No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

SECOND REPORT OF THE SPECIAL MASTER (SUBJECT: FINAL SETTLEMENT STIPULATION)

VINCENT L. MCKUSICK
Special Master
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April 15, 2003

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SECOND REPORT OF THE SPECIAL MASTER (SUBJECT: FINAL SETTLEMENT STIPULATION)

This original action involves the enforcement of the 1943 Republican River Compact ("Compact") entered into by the States of Colorado, Kansas, and Nebraska with Congressional approval. Although this action was initially brought by Kansas to obtain relief from alleged violations of the Compact by Nebraska, each of the compacting States, by the time the pleadings were complete, had become both a complaining State and a defending State vis-à-vis the other two States. As detailed in this Report, after I had ruled on several significant preliminary issues following full briefing and oral argument, and after substantial completion of the written discovery period that spanned some fourteen months, I granted the parties' request to stay the proceedings so that they could pursue a mediated settlement. About a year later, the parties submitted a Final Settlement Stipulation and moved for its approval. The Final Settlement Stipulation, dated December 15, 2002, accompanies this Report in five separately bound volumes. The United States, an active *amicus curiae* throughout these proceedings, has filed a statement in support of the Final Settlement Stipulation. That supporting statement is attached hereto as Appendix E.

To conclude this litigation, the State parties have agreed in their Final Settlement Stipulation that all claims, counterclaims, and cross-claims for which leave to file was or could have been sought in this case prior to December 15, 2002, are to be dismissed, with prejudice, effective upon completion of the groundwater model of the Republican River Basin ("Groundwater Model") that is necessary for administering the Compact. The State parties have also committed themselves to binding and

conclusive procedures for establishing the Groundwater Model, and the States' technical professionals are well along in completing the Model. The States expect to agree upon the Groundwater Model by June 30, 2003, but if for any reason they have not done so by that date, binding arbitration will resolve the remaining issues necessary for its establishment. The Republican River Basin has been without water allocation accounting under the Compact for eight years. For that reason, the States, with the support of the United States, are seeking approval of the Final Settlement Stipulation as soon as possible so that the very detailed provisions of the Final Settlement Stipulation may be implemented as fully as possible before the end of the year.[1]

On full consideration of the Final Settlement Stipulation, I find that it constitutes a fair and legally sound resolution of all of the Compact interpretation and enforcement issues presented in this action, provides detailed techniques for determining future compliance, and serves the public interest by making the Compact easier to administer and enforce and by diminishing the likelihood of future conflict. I am fully satisfied that in framing the Final Settlement Stipulation the party States have stayed within the boundaries of the Compact and that their

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[1] *See* Transcript of Hearing Before Special Master Vincent L. McKusick on Final Settlement Stipulation, held at the Division III Appellate Courtroom, U.S. Court of Appeals for the 10th Circuit at the Byron R. White U.S. Courthouse, Denver, Colorado (January 6, 2003) (Docket Item 346) ("Hearing Tr."), at p. 71, ll. 9-12 ("[I]n order for the States . . . to implement many of the parts of the settlement, we need to have the litigation resolved.") (Statement of David Cookson, Counsel of Record for Nebraska).

settlement is in all respects compatible with the controlling provisions and purposes of the Compact. I therefore recommend that the Court approve the Final Settlement Stipulation as submitted. If the Court does so, my only remaining responsibilities will be to decide disputes concerning the exchange and availability of data and information for completing the Groundwater Model and, if necessary, to designate an arbitrator to establish the Groundwater Model by binding arbitration if the parties are unable to agree on the Model by June 30, 2003.

The Proposed Decree set forth in Appendix A approves the Final Settlement Stipulation and implements the stipulation of the parties for dismissal of all claims, counterclaims, and cross-claims. The Proposed Decree recommits the case to me for the sole purpose of deciding procedural questions arising in the completion of the Groundwater Model.[2] The filing of my final report certifying adoption of the Groundwater Model by the State parties will conclude this litigation.

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[2] On recommital of the case to me, the judicial nature of my remaining responsibilities, as well as the Final Settlement Stipulation's built-in mechanism for bringing this litigation to a certain and early conclusion, distinguigh the present case from *Vermont v. New York*, 417 U.S. 270 (1974), where the proposed decree would have appointed a "South Lake Master" with the function of indefinitely "polic[ing] the execution" of a consent decree settling certain pollution claims.

I. BACKGROUND

A. The Republican River Basin[3]

The Republican River Basin ("Basin")[4] drains a 24,900 square mile watershed covering parts of northeastern Colorado, southern Nebraska, and northern Kansas.[5] In area, the watershed divides among the States as follows: Colorado – 7,700 square miles (31%); Kansas – 7,500 square miles (30%); and Nebraska – 9,700 square miles (39%).[6] The Basin further divides into the main stem of the Republican River Basin and other discrete drainage basins ("sub-basins"), among which the Compact allocates the virgin water supply.[7] On the map attached hereto as Appendix C1, the sub-basins are identified as variously shaded areas.

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[3] A current map of the Republican River Basin is attached hereto as Appendix C1.

[4] Article II of the Compact defines the "Basin" as "all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas." A map of the Basin that was made part of the Compact is part of Appendix B, at B15.

[5] Bureau of Reclamation, U.S. Dep't of the Interior, *Resource Management Assessment: Republican River Basin* 3 (1996) ("RMA"). The Republican River Basin lies in the same region as two other river basins (the Arkansas and the North Platte) that either were until recently or are currently the subject of litigation among these same parties in two other original jurisdiction cases. The Arkansas River involved in *Kansas v. Colorado*, No. 105, Original, lies to the south of the Republican River Basin and the North Platte River involved in *Nebraska v. Wyoming and Colorado*, No. 108, Original, lies to the north of the Republican River Basin.

[6] *Id.*

[7] *See infra* Part I.B.2, at pp. 12-13.

The sparsely populated Basin, some 430 miles in length, is an active agricultural region producing winter wheat, sorghum grain and silage, dry beans, corn, and sugar beets.[8] Over ninety percent of the Basin area is used for agricultural purposes,[9] and, as of 1992, the Basin had 1,888,252 acres of irrigated land.[10] For irrigation, as well as for municipal and industrial uses, the Basin contained 12,246 registered groundwater pumping wells as of 1996.[11]

The Basin is defined by the watershed of the Republican River and its tributaries. The Republican River is formed at the junction of two rivers that rise in the high plains of northeastern Colorado: the Arikaree River and the North Fork Republican River ("North Fork"). The North Fork flows east from Colorado into Nebraska, and the Arikaree flows northeasterly from Colorado, across the far northwest corner of Kansas, and then into Nebraska. The junction of the Arikaree and the North Fork is located in extreme southwestern Nebraska near the town of Haigler. It should be noted that the geography of the Basin places Kansas both upstream and downstream of Nebraska.

Some twenty miles farther east, near Benkelman, Nebraska, the South Fork Republican River, which also rises in Colorado and flows across the northwest corner of Kansas before entering Nebraska, joins the Republican River. From there, the Republican River flows eastward, roughly parallel to the Kansas-Nebraska state line, for

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[8] RMA, *supra* note 5, at 4.

[9] *Id.*

[10] *Id.*, Attachment D, at Table D-7.

[11] *Id.* at 30.

about two-thirds of the length of that border. The main stem of the Republican River is dammed in southeastern Harlan County, Nebraska, to form Harlan County Lake. With a capacity of 314,111 acre-feet[12] of water for all conservation purposes, and an additional 500,000 acre-feet of flood control capacity, Harlan County Lake is the largest federal project in the Basin above the River's final crossing of the Kansas-Nebraska state line.[13] It provides water to both the Nebraska Bostwick Irrigation District and the Kansas Bostwick Irrigation District.

About 50 miles downstream from Harlan County Lake and about 15 miles upstream of the Republican River's final crossing of the Kansas-Nebraska state line is Guide Rock, Nebraska. Guide Rock is the site of a diversion dam for the Superior-Courtland canal system, the principal point for the diversion of irrigation water for the Kansas Bostwick Irrigation District and portions of the Nebraska Bostwick Irrigation District. Kansas may divert at Guide Rock, Nebraska, all or any portion of its water allocation of 138,000 acre-feet derived from the main stem and "otherwise unallocated" upstream sources.[14] Downstream from

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[12] An acre-foot of water is the quantity of water that will cover an acre of land to a depth of one foot; it is 43,560 cubic feet of water.

[13] *See* Bureau of Reclamation, U.S. Dep't of the Interior, Map, *Mirage Flats and Missouri River Basin Projects; Niobrara, Lower Platte and Kansas River Basins: Irrigation and Flood Control Facilities* (July 2001) (containing capacity information for all federal projects in the Basin).

[14] The dispute among the compacting States over the meaning and proper application of this Compact provision, and the resolution of that dispute by the Final Settlement Stipulation, are discussed in Part III.C.4, pp. 55-59.

the Guide Rock diversion dam, the Republican River finally crosses the state line into Kansas just west of Hardy, Nebraska. A short distance after crossing the state line for the last time, the Republican River turns and runs generally southward until it joins the Smoky Hill River at Junction City, Kansas, to form the Kansas River. The Kansas River flows eastward to Kansas City, where it runs into the Missouri River.

Guide Rock is marked on the map of the Basin attached hereto as Appendix C1, and a detailed map of the area from Harlan County Lake to the Kansas-Nebraska state line, including the Superior-Courtland Diversion Dam near Guide Rock, is attached hereto as Appendix C2.

B. The Republican River Compact

1. History of the Compact

The agricultural activities in the Basin require an adequate and reliable water supply. When the Basin experienced an extended drought during the 1930s, interrupted in 1935 by a highly destructive flood, the need to regulate the flow of the Republican River became apparent.[15] The United States began to examine ways to control the Republican River so that swollen spring flows could be retained in reservoirs for flood control in the spring and released for irrigation in the late summer and fall.[16] As a result of that exercise, and based upon the recommendation of the United States Army Corps of

[15] *See* 87 Cong. Rec. 9606-07 (1941).

[16] *See* H.R. Doc. No. 842, 76th Cong., 3d Sess. (1940).

Engineers ("Corps of Engineers"), Congress appropriated funds for construction of the Harlan County Lake in Nebraska.[17] Meanwhile, the United States Bureau of Reclamation ("Bureau of Reclamation") was studying the feasibility of irrigation projects in the Basin. However, the United States delayed construction of any such projects until Colorado, Kansas, and Nebraska reached agreement on an interstate compact to allocate the water in the Basin.

Concerted negotiations for a compact apportioning Basin water began in 1940, and the three States reached an initial agreement on March 19, 1941. During the Congressional hearings, however, the Department of the Interior and the Federal Power Commission objected to the proposed Compact because it diminished federal rights and privileges in the Basin.[18] Over that objection, both houses of Congress approved the Compact as proposed by the States.[19] However, on April 2, 1942, President Roosevelt vetoed that approval[20] solely for the reason that it unduly restricted federal jurisdiction and authority over navigation and water projects within the Basin.[21]

In response to the President's veto, Congress passed, and the President approved, a bill authorizing further

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[17] *See* Act of Aug. 18, 1941, ch. 377, 55 Stat. 646.

[18] *See Republican River Compact: Hearings Before the House Comm. on Irrigation and Reclamation on H.R. 4647 and H.R. 5945*, 77th Cong., 1st Sess. 1-4 (1941).

[19] *See* 88 Cong. Rec. at 2408-09, 2813-14 (1942).

[20] *See id.* at 3285-86; H.R. Doc. No. 690, 77th Cong., 2d Sess. (1942).

[21] *See* H.R. Doc. No. 690, *supra* note 20, at 1-2.

compact negotiations with the involvement of a federal representative[22] and those negotiations led to the three States agreeing on the terms of a revised Republican River Compact on December 31, 1942.[23] The revised Compact differed from the 1941 Compact only as to the matters that had provoked the President's veto. The Compact's apportionment of the water of the Basin remained unchanged.[24] The revised Compact was duly approved by Congress on May 26, 1943, and it received the President's signature nearly 60 years ago.[25]

Shortly thereafter, Congress authorized the creation in the Basin of federal water development and management projects as part of the Missouri River Basin Development Program, also known as the Pick-Sloan Plan.[26] The Pick-Sloan Plan authorized the Corps of Engineers and the Bureau of Reclamation to construct and operate a coordinated system of reservoirs for many purposes including navigation, irrigation, flood control, power development, municipal and industrial uses, fish and wildlife protection, and recreation. Between 1945 and

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[22] Act of Aug. 4, 1942, ch. 545, 56 Stat. 736.

[23] *See Minutes of the Tenth Meeting of the Republican River Compact Commission at Lincoln, Nebraska* (Dec. 29, 1942 to Jan. 1, 1943), *contained in* United States Brief in Opposition to the Motion to Dismiss (Docket Item 20) ("U.S. Brief"); Act of March 15, 1943, 1943 Colo. Sess. Laws 362, codified at Colo. Rev. Stat. §§ 37-67-101 and 37-67-102; Act of February 22, 1943, 1943 Kan. Sess. Laws 612, codified at Kan. Stat. Ann. § 82a-518; Act of February 24, 1943, 1943 Neb. Laws 377, codified at 2A Neb. Rev. Stat., App. § 1-106.

[24] *Compare* Appendix B *with* H.R. Doc. No. 690, *supra* note 20, at 2-5.

[25] Act of May 26, 1943, ch. 104, 57 Stat. 86.

[26] Flood Control Act of 1944, ch. 665, § 9, 58 Stat. 891.

1964, the Bureau of Reclamation completed, and today continues to operate and maintain, a system of seven reservoirs in the Basin – Bonny Reservoir[27] in Colorado; Enders Reservoir, Swanson Lake, Hugh Butler Lake, and Harry Strunk Lake in Nebraska; and Keith Sebelius Lake and Lovewell Reservoir in Kansas. During the same period, the Corps of Engineers completed two other reservoirs in the Basin, Harlan County Lake in Nebraska and Milford Lake in Kansas.[28] The Corps continues to operate and maintain Harlan County Lake and Milford Lake. The Basin also has extensive irrigation canal systems for distributing water from these reservoirs to irrigated fields. Together, the Bureau of Reclamation and the Corps of Engineers operate and maintain the federal projects in the Basin for flood control, irrigation, and other purposes. The Corps furnishes operational procedures for regulation of water stored in the flood control pools of the reservoirs (i.e., when water surfaces in the reservoirs rise above the top of the conservation pools) and the Bureau schedules releases from all reservoirs for irrigation purposes from its Control Center in McCook, Nebraska.

The legislative history of the Republican River Compact, and the subsequent extensive water development and management activities by the federal government in the Basin, make particularly appropriate the active role of

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[27] The conservation capacity of Bonny Reservoir has been transferred to the Colorado Division of Wildlife; however, Bonny Reservoir continues to be operated by the Bureau of Reclamation.

[28] Milford Lake is not included in the Final Settlement Stipulation as a "Federal Reservoir" because "none of the activities involved in the settlement affect[ ] that reservoir directly." Hearing Tr. at p. 11, ll. 20-21 (Statement of Sarah Himmelhoch, Counsel for the United States).

the United States in these proceedings as *amicus curiae*. Starting with the Court's early invitation, participation by the United States has contributed greatly to the effective resolution of this matter, both in the proceedings before me and in the settlement negotiations of the States.

2. Summary of the Compact

The Compact, the text of which is attached as Appendix B, is divided into eleven Articles. The Compact supplies some specifics to guide its administration, but overall it has a broadly drawn structure that sets forth general principles and leaves administrative details to be filled in as a part of the process of Compact administration.[29] I summarize here only those Articles relevant to the Court's consideration of the States' motion to approve the Final Settlement Stipulation.

Article I of the Compact sets forth its major purposes. They include:

> to provide for the most efficient use of the waters of the [Basin] for multiple purposes; to provide

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[29] As expressed by Carol Angel, Counsel of Record for Colorado:

> [T]he Compact was a prospective and overarching broad document. It was entered into almost 60 years ago and the engineers .... who negotiated it expressly acknowledged that there were details of administration that ... needed to be worked out, and ... that's what this settlement does. It sets out, very specifically, agreements on administration and accounting that are consistent with the Compact, that fit within the spaces in the Compact where things are not clearly defined or are ambiguous or simply not addressed.

Hearing Tr. at p. 122, l. 15 to p. 123, l. 5.

> for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

Article II of the Compact defines relevant terms. Most important among them for purposes of the present original action are the definitions of **virgin water supply** as "the water supply within the [Republican River] Basin undepleted by the activities of man" and **beneficial consumptive use** as "that use by which the water supply of the Basin is consumed through the activities of man, [including] water consumed by evaporation from any reservoir, canal, ditch, or irrigated area."

The Compact in 1943 quantified the historic average annual virgin water supply originating in the main stem of the Republican River and each of the sub-basins within the Basin upstream from the lowest crossing of the River at the Nebraska-Kansas state line. Based on the aggregate virgin water supply over an eleven year period, the Compact determined that the virgin water supply in the Basin above that lowest crossing averaged 478,900 acre-feet per year.[30] This average virgin water supply the Compact then allocates to the three compacting States in the following

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[30] Compact, Article III. The aggregate virgin water supply was determined from measurements in state and federal records of historic stream flows for each sub-basin. *See Minutes of the Third Meeting of the Republican River Compact Commission at Lincoln, Nebraska* (Dec. 30, 1940 to Jan. 2, 1941), *contained in* U.S. Brief, *supra* note 23.

annual aggregate amounts: 54,100 acre-feet to Colorado, 190,300 acre-feet to Kansas, and 234,500 acre-feet to Nebraska. In addition, it grants to Kansas "the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line."[31] The annual allocation for each State represents the sum of its allocations from the main stem and from the several sub-basins located in whole or in part within that State.

The Compact also provides in Article III that annual allocations must be adjusted in any year in which the virgin water supply of any sub-basin is determined to vary by more than 10% from the average amount originally set by the Compact. The Compact is silent on adjustment of allocations in years when the variance from the average amount originally set by the Compact is 10% or less, but by implication the compacting States may by unanimous action adjust the allocations in those years.

3. Compact Administration

Article IX of the Compact provides for the administration of the Compact through "the official in each State who is . . . charged with the duty of administering the public water supplies." In 1959, pursuant to Article IX of the Compact, the three compacting States formed the three-member Republican River Compact Administration ("RRCA") to administer the Compact. Currently, the members of the RRCA are

[31] Compact, Article IV. Also the Compact grants to Colorado the entire water supply of the Frenchman Creek and Red Willow Creek drainage basins in Colorado. *Id.*

David Pope, Chief Engineer and Director of the Kansas Department of Agriculture, Division of Water Resources; Roger Patterson, Director of the Nebraska Department of Natural Resources; and Hal Simpson, State Engineer and Director of the Colorado Division of Water Resources. These officials are given broad and general powers to "collect and correlate . . . the data necessary" to administer the Compact and to adopt rules and regulations consistent with the Compact, but they may do so only by unanimous action.

Each year up through 1994, the RRCA made retrospective computations of the virgin water supply and of the consumptive use within each sub-basin in each State, for the purpose of determining whether each State had stayed within its allocation during the previous year. To carry out that function, the RRCA published formulas ("Formulas") in 1961 for making these computations.[32] The Formulas specified the components of each sub-basin's virgin water supply.[33]

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[32] *See* Committee on Procedure for Computation of Annual Virgin Water Supply, *Formulas for the Computation of Annual Virgin Water Supply* (Apr. 4, 1961), *contained in* RRCA, *First Annual Report* ("1961 Formulas"); Committee on Procedure for Computation of Annual Virgin Water Supply, *Revised Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use* (Aug. 19, 1982, rev. June 1990), *contained in* RRCA, *Twenty-Second Annual Report* 17-36 (Aug. 19, 1982) and RRCA, *Twenty-Ninth Annual Report* 18-20 (July 21, 1989) ("Revised Formulas") (together, "Formulas").

[33] For example, the annual virgin water supply for the Beaver Creek Drainage Basin equaled:

> the recorded discharge near Beaver City [at the Beaver City gaging station];

(Continued on following page)

The Formulas for consumptive use, which were used to determine whether a State had exceeded its allocation in a given year, were, like the Formulas for virgin water supply, broken down by sub-basin. Thus, the Formulas generally computed consumptive use as the measured water diversion (minus the measured return flow) within that portion of a sub-basin located within a particular State.

The data for use in the Formulas came from:

(1) Stream discharges from surface water records as compiled by the U.S. Geological Survey;

(2) Total monthly reservoir evaporation records as computed by the U.S. Corps of Engineers;

(3) Precipitation records as compiled by the U.S. Weather Bureau;

(4) Reservoir elevations, surface areas and storage contents from records as compiled by the operating agency;

(5) Irrigation diversions or irrigated acreages from records as furnished by each State; and

(6) Municipal and industrial diversions as furnished by each State.[34]

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plus, the diversions of surface water [within the sub-basin] in Colorado, Kansas and Nebraska;

plus, the diversions from groundwater [within the sub-basin] in Colorado, Kansas and Nebraska;

minus, the return flows from surface water diversions;

minus, the return flows from groundwater diversions.

Revised Formulas, *supra* note 32, at 23.

[34] *Id.* at 19.

Since the RRCA was formed, the States have considered and debated the extent to which groundwater usage should be reflected in the Formulas. In the 1961 Formulas, which constituted part of the RRCA's *First Annual Report*, the RRCA decided to include in its calculations at that time only groundwater pumped "from the alluvium along the stream channels." The Formulas equated alluvial[35] groundwater pumping with direct stream diversions; that is, the consumption of one acre-foot of water pumped from alluvial wells counted as one acre-foot against a State's allocation. The RRCA treated non-alluvial or "table-land"[36] wells differently, omitting from its calculations stream flow diversions caused by pumping from those wells, for the following stated reason:

> The determination of the effect of pumping by "table-land" wells on the flows of the streams in the Republican River Basin must await considerably more research and data regarding the character of the ground-water aquifers and

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[35] There are two types of groundwater in the Basin: alluvial and non-alluvial. Alluvial groundwater wells pump water from the alluvium, which is defined generally as "the sedimentary matter deposited [by flowing water] within recent times, esp. in the valleys of large rivers." Random House Compact Unabridged Dictionary 58 (spec. 2d. ed. 1996). In its brief in support of its Motion to Dismiss, Nebraska defined alluvium as "silts, sands, gravel and other water bearing material deposited by flowing water." Nebraska Brief on Motion to Dismiss at 19 n.7 (Docket Item 18).

[36] Non-alluvial wells are those drilled outside the alluvium and are variously referred to as "Ogallala," "table-land" or "upland" wells. For purposes of this Report, I assume that Ogallala Aquifer wells, table-land wells and upland wells are simply different names for the same non-alluvial wells, and the parties have at all times treated them as equivalents.

> the behavior of ground-water flow before even approximate information is available as to the monthly or annual effects on stream flows.[37]

Despite its apparent intention from the start to include the effect of table-land groundwater pumping in the Formulas at some future date, the RRCA never did so. It merely repeated the call for more research and data.[38] Therefore, for each year, the calculations reflected the effect on stream flow of groundwater pumping only from the alluvium.

II. PROCEDURAL HISTORY OF THIS ACTION

A. The Nature and History of the Present Action

All three compacting States have agreed that the Compact regulates direct diversions from the stream flow in the Basin, but a disagreement for many years over the Compact's treatment of groundwater pumping sparked the dispute leading to this original action. The disagreement stemmed from the Kansas position that the Compact regulates *any* groundwater use, whether from alluvial or table-land pumping, to the extent that groundwater pumping depletes the stream flow forming the basis of the calculation of virgin water supply. In opposition, Nebraska asserted that, although the Compact regulates direct diversions of water from the streams in the Basin, it does not regulate the consumption of water indirectly diverted from those streams through groundwater pumping even if

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[37] 1961 Formulas, *supra* note 32, at 3.

[38] *See* Revised Formulas, *supra* note 32, at 20.

it reduces the surface flow. In this action, Colorado took a position that differed from that of both of the other States; namely, that the Compact regulates the pumping of alluvial groundwater, but not table-land groundwater. Unable to agree on the treatment of groundwater pumping, the RRCA after 1994 ceased its annual determinations of the Basin's virgin water supply and of the consumptive use of that water by each of the three States.

Beginning in 1984, the States made significant efforts to reach a solution to their groundwater dispute through the RRCA, public meetings, a joint legislative committee meeting, and some fourteen months of professionally facilitated mediation, but were still unable to reach agreement on the issue. After all attempts to resolve the dispute failed, Kansas chose to seek redress in the present original jurisdiction action.

B. Initial Pleadings

This action commenced when the Court, on January 19, 1999, granted Kansas' Motion for Leave to File a Bill of Complaint.[39] In considering the Kansas Motion for Leave, the Court received full briefing from the State parties and invited the United States to file a brief as *amicus curiae*.[40] The United States has continued its highly beneficial and productive participation in an *amicus curiae* role throughout the proceedings.

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[39] 525 U.S. 1101 (1999).

[40] 525 U.S. 805 (1998).

The gravamen of the Kansas complaint is that

> [t]he State of Nebraska has breached its solemn obligation to abide by the [Republican River] Compact . . . by allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries, by the failure to protect surface flows from unauthorized appropriation by Nebraska users, and by other acts and omissions.[41]

Kansas alleged that the use of groundwater wells "ha[s] resulted in the appropriation by the State of Nebraska of more than its allocated equitable share of the waters of the Republican River and ha[s] deprived the State of Kansas of its full entitlement under the Compact."[42] The Kansas complaint initially sought no relief against Colorado, but named Colorado as a defendant because it is a party to the Compact.[43] In its answer, Nebraska denied the Kansas allegations and asserted numerous defenses and counterclaims, among them that the Compact does not regulate groundwater pumping and that Kansas has failed to state a claim upon which relief may be granted.[44] In response to the Kansas complaint, Colorado also filed its answer. Thereafter, Colorado and Kansas each filed an answer to Nebraska's counterclaims.

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[41] Kansas Bill of Complaint ¶ 7 (Docket Item 1).

[42] *Id.*

[43] *See* Kansas Brief in Support of Motion for Leave to File Bill of Complaint, at 2 (Docket Item 1).

[44] Nebraska Answer and Counterclaim ¶¶ 19, 20 (Docket Item 11).

C. Nebraska's Motion to Dismiss

To resolve the fundamental and preliminary question of law in this action – whether and to what extent the Compact restricts groundwater pumping – the Court granted Nebraska leave to file a motion to dismiss "in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure."[45] In the brief filed in support of its Motion to Dismiss, Nebraska argued that

> (1) the Compact, by its plain and unambiguous terms, does not apportion or allocate consumption of groundwater; (2) [the Supreme] Court and the Compact states have previously interpreted the Compact as an agreement regarding rights to surface water as distinguished from groundwater; and (3) the parties did not intend to apportion groundwater under the Compact.[46]

In its order of November 15, 1999, appointing me Special Master, the Court also referred to me Nebraska's Motion to Dismiss.[47] Previously, the Court had received briefs both from Kansas and from the United States as *amicus curiae* opposing the Motion to Dismiss, as well as the brief of Colorado, which also opposed the Motion, taking the position that the Compact regulates the use of alluvial groundwater, but not table-land groundwater.[48] As limited by the Court's order, the sole question on Nebraska's Motion to Dismiss was: Does the Republican

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[45] 527 U.S. 1020 (1999).

