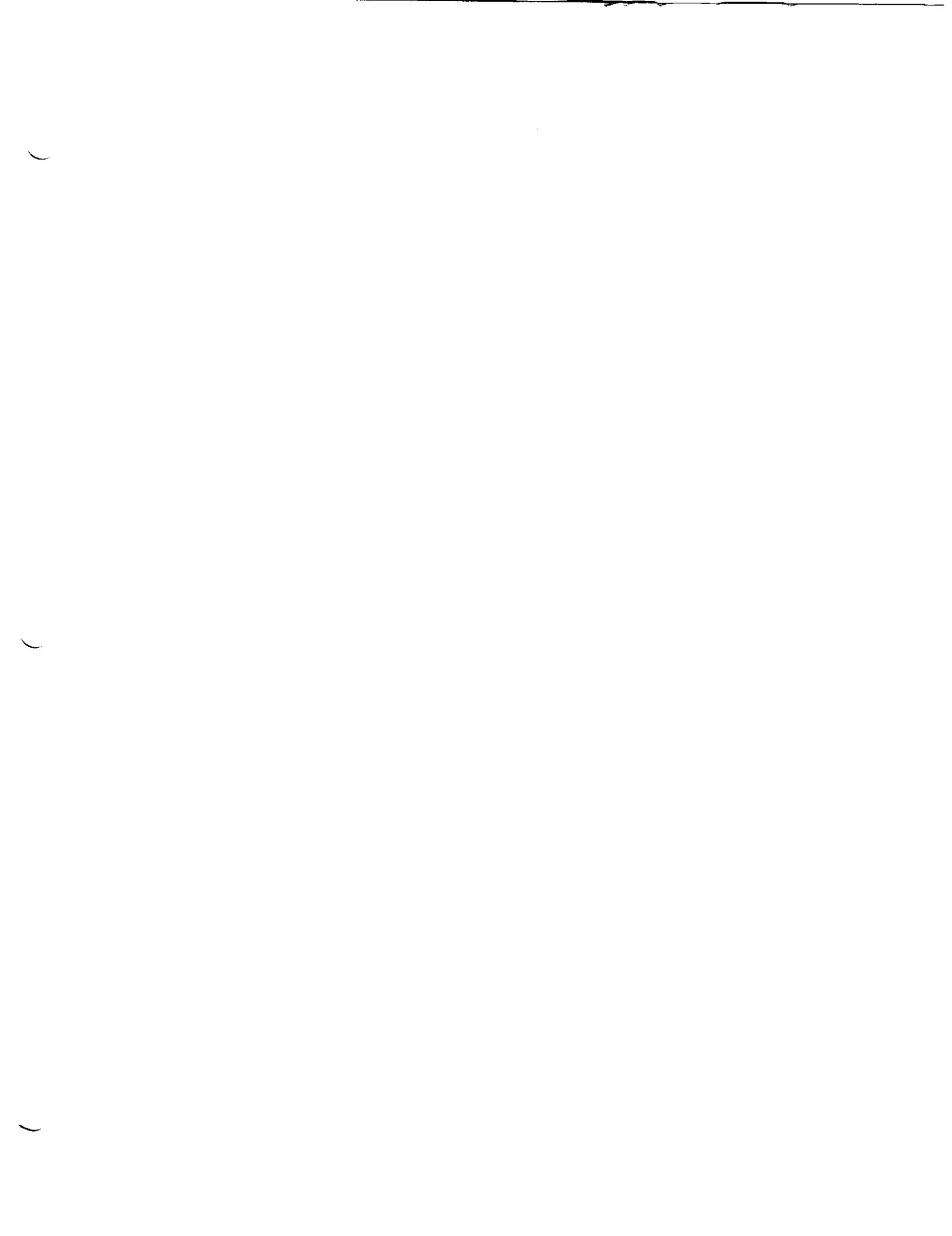
**Interstate Allocation of the Platte River**

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Boundaries and Water:  
Allocation and Use of a Shared Resource