[46] Nebraska Brief in Support of Motion to Dismiss, at 5-6 (Docket Item 18).

[47] 528 U.S. 1001 (1999).

[48] Colorado Response to Motion to Dismiss, at 23 (Docket Item 22).

River Compact restrict a compacting State's consumption of groundwater?

In the First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), dated January 28, 2000, I recommended that the Court deny Nebraska's Motion to Dismiss on the ground that the Compact does restrict groundwater consumption to whatever extent it depletes stream flow in the Republican River Basin. In an Order dated June 29, 2000, the Court denied Nebraska's Motion to Dismiss and recommitted the case to me for further proceedings.[49]

D. Completion of the Pleadings

After the resolution of Nebraska's Motion to Dismiss, each of the parties filed further pleadings, the consequence of which was that each of the three States became both a complaining party and a defending party vis-à-vis each of the other two States. In essence, each State alleged, *inter alia*, that the other two States had violated the Compact by exceeding water allocations and each State asserted numerous affirmative defenses against such claims.

E. Discovery

At a case status conference held in Kansas City on October 16, 2000, I put in place after consultation with the party States and the United States a Comprehensive Case Management Plan ("CCMP") to govern discovery and all other proceedings up to the start of trial. Over the course

[49] 530 U.S. 1272 (2000).

of the following year, working against the deadlines set in the CCMP, the parties completed their initial disclosures, interrogatories, and document production requests and responses. The document inspection and production, in particular, were immense undertakings for the State parties, as well as for the United States. They all worked to move the case forward toward trial with diligence and extraordinary effort. Near the end of 2001, the date for commencement of trial set in the CCMP – March 15, 2003 – remained in place.

F. Resolution of Preliminary Issues

During the course of discovery, the parties briefed and argued a series of preliminary issues appropriate for early resolution. I decided those questions in three Memoranda of Decision, which are attached hereto as Appendices D1 to D3 and explained in more detail in Part III.A at pp. 31-36. Those rulings substantially narrowed the issues remaining for trial, particularly for years 1959-1994 – the years before the RRCA ceased adopting water computations unanimously for each year.

G. Settlement Negotiations

At the October 16, 2000 case status conference in Kansas City, which worked out the CCMP, I urged the parties to consider the possibility of a negotiated settlement of the case. Thereafter, the parties and I discussed the possibility of mediation and/or settlement at each of our case status conferences.

In October 2001, the States held their first face-to-face negotiating session in Lincoln, Nebraska. By mid-December 2001, the parties had held additional negotiating sessions and substantially completed written discovery and I had decided the preliminary issues mentioned above. At that time, the State parties requested and I granted a three-month stay of the proceedings so that they might conduct comprehensive settlement negotiations with the help of mediators of their selection. At the end of that period and as the result of exceptional efforts by all concerned, including the United States as *amicus curiae*, the parties filed with me a joint statement, signed by the Governors and the Attorneys General of all three States, that they had reached a settlement in principle of all remaining issues in the case and were committing the resources of the States to pursue vigorously a final disposition of the litigation.

At the same time, the parties moved for a further stay through December 15, 2002, in order to work out the many details necessary for a final and complete settlement of the whole case. With their stay motion the parties filed a Joint Action Plan detailing the steps they agreed to take to finalize the settlement by December 15, 2002. Under that Action Plan, negotiating teams consisting of representatives of the party States and the United States would address the following subjects: Compact accounting and computations, operation of and supply for major storage and diversion facilities, appropriate timelines and enforcement mechanisms for implementation of any consent decree, and joint development or adaptation of a data-intensive groundwater model. The Action Plan stated that the parties had identified 38 separate technical and legal tasks, each with its own challenges and issues for

resolution. The Plan created five technical and legal committees to carry out those 38 tasks and fixed eleven separate deadlines for their completion. The parties scheduled 32 days of joint meetings for the full negotiating teams with numerous additional meeting days for their five committees.

I granted the States' motion for a further stay in the proceedings through December 15, 2002. The order that granted the stay motion also prescribed an alternative schedule for proceeding to trial if negotiations failed. During the period of the stay, although I was never involved in the negotiations or informed of them in any substantive way, I monitored through telephonic case status conferences the parties' progress in completing the tasks identified in the Joint Action Plan. I also continued to supervise the parties' ongoing efforts to complete the written discovery that was necessary for preparing the Final Settlement Stipulation and that, alternatively, would be necessary for trial if the settlement negotiations failed.

With the rigorous schedule laid out by the Joint Action Plan (meetings and work sessions were in fact far more numerous than those originally planned), the parties achieved their goal. On December 16, 2002, the parties filed their Final Settlement Stipulation with me and moved for its approval. Shortly thereafter, the United States, which had actively participated in the mediated settlement negotiations, filed its statement in support of the Final Settlement Stipulation. The statement of the United States, which is attached hereto as Appendix E, concludes: "The States have achieved consensus through the sort of 'co-operative study,' 'conference,' and 'mutual concession' that the Court envisioned in *Texas v. New*

Mexico, 462 U.S. 554, 575 (1983). . . . As a consequence, the States have developed a sound basis for resolving their differences."

Two weeks after filing the Final Settlement Stipulation, the parties filed a joint statement (a) explaining the core operating provisions of the Final Settlement Stipulation, (b) setting forth how the settlement agreement is consistent with the Republican River Compact, and (c) demonstrating why the Final Settlement Stipulation constitutes an effective and beneficial disposition of this action that the Supreme Court should approve. Four days later, on January 6, 2003, I held an informational hearing in Denver, Colorado, where the State parties, with active participation by the United States as *amicus curiae*, explained the Final Settlement Stipulation to me in detail and responded to my questions arising from review of the Final Settlement Stipulation and their joint statement. At the hearing, the members of the RRCA shared primary responsibility for explaining the Final Settlement Stipulation and its purposes and goals, with supplementation by counsel for the States and the United States as needed. For the benefit of the Court and the historical record, I have at several places in this Report quoted statements made by the members of the RRCA and counsel for the States and the United States at the Denver informational hearing.

The State parties' attainment of the Final Settlement Stipulation in the period of time allowed for its completion was a major accomplishment. It was only through the extraordinary dedication, determined perseverance, and cooperative commitment of the engineers, technical experts, and counsel for the three States and the United States that the parties were able to work out their

differences and achieve a settlement that not only resolves the complex questions posed in this litigation but also provides a sound framework for future Compact administration and enforcement. Fully in conformance with the controlling provisions and declared purposes of the Compact, their outstanding efforts have produced a settlement that I recommend for approval without reservation.

III. THE FINAL SETTLEMENT STIPULATION

The Final Settlement Stipulation results from exactly the kind of cooperative effort and mutual concession by litigating States that the Court has long favored:

> Time and again we have counselled States engaged in litigation with one another before this Court that their dispute "is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of the representatives of the States which are vitally interested than by proceedings in any court however constituted."

Texas v. New Mexico, 462 U.S. at 575 (quoting *New York v. New Jersey*, 265 U.S. 296, 313 (1921)).

Plainly the result of "co-operative study" and of "mutual concession," the Final Settlement Stipulation has the following principal features:

- *Waiver of claims.* All three States agree that "all claims against each other relating to the use of the waters of the Basin pursuant to the Compact with respect to activities or conditions occurring before December 15, 2002, shall be waived, forever barred and dismissed with prejudice."

- *Treatment of groundwater pumping.*

Modeling – The First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), filed on January 28, 2000, recommended that the Court deny Nebraska's Motion to Dismiss because the Compact "restricts a compacting State's consumption of groundwater to the extent the consumption depletes stream flow in the Republican River Basin." The Court denied Nebraska's Motion to Dismiss. Implementing that denial and for the purpose of determining future Compact compliance, the Final Settlement Stipulation provides that the Groundwater Model is the means by which the States will account for consumption of groundwater to the extent the consumption depletes stream flow in the Basin.

Moratorium on the construction of new wells – The Final Settlement Stipulation imposes a moratorium on the construction of new groundwater wells in Nebraska upstream of Guide Rock, to match an existing *de facto* moratorium in Colorado and Kansas. The States have agreed to several reasonable and sensible exceptions to the moratorium.

- *Mechanisms for future Compact administration.* The Final Settlement Stipulation contains numerous clarifications and water accounting improvements that will help the RRCA in better administering the Compact. Many of these provisions resolve issues and ambiguities that hindered Compact administration and enforcement in the past. The clarifications and improvements include:

(a) New, more specific RRCA accounting procedures and formulas;[50]

(b) Use of a five-year running average of water supply and consumptive use figures for determining Compact compliance, except in dry (or "water-short") years, in which either a two- or a three-year running average will be used;

(c) Flexibility for each State, within certain parameters, to use its annual allocation of the virgin water supply wherever it wishes within its boundaries without violating the Compact;

(d) Rules for the use and administration of water above Guide Rock, Nebraska, the point at which Kansas may divert all or part of its allocation from the main stem and otherwise unallocated upstream sources;

(e) Extensive information sharing requirements;

(f) Provisions for giving credit for water imported from outside the Basin for beneficial consumptive use within the Basin; and

(g) Commitments of each State to take various specific actions in water-short years.

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[50] The new accounting procedures are attached to the Final Settlement Stipulation as Appendix C ("RRCA Accounting Procedures").

• *Dispute resolution system.* The Compact is silent on matters of Compact enforcement and the settling of disputes other than by unanimous action of the RRCA. In accordance with the stated purposes of the Compact "to remove all causes present and future which might lead to controversies" and "to promote interstate comity," and in an effort to minimize the need for future litigation before the Court, the Final Settlement Stipulation establishes procedures encouraging resolution of disputes between or among the compacting States where there is no unanimity in the RRCA. Of course, binding arbitration is possible only by agreement of the States affected.

• *Commitment to future joint efforts.* With the goals of using water in the Basin with maximum efficiency and of accounting for water use as accurately as possible, the three States have agreed in the Final Settlement Stipulation to undertake several efforts in the future. These efforts involve:

(a) The calculation of evaporation from small, non-federal reservoirs (typically farm ponds) in the Basin for purposes of Compact accounting;

(b) A study of the effect on virgin water supply of non-federal reservoirs and land terracing practices in the Basin; and

(c) A study of the feasibility of system improvements in the Basin, including measures to improve the ability to use the water supply in the Kansas and Nebraska Bostwick Irrigation Districts as well as the water supply on the main stem below Hardy, Nebraska.

> • *Non-severability.* The agreement of each of the States to the terms of the Final Settlement Stipulation depends upon the inclusion of all its provisions, negotiated as a single whole on a give-and-take basis, and, therefore, the States have provided that the rights and obligations in the Final Settlement Stipulation are not severable. If the Court declines to approve the Final Settlement Stipulation in the form submitted, the States have agreed that the entire Final Settlement Stipulation will be null and void.

Many of the principal features of the Final Settlement Stipulation have their origin in issues identified by the States in the course of this litigation. In addition, other features, although not essential to the issues in the case as framed in the pleadings, reflect agreements reached among the States, with the support of the United States, that are essential to the settlement because they allowed the bargaining process to move forward and ultimately allowed the States to reach a settlement through mutual accommodation of all their existing concerns relating to the management of the Basin water under the Compact.[51] The principal features of the Final Settlement Stipulation, individually and collectively, have the effect of providing for more efficient future Compact administration and

[51] Hearing Tr. at p. 119, ll. 9-15 ("[T]he added benefit [of the settlement process] . . . is we have added on significant parts to this settlement that weren't part of our initial controversy but will allow this process to work in the manner that was envisioned in 1943. . . . [W]e have created an interwoven product that . . . not only is consistent with the terms of the Compact but provides a meaningful way for us to get along in the future and administer the Compact in a way that's beneficial to all three States.") (Statement of David Cookson, Counsel of Record for Nebraska).

implementation. The flexibility and specificity for future administration that are the product of the State parties' mutual accommodation are superior to any litigated conclusion, as the Court has recognized in past original actions:

> [T]hese controversies between States over the waters of interstate streams "involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule."

Nebraska v. Wyoming, 325 U.S. 589, 616 (1945) (quoting *Colorado v. Kansas*, 320 U.S. 383, 392 (1943)).

In each of the following sections, this Report identifies the source and sets forth the history of the various issues addressed in the party States' settlement negotiations and explains in detail how the Final Settlement Stipulation resolves those issues.

A. Waiver of Claims for Damages

As discussed in Parts II.B and II.D above, at pages 18-19 and 21, each of the three compacting States is both a complaining State and a defending State in this action. Each has alleged past Compact violations by each of the other two States and each has asserted various affirmative defenses to the claims made against it. Initially, these claims encompassed alleged violations occurring as far back as 1943, the year the Compact was adopted, and continuing until the filing of this action in 1998. In the course of the proceedings before me, the breadth of the parties' claims was narrowed substantially.

In order to promote resolution of any issues that could be resolved quickly, the years 1959 through 1994 were segregated from the years prior to 1959 and the years after 1994. That segregation was possible because in each of those years 1959 through 1994, the RRCA had unanimously accepted computations of virgin water supply, adjusted annual allocations, and consumptive use. In Memorandum of Decision No. 1 (Subject: Three Issues for Early Resolution) (Feb. 12, 2001), attached hereto as Appendix D1, I ruled that those unanimously accepted computations were binding on the States, foreclosing a complaining State from recovering for excess water consumption by a defending State in any year in which the figures accepted by the RRCA demonstrate compliance with the Compact. Memorandum of Decision No. 2 (Subject: Adjusted Allocations for 1959-1977) (June 15, 2001), attached hereto as Appendix D2, similarly decided that adjusted allocations of virgin water supply for the years 1959-1977, unanimously adopted by the RRCA Engineering Committee in those years but not published by the RRCA in its Annual Reports, were nonetheless conclusive and binding on the States for purposes of this litigation.

After each of the States had reviewed those RRCA determinations in light of my ruling, Kansas and Nebraska each separately agreed with Colorado that no claims would be pressed by or against Colorado for the years 1943 through 1994.[52] Consequently, for claims involving the years through 1994, the case was narrowed

[52] Stipulation, State of Nebraska and State of Colorado (Docket Item 216); Stipulation, State of Kansas and State of Colorado (Docket Item 219).

to claims between Kansas and Nebraska. The issues remaining outstanding between Kansas and Nebraska for those years were also delimited by Nebraska's withdrawal of any claim for a credit or set-off for water imported into the Republican River Basin in the years 1959-1994.[53]

In order to delimit still further the issues to be tried, at a case status conference in Denver in May 2001 the parties and I identified issues appropriate for early resolution for the years 1959-1994. The briefing of some of those issues had to be deferred until the conclusion of written discovery. The States agreed, however, that immediate briefing was appropriate on the question of the availability to Kansas and Nebraska of various affirmative defenses for the years 1959 through 1994. The parties and the United States filed briefs on that question,[54] and I ruled in Memorandum of Decision No. 3 (Subject: First Set of Preliminary Questions Regarding Kansas/Nebraska Claims and Counterclaims for Years 1959-1994) (October 19, 2001), attached hereto as Appendix D3, that the defenses of unclean hands, prior material breach, consent, acquiescence, waiver, estoppel, laches, impossibility of performance, and failure to exhaust administrative remedies are unavailable to the compacting States for claims for the years 1959-1994.

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[53] Letter from Counsel for Nebraska (Docket Item 218); Case Management Order No. 25 (Docket Item 220).

[54] Colorado was given the opportunity to file a brief on any issue that had possible application or consequences for years outside the period 1959 through 1994.

Thus, when the States began mediated settlement discussions in October 2001, the potential viable claims for years prior to 1995 had been narrowed to claims between Kansas and Nebraska. Those claims had been further delimited by the rulings in Memoranda of Decision Nos. 1 and 2 on the binding nature of the unanimously accepted RRCA computations and in Memorandum of Decision No. 3 on the unavailability of various affirmative defenses. Despite this narrowing of the issues for the years 1959-1994, even for those years there remained as between Kansas and Nebraska at least the following complex questions to be tried:

(1) What are Kansas' rights and Nebraska's obligations for delivery of water at Guide Rock?

(2) For purposes of Compact violations is water overuse measured on a statewide basis or sub-basin by sub-basin?

(3) May any Kansas water shortage downstream from Nebraska be offset by Kansas overuse upstream from Nebraska?

(4) What damages, in money or water, should be awarded for any water overuse or other Compact violation?

Furthermore, for the years since 1994, there always remained all the difficult issues of both liability and damages for all three compacting States. For those years, there were no accepted RRCA calculations of virgin water supply, adjusted allocations, or consumptive use, and even the proper methodology for making those calculations with the inclusion of the effect of groundwater pumping would need to be adjudicated. Moreover, there was no accepted

groundwater model for determining the effects of groundwater pumping on stream flow, a factually complicated process. If the case went to trial, each State would have needed to develop its own groundwater model and support it with the testimony of expert witnesses. Furthermore, the four open issues listed above that remained for the years 1959-1994 would also need resolution for the years 1995 and thereafter. Additional questions also required resolution, including, for example, the treatment of Nebraska's claim for a credit for water imported from outside the Basin. In sum, if the parties had not worked out these and other questions in their settlement negotiations, the claims for damages for past violations would have required the completion of discovery, including numerous depositions, followed by a trial of great length, complexity, and expense, on issues of both liability and damages.

Weighing those prospects against the best interests of all three States and placing emphasis on better Compact administration and enforcement procedures for the future, the parties agree in their Final Settlement Stipulation to the entry of judgment waiving, forever barring, and dismissing with prejudice "all claims against each other relating to the use of the waters of the Basin pursuant to the Compact with respect to activities or conditions occurring before December 15, 2002."[55] The waived and barred claims include "all claims for Compact violations,

[55] Final Settlement Stipulation, § I.C.

damages, and all claims asserted or which could have been asserted in . . . No. 126, Original."[56]

B. Treatment of Groundwater Pumping

The principal issue that led to this litigation was the longstanding disagreement among the compacting States on whether and to what extent the Compact regulates groundwater pumping.[57] As early as the RRCA's 1985 meeting, the Kansas member of the RRCA moved that the Engineering Committee "review methods of computing virgin water supply and consumptive use with special attention to ground water depletions including the impact of pumping the Ogallala Aquifer."[58] In this original action, Nebraska's Motion to Dismiss, discussed in detail above,[59] squarely raised the issue. Nebraska contended that the Compact does not restrict consumption of water by groundwater pumping. The First Report of the Special Master rejected that contention, instead concluding that the Compact restricts the pumping of groundwater to the extent it depletes stream flow in the Basin. The Court implicitly rejected Nebraska's argument by denying its Motion to Dismiss.[60]

The Final Settlement Stipulation regulates groundwater pumping in two important ways: (1) by incorporating

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[56] *Id.*

[57] Those positions are explained above in Part II.A, pp. 17-18.

[58] RRCA, *Twenty-Fifth Annual Report* 7 (1985).

[59] *See supra* Part II.C, pp. 20-21.

[60] 530 U.S. 1272 (2000).

the Groundwater Model in Compact accounting and (2) by imposing a moratorium on the construction of new groundwater wells in a defined area of the Basin within Nebraska to match the *de facto* moratorium already existing in the relevant areas of Colorado and Kansas.

1. Groundwater Modeling

As part of the new RRCA Accounting Procedures adopted in the Final Settlement Stipulation, the RRCA will account for the effects of groundwater pumping in the Basin by incorporating determinations of stream flow depletion caused by groundwater well pumping in its determinations of virgin water supply and consumptive use.[61] As stated in the Final Settlement Stipulation, "[s]tream flow depletions caused by Well pumping for Beneficial Consumptive Use will be counted as Virgin Water Supply and Computed Beneficial Consumptive Use at the time and to the extent the stream flow depletion occurs and will be charged to the State where the Beneficial Consumptive Use occurs."[62]

To make the required determinations, the RRCA will adopt and use the Groundwater Model, which matches as closely as possible the actual effects of both alluvial and table-land groundwater pumping on stream flow in the Basin.[63] Although the States have not finally completed the

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[61] Final Settlement Stipulation, § IV.C.1.

[62] *Id.*

[63] In the words of David Pope, Chief Engineer and Director of the Kansas Department of Agriculture, Division of Water Resources, the goal of the Modeling Committee's calibration of the Groundwater Model is to ensure that it "is replicating the actual known historical stream

(Continued on following page)

Groundwater Model, they have entered into a binding agreement prescribing the method for guaranteeing its completion by agreement or by binding arbitration if necessary.[64] The States have created a Modeling Committee consisting of engineers and other experts representing all three compacting States and the United States.[65] Already the States have completed substantial work on the Groundwater Model, having agreed on architecture, parameters, procedures and calibration targets for it as set forth in Appendix J to the Final Settlement Stipulation.[66] Before the States finally adopt the Groundwater Model, the Modeling Committee has yet only to refine and verify data inputs, complete model calibration, and prepare for the historical record a written description of the Model and the process leading to its adoption.[67] The Committee is continuing its work on a tight schedule. The Final Settlement Stipulation provides for the Modeling Committee to complete the Groundwater Model and submit it to the States in final form with sufficient time for the States to

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flow as compared to what the model predicts." Hearing Tr. at p. 46, ll. 14-16. Appendix J to the Final Settlement Stipulation, at p. 1, describes the primary purpose of the Groundwater Model to be "to quantify within the Republican River Basin the amount, location, and timing of depletions to stream flow from ground water pumping and [also] accretions to stream flows due to imported water supply from outside the basin." The credit for imported water is discussed in Part III.C.6, pp. 62-64.

[64] Final Settlement Stipulation, §§ IV.C.5 to IV.C.9.

[65] *Id.* § IV.C.3; Hearing Tr. at p. 40, ll. 3-7.

[66] In sum, "[t]he model has not yet been calibrated, even though it is operational." Hearing Tr. at p. 45, ll. 17-18 (Statement of David Pope of Kansas).

[67] Hearing Tr. at p. 45, ll. 12-16; p. 48, l. 4 to p. 49, l. 3; p. 53, ll. 2-15.

review and approve it before July 1, 2003.[68] As the Modeling Committee completes its work on the Groundwater Model, I will decide any disputes concerning the exchange and availability of data and information necessary for the Model's completion.

With the States' approval, the RRCA will adopt the Groundwater Model for purposes of Compact accounting.[69] In the event the States are unable to agree upon the final Groundwater Model by July 1, 2003, the Final Settlement Stipulation guarantees its establishment by an arbitrator chosen by the States or by me, if necessary, from the States' lists of proposed arbitrators.[70] Thus, either by unanimous action of the States or by binding arbitration, the Groundwater Model will be put in place to control future determinations of Compact compliance.[71] Once the Groundwater Model is in place, as it is sure to be, I will file my final Report certifying to the Court the adoption of the Groundwater Model, binding on the States, thus bringing this action to an end.

2. Moratorium on New Well Construction

Kansas has long had concerns about the proliferation of groundwater wells in Nebraska. The Kansas complaint alleged that the "State of Nebraska is . . . allowing new wells, increased pumping, and increased use of groundwater in the Republican River Basin in Nebraska" that

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[68] Final Settlement Stipulation, § IV.C.7.

[69] *Id.* § IV.C.8.

[70] *Id.* § IV.C.9.

[71] *Id.* §§ IV.C.8 & IV.C.9.f.

deplete stream flow in the Basin and cause injury to Kansas.[72] According to Kansas, the number of groundwater pumping wells in Nebraska had increased from several hundred when the Compact was adopted in 1943 to over 10,000 by 1995.[73] In Nebraska, natural resource districts ("NRDs") are responsible for groundwater management and regulation, including the suspension of groundwater development.[74] Prior to this litigation, only one of the NRDs in areas covered by the Final Settlement Stipulation had a moratorium on new groundwater wells within its district.[75] As long ago as 1985, the RRCA's Engineering Committee recommended that the RRCA "[d]iscourage future ground water development in alluvial aquifers or implement a moratorium on groundwater development in alluvial aquifers."[76] In response, the RRCA member from Nebraska stated, correctly, that he had no authority under Nebraska law to put such a moratorium in place.[77] As a result of that continuing impasse, the RRCA was never able to resolve this issue.

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[72] Kansas Bill of Complaint, ¶ 11 (Docket Item 1).

[73] Kansas Brief in Support of Bill of Complaint, at 4 (Docket Item 1).

[74] Neb. Rev. Stat. §§ 46-656.28.

[75] The relevant area in Nebraska involves three NRDs: the Upper, Middle, and Lower Republican. The Upper Republican NRD adopted a moratorium on the construction of new groundwater wells in 1997. The Middle Republican NRD adopted a moratorium in June of 2002, and the Lower Republican NRD adopted a moratorium in the area upstream of Guide Rock effective December 9, 2002. Hearing Tr. at p. 13, ll. 6-11.

[76] RRCA, *Twenty-Fifth Annual Report* 10 (1985).

[77] *See id.* at 7.

The Final Settlement Stipulation settles this long-standing issue by imposing a moratorium on the construction of new groundwater wells in Nebraska upstream of Guide Rock, with several exceptions.[78] The affected Nebraska NRDs have already adopted temporary rules to make the moratorium immediately effective.[79] The

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[78] Final Settlement Stipulation, § III.A.1. The area of the moratorium is depicted on the map attached to the Final Settlement Stipulation as Appendix D1.

[79] *See supra* note 75. The relevant NRD rules are reproduced in the Final Settlement Stipulation, Appendix E. The process that led to adoption of these rules demonstrates the good faith cooperation of the States in achieving the Final Settlement Stipulation. According to David Cookson, Counsel of Record for Nebraska:

> [A]s part of the agreement with the other States, we had agreed . . . in the Agreement in Principle [in April 2002] to have these particular suspensions and [the] moratorium in place by the time the final settlement agreement was submitted. . . . To do that, each of the NRDs, under the Groundwater Management and Protection Act, had to ask the Department of Natural Resources to resume a study under that Act that had begun prior to the filing of the litigation, but which had been suspended during the pendency of the litigation.
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> They then were entitled, under the statute, to adopt rules and regulations adopting a temporary suspension subject to going through the notice and public hearing. So they had to publish a notice for a period no less than 21 days. There was a public hearing that was necessary. And then they had a board hearing at which time the rules and regulations were discussed.
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> There were two rather contentious public hearings in the Middle Republican and the Lower Republican [NRDs]. And then there was a subsequent meeting of those boards at which time the temporary suspensions were adopted. In the Middle Republican, it was adopted by unanimous vote. In the Lower Republican, it was adopted by a vote of 10 to 1.