Natural Resources Law Center  
University of Colorado School of Law  
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## Interstate Allocation of the Platte River

### I. Introduction.

#### A. Summary.

The Platte River flows through three states, which has resulted in two Supreme Court decrees and one interstate compact. The Platte provides an interesting microcosm of how public attitudes towards water development and use have changed. The early Platte conflicts involved irrigators competing across state lines for scarce water. More recent disputes involve irrigation conflicts, but are also subject to significant federal environmental protection statutes, notably the Endangered Species Act. The 1978 designation of endangered species critical habitat in the central reach of the Platte River may have sounded the death knell for upstream water development projects, particularly those not taking habitat preservation into account. However, shifting administrative positions regarding what constitutes adequate habitat protection may cause a different result.

#### B. General References.

Sievers, "Update on Litigation Involving the Platte River," Environmental Law, Nebr. Continuing Legal Educ. Inc. (1989).

Comment, "Equitable Apportionment: A Judicial Bridge Over Troubled Waters," 66 Neb.L.Rev. 734 (1987) [Deer Creek].

Shoemaker, "Wildlife and Water Projects on the Platte River," Audubon Wildlife Report 1988/89.

Winckler, "The Platte Pretzel," Audubon (May 1989).

Aiken, "New Directions in Nebraska Water Policy," 66 Neb.L.Rev. 8 (1987).

Pearson & Aiken, "Protecting Public Values in the Platte River," 20 Creighton L.Rev. 361 (1987) [Little Blue III].

Aucoin, Water in Nebraska (1984).

### II. The Platte River.

#### A. North Platte River.

##### 1. Surface water.

a. The 665 mile North Platte River

## Platte River Conflicts

originates in northern Colorado. From there it flows north into Wyoming, then east from Casper into Nebraska near Scottsbluff. Approximately forty miles east of the state line the North Platte is joined by its major tributary, the Laramie.

b. Irrigators from all three states have appropriated North Platte water, and the U.S. Supreme Court has apportioned the Laramie between Colorado and Wyoming (but not Nebraska) in 1922, and the North Platte among all three states in 1947. The North Platte Decree was reopened in 1987.

c. The North Platte Project is one of the earliest Reclamation projects, supplying water to Nebraska and Wyoming irrigators. The North Platte Project includes Pathfinder (1 MAF, completed 1909) and Guernsey Reservoirs (45,600 AF, completed 1927) in Wyoming; and the Inland Lakes (76,000 AF, completed 1913) in Nebraska. Approximately 225,000 acres, mostly in Nebraska, are irrigated from this project.

d. The U.S. Fish & Wildlife Service (FWS) has requested § 7 consultation with the Bureau of Reclamation to determine whether North Platte Project operations threaten the Platte critical habitat.

## Platte River Conflicts

e. The Kendrick Project, including Seminoe Reservoir (1 MAF, completed 1939), Alcova Reservoir (184,000 AF, completed 1938) and the Casper Canal, supplies water for 24,000 acres in Wyoming. The Kendrick Project prompted the litigation resulting in the North Platte Decree.

f. In Nebraska, approximately 2 MAF is stored behind Kingsley Dam in McConaughy, operated by the Central Nebraska Public Power & Irrigation District (Tri-County). Approximately 74,000 acres are irrigated from Lake McConaughy, and an additional 280,000 acres are irrigated from ground water recharged from the Tri-County project.

g. Tri-County is currently engaged in Federal Energy Regulatory Commission (FERC) hydropower relicensing for Kingsley. The major issue is how Kingsley should be operated to maintain the Platte critical habitat.

2. Ground water. The North Platte River is fed by an alluvial aquifer in eastern Wyoming and Nebraska, although interstate legal disputes between competing ground and surface water users have not yet arisen.

### B. South Platte River.

#### 1. Surface Water.

a. The South Platte originates in

## Platte River Conflicts

the Colorado Rockies south and west of Denver. The 450 mile South Platte River flows north to Denver where it turns generally east and flows into Nebraska near Big Springs. Irrigation water use conflicts resulted in the South Platte River Compact, signed in 1923.

b. Three proposed South Platte water projects in Colorado--Wildcat, Narrows, and Two Forks--and two in Nebraska--Enders and Perkins County--have been delayed or ended by the Platte critical habitat designation.

2. Ground Water. The South Platte is fed by an alluvial aquifer in eastern Colorado and Nebraska. While South Platte conflicts between competing ground and surface water users abound both in Colorado and Nebraska, the interstate dimension has not been raised, in part because of Nebraska's failure to address the legal relationship between hydrologically-connected surface and ground water supplies (tributary ground water in Colorado).

### C. Platte River.

1. Surface water. The North and South Platte join to form the Platte River near North Platte, Nebraska. The 381 mile Platte is Nebraska's major geographic feature, running the entire length of the state and emptying into the Missouri



## Platte River Conflicts

near Omaha. More intensive Platte water project development has been prevented by a 1936 Nebraska Supreme Court decision prohibiting interbasin water transfers. That case was reversed in 1980, sparking a race among Nebraska irrigation interests to appropriate what was left of the Platte. Competing projects include Prairie Bend, Twin Valley, Plum Creek, and the late Enders and Catherland projects. The U.S. Geological Survey estimates that 70% of the Platte's flows have been depleted by diversion and use.

2. Critical Habitat Designation. The "big bend" reach of the Platte is noted as important migratory waterfowl habitat. Efforts in the early 1970s to protect the area as a national wildlife refuge failed, leading to the 1978 critical habitat designation. Continuation of the controversial Mid-States reclamation project, which would have been constructed in the heart of the critical habitat area, was defeated in a 1975 reclamation district vote. The critical habitat designation has affected the development of at least seven major water projects in Wyoming, Colorado, and Nebraska: Grayrocks, Wildcat, Narrows, Perkins County, Enders, Catherland, and Two Forks.

3. Ground Water. The Platte is fed by

## Platte River Conflicts

an alluvial aquifer throughout its entire length. Most Platte valley municipalities, including Lincoln and Omaha, have located wellfields on Platte River islands to induce ground water recharge from streamflow. The Nebraska Supreme Court has by implication, however, rejected the subflow doctrine, thus failing to recognize the hydrologic connection and consequent legal inter-relationship between surface and ground water.

### III. North Platte River.

#### A. Wyoming v. Colorado.

The proposed Laramie-Poudre irrigation project in Colorado on the Laramie River threatened downstream senior Wyoming appropriators, resulting in Wyoming's suit. The U.S. Supreme Court allocated water between Wyoming and Colorado as follows: first 22,250 AF to Colorado; next 272,500 AF to Wyoming, and 15,500 AF to Colorado. Wyoming v. Colorado, 259 U.S. 419 (1922).

#### B. North Platte Decree.

1. The North Platte Project began operation in 1909. Nebraska sued Wyoming to enjoin junior diversions for the Kendrick Project in 1934. A special master was appointed, and filed his report in 1940. The original Supreme Court decree was entered 1945, and modified by stipulation in 1953 for construction of Glendo

## Platte River Conflicts

Reservoir. Nebraska v. Wyoming, 325 U.S. 589 (1945), modified 345 U.S. 981 (1953). The decree apportions North Platte River among Wyoming, Colorado and Nebraska, controlling the operation of Pathfinder, Guernsey, and Glendo reservoirs in Wyoming largely for benefit of Nebraska irrigators (75% of the May 1 to September 30 flows to Nebraska; 25% to Wyoming).

2. The decree apportions natural flow only. Colorado and Wyoming are allowed to divert water for ordinary and usual domestic, municipal and stock watering purposes.

3. Glendo Modification. The decree was modified in 1953 to provide for construction of Glendo Reservoir (790,000 AF) in Wyoming. The stipulation incorporated Glendo's priority into the decree and allocated Glendo's storage water between Wyoming and Nebraska.