Hearing Tr. at p. 26, l. 9 to p. 27, l. 9.

moratorium applies only to Nebraska because Kansas and Colorado already have a *de facto* moratorium on the construction of new groundwater wells in the relevant areas of their States, and they agree in the Final Settlement Stipulation that they will not change those laws and regulations in a way that "would result in restrictions less stringent" than those that apply to Nebraska.[80] It is also noteworthy that each of the States has previously closed or substantially limited the grant of any new surface water rights or permits in its portion of the Basin above Hardy, Nebraska.[81] Each State will allow new surface water rights or permits only if that use can be made within the State's Compact allocation.[82]

In the future the RRCA may modify the groundwater well moratorium "if it determines that new information demonstrates that additional groundwater development in all or any part of the Basin that is subject to the Moratorium would not cause any State to consume more than its Allocations from the available Virgin Water Supply."[83] However, in response to a concern raised by the United States about further depletion of stream flow into Swanson Lake, behind the Trenton Dam in Nebraska, the States have agreed that upstream of Swanson Lake, they "will not increase the level of development of Wells as of July 1, 2002."[84] That provision may be amended not by

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[80] *Id.* § III.B.2 and Appendices G and H.

[81] *Id.* § III.C; Hearing Tr. at p. 17, ll. 11-15.

[82] Final Settlement Stipulation, § III.C; Hearing Tr. at p. 17, ll. 19-23.

[83] Final Settlement Stipulation, § III.A.1.

[84] *Id.* § III.A.3.

agreement by the RRCA, but only "by making application to the Court"[85] in the form of a motion for leave to file a bill of complaint. Because the United States does not have a voting member on the RRCA, the moratorium on new groundwater wells above Swanson Lake is intentionally made more difficult to alter than in those areas in which the States have given the RRCA the authority to modify the moratorium.[86] Furthermore, the States stipulate that the rights of an existing well depleting the stream below the Trenton Dam may not be transferred upstream of that dam.[87]

The States have agreed to various reasonable and sensible exceptions to the groundwater pumping moratorium. Those exceptions[88] include:

- certain areas in five Nebraska counties where return flows from nearby Platte River basin irrigation have actually raised the groundwater table in the Republican River Basin and contributed to stream flow therein;[89]

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[85] *Id.*

[86] The parties themselves have described the limitation on the construction of new groundwater wells above Trenton Dam as, in effect, "permanent." According to Roger Patterson, Director of the Nebraska Department of Natural Resources:

> The United States is not a party to the Compact. And we wanted to address their concern. We made this a high standard, that you could not simply come to the [RRCA], of which the United States is not a party, and do away with this protection that we included for their benefit.

Hearing Tr. at p. 18, l. 14; p. 20, ll. 6-12.

[87] Final Settlement Stipulation, § III.B.2.

[88] *Id.* § III.B.1; Hearing Tr. at p. 15, l. 4 to p. 17, l. 10.

[89] This phenomenon and its treatment in the Final Settlement Stipulation are discussed in greater detail in Part III.C.6, *infra*, pp. 62-64.

- areas downstream from Guide Rock, Nebraska;
- areas in the Basin located in three Nebraska NRDs that are largely outside the Basin;[90]
- test holes;
- dewatering wells[91] with an intended use of one year or less;
- wells that collectively will pump a *de minimis* amount of water in a single project;
- replacement wells without increased water consumption;
- wells necessary to alleviate an emergency involving the provision of water for human consumption or public health and safety;
- wells to which a water right or permit is transferrred;
- wells for the expansion of municipal and industrial uses; and
- augmentation wells,[92] i.e., wells acquired or constructed for the sole purpose of offsetting

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[90] These areas are depicted on the map attached to the Final Settlement Stipulation as Appendix D1.

[91] Dewatering wells are temporary wells used to pump out water in an area, for example, to dry up the area for laying a foundation in construction. Hearing Tr. at p. 16, ll. 3-8.

[92] Hearing Tr. at p. 81, ll. 9-18 ("[T]he States have agreed that a State could acquire existing wells, eliminate the consumptive use of water by these wells, and pump groundwater from these wells, or even a new well, to a stream to be used as an offset to depletions caused by other consumptive uses or wells in the Basin.") (Statement of Hal

(Continued on following page)

> stream depletions in order to comply with Compact allocations.

Of course, all of these exceptions are subject to the overriding limitation that Compact allocations place on each State's consumptive use.

Thus, through the moratorium and the creation of the Groundwater Model, the Final Settlement Stipulation both settles longstanding disputes among the compacting States and implements the Court's decision on Nebraska's Motion to Dismiss.

C. Mechanisms for Future Compact Administration

In their pleadings, all three compacting States asked for injunctive relief to enforce future Compact compliance.[93] This litigation is at least as much about ensuring compliance in the future as it is about damages for past violations. The Final Settlement Stipulation is itself evidence of that. All claims for past damages have been waived, and the agreements reached in the Final Settlement Stipulation on every open issue focus on future administration of the water of the Basin. The most prominent of these new provisions are those dealing with groundwater, as detailed in the previous section. However,

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Simpson, State Engineer and Director of the Colorado Division of Water Resources).

[93] Kansas Bill of Complaint at 7 (Docket Item 1); Kansas Counterclaim Against Colorado at 6 (Docket Item 100); Colorado Counterclaim Against Nebraska and Cross-Claim Against Kansas at 6, 9 (Docket Item 86); Nebraska Second Amended Answer, Counterclaim and Cross-Claim at 12, 15 (Docket Item 130).

several other significant issues of Compact administration and enforcement arose during this litigation and the settlement negotiations and are resolved in the Final Settlement Stipulation.

1. Revised Formulas for Determining Compact Compliance

Starting with 1959, the RRCA used the Formulas to make its annual computations of virgin water supply, adjusted allocations, and consumptive use.[94] Those Formulas took into account all direct diversions from stream flow but took into account groundwater pumping only from alluvial wells.[95] The States have agreed as part of the Final Settlement Stipulation to revise and update the Compact accounting Formulas to include all depletions caused by groundwater pumping as a beneficial consumptive use. The newly adopted procedures, which supersede the old Formulas, appear as Appendix C to the Final Settlement Stipulation. They include, in addition to new accounting procedures to implement various features of the Final Settlement Stipulation, revised formulas for each sub-basin for computing the virgin water supply, allocations, and consumptive use.[96]

In applying the Formulas, the RRCA historically followed the rule under Article III that it must adjust annual allocations in any year in which the virgin water supply of any sub-basin is determined to vary by more

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[94] *See supra* notes 32-34 and accompanying text, pp. 14-15.

[95] *See supra* notes 35-38 and accompanying text, pp. 16-17.

[96] RRCA Accounting Procedures, *supra* note 50, §§ III.A-D.

than 10% from the amount originally set by the Compact.[97] By implication, as well as under its express administrative powers under Article IX, the RRCA may also adjust the allocations in any year when the virgin water supply varies by 10% or less from the average amount originally set by the Compact. The newly revised RRCA Accounting Procedures do just that in order to ensure that the figures for the virgin water supply and allocations will balance each year.[98]

The changes reflected in the RRCA Accounting Procedures promote the Compact's stated purposes "to provide for the most efficient use of the waters of the [Basin] for multiple purposes" and "to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use."[99] The revised RRCA Accounting Procedures implement the principles of the Final Settlement Stipulation and will allow the RRCA to determine compliance with the Compact and the Final

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[97] *See supra* Part I.B.2, at p. 13.

[98] According to David Pope of Kansas:

> An additional difference . . . in the methods of accounting procedures as compared to the historic methods is that the virgin water supply and allocations are adjusted every year for every designated drainage basin, whether or not the value's within 10 percent of the Compact value. Of course . . . the Compact provides for this adjustment when the departure's greater than 10 percent. We have simply agreed that that should be done each year so that the accounting matches up, so that we can balance the books, so to speak. So that is sort of a practical administration that we think is consistent with the provisions of the Compact.

Hearing Tr. at p. 64, l. 20 to p. 65, l. 8.

[99] Compact, Article I.

Settlement Stipulation and to understand with greater precision how water in the Basin is being used and how it might be used more efficiently.

The importance of the States' collaboration in developing the more comprehensive RRCA Accounting Procedures cannot be overemphasized. Had the States not reached a final settlement and instead fully litigated their claims, accounting methods would of necessity (and with great delay and expense) have had to be determined as part of the trial for the purpose of establishing a methodology for determining water allocation and consumptive use figures for years after 1994. Instead, the States were able to marshal the collective expertise of their engineers and technical experts and by agreement formulate RRCA Accounting Procedures with more detail and precision than would have been possible in litigation, where those same individuals would have instead used their talents to combat each other's positions and conclusions.[100] The

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[100] In the words of Sarah Himmelhoch, Counsel for the United States:

> . . . [The settlement is] consistent with the public interest [because] . . . these cases can be enormous, as everybody knows. And this case was resolved in record time and with as little expense as possible. And where the money was spent was often . . . in leveraging knowledge to achieve a goal rather than [in fighting] each other.
>
> The amount of effort that went into developing the groundwater model and the expertise that was shared in developing the accounting principles is money that perhaps we would have had to spend in litigation. But instead of coming up with a result, we would have been giving [the Court] a problem to resolve. And so in addition to achieving good things on the ground, they have achieved it in a way

(Continued on following page)

experts' collective effort has resulted in much better defined and more comprehensive water accounting procedures that will give the RRCA the ability to administer the Compact with greater certainty and efficiency and that will prevent future disagreements.[101]

2. Use of Five-Year Running Averages

Historically, the RRCA has each year made its calculations of virgin water supply, adjusted allocations, and consumptive use taking into account water used only in the single year for which the calculations are being made. With the inclusion of stream flow depletions from all groundwater pumping, the States will henceforth conduct Compact accounting on the basis of five-year running averages.[102] One reason for this change is that

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> that serves the public interest by minimizing the amount of money we spent on litigation.

Hearing Tr. at p. 129, l. 17 to p. 130, l. 9.

[101] According to Carol Angel, Counsel of Record for Colorado:

> . . . [T]he accounting procedures . . . were largely the product of a committee that consisted of the three engineering advisors from each State, the people who will be [using the procedures] in the future. But they also took care to make it very, very detailed, including tables and formulas, so that their successors will be able to hopefully administer this Compact without leading to the kinds of disagreements that brought us before you.

Hearing Tr. at p. 126, ll. 10-18.

[102] Final Settlement Stipulation, § IV.D; RRCA Accounting Procedures, *supra* note 50, § III.E. Flood events will not be included in the running average. Final Settlement Stipulation, § IV.D; Hearing Tr. at p. 56, ll. 13-15. This is consistent with the exclusion of the 1935 flood figures from the "computed average" virgin water supply in Article III of the Compact. Hearing Tr. at p. 59, l. 14 to p. 60, l. 4.

groundwater pumping may cause stream depletions a year or more after the pumping occurs, so the use of averaging will allow the States to manage groundwater and surface water depletions together.[103] A second reason is that averaging can account for changes in stream flow caused by storage in and releases from federal reservoirs that did not exist at the time the Compact was drafted.[104]

The Final Settlement Stipulation makes an exception for "water-short" years. During those years, the virgin water supply, adjusted allocation, and consumptive use calculations for Nebraska and northwest Kansas will be made using a two-year running average.[105] The Final Settlement Stipulation also provides Nebraska the option of using a three-year running average as an alternative to the two-year running average if Nebraska chooses to implement an alternative administration plan after its approval by the RRCA.[106] The exception for water-short years is intended to prevent an upper State from heavily overusing in a dry year (when all the States need water the most) and from then spreading that use over the succeeding four wetter years to avoid showing a violation under Compact accounting.[107]

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[103] Hearing Tr. at p. 55, l. 25 to p. 56, l. 4 ("Recognizing that groundwater pumping may cause stream depletions a year or more after the pumping occurs, the use of averaging . . . allows the States to manage groundwater and surface water together.") (Statement of David Pope of Kansas).

[104] Hearing Tr. at p. 58, ll. 3-9.

[105] Final Settlement Stipulation, §§ V.B.2.e.i and V.B.4.

[106] *Id.* § V.B.2.e.ii and Appendix M.

[107] Hearing Tr. at p. 90, ll. 4-15.

The use of a running average to determine Compact compliance is consistent with the Compact. Article IV makes allocations to each State "annually," and the RRCA's compliance computations will still be made annually. However, the allocations in Article III were themselves derived from the "computed average"[108] of some eleven years of stream flow,[109] so Article IV implicitly grants an allocation to each State based on an average annual water supply.[110] Recognizing that feature of the Compact, the RRCA has for many years instructed its Engineering Committee to compute for informational purposes adjusted allocations and beneficial consumptive use in five-year and ten-year running averages.[111] Formalizing this process in the revised RRCA Accounting Procedures will better match the necessities of water management over a long term and give the RRCA and the

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[108] Compact, Article III.

[109] *See* M.C. Hinderlider, *Explanatory Statement and Report to the Thirty-Fourth General Assembly*, *contained in* Kansas Brief in Opposition to Nebraska Motion to Dismiss, at M8 (Docket Item 19).

[110] Hearing Tr. at p. 57, ll. 11-13 ("[W]hile not express, implicitly the Compact allocated an average amount . . . .") (Statement of David Cookson, Counsel of Record for Nebraska); Hearing Tr. at p. 58, ll. 11-13.

[111] *See, e.g.*, RRCA, *Tenth Annual Report* 10 (May 26, 1970); Hearing Tr. at p. 55, ll. 17-21 ("[T]he RRCA's annual assignments to its engineering committee [have] included the computation of 5- and 10-year average water supplies and allocations, at least for informational purposes.") (Statement of David Pope of Kansas).

States the ability to manage the water of the Basin with greater predictability, efficiency, and flexibility.[112]

3. Flexibility for Water Use Within Each State

The Compact divides the waters of the Basin by allocating among the three States specific amounts of water for consumptive use from each sub-basin (and the main stem of the Republican River) in each State. In many of the sub-basins, only a part of the available water is specifically allocated. The Compact provides that the main stem and "otherwise unallocated" water in all sub-basins is allocated 51.1% to Kansas and 48.9% to Nebraska.[113] The Compact does not specify where that water may be used.

Thus, one of the ambiguities in the Compact is whether permissible use of a State's allocation under the Compact is measured on a statewide basis or sub-basin by sub-basin. In other words, if a State uses "otherwise unallocated" water in a particular sub-basin, thereby overusing its specific allocation in that sub-basin, has that State violated the Compact? Or may an underuse of an allocation in one sub-basin be used to offset the overuse in another sub-basin by the same State, and, if so, in what circumstances? At a case status conference in May 2001,

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[112] Hearing Tr. at p. 55, ll. 23-25 ("Averaging provides greater predictability and flexibility in the use of water.") (Statement of David Pope of Kansas).

[113] Compact, Article IV (allocating 138,000 acre-feet to Kansas and 132,000 acre-feet to Nebraska).

the parties had identified these questions as appropriate for early resolution as soon as written discovery was completed. The issue had been set for briefing when the States' first request for a stay of the proceedings to explore the possibility of a settlement intervened, and the issue remained set for briefing in the event the settlement negotiations failed.[114]

The Final Settlement Stipulation resolves this Compact accounting and enforcement issue by providing for geographic flexibility in the use of Compact sub-basin allocations. It declares that water derived from a sub-basin in excess of a State's specific sub-basin allocation is available for use by that State to the extent that:

(a) the water is physically available;

(b) use of the water does not impair the ability of another State to use its sub-basin allocation within the same sub-basin;

(c) use of the water does not cause the State using it to exceed its total statewide allocation; and

(d) use of the water, if it occurs in a water-short year, is consistent with the water-short year administration requirements of the Final Settlement Stipulation.[115]

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[114] First Amendment to Case Management Order No. 20 (Docket Item 222); Case Management Order No. 40 (Docket Item 312).

[115] Final Settlement Stipulation, § IV.B. Water-short year administration procedures are explained in Part III.C.7, pp. 64-68.

For example, in a sub-basin located entirely in one State, that State may use all of the specific allocation made to it in that sub-basin along with all of the otherwise unallocated water in that sub-basin, provided that the use does not cause the State to exceed its statewide allocation.[116] In a sub-basin located partly in one State and partly in another, each State may use water otherwise unallocated in that sub-basin as long as that use does not cause it to exceed its statewide allocation or impair another State's specific allocation in that sub-basin.[117] Generally, a State that uses all of the otherwise unallocated water in a single sub-basin will need to use less of its share of water elsewhere in the Basin to ensure that it does not exceed its statewide allocation.[118]

This flexible arrangement is consistent with the Compact because it allows for "the most efficient use of the waters of the [Basin]."[119] The States entered into the Compact before the construction of the federal reservoirs and before any other significant development of water use

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[116] Hearing Tr. at p. 39, ll. 1-6.

[117] Hearing Tr. at p. 34, ll. 12-17; p. 35, ll. 2-17.

[118] Hearing Tr. at p. 39, ll. 4-6.

[119] Compact, Article I.

in the Basin.[120] The States at the time had limited information about where the best and most efficient uses of the water might occur. Thus, the drafters of the Compact reasonably intended that the States have some flexibility in deciding upon the most efficient use of Basin waters. The flexibility embodied in this provision of the Final Settlement Stipulation will allow each State to use water where and when it is most needed while respecting the Compact rights of the other compacting States.

4. Use and Administration of Water Above Guide Rock, Nebraska

Article IV of the Compact grants to Kansas "[f]rom the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water supplies of upstream basins otherwise unallocated [in the Compact], 138,000 acre-feet." With respect to that 138,000 acre-feet of water, Article IV further declares that "Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska," which is located about 15 miles upriver from the lowest crossing of the Nebraska-Kansas state line. At

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[120] [The Compact] was negotiated prior to significant development of the Basin's water resources, thus its provisions were prospective in nature providing a broad, overarching framework for development by the States in cooperation with the United States.

> The Compact negotiators left many details of administration of the Compact to be developed by . . . successors. This settlement . . . provide[s] the States' mutual agreement on the details of the administration of the Compact.

Hearing Tr. at p. 29, ll. 11-22 (Statement of David Pope of Kansas).

Guide Rock, a diversion dam diverts water into the extensive Superior-Courtland canal system for users in the Nebraska and Kansas Bostwick Irrigation Districts, as shown in detail on the map attached hereto as Appendix C2.

The nature of the disagreement over Guide Rock was that Kansas wanted assurance that water would be available at Guide Rock when Kansas needed it, but the other States did not want to be burdened by obligations that they believed the Compact did not require.[121] More specifically, the parties disputed whether Colorado and Nebraska had a duty to deliver 138,000 acre-feet annually to Guide Rock for diversion and beneficial consumptive use by Kansas, or whether Kansas simply had the right to

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[121] As explained by David Cookson, Counsel of Record for Nebraska:

> In terms of an annual or even an averaged annual Compact allocation from Kansas's perspective, they're really interested in water being available when they [need] it.
>
> What we tried to address here was a practical solution within the general principles of the Compact, without being inconsistent with its terms, such that we could address their practical concerns in a way that didn't, in the other States' view, unduly burden us with non-Compact [obligations].
>
> So it was a compromise . . . in the spirit of Article IX, which allows the Compact Administration to adopt rules and regulations that . . . are consistent with the terms of the Compact.
>
> So we tried to address the dispute over Guide Rock and what that meant in a way that addressed the needs of Kansas in a practical way and addressed the concerns of the upstream States . . . such that we aren't burdened with what we would consider to be non-Compact obligations.

Hearing Tr. at p. 95, ll. 2-22.

divert at Guide Rock as much of its 138,000 acre-feet main stem allocation as was available at Guide Rock in a given year, leaving Kansas to divert and use the remainder of its main stem allocation at points downstream from Guide Rock.

To resolve these disagreements, two of the preliminary issues already set for briefing when the States requested a stay of the proceedings to explore the possibility of a settlement were (1) whether Nebraska and Colorado have a Compact obligation to make Kansas' entire main stem allocation available at Guide Rock, Nebraska, and (2) whether Kansas was required to take additional actions under the Compact as a condition precedent to exercising its right to divert all or any portion of its main stem allocation at the Superior-Courtland diversion dam near Guide Rock, Nebraska.[122]

The Final Settlement Stipulation addresses these issues in several ways. First, Nebraska commits itself, as a general principle, to "protect storage water released from Harlan County Lake for delivery at Guide Rock from surface water diversions."[123]

Second, Nebraska has agreed to recognize a priority date of February 26, 1948 for the Kansas Bostwick Irrigation District, the same priority date as the one held by the Nebraska Bostwick Irrigation District's Courtland Canal water right.[124] Thus, Kansas Bostwick Irrigation District

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[122] First Amendment to Case Management Order No. 20 (Docket Item 222).

[123] Final Settlement Stipulation, § V.A.3.

[124] *Id.* § V.A.1.

gets a priority date ahead of users with junior Nebraska priority dates.[125]

Third, Nebraska has agreed that when water is needed for diversion at Guide Rock and the projected or actual irrigation supply is less than 130,000[126] acre-feet of storage available for use from Harlan County Lake, Nebraska will close natural flow diversions of surface

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[125] As explained by Roger Patterson of Nebraska:

> Nebraska will . . . recognize a priority date of February 26, 1948.
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> . . . .
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> . . . [T]his is the same priority date that is held by the Nebraska Bostwick Irrigation [District] on the Courtland Canal. And the priority date is generally the date that is assigned to a water right which determines where you fall in the priority system. And the way water administration works in [Nebraska], as well as in Colorado and Kansas, is the more senior date gets the water first.
>
> . . . .
>
> . . . .For the most part, in this section of the river, the canals have older priority dates. . . . [M]ost of the individual water users in this section of the river are actually later or what we call junior priority dates, that would be junior to this 1948 date.
>
> And that's significant here because what we have agreed to do is when times are short on water supply, Nebraska will shut off these junior users to allow the water to be available to the more senior canals.

Hearing Tr. at p. 85, l. 10 to p. 86, l. 16.

[126] This figure comes from the Consensus Plan for Harlan County Lake entered into by the Bureau of Reclamation and the Corps of Engineers ("Harlan County Lake Consensus Plan"), a description of which is attached to the Final Settlement Stipulation as Appendix K. *See* Hearing Tr. at p. 87, ll. 17-24.

water between Harlan County Lake and Guide Rock that are junior to February 26, 1948, thereby providing natural flow water for the Bostwick Districts.[127] In addition, Nebraska will regulate senior water rights in that reach. Together, these three provisions secure for Kansas greater access at Guide Rock to the water allocated to Kansas, and they do so in accordance with the Nebraska water priority system.

5. Information and Data Sharing

As a result of the impasse the States had reached on how (or whether) to include the effects of groundwater pumping on stream flow in annual water calculations, the RRCA ceased to calculate annual virgin water supply, adjusted allocations, and consumptive use for years 1995 and thereafter. Article IX of the Compact declares: "It shall be the duty of the three States to administer this compact through [the chief water officials of the three States], and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact." In its counterclaim, Nebraska charged Kansas with violating the Compact and causing damage to Nebraska by "failing and/or refusing to provide the Republican River [d]ata required by Article IX of the Compact."[128] Nebraska also asserted the affirmative defense of "prior material breach" as a result of the alleged failure by Kansas to supply the data. The Special Master's Memorandum of Decision No. 3 barred the defense of prior

[127] Final Settlement Stipulation, § V.A.2.

[128] Counterclaim of the State of Nebraska, ¶ 22 (Docket Item 11).

material breach based on the failure to provide data for the years 1959-1994 for the reason that the RRCA had already made binding water computations for those years.[129] However, Memorandum of Decision No. 3 did not speak to the question of what data Kansas was required to provide for years after 1994.[130]

Given that history, an important aspect of the new RRCA Accounting Procedures is its provisions for sharing data and information. In Section V of the RRCA Accounting Procedures, each State agrees to provide by April 15th of each year for the previous calendar year all information from that State that is needed for RRCA Accounting Procedures, including data on the following subjects: surface water diversions and irrigated acreage, groundwater pumping and irrigated acreage, climate information, crop irrigation requirements, streamflow records from state-maintained gaging records, operations data for certain Platte River reservoirs, Nebraska water administration notifications for the protection of releases from Harlan County Lake, a description of all new wells constructed under exceptions to the moratorium on new wells,[131] information about non-federal reservoirs, and data input for the Groundwater Model.[132] As a means of data and information verification, the States have also agreed

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[129] *See* Memorandum of Decision No. 3, App. D3, at D3-11 to D3-12.

[130] *See id.* at D3-12.

[131] *See supra* Part III.B.2, at pp. 43-45.

[132] RRCA Accounting Procedures, *supra* note 50, §§ V.A to V.C.

to make documentation available for inspection upon request and to allow site inspections.[133]

These information and data sharing provisions add specific detail to the general requirements of Article IX "to collect and correlate the data necessary for the administration of the Compact." The new provisions provide an open exchange of needed data among the compacting States, which will contribute to the efficient administration of the Compact and help to avoid future controversies through opportunities for review and discussion of shared

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[133] *Id.* § V.D. The expansion in information sharing obligations compared to historical practice is summarized by David Pope of Kansas:

> In addition to the data explicitly needed for annual accounting, the States are obligated to annually exchange an extensive amount of supporting data used to develop their estimates of use to allow the other States the ability to understand the basis and if needed independently verify the estimates of use.
>
> Further, the States are given the ability to inspect various records and to conduct accompanied or unaccompanied site inspection for purposes of verification.
>
> . . . .
>
> [Prior to the Final Settlement Stipulation,] [t]here were in place . . . a relatively limited set of accounting procedures that had been developed by mutual agreement of the States over the years. . . . But in general, the States had left to each other to develop their own estimates of how much water had been used and provide that data and information. . . .
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> . . . . [T]o some extent we continue that. But with a lot more detail and a lot more opportunity for review of the underlying data and ability to monitor and evaluate that.

Hearing Tr. at p. 30, l. 21 to p. 32, l. 2.

information, as well as independent verification to the extent any State desires.[134]

6. Credit for Imported Water

As part of its affirmative defense of set-off, Nebraska argued that it is entitled to a credit or set-off for water imported from other river basins that is not part of the virgin water supply of the Republican River Basin. According to a pre-trial memorandum filed by Nebraska, "surface water irrigation projects on the North Platte and Platte rivers [just north of the Republican River Basin] have artificially created additional water supplies within the Republican River Basin [by raising the groundwater table through recharge from irrigation, forming what is called a groundwater 'mound']. These artificial water supplies have resulted in increased stream flow in the Republican River

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[134] In the words of David Pope of Kansas:

> . . . [O]ne of the things that [is] advantageous to the settlement [is] to have a much more comprehensive and well-defined set of procedures that would hopefully serve us well in the future and avoid conflict and disagreement.

Hearing Tr. at p. 32, ll. 12-17.