4. Unresolved issues: (1) the allocation of off-season flows has not been addressed; and (2) the Laramie River flows have not been explicitly apportioned between Nebraska and either Colorado or Wyoming.

### IV. South Platte River.

#### A. South Platte River Compact.

1. The compact was signed by state representatives April 27, 1923 and approved by

## Platte River Conflicts

Congress March 8, 1926. 44 Stat. 195 (1926). The compact covers the South Platte and Lodgepole Creek. Lodgepole Creek runs southeasterly from Nebraska to Colorado.

2. Lodgepole Creek. Lodgepole Creek was divided two miles north of where it crosses the state line. Above the division point Nebraska is entitled to the entire flow; Colorado is entitled to the entire flow below the division point.

3. South Platte. Colorado has the entire use of South Platte within Colorado between October 15-April 1. Between April 1-October 15 Colorado is required to regulate diversions junior to June 14, 1897 to maintain an average flow of 120 cfs (unless Nebraska appropriators can only beneficially use a lesser amount). Otherwise, Colorado is entitled to the full use of South Platte River water. Nebraska is entitled to divert any water surplus to Colorado uses that flows into Nebraska. Nebraska gives up any claim against for additional South Platte water.

4. Perkins County Canal. The compact authorizes development of a canal to irrigate land in Perkins County, Nebraska. The compact reserves 35,000 AF for offseason diversion from October 15 to April 1 with December 17, 1921 priority date, subject to a reciprocal Colorado 35,000 AF storage

## Platte River Conflicts

reservation. The Perkins County Canal has never been developed. Appropriations to develop Perkins County Canal were dismissed by the Nebraska Department of Water Resources (DWR) in 1985 for the failure of applicants to comply with the consultation requirements of the Nongame & Endangered Species Conservation Act (NESCA), NRS § 37-435(3) (1988). The dismissal was affirmed in In re Applications A-15995 and A-16006, 223 Neb. 430, 390 N.W.2d 506 (1986).

### V. Platte River Critical Habitat.

A. Habitat Designation. The Platte critical habitat designated was designated by the U.S. Fish & Wildlife Service under the Endangered Species Act (ESA) in 1978. 43 F.R. 20,938, 20,941 (1978); 40 C.F.R. § 17.95. The habitat designation has figured in controversies involving Grayrocks Reservoir on the Laramie; the Wildcat, Narrows, and Two Forks projects on the South Platte in Colorado, and the Perkins County Canal and Enders projects in Nebraska; and the Catherland Project on the Platte; and may yet figure on the Deer Creek project on the North Platte. The Grayrocks litigation settlement resulted in the establishment of the Platte River Whooping Crane Habitat Maintenance Trust in Nebraska. The FWS has required flows for wildlife mitigation in early

## Platte River Conflicts

Platte water controversies, but has changed its position to require only habitat (land) acquisition for mitigation on Deer Creek and Two Forks.

### B. Grayrocks.

Basin Electric Power Cooperative sought to construct the Grayrocks Dam and Reservoir to impound 104,000 AF on the Laramie River for power purposes. The power project would reduce North Platte River flows into Nebraska by approximately 23,000 AF of water per year. An additional 22,500 AF of water from Grayrocks was to be allocated to the proposed Corn Creek irrigation project. The flow reductions from Grayrocks would most directly have affected water storage in McConaughy for irrigation and power production purposes.

Tri-County sought to have the Nebraska Attorney General challenge Grayrocks on the basis that it violated the North Platte decree. When Nebraska did file suit, however, it alleged only National Environmental Policy Act (NEPA) and ESA violations.

The suit sought to enjoin construction of Grayrocks by Basin Electric, alleging that the Rural Electrification Administration, which was guaranteeing Basin's construction loans, violated NEPA and ESA in failing to consider the project's environmental impacts and failing to insure that

## Platte River Conflicts

the Platte critical habitat was not jeopardized. Similar charges were levied against the U.S. Army Corps of Engineers in granting the Grayrocks § 404 dredge and fill permit. Nebraska was joined in its suit by wildlife groups, which significantly affected the settlement terms.

The federal district court ruled that the REA's environmental impact statement (EIS) and Corps's EIS were deficient and should have included an evaluation inter alia of the possible impacts of Grayrocks on downstream fish and wildlife habitat. Regarding endangered species, the court further ruled that the REA should have consulted with the FWS. The FWS had sought consultation with REA who declined on the basis that REA itself had concluded that there were no adverse impacts on downstream critical habitat or endangered species. FWS then issued its jeopardy opinion, stating that Grayrocks would jeopardize the continued existence of the whooping crane and destroy or adversely modify its critical habitat, and indicated that further studies would be needed. The court also ruled that REA (and the Corps) were required to insure no jeopardy regarding endangered species or their critical habitat. Nebraska v. Rural Elect. Adm., 12 Env't Rep.Cas. (BNA) 1156 (D.Neb. 1978).

## Platte River Conflicts

Subsequently the parties settled. Principal terms were Basin Electric (1) agreeing to reduce project water consumption principally to satisfy Nebraska irrigation interests (represented by the state of Nebraska) and (2) agreeing to establish the \$7.5 million Platte River Whooping Crane Habitat Maintenance Trust.

### C. Wildcat.

The Riverside Irrigation District sought to construct the 60,000 AF Wildcat Dam and Reservoir on the South Platte under a general § 404 permit. The U.S. Army Corps of Engineers denied the general permit, based on a FWS jeopardy opinion that the project would affect the Platte critical habitat in Nebraska. The district appealed, arguing that dam construction itself would not affect the critical habitat in Nebraska. The court denied this argument, ruling that indirect effects of reservoir construction, i.e. reduced streamflow, could also be taken into account in § 404 proceedings. Riverside Irr. Dist. v. Andrews, 568 F.Supp 583 (D. Colo. 1983), aff'd 758 F.2d 509 (10th Cir. 1985). The project is not being actively pursued.

### D. Narrows.

The Bureau of Reclamation Narrows Unit would store 1.1 MAF on the South Platte to irrigate



## Platte River Conflicts

287,000 acres in eastern Colorado. A 1983 FWS jeopardy opinion concluded that reduced stream-flows would harm the downstream critical habitat in Nebraska. The jeopardy opinion recommended mitigation flow releases, which was rejected by the Bureau. The Bureau and FWS are now engaged in the state-federal Platte River Management Joint Study in an attempt to resolve the issue.

### E. Enders.

The Hitchcock & Red Willow and Frenchman Valley irrigation districts jointly sought an appropriation to divert 45,000 AF of South Platte water to Enders Reservoir in the Republican River basin in Nebraska. The applicants and the DWR director consulted with the Nebraska Game and Parks Commission (GPC) pursuant to NESCA, regarding whether the proposed Enders diversion would threaten the continued existence of Platte river endangered species. The GPC issued a jeopardy opinion concluding that the proposed diversion would jeopardize the continued existence of three Platte river endangered species: the whooping crane, bald eagle, and least tern. The irrigation districts did not present information to the DWR contesting the jeopardy opinion, and did not modify their diversion proposal to avoid jeopardy.

The DWR issued an order on November 4, 1985

## Platte River Conflicts

denying the Enders diversion application because inter alia applicants failed to show that the proposed diversion would not threaten endangered species or the Platte critical habitat.

On appeal the Nebraska Supreme Court sustained the DWR. In re Applications A-15738, 226 Neb. 146, 410 N.W.2d 101 (1987). The court ruled Inter alia that there was sufficient evidence to conclude that state benefits from using what unappropriated water was available for wildlife purposes in the central Platte region were greater than the state benefits from the Enders diversion. The court did not address the constitutionality of the § 37-435(3) no-jeopardy provision raised by plaintiffs.