According to Hal Simpson of Colorado:

> We agree that the measurement techniques need to be clearly identified, as well as data collection and reporting . . . . [T]hrough the use of the procedures set forth in the stipulation as well as in the accounting procedures, we have very specific and detailed procedures for . . . measurement, for data collection, and for reporting.
>
> The purpose of this, of course, is to prevent any future disagreements on reporting and verification.

Hearing Tr. at p. 80, ll. 16-25.

that would not otherwise occur but for the activities of man."[135] The United States Geological Survey has measured a rise of at least 10 feet in the groundwater table in this area since pre-development.[136] As a result of the ruling in Memorandum of Decision No. 1 that the RRCA determinations of virgin water supply, adjusted allocations, and consumptive use are binding on the States for the years 1959-1994, Nebraska withdrew its claim for a credit for water imported from outside the Republican River Basin for those years 1959-1994.[137] However, at the time the

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[135] Nebraska's Pre-Trial Memorandum for May 30, 2001 Pretrial Conference, at 5-6 (Docket Item 149); *see also* Hearing Tr. at p. 43, ll. 2-12 and p. 43, l. 25 to p. 44, l. 8 ("[S]ome of the projects that divert water through canals and onto irrigated land from the Platte River . . . [have] return flows that add to the water table. And because these return flows and these lands are located geographically right near the boundary of the Platte River basin and the Republican River Basin, that increase in water level has occurred historically for a number of years. And that's what's referred to as the mound . . . . [U]nlike some other areas of the basin where water levels tend to go down rather than up with use over years or stay stable, in the mound area, it's higher. And then that results, in certain areas at least, [in] increased discharge from the groundwater system to streams . . . in the Republican River Basin that otherwise would not have been there were it not for this additional water diverted into the Basin.") (Statement of David Pope of Kansas); Hearing Tr. at p. 77, ll. 16-22 (" . . . [The groundwater mound] exists as return flows from diversion just north of the Republican River Basin from the Platte River and very large canals that were constructed after the Compact was negotiated, creating [the] groundwater mounds . . . which . . . are migrating southward into the Republican River Basin. This mound of imported water provides a source of supply for groundwater wells and also discharges into some surface streams in Nebraska.") (Statement of Hal Simpson of Colorado).

[136] Hearing Tr. at p. 15, ll. 8-13.

[137] *See supra* note 53 and accompanying text, p. 33.

parties entered upon mediated settlement negotiations, the issue still remained open for all years after 1994.

The Final Settlement Stipulation resolves this issue by providing that beneficial consumptive use of imported water will not count as computed beneficial consumptive use or as virgin water supply. For any remaining imported water supply (i.e., imported water supply that contributes to increased stream flow) a credit will be given to the importer State as calculated in accordance with the RRCA Accounting Procedures and by using the Groundwater Model.[138] If water-short year administration is in effect,[139] Nebraska has the right to offset consumption in excess of its allocation with imported water, but it will receive credit only for imported water supply that (1) produces water above Harlan County Lake; (2) produces water below Harlan County Lake and above Guide Rock that can be diverted during the irrigation season; (3) produces water that can be stored and is needed to fill Lovewell Reservoir in Kansas; or (4) is otherwise useable by Kansas as agreed by Kansas and Nebraska.[140]

7. Water-Short Year Administration

Although the Compact does not contain special provisions for water administration in dry years, such provisions without any doubt further the Compact's purposes "to provide for the most efficient use of the waters of the [Basin]" and "to recognize that the most efficient use of the

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[138] Final Settlement Stipulation, § IV.F.

[139] *See* Section III.C.7., which immediately follows.

[140] Final Settlement Stipulation, § V.B.2.b.

waters within the Basin is for beneficial consumptive use."[141] After all, in relatively dry years, the Compact best serves its very important purpose of "provid[ing] for an equitable division of such waters"[142] and the delivery to downstream water users of sufficient water for irrigation is most critical.

Yet for over fifteen years, the compacting States have disagreed about the necessity for special procedures to be followed in a year of water shortages. As early as 1985, the RRCA agreed to meet "to specifically consider developing administrative procedures for handling potential water shortages."[143] The compacting States failed to agree on any such procedures until the execution of the Final Settlement Stipulation. In general, the Final Settlement Stipulation establishes a set of procedures that will apply in any year when water is in short supply – in the terminology of the Final Settlement Stipulation, "Water-Short Year Administration."[144] The effect of these procedures is to protect downstream users and maximize the efficient use of the waters of the Basin during drier years. For water-short years, Kansas' and Nebraska's compliance will be measured on a two-year running average rather than on the usual five-year running average.[145] The Final Settlement Stipulation also provides Nebraska the option to use a three-year running average as an alternative to the two-year running average if Nebraska chooses to implement

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[141] Compact, Article I.

[142] *Id.*

[143] RRCA, *Twenty-Fifth Annual Report* 8 (July 11, 1985).

[144] Final Settlement Stipulation, § V.B.

[145] *Id.* §§ V.B.2.e.i and V.B.4; *see supra* Part III.C.2, at pp. 49-50.

an alternative administration plan approved by the RRCA.[146]

By the terms of the Final Settlement Stipulation, "Water-Short Year Administration will be in effect in those years in which the projected or actual irrigation supply is less than 119,000[147] acre-feet of storage available for use from Harlan County Lake . . . ."[148] The final determination of whether Water-Short Year Administration will be in effect will be made as of June 30 each year.[149]

Each State has fixed obligations when Water-Short Year Administration is in effect. Colorado agrees not to use any portion of its allocation for Beaver Creek (which flows through Colorado, Kansas, and Nebraska and then into Harlan County Lake), in any other sub-basin in Colorado (the waters of which flow into the main stem of the Republican River above Swanson Lake).[150] Nebraska and Kansas each agrees to limit its computed beneficial consumptive use above Guide Rock to not more than its allocation that is derived from sources above Guide Rock, along with its share of any unused portion of Colorado's allocation for that year under the applicable two- or three-year average.[151]

When Water-Short Year Administration is not in effect, Kansas and Nebraska are each allowed to use, on a

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[146] *Id.* § V.B.2.e.ii and Appendix M.

[147] This figure comes from the Harlan County Lake Consensus Plan, *supra* note 126. *See* Hearing Tr. at p. 88, ll. 5-15.

[148] Final Settlement Stipulation, § V.B.1.a.

[149] *Id.* § V.B.1.b.

[150] *Id.* § V.B.3; *see* App. C1.

[151] Final Settlement Stipulation, §§ V.B.2.a., V.B.4.

"first come, first served" basis, as much as 100% of the otherwise unallocated water in a sub-basin as long as the State's statewide allocation is not exceeded and a downstream State's specific allocation from that sub-basin is not impaired.[152] When, however, Water-Short Year Administration is in effect, Kansas and Nebraska each agree to limit its computed beneficial consumptive use in the sub-basins to the sum of its respective sub-basin allocations and 51.1% (for Kansas) and 48.9% (for Nebraska)[153] of the sum of the unallocated supply from those same sub-basins.[154] This provision is one of the limitations placed upon Kansas' and Nebraska's flexibility to use otherwise unallocated water as each wishes.[155]

Subject to certain limitations, if in any year the projected or actual irrigation supply from Harlan County Lake is less than 130,000 acre-feet, Nebraska may elect to use an alternative Water-Short Year Administration plan if the RRCA approves it.[156] Under an approved alternative plan, Nebraska essentially agrees to reduce its consumptive use above Guide Rock, in order to increase availability of water for diversion at Guide Rock, at a time before Water-Short Year Administration goes into effect.[157] In exchange for its early actions, Nebraska's Compact compliance will be computed using a three-year running

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[152] *See supra* notes 116-18 and accompanying text, p. 54.

[153] *See supra* note 113 and accompanying text, p. 52.

[154] Final Settlement Stipulation, §§ IV.B.4, V.B.2.c, V.B.4.

[155] *Cf. supra* Part III.C.3, pp. 52-55.

[156] Final Settlement Stipulation, § V.B.2.e.ii and Appendix M; Hearing Tr. at p. 92, ll. 7-23.

[157] *See* Final Settlement Stipulation, Appendix M, ¶¶ 1-2, 4.

average rather than the two-year running average that otherwise applies during Water-Short Year Administration.[158] Nebraska may terminate its alternative plan if the projected supply for Harlan County Lake rises above 130,000 acre-feet in any year an alternative plan is in effect.[159]

D. Dispute Resolution System

Article IX of the Compact provides that the three State officials charged with administering the Compact "may, by unanimous action, adopt rules and regulations consistent with the provisions of [the Compact]." If the three members do not agree on a particular matter, the Compact provides no means for resolving the dispute. The disputing States have no recourse other than to appeal to the ultimate forum of the Supreme Court of the United States in an original jurisdiction action. As a result, issues large and small about which the States disagree linger for years, hindering the efficient administration of the Compact. In the years leading to the present original action, disagreements among the parties over a span of some fifteen years eventually led to a breakdown in Compact administration after the year 1994. In order to attempt to prevent that from happening in the future and to provide a means for the possible resolution of disputes short of

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[158] *Id.* ¶ 4.

[159] *Id.* ¶ 5.

litigation in the Court, the Final Settlement Stipulation creates a system for dispute resolution.[160]

Any matter related to Compact administration, including administration and enforcement of the Final Settlement Stipulation, will first be submitted to the RRCA as a matter of course.[161] The State submitting a matter to the RRCA may designate it as a "fast-track" issue, which the RRCA must address within 30 days of the matter's submission unless otherwise agreed by the parties, or as a "regular" issue, which is one the RRCA will address at its next regularly scheduled meeting.[162] If the members of the RRCA are not unanimous on a particular matter and the State raising the matter wishes to proceed further, that State must submit the matter to non-binding arbitration by an arbitrator or arbitrators chosen by the States according to a procedure prescribed by the Final Settlement Stipulation.[163] The arbitration will be non-binding unless the States agree to submit the matter to binding arbitration.[164] In non-binding arbitration, after the arbitrator has issued a decision, each State that is a party to the dispute must give notice to the other States and the United States as to whether it accepts, accepts in part and rejects in part, or rejects the arbitrator's decision.[165] At the

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[160] Hearing Tr. at p. 101, ll. 6-9 (dispute resolution system is "an attempt by the parties to try to resolve disputes, if possible, through the Compact administration, and then through other alternative dispute resolution methods, if possible") (Statement of David Pope of Kansas).

[161] Final Settlement Stipulation, § VII.A.1.

[162] *Id.* §§ VII.A.3, VII.A.4.

[163] *Id.* §§ VII.A.7, VII.B.

[164] *Id.* § VII.A.7.

[165] *Id.* § VII.B.6.

conclusion of this process, the State raising the matter will have exhausted its administrative remedies.[166]

This system promotes the Compact's purpose "to remove all causes . . . which might lead to controversies."[167] The new dispute resolution system makes available to any of the three States a prescribed method for obtaining a ruling outside the Court that the contending parties are likely in most cases to find acceptable, thereby resolving a dispute quickly and allowing Compact administration to continue with minimal interruption.

E. Commitment to Joint Future Efforts

The three States have agreed in the Final Settlement Stipulation to undertake several future efforts in good faith in order to resolve longstanding Compact administration disagreements or ambiguities. The Compact itself calls for such efforts in its declared purpose "to promote joint action by the States and the United States in the efficient use of water."[168] Each of these undertakings has the twin goals of improving the efficiency of water use in the Basin and making the accounting for water use as accurate as possible, consistent with the declared purposes of the Compact.

The first two joint undertakings involve soil and water conservation measures. The 1961 Formulas stated that "[d]epletions of stream flows due to erosion control

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[166] *Id.* § VII.B.8.

[167] Compact, Article I.

[168] *Id.*

practices and stock-water ponds have not been included in the present virgin water supply formulas. . . . [T]here has been no success in isolating the effect of such practices on stream flow."[169] The Formulas did not include, and the RRCA did not calculate as part of the virgin water supply or as beneficial consumptive use, waters in small reservoirs or storage ponds or water impounded for soil and water conservation. This has been a source of disagreement between the United States and the compacting States. Nebraska, for example, argued in a pre-trial memorandum that soil and water conservation practices, encouraged by financial assistance and education by the United States, have contributed to diminished stream flows and make it appear that Nebraska has beneficially consumed more water than it has actually consumed.[170] For its part, the United States believes that the Compact requires the States to account for the effects of conservation practices,[171] a point of view with which the States disagree.[172]

As a means of resolving these conflicts, the States have, first, agreed in the Final Settlement Stipulation that, for purposes of Compact accounting, the RRCA will calculate the evaporation from non-federal reservoirs (which are typically farm ponds) that have a capacity greater than 15 acre-feet and count such evaporation as a

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[169] 1961 Formulas, *supra* note 32, at 3.

[170] Nebraska's Pre-Trial Memorandum for May 30, 2001 Pretrial Conference, at 8-9 (Docket Item 149).

[171] Statement of the United States, App. E, at E15.

[172] *See* Final Settlement Stipulation, § VI.B.3.

beneficial consumptive use.[173] Second, the States have agreed to undertake a study, in cooperation with the United States, of the effect on virgin water supply of nonfederal reservoirs and land terracing practices in the Basin.[174] The purpose of the study is to develop information that will allow the States to assess the impacts of nonfederal reservoirs and land terracing on the water supply and water uses within the Basin.[175]

Third, in order to further the stated Compact goal "to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use,"[176] the States have agreed to pursue, in collaboration with the United States, system improvements in the Basin, including measures to improve the ability to use the water supply below Hardy, Nebraska, a part of the Basin completely in Kansas.[177] The States have already reviewed thirteen possibilities for achieving that goal and determined that three of those possibilities merit additional

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[173] *Id.* § VI.A.

[174] *Id.* § VI.B.

[175] *Id.*; Hearing Tr. at p. 97, ll. 8-23 ("During the negotiations, it became clear that the apparent reduction of surface runoff from some of the sub-basins could not be fully explained by changes in precipitation or from depletions resulting from groundwater pumping and use. Therefore, the States and the United States have agreed to study the impacts of nonfederal reservoirs and the land terracing on the virgin water supply of the Basin. . . . By April 30, 2004, the Conservation Committee [established under the Final Settlement Stipulation] will submit to the [RRCA] a proposed study to quantify the effects of evaporation and land terracing practices on water supplies.") (Statement of Hal Simpson of Colorado).

[176] Compact, Article I.

[177] Final Settlement Stipulation, § IV.E.

study.[178] Accordingly, they have asked the Bureau of Reclamation to conduct an "appraisal study" to assess the feasibility of those three possibilities.[179] Also in connection with the effort to pursue system improvements in the Basin, the States have agreed to undertake a system operations study in collaboration with the United States.[180] The goal of that study is to apply the results of the appraisal study to determine whether the benefits of the proposed system improvements, including increased supply to the Nebraska and Kansas Bostwick Irrigation Districts, reducing the demand on Harlan County Lake, and making additional water available for use below Hardy, Nebraska in Kansas, would warrant revisiting the averaging provisions for Compact accounting.[181]

F. Non-Severability

The Final Settlement Stipulation is a series of bargained-for exchanges resulting from genuine negotiation and give-and-take among the States on many controversial issues that have divided them for years, and in some cases, decades. The compromises across and within issues form what the States view as an indivisible whole. For that reason, the severing or alteration of any of its parts destroys the viability and appeal of the whole to the States. The Final Settlement Stipulation declares:

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[178] Hearing Tr. at p. 73, ll. 3-21.

[179] Hearing Tr. at p. 73, l. 22 to p. 74, l. 2.

[180] Final Settlement Stipulation, § IV.E.

[181] Hearing Tr. at p. 75, l. 23 to p. 76, l. 18.

> The agreement of the States to the terms of this Stipulation is based upon the inclusion of all of the terms hereof, and the rights and obligations set forth in this Stipulation are not severable. If for any reason, the Court should decline to approve this Stipulation in the form presented, the entire Stipulation shall be null and void . . . .[182]

In recognition of the States' extraordinary achievement in reaching an integrated agreement that settles all of the issues raised in the litigation and in addition provides a much-improved framework for future Compact administration, compliance, and enforcement, I recommend that the Court preserve the bargain that the compacting States have struck as co-equal sovereigns and approve the Final Settlement Stipulation as a single whole.

IV. CONCLUSION AND RECOMMENDATION

Following the Court's denial of Nebraska's Motion to Dismiss and my decision of several significant legal issues, the States, at the same time they were completing document production, conducted settlement negotiations with the help of professional mediators. After a year of that effort they reached agreement on the Final Settlement Stipulation which completely settles the case. I strongly recommend that the Court approve the Final Settlement Stipulation for reasons that can be stated succinctly as follows:

- The Final Settlement Stipulation fully conforms to the controlling provisions of the

[182] Final Settlement Stipulation, § VIII.

Compact and implements its declared purposes "to provide for the most efficient use of the waters of the Republican River," "to remove all causes . . . which might lead to controversy," and "to promote interstate comity."[183]

- The Final Settlement Stipulation arrived at by the States themselves through compromise and collaborative effort is superior to any possible litigated result in this original action because

  – it is much more conducive to building and maintaining a satisfactory continuing relationship among the States in administering the Compact indefinitely into the future; and

  – it is much more complete in breadth of subject matter and in depth of specificity than could be any judgment of the Court

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[183] As expressed by Sarah Himmelhoch, Counsel for the United States:

> . . . [T]he Compact states that its overriding purpose is the efficient use of water in the Republican River Basin. And by addressing not only the current disputes but by building a framework by which future disputes could be resolved and additional information could be gathered as necessary, the States have implemented that fundamental purpose of the Compact. And they have done so while recognizing the plain language of the Compact and addressing the ambiguities in the Compact in a manner that's consistent with the plain language and the intent.

Hearing Tr. at p. 128, ll. 7-18.

deciding merely the issues raised by the pleadings.[184]

- Through compromise each State in the Final Settlement Stipulation has gained much of what it most needed, rendering the settlement as fair and equitable as is practicably possible.[185]

- After an interlude of eight years of disrupted Compact administration, the Final Settlement Stipulation, without the further delay of a lengthy trial, puts back in operation the Compact's system for administration of the water of the Republican River Basin.

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[184] As described by Carol Angel, Counsel of Record for Colorado:

> . . . [T]his is a beneficial and effective settlement [because] it's given [the States] the opportunity to create solutions just not possible in litigation. . . . [T]he best example is the groundwater model. This was a model put together in record time, specifically because the very high-powered experts hired by each State, instead of fighting each other and testifying, [could work together].
>
> . . . .
>
> And the cooperation and the level of effort they put into it gives me great confidence that we will have a model that is far superior [to anything that could come out of litigation] because it's a cooperative model. . . .

Hearing Tr. at p. 124, l. 18 to p. 125, l. 23.

[185] In the words of John Draper, Counsel of Record for Kansas:

> This settlement . . . allows the perceived ambiguities in the application of the 1943 Compact to present and future conditions to be resolved in a manner that is not inconsistent with the Compact and that satisfies the prime concerns of the three States and the United States in this Basin. . . .

Hearing Tr. at p. 116, ll. 17-22.

- The United States, the builder and operator of all nine major reservoirs in the Republican River Basin, participated actively with the States in the negotiation of the Final Settlement Stipulation and, as *amicus curiae* in this original action, fully supports the States' motion for the Court's approval of the settlement.
- By its nature this original action could have been brought to a litigated conclusion only after a very long, complex, and costly trial.

For all those reasons, I respectfully recommend the entry of the Proposed Decree set forth in attached Appendix A, which will approve the Final Settlement Stipulation and recommit the case to me for the sole purpose of performing my responsibilities in connection with the completion of the Groundwater Model.

Respectfully submitted,

VINCENT L. MCKUSICK
Special Master
One Monument Square
Portland, Maine 04101
(207) 791-1100

April 15, 2003

APPENDIX A

PROPOSED DECREE

STATE OF KANSAS

v.

STATE OF NEBRASKA
and
STATE OF COLORADO

No. 126, Original

Decree Entered _____

DECREE

This cause, having come to be heard on the Second Report of the Special Master appointed by this Court and on the Parties' Joint Motion for Approval of Final Settlement Stipulation, which accompanies said Report, IT IS HEREBY DECREED AS FOLLOWS:

1. The Final Settlement Stipulation executed by all the Parties to this case and filed with the Special Master on December 16, 2002, is approved.

2. This action is recommitted to the Special Master for the sole purpose of deciding procedural questions arising in the completion by the State parties of the RRCA Groundwater Model pursuant to the binding procedures prescribed by the Final Settlement Stipulation. All claims, counterclaims, and cross-claims for which leave to file was or could have been sought in this case arising prior to December 15, 2002, are hereby dismissed with prejudice effective upon the filing by the Special Master of a final report certifying adoption of the RRCA Groundwater Model by the State parties.

APPENDIX B

The Republican River Compact as
Enacted by Congress
57 Stat. 86 (1943)

AN ACT

To grant the consent of Congress to a compact entered into by the States of Colorado, Kansas, and Nebraska relating to the waters of the Republican River Basin, to make provisions concerning the exercise of Federal jurisdiction as to those waters, to promote flood control in the Basin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the compact authorized by the Act entitled "An Act granting the consent of Congress to the States of Colorado, Kansas, and Nebraska to negotiate and enter into a compact for the division of the waters of the Republican River", approved August 4, 1942. (Public Law 696, Seventy-seventh Congress; 56 Stat. 736), signed by the commissioners for the States of Colorado, Kansas, and Nebraska at Lincoln, Nebraska, on December 31, 1942, and thereafter ratified by the Legislatures of the States of Colorado, Kansas, and Nebraska, which compact reads as follows:

"REPUBLICAN RIVER COMPACT

"The States of Colorado, Kansas, and Nebraska, parties signatory to this compact (hereinafter referred to as Colorado, Kansas, and Nebraska, respectively, or individually as a State, or collectively as the States), having resolved to conclude a compact with respect to the waters of the Republican River Basin, and being duly authorized therefor by the Act of the Congress of the

United States of America, approved August 4, 1942, (Public No. 696, 77th Congress, Chapter 45, 2nd Session) and pursuant to Acts of their respective Legislatures have, through their respective Governors, appointed as their Commissioners:

M.C. Hinderlider, for Colorado
George S. Knap, for Kansas
Wardner G. Scott, for Nebraska

who, after negotiations participated in by Glenn L. Parker, appointed by the President as the Representative of the United States of America, have agreed upon the following articles:

"Article I

"The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the 'Basin') for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

"The physical and other conditions peculiar to the Basin constitute the basis for this compact, and none of the States hereby, nor the Congress of the United States by its consent, concedes that this compact establishes any general principle or precedent with respect to any other interstate stream.

"Article II

"The Basin is all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas. The main stem of the Republican River extends from the junction near Haigler, Nebraska, of its North Fork and the Arikaree River, to its junction with Smoky Hill River near Junction City, Kansas. Frenchman Creek (River) in Nebraska is a continuation of Frenchman Creek (River) in Colorado. Red Willow Creek in Colorado is not identical with the stream having the same name in Nebraska. A map of the Basin approved by the Commissioners is attached and made a part hereof.

"The term 'Acre-foot', as herein used, is the quantity of water required to cover an acre to the depth of one foot and is equivalent to forty-three thousand, five hundred sixty (43,560) cubic feet.

"The term 'Virgin Water Supply', as herein used, is defined to be the water supply within the Basin undepleted by the activities of man.

"The term 'Beneficial Consumptive Use' is herein defined to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

"Beneficial consumptive use is the basis and principle upon which the allocations of water hereinafter made are predicated.

"Article III

"The specific allocations in acre-feet hereinafter made to each State are derived from the computed average annual virgin water supply originating in the following designated drainage basins, or parts thereof, in the amounts shown:

"North Fork of the Republican River drainage basin in Colorado, 44,700 acre-feet;
"Arikaree River drainage basin, 19,610 acre-feet;
"Buffalo Creek drainage basin, 7,890 acre-feet;
"Rock Creek drainage basin, 11,000 acre-feet;
"South Fork of the Republican River drainage basin, 57,200 acre-feet;
"Frenchman Creek (River) drainage basin in Nebraska, 98,500 acre-feet;
"Blackwood Creek drainage basin, 6,800 acre-feet;
"Driftwood Creek drainage basin, 7,300 acre-feet;
"Red Willow Creek drainage basin in Nebraska, 21,900 acre-feet;
"Medicine Creek drainage basin, 50,800 acre-feet;
"Beaver Creek drainage basin, 16,500 acre-feet;
"Sappa Creek drainage basin, 21,400 acre-feet;
"Prairie Dog Creek drainage basin, 27,600 acre-feet;

"The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line and the small tributaries thereof, 87,700 acre-feet.

"Should the future computed virgin water supply of any source vary more than ten (10) per cent from the

virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportion that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

"Article IV

"There is hereby allocated for beneficial consumptive use in Colorado, annually, a total of fifty-four thousand, one hundred (54,100) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin, 10,000 acre-feet;
"Arikaree River drainage basin, 15,400 acre-feet;
"South Fork of the Republican River drainage basin, 25,400 acre-feet;
"Beaver Creed drainage basin, 3,300 acre-feet; and

"In addition, for beneficial consumptive use in Colorado, annually, the entire water supply of the Frenchman Creek (River) drainage basin in Colorado and of the Red Willow Creek drainage basin in Colorado.

"There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"Arikaree River drainage basin, 1,000 acre-feet;
"South Fork of the Republican River drainage basin, 23,000 acre-feet;
"Driftwood Creek drainage basin, 500 acre-feet;
"Beaver Creek drainage basin, 6,400 acre-feet;
"Sappa Creek drainage basin, 8,800 acre-feet;
"Prairie Dog Creek drainage basin, 12,600 acre-feet;

"From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water supplies of upstream basins otherwise allocated herein, 138,000 acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska; and

"In addition there is hereby allocated for beneficial consumptive use in Kansas, annually, the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line.

"There is hereby allocated for beneficial consumptive use in Nebraska, annually, a total of two hundred thirty-four thousand, five hundred (234,500) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin in Colorado, 11,000 acre-feet;
"Frenchman Creek (River) drainage basin in Nebraska, 52,800 acre-feet;
"Rock Creek drainage basin, 4,400 acre-feet;
"Arikaree River drainage basin, 3,300 acre-feet;
"Buffalo Creek drainage basin, 2,600 acre-feet;

"South Fork of the Republican River drainage basin, 800 acre-feet;
"Driftwood Creek drainage basin, 1,200 acre-feet;
"Red Willow Creek drainage basin in Nebraska, 4,200 acre-feet;
"Medicine Creek drainage basin, 4,600 acre-feet;
"Beaver Creek drainage basin, 6,700 acre-feet;
"Sappa Creek drainage basin, 8,800 acre-feet;
"Prairie Dog Creek drainage basin, 2,100 acre-feet;

"From the North Fork of the Republican River in Nebraska, the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line, from the small tributaries thereof, and from water supplies of up-stream basins otherwise unallocated herein, 132,000 acre-feet.

"The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made.

"Article V

"The judgment and all provisions thereof in the case of Adelbert A. Weiland, as State Engineer of Colorado, et al, v. The Pioneer Irrigation Company, decided June 5, 1922, and reported in 259 U.S. 498, affecting the Pioneer Irrigation ditch or canal, are hereby recognized as binding upon the States; and Colorado, through its duly authorized officials, shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal in conformity with said judgment.

"The water heretofore adjudicated to said Pioneer Canal by the District Court of Colorado, in the amount of fifty (50) cubic feet per second of time is included in and is a part of the total amounts of water hereinbefore allocated for beneficial consumptive use in Colorado and Nebraska.

"Article VI

"The right of any person, entity, or lower State to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper State for the purpose of regulating water herein allocated for beneficial consumptive use in such lower State, shall never be denied by an upper State; provided, that such right is subject to the rights of the upper state.

"Article VII

"Any person, entity, or lower State shall have the right to acquire necessary property rights in an upper State by purchase, or through the exercise of the power of eminent domain, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, that the grantees of such rights shall pay to the political subdivisions of the State in which such works are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements during the ten years preceding the use of such lands, in reimbursement for the loss to taxes of said political subdivisions of the State.

"Article VIII

"Should any facility be constructed in an upper State under the provisions of Article VI, such construction and the operation of such facility shall be subject to the laws of such upper State.

"Any repairs to or replacements of such facility shall also be made in accordance with the laws of such upper State.

"Article IX

"It shall be the duty of the three States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

"The United States Geological Survey, or whatever federal agency may succeed to the functions and duties of that agency, insofar as this compact is concerned, shall collaborate with the officials of the States charged with the administration of this compact in the execution of the duty of such officials in the collection, correlation, and publication of water facts necessary for the proper administration of this compact.

"Article X

"Nothing in this compact shall be deemed:

"(a) To impair or affect any rights, powers or jurisdiction of the United States, or those acting by or under its authority, in, over, and to the waters of the Basin; nor to impair or affect the capacity of the United States, or those acting by or under its authority, to acquire rights in and to the use of waters of the Basin;

"(b) To subject any property of the United States, its agencies or instrumentalities, to taxation by any State, or subdivision thereof, nor to create an obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

"(c) To subject any property of the United States, its agencies or instrumentalities, to the laws of any State to any extent other than the extent these laws would apply without regard to this compact.

"Article XI

"This compact shall become operative when ratified by the Legislature of each of the States, and when consented to by the Congress of the United States by legislation providing, among other things, that:

"(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact, shall be

made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.

"(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

"(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.

"IN WITNESS WHEREOF, the Commissioners have signed this compact in quadruplicate original, one of which

shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the States.

"Done in the City of Lincoln, in the State of Nebraska, on the 31st day of December, in the year of our Lord, one thousand nine hundred forty-two.

"M. C. HINDERLIDER
"Commissioner for Colorado
"GEORGE S. KNAPP
"Commissioner for Kansas
"WARDNER G. SCOTT
"Commissioner for Nebraska

"I have participated in the negotiations leading to this proposed compact and propose to report to the Congress of the United States favorably thereon.

"GLENN L. PARKER
"Representative of the United States"

Sec. 2(a) In order that the conditions stated in article XI of the compact hereby consented to shall be met and that the compact shall be and continue to be operative, the following provisions are enacted –

(1) any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by such compact, shall be made within the allocations made by such compact for use in that State and shall be taken into account in determining the extent of use within that State;

(2) the United States, or those acting by or under its authority, in the exercise of rights or powers arising from

whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of such compact and after consultation with all interested Federal agencies and the State officials charged with the administration of such compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(3) the United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by such compact which may be impaired by the exercise of Federal jurisdiction in, over, and to such waters: *Provided*, That such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with such compact at the time of the impairment thereof, and was validly initiated under State law prior to the initiation or authorization of the Federal program or project which causes such impairment.

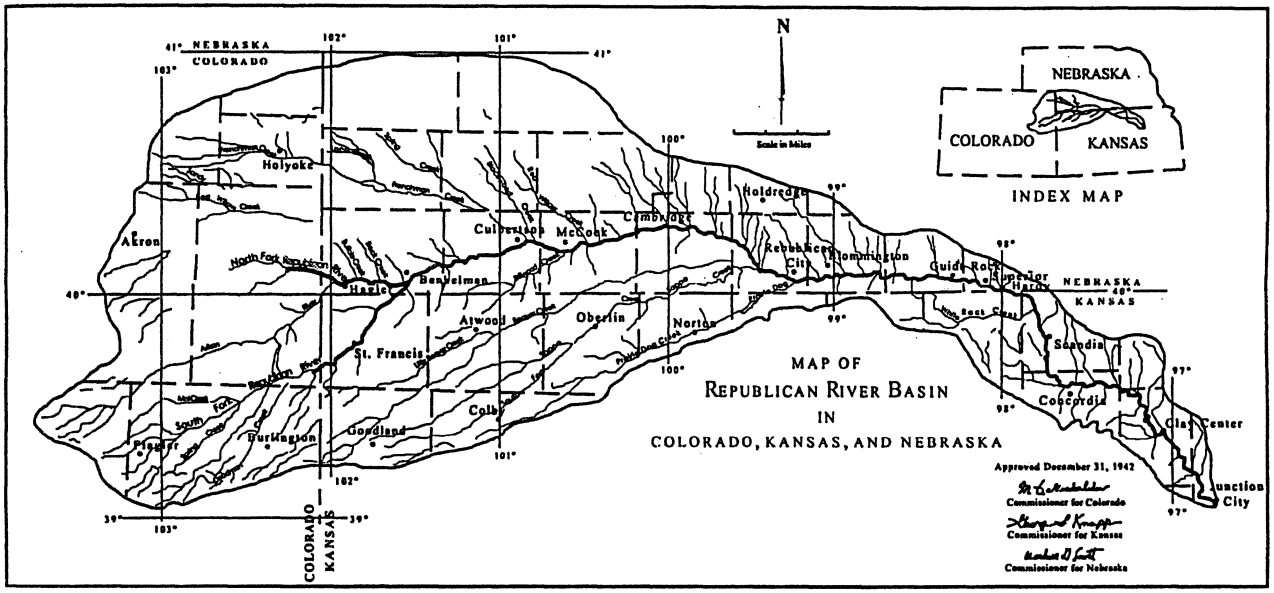
(b) As used in this section –

(1) "beneficial consumptive uses" has the same meaning as when used in the compact consented to by Congress by this Act; and

(2) "Basin" refers to the Republican River Basin as shown on the map attached to and made a

part of the original of such compact deposited in the archives of the Department of State.

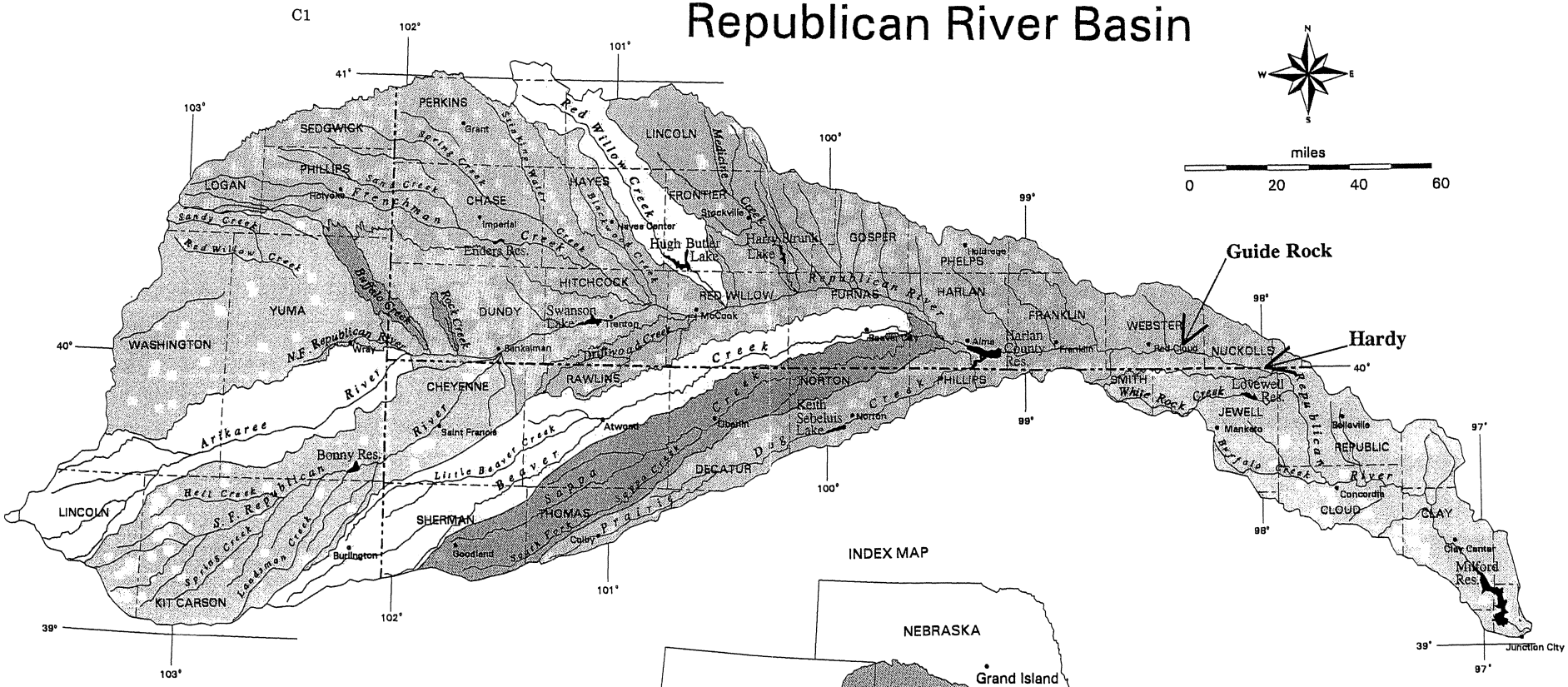
Approved May 26, 1943.


NEBRASKA
COLORADO
N
Scale in Miles
INDEX MAP
NEBRASKA
COLORADO
KANSAS
Holyoke
Akron
Haxtun
Benkelman
Culbertson
McCook
Cambridge
Holdrege
Atwood
Oberlin
Norton
St. Francis
Colby
Goodland
Burlington
Wray
Republican City
Superior
Hardy
Guide Rock
Scandia
Concordia
Clay Center
Junction City
COLORADO
KANSAS
NEBRASKA
KANSAS
MAP OF
REPUBLICAN RIVER BASIN
IN
COLORADO, KANSAS, AND NEBRASKA
Approved December 31, 1942
Commissioner for Colorado
Commissioner for Kansas
Commissioner for Nebraska

APPENDIX C1

C1

Republican River Basin



N
W
E
S

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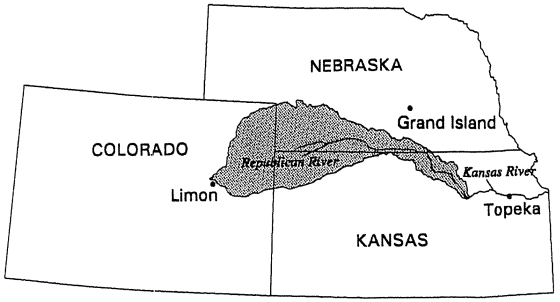
0 20 40 60

INDEX MAP



LEGEND

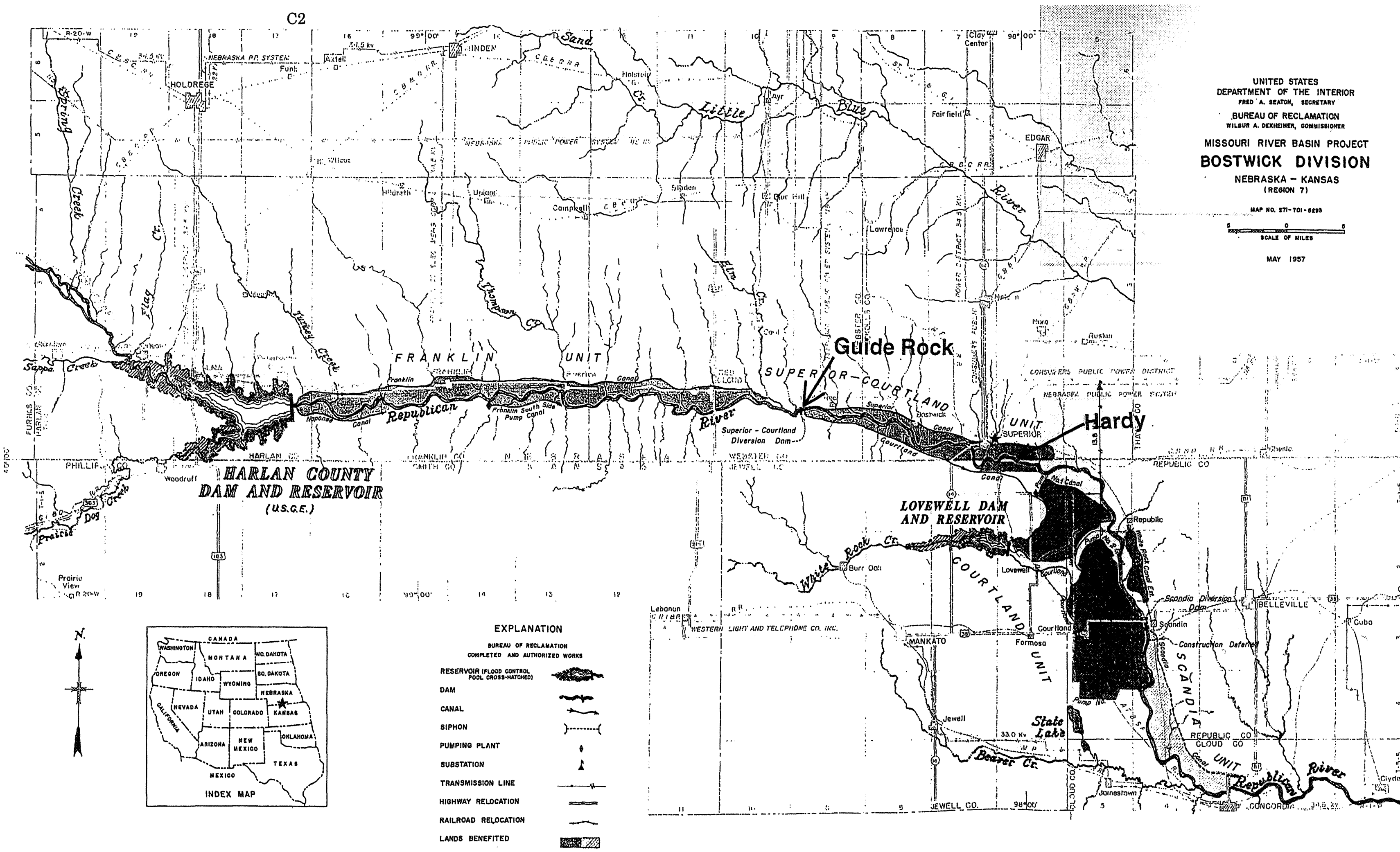
- Lakes and Reservoirs
- County Lines
- State Lines
- Basin Boundaries
- Rivers or Streams
- County Seats

The main source of data for this map is from USGS data at a scale of one to two million. This data includes hydrology, counties and HUC8 boundaries (1987). The Buffalo, Rock, Frenchman, N.F. Republican, and Driftwood Creek basins are HUC11 boundaries from the Nebraska Natural Resources Commission (1994). Cities and towns in Nebraska are also from the NRC.

Kansas Department of Agriculture
Division of Water Resources
SWRMP, June 1995

APPENDIX C2

C2


UNITED STATES
DEPARTMENT OF THE INTERIOR
FRED A. SEATON, SECRETARY
BUREAU OF RECLAMATION
WILBUR A. DEXHEIMER, COMMISSIONER
MISSOURI RIVER BASIN PROJECT
BOSTWICK DIVISION
NEBRASKA - KANSAS
(REGION 7)
MAP NO. 271-701-6293
SCALE OF MILES
MAY 1957
Guide Rock
Hardy
HARLAN COUNTY DAM AND RESERVOIR (U.S.C.E.)
LOVEWELL DAM AND RESERVOIR
FRANKLIN UNIT
SUPERIOR-COURTLAND UNIT
COURTLAND UNIT
SCANDIA UNIT
Republican River
Superior - Courtland Diversion Dam
Franklin South Side Pump Canal
White Rock Cr.
Beaver Cr.
Little Blue River
Sappa Creek
Spring Creek
Prairie Dog Creek
Turkey Creek
Thompson Cr.
Elm Cr.
HOLDREGE
MINDEN
EDGAR
SUPERIOR
Burr Oak
MANKATO
Jewell
Formoso
Courtland
Lovewell
Republic
Scandia
BELLEVILLE
CONCORDIA
Jamestown
Clyde
Cuba
Woodruff
State Lake
EXPLANATION
BUREAU OF RECLAMATION
COMPLETED AND AUTHORIZED WORKS
RESERVOIR (FLOOD CONTROL POOL CROSS-HATCHED)
DAM
CANAL
SIPHON
PUMPING PLANT
SUBSTATION
TRANSMISSION LINE
HIGHWAY RELOCATION
RAILROAD RELOCATION
LANDS BENEFITED
INDEX MAP
CANADA
WASHINGTON
MONTANA
NO. DAKOTA
OREGON
IDAHO
WYOMING
SO. DAKOTA
NEBRASKA
NEVADA
UTAH
COLORADO
KANSAS
CALIFORNIA
ARIZONA
NEW MEXICO
OKLAHOMA
TEXAS
MEXICO

APPENDIX D1

No. 126, Original

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

SPECIAL MASTER'S MEMORANDUM OF DECISION NO. 1
(Subject: Three Issues for Early Resolution)

February 12, 2001

At the case status conference held on October 16, 2000, the parties identified three subsidiary issues appropriate for early resolution. Following that conference, the Special Master set a briefing schedule for those three issues in Case Management Order No. 6. Pursuant to Item 6 of CMO 6, as amended, the State parties have extensively briefed the following three issues for resolution now by the Special Master:

(1) Are the Republican River Compact Administration's determinations for a given year of (i) virgin water supply, (ii) allocations of virgin water supply and (iii) consumptive use conclusive so as to foreclose a complaining State from stating a claim for excess water consumption by a defending State in that year?

(2) Is any State entitled to consume any water allocated to another State that the latter does not put to beneficial use?

(3) Must a complaining State show injury to obtain prospective relief?

The Special Master received the parties' principal briefs on January 16, 2001, and received replies to those briefs, including a brief filed by the United States as *amicus curiae*, on January 29, 2001. Pursuant to special leave granted by Case Management Order No. 13, Kansas and Nebraska on February 8, 2001, filed responses to the brief of the United States.

Counsel have also deposited with the Special Master two complete sets of the Republican River Compact Administration ("RRCA") Annual Reports commencing with the period July 15, 1959 – December 31, 1960 and running

through the year 1997. These official records covering more than thirty-eight years relate a commendably complete history of the RRCA's administration of the Republican River Compact.

After careful consideration of the excellent briefs of all counsel, the Special Master rules as follows on the three issues:

(1) The Republican River Compact Administration's unanimous acceptance of its Engineering Committee's computations for each year from 1959 through 1994 of (i) virgin water supply, (ii) allocations of virgin water supply and (iii) consumptive use is conclusive and binding on the States, foreclosing a complaining State from recovering for excess water consumption by a defending State in any year in which the figures accepted by the RRCA demonstrate compliance with the Compact.

(2) No State is entitled to consume any water allocated to another State that the latter does not put to beneficial consumptive use.

(3) A complaining State need not show injury to obtain prospective relief.

Question 1:

Are the Republican River Compact Administration's determinations for a given year of (i) virgin water supply, (ii) allocations of virgin water supply and (iii) consumptive use conclusive so as to foreclose a complaining State from stating a claim for excess water consumption by a defending State in that year?

The States of Colorado and Nebraska, as well as the amicus United States, urge an affirmative answer to this question. The State of Kansas argues for the opposite result. The facts and the law clearly compel the affirmative answer.

Article III of the Republican River Compact declares, as of the date of its adoption, the average annual virgin water supply for each sub-basin within the Republican River Basin. Article IV allocates the entire amount of the Basin's virgin water supply among the compacting States, identifying by sub-basin the sources of the water allocated to each State. Article III of the Compact provides that if the future virgin water supply of any source, i.e., sub-basin, varies by more than 10 per cent from its virgin water supply as set forth in Article III, the State allocations from that source shall be increased or decreased proportionately.

Article IX of the Compact provides:

> It shall be the duty of the three States to administer this compact through the official in each State who is now or hereafter may be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this

> compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.
>
> The United States Geological Survey . . . shall collaborate with the officials of the States charged with the administration of this compact in the execution of the duty of such officials in the collection, correlation, and publication of water facts necessary for the proper administration of this compact.

Article IX thus imposes collectively upon the "three States," not just each State singly, the duty of administering the Compact, the duty of collecting and correlating data, and the duty of publishing "water facts" for its administration. These collective duties the States were directed to perform through their chief water officials. In 1959, pursuant to Article IX, those State officials promulgated Rules and Regulations Constituting the Republican River Compact Administration ("Rules"), by which they organized themselves as the RRCA to administer the Compact.[1] The RRCA, in turn, adopted formulas for the computation of annual virgin water supply and consumptive use ("Formulas").[2] Pursuant to the Rules, the RRCA

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[1] Rules and Regulations Constituting the Republican River Compact Administration (July 15, 1959), *reprinted in* RRCA, First Annual Report (Apr. 4, 1961).

[2] RRCA, First Annual Report (Apr. 4, 1961), at 2 (accepting Committee on Procedure for Computation of Annual Virgin Water Supply, *Formulas for the Computation of Annual Virgin Water Supply* (Apr. 4, 1961)); RRCA, Fourth Annual Report (Apr. 27, 1964), Minutes of the Fifth Annual Meeting of the RRCA, at 3 (adopting Engineering Committee, *Formulas for the Computation of Annual Consumptive Use* (Apr. 27, 1964)); RRCA, Twenty-Second Annual Report (Aug. 19, 1982), Minutes of the Twenty-Third Annual Meeting of the RRCA, at 8 and

(Continued on following page)

also established its Engineering Committee (initially known as the Committee on Procedure for Computation of Annual Virgin Water Supply) with representatives from all three States.[3] The RRCA specifically delegated each year to the Engineering Committee the responsibility of computing virgin water supply and consumptive use pursuant to the Formulas and also from time to time assigned other tasks to it.[4] For each year from 1959 through 1994, the Engineering Committee collected the data to compute retroactively both the virgin water supply and each State's consumptive use. It reported those computations to the RRCA and the RRCA each year accepted[5] those computations by unanimous vote.[6]

RRCA, Twenty-Ninth Annual Report (July 21, 1989), Minutes of the Thirtieth Annual Meeting of the RRCA, at 15 (adopting Engineering Committee, *Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use* (Aug. 19, 1982, rev. June 1990)).

[3] *See* RRCA, First Annual Report (Apr. 4, 1961), at 2 and Rules and Regulations Constituting the Republican River Compact Administration, Rule 8.

[4] *See, e.g.*, RRCA, Second Annual Report (Mar. 23, 1962), Minutes of the Third Annual Meeting of the RRCA, at 2; RRCA, Twenty-First Annual Report (July 2, 1981), Minutes of the Twenty-Second Annual Meeting of the RRCA, at 9, 12 (Engineering Committee directed to include identified municipal and industrial uses in its computations).

[5] Whether the RRCA "accepted" or "received" the computations is inconsequential. Some RRCA Annual Reports and Minutes of the Annual Meetings suggest that there may be a distinction between those words, but others suggest the opposite. *Compare* RRCA, Twenty-Ninth Annual Report (July 21, 1989), at 12-13 (suggesting a distinction between "received" and "accepted") *with* RRCA, Thirty-Third Annual Report (June 10, 1993), at 14 (Engineering Committee report "received" after resolution of objections to it) *and id.* at 3 (Engineering Committee report "accepted"). In any event, in every year except 1962, either the

(Continued on following page)

Given these facts, the unanimous acceptance by the RRCA of the Engineering Committee's water computations must be held final and binding on the States. By the plain language of Article IX, the officials jointly charged with administering the Compact have the authority – and indeed the duty – to monitor and assess compliance with the Compact's allocations through computation of the annual virgin water supply, allocations of that supply, and beneficial consumptive use. The Engineering Committee, as the RRCA's delegate, used the best information available to it to perform the duties delegated to it and to assemble its report for the RRCA. Once that Committee made its computations and presented its report to the RRCA, each State, acting through its chief water official, took the further act of reviewing, and joining in unanimous acceptance of, those computations. On these facts, there is no basis for concluding anything other than that all three States have unanimously agreed to make those retroactive determinations final and binding as the result of a task duly delegated to and properly carried out by the RRCA's Engineering Committee. The Annual Reports reveal no evidence that the RRCA ever intended to leave the results of its computations open for later revision, nor has there ever been a later attempt to effect any such revision.[7]

Annual Report or the Minutes of the Annual Meeting uses the word "accepted."

[6] *See, e.g.*, RRCA, Fourth Annual Report (Apr. 27, 1964), Minutes of the Fifth Annual Meeting of the RRCA, at 3.

[7] Kansas suggests in its Response to Brief of Amicus United States that the Special Master in his First Report has already found that the RRCA intended to leave the annual computations open to include the

(Continued on following page)

Now, some forty-one years after the process began and after thirty-six years of unanimous State acceptance of the RRCA's water computations, Kansas in this action contends that those computations are not final and binding on the States. In support of its position, Kansas argues that the Compact's lack of authorization to make "findings of fact," the incompleteness and imprecision of the figures, and the RRCA's acceptance of the Engineering Committee's unverified data indicate that the accepted computations should not be held conclusive.

In truth, the Compact does authorize findings of fact. The Compact gives to the top State water officials the duty (and of course the corresponding power) to "administer" the Compact and collect and correlate data and to publish water facts "necessary for the proper administration" of

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effects of non-alluvial groundwater pumping after further study. *See* Kansas Response at 2, 6-7. That reading of the First Report runs counter to its author's intention. The First Report, while discussing the Formulas as evidence that the Compact restricts non-alluvial groundwater pumping, expresses the view that the RRCA's intention was to include in the Formulas the effects of non-alluvial groundwater pumping only at some future date. *See* First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) at 16-17 ("*For the time being*, the RRCA treated 'table-land' wells differently, omitting from its calculations stream flow diversions caused by pumping from [table-land] wells. . . . Despite its apparent intention from the start to include the effect of table-land groundwater pumping in the Formulas *at some future date*, the RRCA has never done so." (Emphasis added)); *id.* at 34 ("The RRCA, through its call for 'more research and data' to quantify the hydraulic connection between table-land pumping and stream flow, has repeatedly indicated its intention *later* to include the effect of table-land groundwater pumping in the Formulas." (Emphasis added)). The binding effect of duly adopted Formulas is not diminished by an intention to change them at a future date once the necessary technical data becomes available.

the Compact. Plainly, that duty and its corresponding power – to be exercised collaboratively by the three States – are broad enough to encompass the collaborative fact-finding necessary to monitor compliance with Compact allocations from year to year and to accept the Engineering Committee's computations and make them conclusive for that purpose. Each State has the duty to oversee consumptive use within its borders in order to collaborate and share data necessary for the proper interstate administration of the Compact. All three States recognized their administrative obligations under the Compact and acted accordingly, using the Engineering Committee's water computations to fulfill those obligations.