### VI. Little Blue.

#### A. Little Blue I.

In 1980 the Nebraska Supreme Court ruled, in Little Blue I, that interbasin transfers of surface water were legal in Nebraska. Little Blue NRD v. Lower Platte North NRD, 206 Neb. 535, 294 N.W.2d 598 (1980). See Water Law Update vol. XIII no. 3 at 7 (1980). Little Blue I involved the Catherland project, which proposed to divert 125,000 AF water from the Platte to irrigate 66,500 acres in the Blue River basin in south-central Nebraska. Little Blue I, which overruled

## Platte River Conflicts

a 1936 decision prohibiting interbasin water transfers, ignited the race among Nebraska irrigation interests to obtain Platte appropriations for new irrigation projects.

### B. Little Blue II.

After Little Blue I, the DWR held additional hearings and issued the Catherland appropriations. In Little Blue II the Nebraska Supreme Court ruled that the DWR was required to comply with NESCA before he could issue a Catherland appropriation. Little Blue NRD v. Lower Platte North NRD, 210 Neb. 862, 317 N.W.2d 726 (1982). See Water Law Update vol. XV no. 2 at 8 (1982). Specifically the DWR director was required to consult with the GPC to determine whether Catherland would harm the Platte critical habitat.

### C. Little Blue III.

1. Catherland Jeopardy Opinion. After Little Blue II the GPC evaluated the impact of Catherland on the Platte critical habitat. The GPC concluded in 1983 that it would irreparably harm endangered species and their critical habitat unless project operation were modified. See Water Law Newsletter vol. XVI no. 2 at 10 (1983). The Catherland jeopardy opinion aroused a storm of controversy within the Nebraska water development community: the GPC had the apparent authority to

## Platte River Conflicts

kill a water project based on adverse environmental impacts. Governor Bob Kerrey established his Water Independence Congress to deal with the water development impasse created by Little Blue II and the GPC jeopardy opinion. The 1984 Unicameral enacted most of the Water Congress water policy recommendations, which included establishment of a new Water Management Board to deal with development-environmental conflicts. See Water Law Newsletter vol. XVII no. 2 at 12 (1984). The WMB's authorities did not extend to existing water right applications such as Catherland, however, unless the project sponsor sought WMB review. Thus the fate of Catherland remained in the hands of the DWR.

2. DWR Catherland Order. After the 1983 GPC jeopardy opinion, the DWR director held public hearings, taking additional testimony regarding the impact of Catherland on the Platte critical habitat. In 1986 the DWR director ruled that the project would not harm endangered species and issued the project water rights. See Water Law Newsletter vol. XX no. 3 at 5 (1987).

3. Little Blue III. After a decade of litigation which has changed the course of Nebraska water law and policy, the Nebraska Supreme Court handed down a final but disappointing Cath-

## Platte River Conflicts

erland decision. In re Applications A-15145, A-15146, A-15147, and A-15148, 230 Neb. 580, 433 N.W.2d 161 (1988) [Little Blue III]. The decision had been expected to deal with endangered species but instead determined that an assignment of the project water right applications was invalid, thus ending Catherland.

The 1986 DWR decision granting the Catherland appropriations despite the GPC jeopardy opinion was immediately appealed to the Nebraska Supreme Court. The case was argued in 1987 and reargued in 1988. The major legal issues were (1) whether there was sufficient factual basis for the DWR director to determine that Catherland would not harm Platte River endangered species despite the GPC biological opinion to the contrary, and (2) whether the Nebraska Constitution required the issuance of project water rights if unappropriated water were available despite the effect on the Platte critical habitat.

The Nebraska Supreme Court did not reach the endangered species issues. Instead, the court ruled that an assignment of the water right application for the irrigation project from the Little Blue NRD to the Catherland reclamation district was illegal, ending the project. The NRD was the original project sponsor back in the early 1970s.

## Platte River Conflicts

The project became politically controversial over the years for a variety of reasons, including costs, the fact that the project would not deliver water to the portion of the NRD with declining ground water supplies, and environmental concerns. Finally the NRD board of directors voted not to pursue the project, and assigned its water right application to the Catherland reclamation district to allow the district to pursue the project instead of the NRD. The DWR substituted the reclamation district for Little Blue as the party in interest over objection.

The DWR approval of the assignment was one of numerous errors assigned on appeal. The reclamation district did not brief the assignment issue, instead relying solely on its contention that NRS § 2-3233 (1987) authorizes NRDs to transfer unperfected appropriation applications. The court ruled that unperfected appropriation applications are not personal property, citing United States v. Fallbrook Public Utility District, 165 F.Supp. 806, 855 (S.D.Cal. 1958). The court stated that assignment of unperfected appropriation applications could result in collusion between applicants, were unfair to those who applied between the original application and its assignment, and were not in the public interest. The court fur-

## Platte River Conflicts

ther ruled that neither appropriation nor NRD statues authorized the transfer of unperfected appropriations.

Little Blue III was a great surprise to the Nebraska water community. Similar uncontested assignments had been routinely approved by the DWR in the past, the status of which have now been clouded by Little Blue III. Unfortunately the substantive endangered species issues remain unresolved, creating considerable uncertainty regarding other proposed Platte water projects.

### VII. Deer Creek.

A. Nebraska v. Wyoming II. On June 22, 1987 the U.S. Supreme Court granted the state of Nebraska's petition to reopen the decree apportioning the North Platte river between Wyoming and Nebraska. The Court subsequently denied Nebraska's motion to broaden the proceedings to include consideration of the effect of Deer Creek and Two Forks on the Platte river critical habitat in Nebraska.

Several Wyoming water developments on North Platte tributaries have troubled Nebraska appropriation officials: Grayrocks, Corn Creek, and Deer Creek. Corn Creek would use approximately 25,000 AF of water stored in Grayrocks for irrigation. Grayrocks operation is governed by a set-

## Platte River Conflicts

tlement of Nebraska v. REA, although the state of Wyoming is not a party thereto.

The Deer Creek project is a proposed reservoir on Deer Creek, another North Platte river tributary, to supply water to Casper, Wyoming. The reservoir would have a storage capacity of 66,000 AF. Negotiations initiated by the DWR were unsuccessful in resolving differences between the states, particularly whether development of Deer Creek was governed by the decree.

1. Wyoming Suit. The Nebraska petition to reopen the decree followed Wyoming litigation regarding Bureau North Platte project natural flow diversions into the Inland Lakes without Wyoming permits. State of Wyoming v. Bureau of Reclamation, No. 23-13 (Goshen Co. Dist. Ct., filed October 3, 1986). The case was subsequently removed to federal district court, where the action was stayed pending resolution of the Supreme Court decree litigation.

2. Nebraska Suit. Nebraska filed its motion to reopen the decree before the Supreme Court October 6, 1986, alleging that construction and operation of Corn Creek and Deer Creek will reduce North Platte flows in violation of the decree; and that Wyoming will not allow water releases made pursuant to the Grayrocks settlement



## Platte River Conflicts

to reach Nebraska. Wyoming answered that operation of Grayrocks did not violate the decree; that tributary water impoundments did not violate the decree; and that construction of Deer Creek fell within the decree's domestic use exception. The Supreme Court granted Nebraska's petition and appointed a special master. 107 S.Ct. 1883 (1987).

3. Habitat Motion. Subsequently Nebraska petitioned the Court to broaden the proceeding to include the effects of Deer Creek and Two Forks on the Platte critical habitat in Nebraska. Recall that Tri-County is engaged in FERC relicensing proceedings. The major issue is whether releases should be made from McConaughy to maintain downstream Platte river endangered species's critical habitat. Nebraska water officials feared that any additional streamflow depletions resulting from Deer Creek and Two Forks affecting critical habitat would have to be made up with higher water releases by Tri-County mandated by FERC. Thus Nebraska petitioned the Supreme Court to broaden the scope of the North Platte decree proceedings to include the streamflow depletion effects of Deer Creek and Two Forks on the Platte critical habitat in Nebraska. That motion was denied. 108 S.Ct. 1103 (1988).