A holding that the Engineering Committee computations are binding when unanimously accepted by the RRCA is in no way inconsistent with (1) the lack of independent verification of each State's reported data, (2) possible imprecision in the figures, or (3) the RRCA's inability to quantify the effect of Ogallala or "table-land" groundwater pumping. First, the RRCA's members – who were the three State officials charged with Compact administration – were well aware that the data and computations, being retrospective, were open to verification at any time, but each of them, apparently operating in an atmosphere of professional mutual respect, was willing to use the data supplied by the other States without independent verification.

Second, the professionals who were members of the RRCA and its Engineering Committee were fully aware that they were not achieving perfection in making their water computations under the Compact. They realized that their Formulas, and therefore their water computations, were in some respects estimates and left out some

factors that were at the time incapable of determination or even approximation. Nonetheless, no one can read all 36 of the RRCA Annual Reports through 1995 without being convinced that these were conscientious public officials who took their Compact responsibilities most seriously and who performed their duties as well as could reasonably be expected with the tools they had at hand. In each year, the professionals on the Engineering Committee made their water computations using the Formulas the RRCA had adopted and, working together under a common set of approximating rules, did their job using the best technical information they could then assemble. Each State, through its top water official, then freely and knowingly accepted the computations based on the Formulas and on the self-reported, estimated information. That unanimous State action for 36 years in computing virgin water supply and consumptive use under the Compact is now final and binding upon all three participating States.

Third, the RRCA more than once stated that more study was required on the subject of how to reflect non-alluvial groundwater pumping in the computations.[8] For

[8] As stated in RRCA, First Annual Report (Apr. 4, 1961), Committee on Procedure for Computation of Annual Virgin Water Supply, *Formulas for the Computation of Annual Virgin Water Supply*, at 3: "Irrigation diversions from ground water shall be limited to those by wells pumping from the alluvium along the stream channels. The determination of the effect of pumping by 'table-land' wells on the flows of the streams in the Republican River Basin must await considerably more research and data regarding the character of the ground-water aquifers and the behavior of ground-water flow before even approximate information is available as to the monthly or annual effects on stream flows. The ground-water representatives of the [U.S.] Geological Survey and the University of Nebraska reported that the effect of pumping by 'table-land' wells is not subject to an exact determination

(Continued on following page)

that practical reason and only that reason, the RRCA unanimously agreed to omit any effect of such pumping from current computations, while calling for further study for the future. The Special Master rejects Kansas' argument that the RRCA's Formulas were *ultra vires* and of no force and effect because inconsistent with the Special Master's First Report ruling that the Compact requires inclusion of the net effect of all groundwater pumping in the water computations. In the Formulas, the RRCA never made a determination adverse to the Compact interpretation declared by the First Report; on the contrary, it merely stated that it was unable without more study to quantify the effect of non-alluvial groundwater pumping. The RRCA kept repeating its call for more study to provide a basis for quantifying that effect. The Formulas and the computations must be judged as of the time of the unanimous State action accepting them and in light of the information available at that time to the States and their duly authorized agents. The time for impeaching the Formulas and the water computations unanimously accepted by the RRCA has long since passed.

Because the RRCA could accept the water computations only by unanimous action, any State could have prevented the RRCA's acceptance of the water computations for any year, held those computations open for

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and that it is possible those wells may not appreciably deplete stream flows." *See also* RRCA, Twenty-Second Annual Report (Aug. 19, 1982), Engineering Committee, *Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use*, at 20, stating: "The determination of the effect of pumping by upland wells on the flows of the streams in the Republican River Basin must await considerably more research and data."

revision until full and precise information was obtained, and forced resolution of issues of accuracy and completeness. No State took any such action until 1995, when disagreement over groundwater pumping prevented the Engineering Committee from completing its assigned duty. The two instances Kansas cites – out of the thirty-six years of reported acceptances – as proof that Kansas "protested" or "objected" concerning the methodology used by the Engineering Committee fall far short of demonstrating a lack of unanimous acceptance and conclusive effect for its computations. In each case, Kansas pressed for future improvements in the methodology but nevertheless joined in the unanimous acceptance of the current year's computations.[9]

Giving conclusive effect to the RRCA's acceptance of the water computations is supported by the Supreme Court's decision in *Texas v. New Mexico*, 462 U.S. 554 (1983), involving the Pecos River Compact. The two-member Pecos River Commission could take official action only with the agreement of both States' commissioners. *Id.* at 560. The Commission unanimously determined the water shortfall to Texas for the period 1950 through 1961, but not thereafter. *Id.* at 575. The Pecos River Compact contained an explicit provision that "[f]indings of fact made by the Commission shall not be conclusive in any court." *Id.* at 569, n.14. Nevertheless, the Supreme Court held:

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[9] *See* RRCA, Twenty-Ninth Annual Report (July 21, 1989), at 5, 12-16; Thirtieth Annual Report (June 28, 1990), at 1, 11-14. This contrasts starkly, and significantly, with Kansas' actions since 1995.

> According to New Mexico, Texas may seek judicial review in this Court of decisions actually made by the Commission – presumably on the votes of both States' Commissioners. That is not the proper function of our jurisdiction to decide controversies between two States . . . . If authorized representatives of the compacting States have reached an agreement within the scope of their congressionally ratified powers, recourse to this Court when one State has second thoughts is hardly "necessary for the State's protection . . . . "
>
> . . . .
>
> For the 1950-1961 period, th[e] difference [between the amount Texas could have expected to receive and the quantity it actually received] has been determined by unanimous vote of the Commission; for 1962 to the present, determining the extent of the shortfall will require adjudicating disputes between the States . . . .

Id. at 570-71, 575 (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939)). The Court's decision in *Texas v. New Mexico* could hardly be more on point. Where, as here, duly authorized representatives of the compacting States have unanimously accepted for Compact administration water computations made in accordance with unanimously adopted Formulas, those computations are binding. For the period in which unanimity was not reached, i.e., from 1995 on, it remains open for the Special Master to determine whether the Compact has been violated, on the basis of independent evidence of all relevant water facts.

In sum, the authority granted in Article IX to administer the Compact and the unanimous actions taken pursuant to that authority to compute annual allocations and consumptive use are binding on the States. The States

unanimously established a system for administering the Compact and faithfully and unanimously executed that system for over thirty-six years, from mid-1959 through 1994. No compacting State can now dismiss those actions as less than conclusive or ignore the consequences of those actions.

This decision goes no further than giving conclusive effect to past RRCA water computations for the purpose of judging past Compact compliance. Computation of virgin water supply and consumptive use in order to determine Compact compliance in 1995 and subsequent years for purposes of this litigation should, it appears, be based on figures independently collected, even for prior years, to the extent necessary to create a reliable model of the effects of groundwater pumping on stream flow in the Republican River Basin.[10]

In addition, this decision leaves open questions as to (1) which years prior to 1995 show excessive water use by which States under the unanimously accepted and binding RRCA computations, (2) possible defenses to recovery for such excessive use, and (3) the consequences of the RRCA's failure to adjust the water allocations in years prior to 1978.

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[10] The parties' briefs have made various arguments about whether discovery and trial time will be increased or decreased as a result of the outcome of Question 1. The decision-maker must arrive at the answer to that question free of any thought given to whether the result of the answer will be to slow or to speed the progress of this litigation. That consideration is utterly irrelevant to the legal consequences of the RRCA's unanimous acceptance for a great many years of its Engineering Committee's water computations.

Question 2:

Is any State entitled to consume any water allocated to another State that the latter does not put to beneficial use?

The State of Nebraska urges an affirmative answer to this question, whereas the States of Colorado and Kansas, as well as the amicus United States, urge a negative answer. Construing the Republican River Compact as both the statute and the interstate contract that it is[11] leads clearly to the latter conclusion.

At the outset, it is important to note that Question 2 does *not* ask whether a complaining State may *recover damages* for water overuse in a past year in which it was not able to put undelivered water to beneficial consumptive use. That different question would likely implicate the general principle that, to prevail in a damages action, the plaintiff must prove it was injured by the complained-of acts of the defendant. Question 2 simply asks whether the Compact gives one State the legal authority to take over water allocated to another State that fails to use it.

Article IV of the Compact allocates in very specific amounts the *entire* virgin water supply of the Republican River Basin among the three compacting States: 154,100 acre-feet to Colorado, 234,500 acre-feet to Nebraska, and 190,300 acre-feet to Kansas, subject only to (1) the

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[11] *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) ("a congressionally approved compact is both a contract and a statute"); Act of May 26, 1943, ch. 104, 57 Stat. 86. *See also* Colo. Rev. Stat. §§ 37-67-101 and 37-67-102 (1990); Kan. Stat. Ann. § 82a-518 (1991); 2A Neb. Rev. Stat., App. § 1-106 (1995).

adjustments from time to time that are specifically required by Article III, and (2) the physical availability of the water allocated from specific sub-basins. Whether a State is able to use or chooses to use all its allocation in any given year is left to its sovereign choice. By clearly and affirmatively allocating the entire virgin water supply, the Compact simply does not allow for unallocated water.[12]

In Article III of the Compact, the drafters expressly addressed modifications to the specific allocations among the three States. Increases or reductions in those allocations must be made where the virgin water supply varies more than 10 percent from the amount originally determined and in that situation the allocations to all three compacting States are adjusted by the identical percentage. Nowhere is there a provision for reallocation of any water based on a State's failure to use all of the water allocated to it. To the contrary, the only adjustments provided in the Compact, namely, those of Article III, ensure that there is never any unallocated water of any significance that a State may unilaterally take for its own use.

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[12] The only references in the Compact to "unallocated" water are in the portions of Article IV that allocate water to Kansas and Nebraska. Those passages provide that Kansas and Nebraska may use water, up to a specific total amount, from sources "otherwise unallocated." This, of course, is not truly unallocated water, but rather, the specific allocation of water, *up to a specified and certain limit*, from sub-basins whose virgin water supply is otherwise not completely allocated. For example, Article III sets the average virgin water supply of Rock Creek drainage basin at 11,000 acre-feet. Of that 11,000 acre-feet, only 4,400 acre-feet are specifically allocated in Article IV. The remainder may be shared by Kansas and Nebraska to make up their total allocations.

The Compact fully allocates the virgin water supply in specific amounts to each State. Under the Compact's express terms, a State's failure to use its entire allocated share does not somehow reduce that State's allocation. Nor does it increase the allocation of another State. To hold otherwise would run into direct conflict with the express purposes stated in Article I of the Compact "to provide for equitable division of [the entire virgin water supply]; to remove all causes, present and future, which might lead to controversies; to promote interstate comity . . . ." To permit reallocation of any unused water in any given year would also present serious administrative and enforcement difficulties – difficulties that the Compact does not address – and would create a source of continual interstate controversy. Although the Compact (Art. I) does "recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use," the decision of how and when to make such use of each allocated share of the Republican River water supply rests solely in the hands of the compacting State to which it is allocated, and nowhere else.

Contrary to Nebraska's argument, the Compact's declaration of the importance of beneficial consumptive use cannot reasonably be read as anything more than a recognition of that importance by the compacting States and a good faith commitment by them all to apply their water allocations within their territories accordingly. It is entirely too much of a stretch to interpret that general language to give authority to one State to usurp part of another State's allocation where each State's allocation and any permitted adjustment are set forth with such unqualified specificity. Of course, the drafters of the Republican River Compact could, if they had so intended,

have included a provision by which an upper State could under prescribed conditions use water allocated to, but unused by, a lower State. The parties have called attention to several other river compacts that contain just such an explicit provision. See, for example, the Amended Costilla Creek Compact, Art. V(h), 77 Stat. 350, 357 (1963):

> When it appears to the Commission that any part of the water allocated to one State for use in a particular year will not be used by that State, the Commission may permit its use by the other State during that year, provided that a permanent right to the use of such water shall not thereby be established.[13]

and South Platte River Compact, Art. IV-3, 44 Stat. 195, 197 (1926):

> Nebraska shall not be entitled to receive, and Colorado shall not be required to deliver, on any day any part of the flow of the river to pass the interstate station . . . not then necessary for beneficial use by those entitled to divert water from said river within Nebraska.

See also Colorado River Compact, Art. III(e), 45 Stat. 1057, 1064 (1928); Upper Colorado River Basin Compact, Art. III(b)(3), 63 Stat. 31, 33 (1949). The conspicuous absence of any comparable provision in the Republican River Compact is a powerful command that none be read into the Compact by judicial construction. As the Supreme Court stated in refusing to read into the Pecos River Compact an

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[13] The identical provision appeared in the original Costilla Creek Compact, Art. V(h), 60 Stat. 246, 253 (1946).

administrative provision similar to that contained in some other compacts: "The Pecos River Compact clearly lacks the features of those other compacts, and we are not free to rewrite it." *Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

In sum, the Compact affirmatively allocates to each State a specific number of acre-feet per year, no more and no less, subject only to physical availability and the proportionate adjustments explicitly required in Article III where the virgin water supply changes by more than 10 percent. Given the specificity of both the allocations and the only permitted adjustments, the Compact cannot be construed to allow a State unilaterally to increase its consumptive use beyond its Compact allocation merely because another State is not fully using its allocation.

Question 3:

Must a complaining State show injury to obtain prospective relief?

The State of Nebraska contends that this question requires an affirmative answer, whereas the States of Colorado and Kansas, as well as the amicus United States, urge a negative answer. The law supporting the latter view is well established.

In this original action Kansas seeks, in addition to damages for past violations, a "decree commanding the State of Nebraska in the future to deliver the waters of the Republican River in accordance with the provisions of the

Republican River Compact." Kansas Complaint at 7.[14] Thus, so far as the future is concerned, this case is an enforcement action, seeking an injunction mandating future compliance with the terms of the Republican River Compact. With controlling pertinence here, the Supreme Court in *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993), stated: "In an enforcement action, the plaintiff need not show injury." The present action to enforce in the future the water allocations agreed to by the compacting States is to be contrasted with reported cases in which a State has sought to establish or to modify an equitable apportionment of an interstate river beyond any existing apportionment by either decree or compact.[15] Those cases require a showing of injury to get a new water apportionment, but they are not authority for making that showing a precondition for ordering future compliance with the allocation system already agreed upon in the Compact.

Kansas is entitled, as are the other compacting States, to insist on the enforcement of the Compact's provisions. There is no justification for requiring Kansas or any other State to show injury to itself before obtaining a decree for future enforcement of a Compact right or limitation with which another compacting State is refusing or failing to comply without judicial intervention. The Supreme Court has specifically so held. In *Wyoming v. Colorado*, 309 U.S.

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[14] Nebraska's cross-claim against Colorado filed on August 1, 2000, and the subsequently filed counterclaims and cross-claims between Colorado and the other two States contain comparable prayers for injunctive relief for future compliance with the Compact.

[15] Cited by Nebraska, for example, are *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); and *New York v. Illinois*, 274 U.S. 488 (1927).

572 (1940), Colorado "insist[ed] that Wyoming ha[d] not been injured," *id.* at 581, and was therefore not entitled to relief. Rejecting that argument, the Court stated:

> Colorado is bound by the decree not to permit a greater withdrawal [than the amount the Court had fixed in a prior decree] and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights. If nothing further were shown, it would be our duty to grant the petition of Wyoming and to adjudge Colorado in contempt for her violation of the decree.

Id. Whether a complaining State has been injured does not affect the entitlement of one compacting State to have another compacting State comply with its solemn commitment under the Compact.

CONCLUSIONS

In response to Question 1:

(a) The Republican River Compact Administration's unanimous acceptance of its Engineering Committee's computations for each year from 1959 through 1994 of (i) virgin water supply, (ii) allocations of virgin water supply and (iii) consumptive use is conclusive and binding on the States, foreclosing a complaining State from recovering for excess water consumption by a defending State in any year in which the figures accepted by the RRCA demonstrate compliance with the Compact.

(b) The consequences of the RRCA's water computations for any year from 1959 to 1994 where those computations indicate a failure to comply with the Compact allocations is left for determination by the Special Master in further proceedings.

In response to Question 2:

No State is entitled to consume any water allocated to another State that the latter does not put to beneficial consumptive use.

In response to Question 3:

A complaining State need not show injury to obtain prospective relief.

Dated: February 12, 2001

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APPENDIX D2

No. 126, Original

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

SPECIAL MASTER'S MEMORANDUM OF DECISION NO. 2 (Subject: Adjusted Allocations for 1959-1977)

June 15, 2001

In tabulating water facts for the years 1959-1994, the States disagree on whether the adjusted allocations of virgin water supply for the years 1959-1977, unanimously adopted by the Republican River Compact Administration ("RRCA") Engineering Committee in those years but not published by the RRCA in its Annual Reports, are conclusive and binding on the States for purposes of this litigation. Colorado and Nebraska urge that the adjusted allocations are binding. Kansas argues that those figures are non-binding and must be computed anew.

After careful review of the parties' written submissions and receipt of oral argument on this issue, I conclude that the RRCA Engineering Committee computations of adjusted allocations of virgin water supply, as unanimously adopted by that Committee for each year 1959-1977, are conclusive and binding on the States.

BACKGROUND

A. The RRCA Engineering Committee

In 1959, the three top State water officials charged under Article IX of the Compact with the duties of administering the Compact, collecting and correlating data, and publishing "water facts" for Compact administration promulgated Rules and Regulations Constituting the Republican River Compact Administration ("Rules"), by which they organized themselves as the RRCA to administer the Compact.[1] Pursuant to the Rules, the RRCA

[1] Rules and Regulations Constituting the Republican River Compact Administration (July 15, 1959), *reprinted in* RRCA, First Annual Report (Apr. 4, 1961).

established its Engineering Committee (initially known as the Committee on Procedure for Computation of Annual Virgin Water Supply) with a representative from each of the three States.[2] The RRCA specifically delegated each year to its Engineering Committee, among other items, the task of computing adjusted allocations of virgin water supply.[3] For each year from 1959 through 1994, the Engineering Committee computed the adjusted allocations and reported those computations to the RRCA.[4]

B. The Tabulation Committee Designated in the Present Case

In Memorandum of Decision No. 1 (Subject: Three Issues for Early Resolution) ("Mem. Dec. 1"), I ruled:

> The Republican River Compact Administration's unanimous acceptance of its Engineering Committee's computations for each year from 1959 through 1994 of (i) virgin water supply, (ii) allocations of virgin water supply and (iii) consumptive use is conclusive and binding on the States,

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[2] *See* RRCA, First Annual Report (Apr. 4, 1961), at 2 and Rules and Regulations Constituting the Republican River Compact Administration, Rule 8.

[3] *See, e.g.*, RRCA, Fourth Annual Report (Apr. 27, 1964), Minutes of the Fifth Annual Meeting of the RRCA, at 4; RRCA, Sixth Annual Report (Apr. 7, 1966), Minutes of the Seventh Annual Meeting of the RRCA, at 4, RRCA, Eighteenth Annual Report (July 7, 1978), Minutes of the Nineteenth Annual Meeting of the RRCA, at 12.

[4] *See, e.g.*, RRCA, Sixth Annual Report (Apr. 7, 1966), Report of the Engineering Committee, at 1-2; RRCA, Thirteenth Annual Report (June 18, 1973), Minutes of the Fourteenth Annual Meeting of the RRCA, at 8; RRCA, Fourteenth Annual Report (June 13, 1974), Minutes of the Fifteenth Annual Meeting of the RRCA, at 12-13.

> foreclosing a complaining State from recovering for excess water consumption by a defending State in any year in which the figures accepted by the RRCA demonstrate compliance with the Compact.

Mem. Dec. 1 at 2 [Appendix D1, at p. D1-2]

As a consequence of that ruling, claims in this proceeding for the years 1959-1994 were segregated from claims for years outside that time period. To facilitate the resolution of issues for those 36 years, I ordered in Item 3 of Case Management Order No. 15, issued February 23, 2001:

> A Committee of three water officials or engineers, one designated as its representative by each of the three States, shall prepare a tabulation, derived from the Annual Reports of the Republican River Compact Administration, of the following computations for each year 1959 through 1994: (a) the total virgin water supply and the virgin water supply for each sub-basin, and (b) for each State, (i) the total allocation and the allocation for each sub-basin, adjusted pursuant to Article III of the Compact, and (ii) the total consumptive use and the consumptive use by sub-basin. For the years prior to 1978, the tabulation shall show allocations on both an adjusted and unadjusted basis.

Pursuant to Item 3 of CMO 15, the States formed a Tabulation Committee, consisting of Kenneth W. Knox of Colorado, David W. Barfield of Kansas, and Ann Salomon Bleed of Nebraska. The Tabulation Committee submitted its report to the Special Master on May 10, 2001, along with a cover letter stating that in the preparation of Tables 2A, 2B, and 2C (showing unadjusted and adjusted

allocations of virgin water supply for each of the States), disagreement had arisen between the Kansas member of the Committee and the Nebraska and Colorado members. The disagreement arose from the RRCA's treatment of adjusted allocations of virgin water supply in the years 1959-1994. For each water year since 1978, the RRCA has published in its Annual Reports the adjusted allocations of the virgin water supply computed by its Engineering Committee.[5] For each year 1959 through 1977, the RRCA's Engineering Committee computed and unanimously adopted adjusted allocations of virgin water supply and reported them to the RRCA, but the RRCA did not publish those computations in its Annual Reports.[6] Colorado and Nebraska believe that those unanimously adopted but unpublished figures are binding on the States for purposes of this litigation. Kansas would give binding effect only to the 1978-1994 published computations.

Accordingly, the Colorado and Nebraska members of the Tabulation Committee used in their Tables 2A, 2B, and 2C the unpublished adjusted allocations as unanimously computed and reported for 1959-1977 by the RRCA Engineering Committee. On the other hand, the Kansas member computed the adjusted allocations as an original matter using procedures that "the Kansas member believes are more consistent with the Compact." Specifically,

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[5] *See, e.g.*, RRCA, Nineteenth Annual Report (July 13, 1979), Minutes of the Twentieth Meeting of the RRCA, at 13.

[6] *See, e.g.*, RRCA, Eighth Annual Report (June 3, 1968), Report of the Engineering Committee, at 1; RRCA, Fourteenth Annual Report (June 13, 1974), Minutes of the Fifteenth Annual Meeting of the RRCA, at 12-13.

the differences between the methodology historically used by the RRCA Engineering Committee and that used by the Kansas member are:

1. *Rounding of adjusted virgin water supply allocations*. The Kansas member rejected the "historic practice of the RRCA Engineering Committee" to "round[ ] the adjusted virgin water supply allocations" because he believes that "rounding is unnecessary and inconsistent with the Compact." (Tabulation Committee Letter dated May 10, 2001, at 4).

2. *Adjustments for variation of virgin water supply by more than 10% from Compact values*. Relying upon the RRCA Engineering Committee records, the Nebraska and Colorado members "did not adjust any allocations for sub-basins in 1959-1977 unless the virgin water supply varied by more than 10% from the [C]ompact supply." The Kansas member rejected this historic practice because he "believes that the methodology mandated by the Compact for adjustments above 10% should also be used for adjustments below 10%." (Tabulation Committee Letter dated May 10, 2001, at 4).

ANALYSIS

Whether the adjusted allocations computed by the RRCA Engineering Committee for each of the years 1959-1977 are conclusive and binding on the States is not a question of Compact interpretation; therefore, the consistency of those computations with the Compact is not here at issue. Rather, the issue presented requires a determination of the effect of the Engineering Committee's and the RRCA's actions in those years and subsequent years.

Those actions clearly compel a conclusion that the unpublished computations of the adjusted allocations are binding on the States. Article III of the Compact mandates the proportional adjustment of annual water allocations whenever the annual virgin water supply of a source varies by more than 10% from the original Compact virgin water supply for that source. In computing those mandated adjustments, the Engineering Committee was the RRCA's duly authorized agent for each year in the period 1959-1977, as it continued to be for each year in the following period of 1978-1994. The Engineering Committee was unanimous in its computation of the adjusted allocations for the years 1959 through 1977, as it continued to be for the following period of 1978-1994. In accordance with the expectation that "each official member shall have and preserve a complete file of the records of the [RRCA],"[7] all three States were contemporaneously furnished and have continued to maintain in their possession the "blueline" tables displaying the computations of adjusted allocations made year-by-year by the RRCA Engineering Committee for the period 1959-1977 and there is no dispute among the States as to the authenticity of those tables.[8] For each year from 1959-1977 (as well as from 1978-1994), the Engineering Committee carried out its assignment and reported its adjusted allocations to the RRCA; there is no indication whatever that any member of the RRCA ever expressed any disagreement over any of those allocations or ever made a later attempt to revise the Engineering

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[7] Rules and Regulations Constituting the Republican River Compact Administration, Rule 7.

[8] *See* Transcript of Hearing at Pretrial Conference (May 30, 2001), at 22, 23 ("Oral Arg. Tr.").

Committee's computations. Most significantly, in carrying out its assignment of computing the adjusted allocations, the Engineering Committee used the same methodology throughout the thirty-six year period of 1959 through 1994 and, since at least 1978, the RRCA has each year accepted that methodology and published the resulting adjusted allocations in its Annual Reports.

In these circumstances, it would be anomalous to hold that the methodology for computing adjusted allocations for the earlier years 1959-1977 should be different from that for the later years 1978-1994 merely because the RRCA "accepted" and published the adjusted allocations in its Annual Reports beginning in 1978, but not before. The RRCA has, no fewer than seventeen times, unanimously accepted and published, without objection by any member, figures using the Engineering Committee's established methodology for adjusting allocations.[9] In computing the adjusted allocations for the earlier years 1959-1977 the Engineering Committee used precisely the same methodology it used for the later years.

For this reason, the distinction urged by Kansas – that the earlier and later computations should be treated

[9] As early as water year 1973, the RRCA "accepted" the adjusted allocations (and the methodology used to compute them) as part of its acceptance of the Engineering Committee's Report. *See* RRCA, Fourteenth Annual Report (June 13, 1974), Minutes of the Fifteenth Annual Meeting, at 5, 11. However, for the reasons stated herein, the year in which the RRCA first formally "accepted" the adjusted allocations themselves is less important than the RRCA's repeated approval of the methodology the Engineering Committee used to compute those adjusted allocations.

differently because one set of figures was formally "accepted" by the RRCA and the other was not – is not persuasive. The RRCA's repeated acceptance of the Engineering Committee's methodology gives it, and the figures derived from its use without objection for each year from 1959 through 1994, the imprimatur of the RRCA and makes the computations binding, whether or not the computations themselves were formally accepted or published. In the same way, the formally "accepted" computations of virgin water supply and consumptive use held to be binding in Mem. Dec. 1 – computations derived from the methodology in the RRCA-approved formulas for the computations of those figures – would be binding on the States solely on the basis of the RRCA's acceptance of the methodology used to compute those figures, provided, of course, that there was no dispute about the accuracy with which that methodology had been applied. Stated more simply, an acceptance of the methodology used to make computations is tantamount to an acceptance of the computations themselves, where, as here, there is no dispute that the approved methodology was properly applied. To hold otherwise would create different standards for two sets of figures – computations "accepted" by the RRCA and computations not "accepted" – solely on the basis of a formalistic distinction where the substantive methodology used to compute both sets of figures was approved. When in 1978 the RRCA Annual Report first published the adjusted allocations, the RRCA itself characterized the change as one only of "format" and not one of substance:

> [T]he *format* of the [Engineering Committee] report ha[s] been changed to reflect in Table I a comparison of the original Compact allocations

> for each state and the adjusted Compact allocations for each state.

RRCA, Minutes of the Twentieth Annual Meeting, at 7 (emphasis added).[10]

I reject any conclusion that although (1) the Engineering Committee has unanimously used the same methodology for 36 years and (2) the RRCA has many times accepted that methodology and the resulting allocations, that methodology is now binding on the States only for those more recent years in which the RRCA formally accepted and published the adjusted allocations in a bound booklet instead of leaving them in their unpublished "blueline" format. Nonpublication and the absence of formal acceptance of the *figures* do not justify denying binding effect to unpublished computations of the Engineering Committee – those for 1959-1977 – in favor of a new methodology to which the Engineering Committee has never agreed, where the RRCA has repeatedly and without

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[10] The Engineering Committee characterized the change similarly as one of form:

> This year's Engineering Committee Report is somewhat different than reports of previous years. The report eliminates a detailed explanation of computations in the narrative. Instead additional information within the tables of the report have been added *for the convenience and ready reference* of Compact officials . . . . It now portrays the original Compact allocations along with the annual adjusted allocations.

RRCA, Nineteenth Annual Report (July 13, 1979), Minutes of the Twentieth Meeting of the RRCA, at 11 (emphasis added).

objection or reservation approved the consistent use of the methodology that produced those computations.[11]

I therefore rule that the RRCA Engineering Committee computations of adjusted allocations of virgin water supply, as unanimously adopted and reported to the RRCA by that Committee for each year 1959-1977 under a consistent methodology accepted by the RRCA, are conclusive and binding on the States. My present ruling is in no way an interpretation of Article III of the Compact nor is it a decision about how adjusted allocations should be computed for 1995 and subsequent years to comply with the Compact.

Dated: June 15, 2001

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[11] The RRCA's acceptance of the methodology the Engineering Committee used to carry out its annual assignment from the RRCA to compute the adjusted allocations alleviates any concern that a compacting State will later be bound when "the three engineers on the staffs of the various water agencies . . . happen[ ] to do some tabulations." (Oral Arg. Tr. at 31).

APPENDIX D3

No. 126, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

SPECIAL MASTER'S MEMORANDUM OF DECISION NO. 3 (Subject: First Set of Preliminary Questions Regarding Kansas/Nebraska Claims and Counterclaims for Years 1959-1994)

October 19, 2001

INTRODUCTION

The Republican River Compact allocating the River's virgin water supply among the States of Kansas, Nebraska, and Colorado received Congressional approval in 1943. In 1959-1960 the chief water officials of the three States organized themselves into the Republican River Compact Administration ("RRCA") as contemplated by Article IX of the Compact. Commencing with the water year 1959, the RRCA took actions to administer the Compact, including the computation annually of the virgin water supply and each State's consumptive use for the preceding year. The RRCA accepted those computations by unanimous action each year until in 1995 the disagreement leading to this original jurisdiction action destroyed the unanimity by which the RRCA acts.

In this present action, Kansas' complaint, which sought no affirmative relief against Colorado, alleged principally that Nebraska was in violation of the Compact by use of water in excess of its Compact allocation through groundwater pumping. Nebraska pleaded a variety of affirmative defenses and counterclaimed against Kansas alleging principally Kansas' violation of the Compact by exceeding its water allocation in areas of Kansas upstream of Nebraska. After the Supreme Court's denial of Nebraska's motion to dismiss, filed on the ground that the Compact does not restrict groundwater pumping, Nebraska amended its answer to assert a cross-claim against Colorado alleging violation of the Compact by water overuse. Thereafter, further pleadings resulted in each of the three States becoming both a complaining State and a defending State vis-à-vis the other two States on claims of water overuse in violation of the Compact.

By stipulation of all three States, the proceedings before me for the years prior to 1995 are now limited solely to the claims and counterclaims between Kansas and Nebraska, each claiming water overuse by the other as the upper State. Also, for the years 1959-1994, substantially all the water quantities relevant to proving those claims and counterclaims between Kansas and Nebraska have been established and will not be open to further evidentiary proof. First, on August 31, 2001, I approved and docketed stipulations agreed to between Colorado and each of the other two States by which no claims will be pressed in these proceedings by or against Colorado for the years prior to 1995, subject to the condition that the rulings under Question 1 of Memorandum of Decision No. 1 ("Mem. Dec. 1") dated February 12, 2001, and Memorandum of Decision No. 2 ("Mem. Dec. 2") dated June 15, 2001, for the years 1959-1994 are not modified or overruled in any way in the course of this litigation.

Second, the issues remaining outstanding between Kansas and Nebraska for the years prior to 1995 have been further delimited by the stipulation filed by Nebraska on August 30, 2001, withdrawing for those years any claim for a credit or set-off for water imported into the Republican River Basin in the years 1959-1994, subject to conditions similar to those in the above stipulations withdrawing claims by or against Colorado for the years before 1995.

Finally, Mem. Dec. 1 ruled under Question 1 that the computations of virgin water supply, allocations of virgin water supply, and consumptive use unanimously arrived at annually and accepted by the RRCA for the years 1959-1994 are final and binding upon the State parties to the Compact. In the same connection, Mem. Dec. 2 dated June

15, 2001, ruled that the annual adjustments to the water allocations computed and reported by the RRCA's Engineering Committee for the years prior to 1978 but not published in the RRCA's Annual Reports are nevertheless binding upon the compacting States.

Working together at the pretrial conference held in Denver on May 30, 2001 and in a subsequent telephone conference, the parties identified certain preliminary questions relating to the Kansas/Nebraska claims and counterclaims for the years 1959-1994. Those questions fell into two sets: one appropriate for immediate briefing and the other for briefing following the completion of written discovery. Case Management Order No. 20 ("CMO 20") issued on June 18, 2001, prescribed a September and October 2001 briefing schedule for the first set of questions. A subsequent amendment to CMO 20 fixed a January 2002 briefing schedule for the second set, which will be the subject of a later memorandum of decision following briefing. The first set, now fully briefed and ready for decision, consists of the following questions:

Question 1. Is the doctrine of unclean hands an available defense in an action for damages for water overuse in the years 1959-1994?

Question 2. Is either Kansas or Nebraska entitled to pursue an affirmative defense to liability on claims by the other for the years 1959-1994 on grounds of consent, failure to exhaust administrative remedies, estoppel, waiver, or laches?

Question 3. Are impossibility of performance and consent defenses to claims

under the Compact for water overuse in the years 1959-1994 as a consequence of the RRCA's *ex post facto* determinations of State allocations?

Question 4. Is Nebraska's claim against Kansas for water overuse in the years 1959-1994 in the Republican River Basin downriver from Hardy, Nebraska barred by the affirmative defense of lack of standing (i.e., Does Nebraska have standing to make a damages claim for Kansas' overuse in those years downriver from Hardy, Nebraska)?

Question 5. Is Nebraska for the years 1959-1994 entitled to an affirmative defense for prior material breach because Kansas had a duty to provide full data to the RRCA regarding its beneficial consumptive use of water downstream of Nebraska?

Kansas and Nebraska filed their principal briefs on the first set of questions on September 14, 2001, and their reply briefs on October 2, 2001. By their briefs Nebraska and Kansas have in two respects limited the questions here to be decided:

First, *Question 4* is eliminated. It is mooted by the declaration of Nebraska's brief that it is not making any claim "'for damages' . . . against Kansas for water overuse downstream from Hardy, Nebraska for the years 1959-1994." (NE Br. at 20). Nebraska's pleadings confirm this statement. Nebraska makes only one counterclaim against Kansas for damages for water overuse – for "consuming more water than allocated to it *in that portion of the*

Republican River lying upstream of Nebraska." (NE Second Amended Answer, ¶ 18) (emphasis added).

Second, Questions 1-3 and 5 are now limited to the affirmative defenses asserted by Nebraska. In its briefs Nebraska argues that those questions should be answered "yes"; in other words, that all eight of the affirmative equitable defenses identified in those questions are available to it against Kansas' claims that in the years 1959-1994 Nebraska used water in excess of its Compact allocations. In its briefs Kansas argues exactly the contrary – that all of those questions should be answered "no." Although Kansas has pleaded the seven affirmative defenses identified in Questions 1-3 in its reply to Nebraska's counterclaim for Kansas' water overuse, Kansas now argues that those defenses are not available to either State for the years 1959-1994. Thus, Kansas has for that period withdrawn those affirmative defenses as pleaded by it.

The case management order that set the briefing schedule for the first set of questions permitted Colorado to file briefs to address "any of the foregoing issues that [Colorado] believes has possible application to or consequences for years outside the period 1959-1994." Colorado elected not to file an initial brief, but it did on October 2, 2001, file a reply brief, and on October 9, 2001, both Kansas and Nebraska filed responses to the Colorado reply brief as authorized by the same case management order. The *amicus* United States has filed no brief on the first set of questions, submitting only a letter correctly pointing out that Nebraska's argument that the actions of the United States rendered Nebraska's performance of the Compact impossible was beyond the scope of the issues identified for briefing in the first set of questions.

After thorough consideration of all the briefs filed by the party States and of the law applicable to the circumstances of this original action, I conclude that all four open questions (Nos. 1-3, 5) must be answered in the negative. None of the eight affirmative defenses asserted by Nebraska is available to it against Kansas' claims for Nebraska's alleged water overuse in the years 1959-1994. This decision is strictly limited to that period. Whether in years outside that period any of those defenses is available to any of the States as a defending party is not here decided.

ANALYSIS

The eight affirmative defenses pressed by Nebraska fall into three distinct categories. First of all, Nebraska asserts the availability of defenses against Kansas' claims of Nebraska Compact breaches by water overuse that are based upon alleged Compact breaches on the part of Kansas itself; namely, the "unclean hands" defense based on Kansas' own alleged overuse of water and the "prior material breach" defense based on Kansas' alleged failure to provide full consumptive use data downriver from Hardy, Nebraska. Second, Nebraska asserts the availability of five defenses against Kansas' claims of Nebraska Compact breaches by water overuse that are based on alleged action or nonaction by Kansas itself vis-à-vis those alleged Compact violations by Nebraska. These are the defenses of consent, waiver, estoppel, laches, and failure to exhaust administrative remedies. Finally, Nebraska asserts the availability of the "impossibility of performance" defense, which it alleges arises out of the RRCA's *ex post facto* methodology for computing State water allocations.

Very evident in the Compact's statement of purposes is the strong interest shared by a broad public in maintaining with certainty an established interstate system for allocating the water of the Republican River Basin and for achieving State compliance with that allocation system. Any affirmative defense must not undermine these important public interests of nation and region.

I. Defenses Asserted by Nebraska on the Basis That Alleged Compact Violations by Kansas Constitute "Unclean Hands" and "Prior Material Breach"

For any Compact violations by its water overuse in the years 1959-1994, Nebraska does not have available the affirmative defense asserted by it on the basis of either Kansas' "unclean hands" by having itself overused water in violation of the Compact or Kansas' "prior material breach" of the Compact by having failed to provide full consumptive use data downriver from Hardy, Nebraska.

A. Unclean Hands

What Nebraska claims constitutes unclean hands on the part of Kansas is stated as follows by the Nebraska brief:

> Kansas overused water in a manner such that Nebraska was deprived of water that the Compact explicitly intended to be available to Nebraska.

(NE Br. at 6). Nebraska is here doing nothing more than restating its counterclaim that Kansas has in the period 1959-1994 exceeded its Compact allocations upriver from Nebraska and used water allocated to Nebraska to

For convenience, I will discuss those three categories of defenses in order, treating each as a group. Then, in conclusion, I will record my answers to the four remaining questions posed in Case Management Order No. 20, limiting the questions in formulation to the defenses Nebraska asserts against Kansas' claims for Nebraska's alleged water overuse in the years 1959-1994.

In considering the affirmative defenses asserted by Nebraska, I have kept in mind that the Republican River Compact is much more than merely an exchange of contractual promises by the States of Colorado, Nebraska, and Kansas; it is a federal statute as well as a statute of all three States. Act of May 26, 1943, ch. 104, 57 Stat. 86; Colo. Rev. Stat. §§ 37-67-101 & 37-67-102; Kan. Stat. Ann. § 82a-518; 2A Neb. Rev. Stat., App. § 1-106; *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) ("a congressionally approved compact is both a contract and a statute"). These federal and State statutes declare and implement important public policies of the nation and the region that necessarily are involved in dividing the waters of a significant interstate river. Article I of the Compact reflects those important public policies in its statement of the Compact's major purposes:

> To provide for the most efficient use of the waters of the Republican River Basin . . . for multiple purposes; to provide an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

Nebraska's injury. If water computations made by the RRCA for those years support Nebraska in its counter-claim in any year from 1959-1994, Nebraska will be entitled to a remedy to make it whole; however, Nebraska cannot dress up its damages claim as an equitable defense against Kansas' separate claims for any proven violation by Nebraska of the Compact allocations.

Each of Kansas and Nebraska stands in the position of being both the "upper" state and the "lower" state with respect to the other. As a consequence of that unique geographic relationship in the Republican River Basin, Kansas and Nebraska each make the same general allegation against the other – that water overuse by the other State deprived it of water to which it was entitled under its Compact allocation. As a result, this litigation for the years 1959-1994 may well produce a damages judgment (in water or the money equivalent) for each State as a remedy for injury suffered by it in certain years as a result of the other State's use of water in excess of its Compact allocation; in other words, both States may prevail in part. That result is entirely consistent with the strong public interest evident in the Compact's declaration of purposes in maintaining the water allocation system prescribed by the Compact and in achieving State compliance with it. By such an independent and reciprocal enforcement of the separate obligations of the States, each will be provided as nearly as may be with the water (or its equivalent) that the Compact guaranteed it in absence of the other State's overuse of water.

Contrariwise, injection into this case of the affirmative defense of unclean hands based on one State's water overuse would disrupt the symmetry of that outcome and destroy the certainty of the Compact's water allocations. It

would distort the water allocation system carefully worked out over several years by the State and federal negotiators and duly legislated by Congress and the three State legislatures. Recognition of the equitable defense of unclean hands as asserted by Nebraska would undermine the important public interests served by the Compact. *Cf. Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 315 (1985) (denying *in pari delicto* defense "will best promote the primary objective of the federal securities laws"); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-40 (1968) (*in pari delicto* defense is not appropriate in antitrust actions because it would undermine the purposes of federal antitrust laws).

In any event, Nebraska founds this affirmative defense upon alleged action by Kansas that falls well short of constituting unclean hands. The Supreme Court has explained the guiding principles of this defense as follows:

> "He who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one *tainted with inequitableness or bad faith* relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant . . . . Thus while 'equity does not demand that its suitors shall have led blameless lives,' as to other matters, it does require that they shall have acted *fairly and without fraud or deceit* as to the controversy in issue.

Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery, 324 U.S. 806, 814-15 (1945) (citations omitted) (emphasis added). In *Precision Instrument*, a case involving private companies, not States, the "history of the

patents and contracts in issue [was] steeped in perjury and undisclosed knowledge of perjury." *Id.* at 816. In contrast, Nebraska has not alleged any action of Kansas that has a "taint" of bad faith, fraud or deceit here. In actuality, Nebraska knew in the year following each of the years 1959-1994 exactly what amounts of water Kansas had used and Nebraska, through its RRCA representative, accepted computations reflecting that use. Nebraska can press a claim for damages for injury suffered because of Kansas' water overuse, but it cannot use Kansas' overuse to bar Kansas' claims against Nebraska's own overuse.

Nebraska does not have available an "unclean hands" defense against Kansas' damage claims for injury suffered by it from Nebraska's overuse of water.

B. Prior Material Breach

In pressing its defense of prior material breach, Nebraska contends that Kansas violated the Compact by failing "to provide data regarding its water use within the entire Basin, including downstream from Hardy. Kansas' failure to provide this necessary data to RRCA constitutes a material breach." (NE Br. at 22). As a consequence, Nebraska argues, Kansas is barred from recovering damages for any injury caused Kansas by Nebraska's upstream use of more water than the Compact allocated to it.

Nebraska claims that "[i]nformation regarding Kansas' consumptive use downstream from Hardy, Nebraska is necessary to determine whether Kansas is exceeding its allocations as well as providing administrative guidance as to what constitutes 'consumption.'" (NE Br. at 21). Assuming for present purposes that Kansas has withheld

consumptive use data that the Compact obligates it to supply, that assumed breach, in the circumstances of this case, is not "material" with respect to the years 1959-1994 and therefore cannot form the basis for the defense of prior material breach. With respect to claims for that period, whether Kansas has provided all the consumptive use data that Nebraska wishes Kansas had supplied is now irrelevant. The RRCA computations of consumptive use for 1959-1994 have, at Nebraska's urging, already been held binding on the States by Mem. Dec. 1 (Question 1). Whatever consumptive use data Kansas provided for those years Nebraska accepted each year when the RRCA accepted the annual water computations. The question whether in the future Kansas has an obligation to provide additional types of consumptive use data downstream of Hardy remains open for decision at the appropriate time and in the appropriate circumstances.

Furthermore, consideration of the public interests served by the Compact counsels denial of the prior material breach defense as asserted by Nebraska, whether that breach be the withholding of data or, as Nebraska alternatively suggests, the overuse of water. (NE Br. at 22, n.7). According to Nebraska, the unilateral action or nonaction by one State (here, the alleged failure to provide consumptive use data or water overuse) "suspend[s]" the other State's Compact obligations "during the period in which a material breach . . . remain[s] uncured." (NE Opp. Reply at 5). In other words, according to Nebraska, once a State violates the Compact, another compacting State is relieved of its Compact obligations until the breach is cured, or, in terms of the "prior material breach" defense as asserted here, has a defense for its own Compact violations as a consequence of the other State's violations. The Compact

simply cannot work this way. As discussed above in relation to the asserted defense of unclean hands, the strong public interest in maintaining the water allocation system statutorily prescribed by the Compact is better served by an independent and reciprocal enforcement of the separate Compact obligations of the States. At all times each State is required to live within its Compact allocation and is entitled to a remedy for any injury caused it by the other's Compact violations. It cannot, however, shield its own liability for Compact violations by pleading a defense based on the violations of the other; such an enforcement system is not at all one likely to provide each State with the share of the Republican River Basin water guaranteed it by the Compact. Applying the defense of prior material breach as urged by Nebraska would, I conclude, distort and disrupt the certainty of the Compact's water allocation system and thereby undermine the important public interests served by the Compact.

Nebraska does not have available a "prior material breach" defense against Kansas' damage claims for injury suffered by it from Nebraska's overuse of water.

II. Defenses Asserted by Nebraska on the Basis of Alleged Action or Nonaction by Kansas vis-à-vis Nebraska's Compact Violations by Overuse of Water: Consent, Waiver, Estoppel, Laches, and Failure to Exhaust Administrative Remedies

For any Compact violations by its water overuse in the years 1959-1994, Nebraska does not have available any of the equitable defenses asserted by it on the basis of Kansas' action or inaction, namely, Kansas' consent or waiver of objection to Nebraska's overuse of water; Kansas'

estoppel from objecting to Nebraska's water overuse; Kansas' laches in seeking relief for injury caused it by Nebraska's water overuse; and Kansas' failure to exhaust administrative remedies for Nebraska's water overuse. None of these equitable defenses is available to Nebraska for the past period here in issue.

As an initial matter, Nebraska's argument for all five affirmative equitable defenses in this category suffers from an erroneous understanding of the Kansas claim. Nebraska first expresses its misunderstanding in its opening statement of the circumstances underlying all five of these defenses. That statement reads as follows:

> For thirty five years, the three States unanimously agreed on the annual allocations of water to each State. Kansas specifically agreed to the amount of Kansas' adjusted annual allocation. If Kansas received its annual adjusted allocation each year during the 1959-1994 period, then Kansas' pursuit of a claim for overuse by Nebraska is a request by Kansas that the Court *retroactively increase Kansas' allocation* during those years in contravention of the Special Master's rulings that the determinations by the RRCA are binding. Kansas' acquiescence and approval of the RRCA determinations of supply, allocations and use precludes Kansas from *now claiming it was entitled to a larger allocation.*

(NE Br. at 2-3) (emphasis added). Nebraska repeats this statement five times in its brief: (1) for consent, "Kansas cannot, after agreeing to its allocation and sitting in silence for over thirty years, now raise *a claim for more water* for those years." (NE Br. at 9); (2) for waiver, "Kansas waived any right to claim *a larger allocation from the virgin water supply*." (NE Br. at 14); (3) for estoppel,

"Kansas never made a claim for *a larger adjusted annual allocation* and therefore, is estopped. . . ." (NE Br. at 13); (4) for laches, "For over thirty years, Kansas failed to assert any claim that it was entitled to *a larger adjusted allocation*." (NE Br. at 17); and (5) for failure to exhaust administrative remedies, "Kansas failed to bring any claim for *a larger allocation* to the attention of the RRCA at the time when allocations were being made." (NE Br. at 11). In its reply brief, Nebraska repeats its statement that Kansas is "*claiming greater allocations* of Republican River water" and "attempt[ing] to retroactively *increase its allocations*." (NE Reply at 2, 9) (all emphasis added).

All these statements are contradicted by Kansas' pleadings. Kansas is not seeking an increase in its annual water allocations under the Compact. Contrary to Nebraska's statements, Kansas is not pursuing claims against Nebraska for years in which it received its full adjusted Compact allocation. Kansas' claim for damages because of Nebraska's overuse is not a claim for a larger allocation; rather, it is simply a claim that Kansas has been injured by Nebraska's overuse of water in that Kansas has been deprived of part of its own existing Compact allocation. By the express language of its complaint, Kansas is claiming only that Nebraska has appropriated "more than its allocated equitable share of the waters of the Republican River *and [has] deprived the State of Kansas of its full entitlement under the Compact*." (KS Cplt. ¶ 7) (emphasis added). "*As a result of the State of Nebraska's failure to deliver water to Kansas in the quantities allocated under the Compact, the State of Kansas has suffered grave and substantial injuries*." (KS Cplt. ¶ 9 (emphasis added)). So far as past violations of the Compact are concerned, Kansas specifically limits its prayer

for relief to "*damages and other relief, including pre- and post-judgment interest, appropriate fully to remedy the injury suffered by the State of Kansas. . . .*" (KS Cplt. Prayer for Relief). Thus, all that Kansas seeks for past years is to be made whole in obtaining its full allocation established by the Compact without deprivation by Nebraska's overuse. It seeks, and may seek, nothing more. Nebraska cannot found an affirmative defense on a misstatement of what Kansas is claiming. This defect runs through all five of the affirmative defenses pressed by Nebraska in this category, and alone justifies disallowing the defenses as Nebraska has presented them.

Entirely apart from Nebraska's misunderstanding of Kansas' claims, I conclude that in the circumstances of this case additional considerations militate against Nebraska's asserted defenses in this category.

A. Consent and Waiver

Disregarding Nebraska's mistaken reference to Kansas' intention "to pursue a larger allocation," (NE Br. at 14), the possible ground for application of the defenses of consent (which Nebraska has in its briefs recast as "acquiescence") and waiver is the same – that Nebraska is entitled to these defenses against its own overuse because Kansas consented and waived objection to Nebraska's overuse as shown by RRCA computations by delaying filing this action until 1998. Nebraska asserts that Kansas consented to or acquiesced in Nebraska's exceeding its Compact allocation because it "[sat] in silence for over thirty years" after having accepted the water computations as a member of the RRCA. (NE Br. at 9). Nebraska similarly suggests that through Kansas' delay in filing this

original action until 1998, Kansas has impliedly waived its right to pursue a claim against Nebraska for water overuse in the years 1959-1994. (NE. Br. at 14). Given the similarity between the grounds for the defenses of consent/acquiescence and waiver, I will consider these equitable defenses one after the other.

1. Consent/Acquiescence

Kansas' delay in filing this action for what is at the very outside a period of thirty-nine years is not sufficient to constitute consent or acquiescence to Nebraska's overuse. In *Texas v. New Mexico*, 482 U.S. 124 (1987), the Supreme Court expressed reluctance to deny relief for past breaches of the Pecos River Compact allocating water between two States where there was a twenty-four year delay from the time of the first breach until the filing of an original action and a delay of more than thirty years from the time of the first breach until the determination of liability. The Court there stated:

> There is nothing in the nature of compacts generally or of this Compact in particular that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact . . . .
>
> . . . . The basic meaning of the 1947 condition was not defined until 1979 in the course of this litigation; and a workable methodology for translating New Mexico's obligation into quantities of water was not achieved until 1984, also in this litigation . . . . A court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in

> fact occurred and the nature of the remedy called for.

Id. at 128-29 (citing Restatement (Second) of Contracts § 33(2) & cmt. b (1981)). The different length of delay involved in the present action is not sufficient to justify a result opposite that in *Texas v. New Mexico*, where the Court clearly favored providing a remedy for past Compact breaches. No case cited by Nebraska in which the Court has found a valid acquiescence defense involves a time lapse of fewer than forty years, which is beyond the longest possible delay in this case, and most of the cases cited have a lapse of 100 or more years. The time period here is not sufficiently long to constitute consent/acquiescence, especially in view of the public's overriding interest in having the water allocation system of the Compact complied with.

In addition, the acquiescence defense normally requires longstanding affirmative acts by the State asserting the defense or a prior court decision, so that the other State is fairly charged with having had prior notice for a good many years that its claimed rights are disputed by the first State. *See New York v. New Jersey*, 523 U.S. 767, 786-87 (1998); *Nebraska v. Wyoming*, 507 U.S. 584, 594-95 (1993); *Illinois v. Kentucky*, 500 U.S. 380, 384-87 (1991); *Georgia v. South Carolina*, 497 U.S. 376, 393 (1990); *Ohio v. Kentucky*, 410 U.S. 641, 649 (1973); *Michigan v. Wisconsin*, 270 U.S. 295, 306-07 (1926). Neither circumstance is present here. Neither Nebraska nor any tribunal took any action that would put Kansas on notice that Nebraska had or believed it had a right to all the water it used or that Nebraska disputed Kansas' right to bring a claim for injury caused by Nebraska's overuse. In a few cases, all

State boundary cases, the Court has recognized the acquiescence defense in the absence of prior notice to the plaintiff State; however, those cases have involved inaction by the plaintiff State lasting a century or more, well over twice the time period involved here. *See Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Rhode Island v. Massachusetts*, 15 Pet. 233, 274 (1841).

I conclude that the circumstances of this case in the years 1959-1994 do not justify applying the equitable defense of consent/acquiescence to bar Kansas' damages claim for injuries caused by Nebraska's overuse of water.

2. Waiver

Waiver requires an intent to release known rights. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("waiver is the '*intentional* relinquishment or abandonment of a known right'" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added))). I will not lightly infer any intent on the part of a State to waive objection to a violation of this interstate Compact involving as it does important public interests for the region and nation. Even "implied waiver" requires "clear, decisive and unequivocal" conduct sufficient to evidence an intention to waive a right. *See United States v. Amwest Surety Insurance Company*, 54 F.3d 601, 602-03 (9th Cir. 1995); *Heller International Corporation v. Sharp*, 974 F.2d 850, 861 (7th Cir. 1992). There is no such conduct here. In the present circumstances the mere fact that Kansas may indeed have "[sat] in silence for over thirty years" (NE Br. at 9) while RRCA computations showed Nebraska was exceeding its Compact allocations does not demonstrate "decisive" or "unequivocal" conduct evidencing an intent by Kansas to

release any claim to recover damages for injuries suffered from Nebraska's violations. All Kansas has done is join in the RRCA's annual water computations. Nebraska had no just reason to construe that action to be a waiver of any claim for relief that Kansas might have based on Nebraska's overuse as shown by the RRCA computations. Kansas, like the other States, is bound by those computations, but accepting them as correct and being bound by them is not equivalent to consenting to Nebraska's water overuse as shown by them. By joining in the computations, Kansas cannot be held to have foregone bringing an action to recover damages for an overuse that those unanimously adopted computations show.

Texas v. New Mexico, 462 U.S. 554 (1983), teaches nothing to the contrary. There, the unanimous action of the two States through the Pecos River Compact Commission in quantifying the shortfalls in the water received by Texas was held conclusive upon both States and not subject to review, *id.* at 575, but Texas was by no means held to have waived an action to seek a remedy for those quantified shortfalls. Here, Kansas is similarly bound by the unanimous RRCA computations, but it has not waived its right to recover damages for any injury shown by those computations. Kansas' claim is not one based on "second thoughts" akin to those that the Court found inappropriate for its original jurisdiction when it declined review of the unanimous actions of the Pecos River Compact Commission. *Id.* at 570-71.

I conclude that the circumstances of this case in the years 1959-1994 do not justify applying the equitable defense of waiver to bar Kansas' damages claim for injuries caused by Nebraska's overuse of water.

B. Estoppel

The nature of the equitable defense of estoppel has been spelled out by the Supreme Court as follows:

> Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. While a hallmark of the doctrine is its flexible application, certain principles are tolerably clear:
>
> > "If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act . . . the first person is not entitled
> >
> > . . . .
> >
> > (b) to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired."
>
> Thus, the party claiming the estoppel must have relied on its adversary's conduct "in such a manner as to change his position for the worse," and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.

Heckler v. Community Health Serv. of Crawford County, Inc., 467 U.S. 51, 59 (1984) (quoting Restatement (Second) of Torts 894(1) (1979) and 3 J. Pomeroy, *Equity Jurisprudence* § 805, p. 192 (S. Symons ed. 1941)).

As discussed earlier, Nebraska grounds its estoppel defense on a representation by Kansas that it was

satisfied with its adjusted allocation. That is entirely irrelevant. Contrary to Nebraska's assertion, Kansas does not claim "a larger adjusted annual allocation." (NE Br. at 13). However, even had Nebraska based its assertion of the estoppel defense on a representation that would be relevant, namely, that Kansas agreed with the RRCA's annual water computations, no basis exists for an estoppel defense. The Kansas "representation" by participating in the computation of water data is not in any way a "misrepresentation" on which Nebraska might have relied to its detriment. Kansas has been barred by Mem. Dec. 1 (Question 1) and Mem. Dec. 2 from disputing the figures that the RRCA accepted each year for the prior year. The RRCA computations on which Nebraska has relied remain the same, and Kansas' acceptance of the figures is not itself a representation that Kansas would not in the future bring any claim for water overuse revealed by those figures.

I conclude that the circumstances of this case do not justify applying the equitable defense of estoppel to bar Kansas' damages claim for injuries caused by Nebraska's overuse of water in the years 1959-1994.

C. Laches

To raise the bar of laches, Nebraska must establish both lack of diligence by Kansas as the party against whom the defense is asserted and prejudice to Nebraska as the party asserting the defense. *New Jersey v. New York*, 523 U.S. 767, 806 (1998). Kansas filed its complaint in this original action in 1998, only some thirty-nine years after even the earliest year here in issue. Although the Court has left open the question of whether laches can apply in an interstate compact enforcement action, *see Kansas v. Colorado*, 514 U.S. 673, 687-88 (1995), it is a

dubious proposition that a time period at the maximum of thirty-nine years is sufficient to justify a laches defense in the face of (1) the Supreme Court's reluctance to deny relief for past breaches of a Compact allocating river water between two States, *Texas v. New Mexico*, 482 U.S. 124, 128-29 (1987), (2) the Court's statement that the "laches defense is generally inapplicable against a State," *Illinois v. Kentucky,* 500 U.S. 380, 388 (1991), and (3) the Court's hesitancy to impose a time limit where Congress has not done so, *Missouri v. Illinois*, 200 U.S. 496, 520 (1906).

In any event, Nebraska's allegations of prejudice suffered by it as a result of Kansas' delay until after 1994 in asserting its claim against Nebraska are not persuasive. Nebraska argues that Kansas' lack of diligence prevented Nebraska from "collecting data necessary to evaluate Kansas' claims" and that "the information, physical evidence and memories of witnesses have faded or become nonexistent as a result of Kansas' delay." (NE Br. at 17). For the years 1959-1994, all of the figures relevant to Kansas' claims are determined except for the amount of water flowing into Kansas from Nebraska. As for that figure, Nebraska itself asserts (and therefore presumably believes it has sufficient evidence to prove) that Kansas has received its Compact allocation in every year except 1992 (NE Br. at 8), and has not suggested that any evidence necessary to prove that fact is unavailable. Nebraska has pointed to no specific missing information or lack of access to any witness necessary for a full and fair trial of Kansas' claims regarding water overuse by Nebraska for the years 1959-1994.

I conclude that the circumstances of this case do not justify applying the equitable defense of laches to bar

Kansas' damages claim for injuries caused by Nebraska's overuse of water in the years 1959-1994.

D. Failure to Exhaust Administrative Remedies

For a very basic practical reason, Nebraska cannot avail itself of a "failure to exhaust administrative remedies" defense: there are no administrative remedies that are available alternatively to this original action. The RRCA is equipped with no mechanism to grant Kansas the relief it seeks in its Complaint; namely, a remedy for injury caused it by Nebraska's past Compact violations by water overuse. Even if it were so equipped, the RRCA can take no action except by unanimity, making it a most unlikely forum in which Kansas could be expected to seek relief from Nebraska's alleged violation of the Compact. *Cf. Texas v. New Mexico*, 462 U.S. 554, 566-70 (1983) (unanimity rule makes impractical a requirement that all disputes first be submitted to compact commission). In a closely parallel case, the Supreme Court has already rejected as improper a Special Master's proposal to return an issue to a compact commission for an attempt at a negotiated settlement. *Oklahoma v. New Mexico*, 501 U.S. 221, 240-41 (1991).

In any event, the time to raise the alleged failure to exhaust administrative remedies was at the time Nebraska opposed Kansas' Motion for Leave to File Bill of Complaint. One of the two criteria for cases not appropriate for the Supreme Court's original jurisdiction is "the availability of an alternative forum in which the issue tendered may be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). The defense of failure to exhaust

administrative remedies falls comfortably within that criterion. Kansas addressed the issue in its briefs before the Court on its Motion for Leave to File Bill of Complaint. (*See* KS Br. in Support of Motion, at 14-15; KS Reply to Nebraska's Br. in Opposition, at 10). Nebraska, too, argued the matter to the Court in opposing the Motion for Leave. (*See* NE Motion for Leave to File Sur-Reply, at 6). Thus, the Court has already had this question before it and, in granting Kansas' Motion for Leave, implicitly rejected any notion that Kansas was barred by failure to exhaust administrative remedies.

III. "Impossibility of Performance" Defense Asserted by Nebraska Because of *Ex Post Facto* RRCA Computations

For any Compact violation by its water overuse in the years 1959-1994, Nebraska does not have available the defense asserted by it on the ground that the RRCA's *ex post facto* methodology for computing the water allocations of the States makes the Compact impossible of performance.

Nebraska's theory is that because the RRCA makes its computations each year for the preceding year, it is "impossible for Nebraska to know how much water it was entitled to consume when the water was available or over the course of the year." (NE Br. at 18). However, the Supreme Court's actual practice in enforcing interstate river compacts flatly rejects Nebraska's assertion of an "impossibility of performance" defense in this situation. In enforcing river compacts the Court has specifically allowed damages to be assessed when quantifications of water overuse are made retroactively. In *Texas v. New Mexico*, involving the Pecos River Compact, the Court stated:

> [G]ood-faith differences about the scope of contractual undertakings do not relieve either party from performance. A court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for. There is often a retroactive impact when courts resolve contract disputes about the scope of a promisor's undertaking; parties must perform today or pay damages for what a court decides they promised to do yesterday and did not.

Texas v. New Mexico, 482 U.S. 124, 129 (1987) (citation omitted). The Court later entered an amended decree for the Pecos River that required the River Master to calculate each year the water shortfall or overage for the previous year. *Texas v. New Mexico*, 485 U.S. 388, 391-92 (1988). Very recently, in No. 105 Original, involving the Arkansas River, the Court upheld a damages award for past "material depletion," the quantification of which the compacting States did not know for many years after the actual use. *See Kansas v. Colorado*, 121 S. Ct. 2023, 2028-30 (2001). In accordance with the enforcement principles of *Texas v. New Mexico* and *Kansas v. Colorado*, the retroactive impact of the RRCA computations does not render Nebraska's compliance impossible. The computations merely provide quantification of the remedial relief for water overuse after the breach has occurred.

In addition, the Compact is self-executing. In fact, it was necessarily self-executing during the first 16 years of its existence before organization of the RRCA. Whether the RRCA makes its annual computations or not, a State has an enforceable legal obligation to comply with the

Compact, which constitutes the law of the United States as well as of all three compacting States. If a State fails to meet that obligation, it is subject to liability for breach of the Compact. A State is not relieved of that obligation merely because it may not be determined until a later date whether it has complied with the Compact.

Without discussion, Nebraska suggests that Kansas by "consenting" to the RRCA's use of *ex post facto* computations of State allocations has barred itself from getting relief for Compact violations by Nebraska shown by those determinations. Any such "consent" argument is plainly without merit. Kansas' representative joined the representatives of the other States in making the *ex post facto* computations for the purpose, in the words of Article IX of the Compact, of "collect[ing] . . . the data necessary for the proper administration of the provisions of this compact." But by no stretch can any of the three States or its representative be taken to have thereby agreed to absolve the other States from liability for whatever Compact violations may be revealed by those computations.

Conclusion: Answers to the Questions Posed by Case Management Order No. 20

Since Kansas, so far as the years 1959-1994 are concerned, has withdrawn any of the affirmative defenses identified in the questions posed by Case Management Order No. 20, I have here had the task of deciding only whether Nebraska is entitled to maintain any of those defenses. Accordingly, I have for purposes of this summary reformulated the questions here decided to apply only to Nebraska and the affirmative defenses asserted by it.

Question 1. Is the doctrine of unclean hands available to Nebraska as a defense to Kansas' action for damages for Nebraska's water overuse in the years 1959-1994?

Answer: No.

Question 2. Is Nebraska entitled to pursue an affirmative defense to liability on claims by Kansas for the years 1959-1994 on grounds of consent, waiver, estoppel, laches, or failure to exhaust administrative remedies?

Answer: No.

Question 3. Are impossibility of performance and consent defenses to Kansas' claims under the Compact for Nebraska's water overuse in the years 1959-1994 as a consequence of the RRCA's *ex post facto* determinations of State allocations?

Answer: No.

Question 4. Is Nebraska's claim against Kansas for water overuse in the years 1959-1994 in the Republican River Basin downriver from Hardy, Nebraska barred by the affirmative defense of lack of standing (i.e., Does Nebraska have standing to make a damages claim for Kansas' overuse in those years downriver from Hardy, Nebraska)?

> Question 4 is eliminated by Nebraska's stipulation that it is making no claim against Kansas for water overuse in the years 1959-1994 in the Republican River Basin downriver from Hardy, Nebraska.

Question 5. Is Nebraska for the years 1959-1994 entitled to an affirmative defense for prior material breach because Kansas had a duty to provide full data to the RRCA regarding its beneficial

consumptive use of water downstream of Nebraska?

Answer: No.

Dated: October 19, 2001

Vincent L. McKusick
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APPENDIX E

No. 126, Original

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

BEFORE SPECIAL MASTER VINCENT L. McKUSICK
(Hearing Scheduled For January 6, 2002)

STATEMENT OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PROPOSED SETTLEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

No. 126, Original

STATE OF KANSAS, Plaintiff,

v.

STATE OF NEBRASKA
and
STATE OF COLORADO

BEFORE SPECIAL MASTER VINCENT L. McKUSICK
(Hearing Scheduled For January 6, 2002)

STATEMENT OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PROPOSED SETTLEMENT

The United States submits this statement in accordance with the Special Master's instructions during the status conference held on November 13, 2002. The United States supports the joint motion of the parties seeking the Court's approval of the proposed settlement of this action because the settlement agreement is consistent with the Compact and this Court's rulings and because the agreement ensures greater certainty and efficiency in administering the waters of the Republican River Basin.

I. Procedural and Factual Background

On December 17, 2002, the parties submitted a joint motion for approval of a proposed settlement of this action. The settlement, which represents the culmination of more than a year of negotiations, addresses each of the parties' claims and settles long-standing issues relating to the implementation of the Republican River Compact ("the Compact").

A. Description of the Compact

The Compact is designed "to provide for the most efficient use of the waters of the Republican River Basin" through beneficial consumptive use, "to provide for an equitable division of such waters," and to remove controversy and enhance cooperation among the States. Compact, Article I. The Compact defines beneficial consumptive use as "that use by which the water supply of the Basin is consumed through the activities of man," including water consumed by evaporation from reservoirs and irrigated areas. Compact, Article II.

The Compact allocates the water of the Republican River based on the computed "virgin water supply," which is defined as the "water supply within the Basin undepleted by the activities of man." Compact, Article II. The commissioners estimated the water supply based on stream flow records for the years 1929 to 1939, and adjusted the supply to eliminate the effects of the 1935 flood, producing estimates of the virgin water supply for each of the major drainage sub-basins. Compact, Article III. The commissioners also recognized the potential for variations in the amount of water available for diversion. Accordingly, to accommodate the annual variability in supply,

Article III provides that, if the sub-basin virgin water supply varies by more than ten percent from the virgin water supply stated in the Compact, the total and sub-basin allocations should be adjusted by increasing or decreasing allocations proportionately.

To ensure equitable use of the Basin's virgin water supply, the Compact allocates the supply to each State according to the designated drainage sub-basins and the main stem. Compact, Article IV. On that basis, Article IV of the Compact gives Colorado the right to use consumptively a total of 54,100 acre-feet (11% of the total virgin water supply), Nebraska, 234,500 acre-feet (49%) and Kansas 190,300 acre-feet (40%). Colorado may also consume all the water in Frenchman Creek in Colorado. In addition, the Compact allocated the entire water supply in the Basin originating below the Nebraska-Kansas state line to Kansas. Compact, Article IV.

Some of the water in the tributaries and main stem upstream of the Nebraska-Kansas state line was left "otherwise unallocated." This unallocated water and the supply of the main stem are allocated to Kansas (51.1%) and Nebraska (48.9%). *See* Compact Article IV (allocating 138,000 acre-feet to Kansas and 132,000 acre-feet to Nebraska). Kansas can divert some or all of its unallocated-main stem allocation at or near Guide Rock, Nebraska, located about 15 miles upstream of the Nebraska-Kansas state line. Compact, Article IV. The Compact also recognizes that the United States may beneficially use water and provides that any beneficial consumptive uses by the United States within a particular State "shall be taken into account in determining the extent of use within that State." Compact, Article XI(a).

Article IX of the Compact established the Republican River Compact Administration ("RRCA"). Beginning in 1959, the States each appointed a representative to the three-member administrative body, which has the duty of computing the Basin's annual virgin water supply and the consumptive use attributable to each State.

B. The Federal Projects

After Congress approved the Compact in 1943, it authorized a system of federal water development and management projects in the Republican River Basin as part of the Missouri River Basin Development Program. *See* Flood Control Act of 1944, ch. 665, § 9, 58 Stat. 891. Between 1945 and 1964, the United States constructed eight federal reservoirs in the portion of the Republican River Basin subject to the Compact. Those projects support a variety of purposes, including irrigation of farmland, flood control, municipal and industrial uses, recreation, and fish and wildlife needs.

One of the largest of the federal projects is Harlan County Lake, which the Army Corps of Engineers completed in 1952. Harlan County Lake, located about fifty miles upstream of Guide Rock, Nebraska, has multiple purposes including irrigation, flood control, recreation, and fish and wildlife uses. (Harlan County Lake was originally authorized by the Flood Control Act of 1941, Public Law 77-228, which incorporated the recommendations of the Chief of Engineers in House Document 842. The plans for Harlan County Lake were modified, however, by the Flood Control Act of 1944, Public Law 78-534, to include other purposes, such as irrigation.) In conjunction with the Bureau of Reclamation, Harlan County Lake provides

irrigation to the Bostwick Irrigation District in Nebraska and the Kansas Bostwick Irrigation District. Irrigation operations at Harlan County Lake are governed by the Harlan County Lake Operation Consensus Plan, which the two federal agencies developed to address potential conflicts among the Lake's multiple uses at the dam. (The consensus plan is attached to the Final Settlement Stipulation as Appendix K). Another of the federal projects of significance in this settlement is Trenton Dam, which impounds Swanson Lake. Located upstream of Harlan County Lake on the main stem, and operated by the Bureau of Reclamation, Swanson Lake functions primarily as an irrigation project. The remaining federal projects in the area of the Basin subject to the Compact consist of multi-purpose projects operated by the Bureau of Reclamation.

II. The Settlement

The proposed settlement is divided into ten sections addressing issues ranging from general provisions, to Compact accounting, to additional administration requirements. The significant provisions of the agreement address the issues raised by each of the parties in their pleadings in a manner that is consistent with the Compact and provides long-term certainty regarding the administration of water in the Republican River Basin.

A. Groundwater Issues

As the Court is aware, one of the most significant issues raised in Kansas's complaint was its contention that Nebraska had exceeded its allocations under the Compact by excessive consumption of hydraulically connected

groundwater. Kan. Complaint ¶¶ 7-9. At the Court's invitation, 527 U.S. at 1020 (1999), Nebraska moved to dismiss this claim, alleging that the Compact does not place limitations on the right of a compacting State to consume groundwater. The Court referred the matter to the Master for his consideration. 528 U.S. 1001 (1999). The Master recommended:

> The Republican River Compact restricts a compacting State's consumption of groundwater to the extent the consumption depletes stream flow in the Republican River Basin and, therefore, Nebraska's Motion to Dismiss should be denied.

First Report of the Special Master 45 (Jan. 28, 2000). The Court followed the Master's recommendation and denied Nebraska's motion to dismiss. 530 U.S. 1272 (2000). The proposed settlement recognizes that ruling and incorporates the stream depletions attributable to the consumption of groundwater into the management of water within the Republican River Basin. It does so in a number of ways.

First, the proposed settlement requires the States to complete development of the RRCA Groundwater Model. Final Settlement Stipulation, Section III. When completed, this Model will be used to estimate stream flow depletions caused by pumping of hydraulically connected groundwater wells. *See, e.g., id.* Because the groundwater model is being developed jointly by the three States and will be adopted by the RRCA, its use should minimize conflict among the States regarding the depletions of stream flow due to groundwater pumping.

Second, the States have revised and updated the accounting formulas to account for the inclusion of

depletions caused by groundwater pumping as a beneficial consumptive use. Among other changes, the States have agreed to conduct accounting on a five-year running average except in certain circumstances. *See* Final Settlement Stipulation, Subsection IV.D. Because groundwater pumping may cause stream depletions a year or more after the pumping occurs, the use of averaging in accounting allows the States to manage groundwater and surface waters together. The use of averaging in determining Compact compliance is also implicitly contemplated in the Compact, which refers to the "average virgin water supply." Compact, Article III.

Third, recognizing that the Republican River has not yet shown the full depletion effects from already existing well development, the States have agreed to impose a "prohibition on the construction of all new Wells in the Basin upstream of Guide Rock," subject to certain exceptions. Final Settlement Stipulation, Subsection III.A.1. Nebraska has recently established regulations imposing the moratorium through its Natural Resource Districts and those regulations are attached to and incorporated into the agreement. *Id.*, Subsection III.A.1. Kansas and Colorado already have such analogous restrictions in place, and they have agreed that neither State will modify its existing restrictions on well development so as to render them less stringent. *Id.*, Subsection III.B.2.

The States have excluded certain types of wells from the moratorium, including wells used for emergency purposes, dewatering wells, and wells with *de minimis* impacts. *See* Final Settlement Stipulation, Subsection III.B.1.d.-f. and h. In addition, the States will allow transfers of water use from an existing well to a new well and the drilling of replacement wells, so long as such

transfers or replacements do not result in additional depletions to the stream. *Id.*, Subsection III.B.1.g. and i. The most significant exception from the groundwater moratorium is the provision permitting "wells for expansion of municipal and industrial uses." *Id.*, Subsection III.B.1.j. Any such wells would be accounted for as a beneficial consumptive use by the State. The proposed settlement also exempts from the moratorium wells designed to augment stream flow to help achieve Compact compliance, so long as those wells do not result in a net depletion of stream flows. *Id.*, Subsection III.B.1.k. Colorado anticipates that it may purchase or install groundwater wells to pump water into the stream to offset some of its beneficial uses in order to maintain compliance with its Compact allocations. The RRCA must approve plans for the installation and operation of such augmentation wells. *Id.*

In general, the moratorium on groundwater wells can be lifted in all or in a portion of the Republican River Basin only if the RRCA unanimously determines that new information demonstrates that additional groundwater development would not result in a violation of the Compact. Final Settlement Stipulation, Subsection III.A.1. With respect to the area above Trenton Dam, however, the States have agreed: (1) "not to increase the level of development of groundwater wells as of July 1, 2002" unless the Court approves a modification of the settlement agreement; and (2) not to transfer well usage from below Trenton Dam to above it. *Id.*, Subsections III.A.3 and III.B.1.i(ii).

In sum, the groundwater moratorium, coupled with the completion of the groundwater model and revision of the accounting procedures, resolve one of the central issues in this litigation. By adopting terms that account

for the relationship between ground and surface water, the states have resolved this issue in a manner that meets the requirements and terms of the Compact.

B. Use of Waters "Otherwise Unallocated"

The Compact divides the waters of the Republican River among the three States by allocating specific amounts to particular States in each designated drainage basin, including the main stem. For instance, Article III of the Compact estimates the average virgin water supply in the South Fork of the Republican River drainage basin at 57,200 acre-feet. Article IV allocates specific amounts to each State, which amounts are "to be derived from the sources and in the amounts hereinafter specified." As to the South Fork of the Republican River, Colorado is allocated 25,000 acre-feet, Kansas is allocated 23,000 acre-feet, and Nebraska is allocated 800 acre-feet. Thus, under the Compact, 48,800 acre-feet of the 57,200 acre-feet of the water supply in the South Fork of the Republican River drainage basin are allocated, while the remaining 8,400 are not specifically allocated. Article IV of the Compact provides that the waters of the mainstem, together with the waters of "upstream basins" that are "otherwise unallocated," are allocated to Kansas and Nebraska. The ratio of their respective shares is 51.1 percent for Kansas and 48.9 percent for Nebraska. Compact Article IV (the ratio of 138,000 acre-feet to 132,000 acre-feet).

During the course of this litigation and particularly during settlement, it became clear that the Compact's silence as to where the States may consume those "otherwise unallocated" waters created uncertainty and a

potential for conflict among the States. In particular, the States desired to resolve whether it was permissible for a State to consume more than its specific allocation on a tributary of the Republican River so long as the State did not exceed its overall allocation. The proposed settlement resolves that question by providing that water derived from a sub-basin in excess of a State's specific sub-basin allocation may be used by any of the States to the extent that: (1) the water is physically available; (2) the "use of such water does not impair the ability of another state to use its sub-basin Allocated Water Supply within the same sub-basin"; (3) the State remains within its total allocation; and (4) certain water-short-year administration measures (described below) are not in effect. *See* Final Settlement Stipulation, Subsection IV.B.

Those provisions provide sensible rules for use of the "otherwise unallocated" waters. Returning to the example of the South Fork of the Republican River, the Final Settlement Stipulation would allow any of the three States to consume the 8,000 acre-feet of "otherwise unallocated" water that is physically available, in the sense that it can be diverted from the South Fork or downstream on the main stem, provided that the State first putting the water to use does not exceed its total state-wide allocation, and provided that the State's use does not adversely affect the specific sub-basin allocations of the other States in the South Fork. For example, Colorado could divert some or all of the 8,000 acre-feet from the South Fork, provided that Colorado does not: (a) exceed its total state-wide allocation of 54,100 acre-feet (or its adjusted allocation in an abnormally wet or dry year); and (b) prevent Kansas or Nebraska from receiving their respective South Fork allocations of 23,000 acre-feet and 800 acre-feet (or their

adjusted allocations in an abnormally wet or dry year). Furthermore, Colorado's use could not violate any of the administrative measures, discussed below, for water-short years.

The proposed settlement terms are consistent with a reasonable interpretation and implementation of the Compact. While Article IV envisions that only Kansas and Nebraska would share the "unallocated" water, and that they would do so in essentially equal measure, there is no evident harm to the interests of the United States and the individual States if Kansas and Nebraska further agree to share the relatively small amounts of water at issue here with