## Platte River Conflicts

4. Motion for Summary Judgment. The Special Master, on March 2, 1989, denied Wyoming's motion for summary judgment. The Special Master ruled inter alia that Nebraska had made a strong showing that the 1904 Inland Lake appropriations were valid, and that "Wyoming faces a daunting burden to counter that position."

B. Jess v. West.

On June 9, 1989, Nebraska sued the Corps for issuing the Deer Creek § 404 permit. The FWS biological opinion recommended habitat (land) purchase to mitigate Deer Creek's adverse impact on Platte critical habitat. In contrast, on Wildcat and Narrows the FWS required change in project operation to maintain streamflow to the Platte critical habitat. Nebraska's suit alleges inter alia (1) that the Corps estimate of downstream environmental impacts was based on a simulation model not made available to Nebraska to evaluate, (2) that there are water supply alternatives to Deer Creek that are more economically and environmentally feasible (including purchasing irrigation appropriations), and (3) that FWS erred in allowing mitigation through land purchase rather than minimum streamflow. Discovery has begun.

## Platte River Conflicts

### VIII. Two Forks.

Two Forks is a proposed impoundment on the South Platte river to store 1.1 MAF to supply water to Denver. The FWS Two Forks biological opinion stated that while project water depletion could adversely affect the downstream Platte river critical habitat in Nebraska, those adverse effects could be adequately mitigated through habitat (land) purchase. This contradicts the prior jeopardy opinions issued for Wildcat and Narrows, where the FWS concluded that streamflow was necessary to maintain the critical habitat. The Two Forks § 404 permit has been issued, but is being reviewed by EPA for a possible § 404(c) veto. In addition the Corps is conducting an internal investigation regarding alleged irregularities in the § 404 permit evaluation process.

### IX. Future Prospects.

#### A. Tri-County Relicensing.

Tri-County's federal hydropower license is now in FERC relicensing proceedings. In 1986, the Federal Power Act, 16 U.S.C. § 797(e), was amended to include:

In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish, wildlife (including related spawning grounds and habitat), the protection of

## Platte River Conflicts

recreational opportunities, and the preservation of other aspects of environmental quality [emphasis added].

100 Stat. 1243 (1986). McConaughy is the nearest existing reservoir to the critical habitat, and is an inviting source of supplemental water when streamflow is inadequate for wildlife purposes. The major relicensing issue is how much water Tri-County will be required to contribute for critical habitat preservation. Tri-County has yet to submit an application for a new license, and is operating under a one year license extension.

### B. North Platte Project § 7 Consultation.

The FWS has notified the Bureau it intends to seek § 7 consultation under ESA to determine whether the North Platte Project is being operated in a fashion that threatens the continued existence of endangered species or their critical habitat. The result of such consultation could be to establish flow release requirements for the North Platte Project to help maintain the Platte critical habitat.

Nebraska water interests, particularly Tri-County, feel that they are being asked to meet the total water demand for the critical habitat and that Wyoming and Colorado, through the Deer Creek and Two Forks biological opinions, are receiving an unfair preference by being able to compensate

## Platte River Conflicts

for streamflow depletion through land acquisition rather than by streamflow.

### C. Surface-Ground Water Conflicts.

One issue currently not addressed, at least regarding meeting critical habitat streamflow requirements, is the effect of Platte Valley ground water pumping on streamflow. Some observers believe that ground water pumping within two miles of the river may have a greater stream depletion effect than upstream diversions. The Nebraska Supreme Court has by implication, however, rejected the subflow doctrine, thus failing to recognize the hydrologic connection and consequent legal interrelationship between surface and ground water. Metropolitan Util. Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966). Similarly the Nebraska Unicameral has ignored this issue. Resolution of the issue is not simple, however, as indicated by the continued South Platte tributary ground water controversies in Colorado.

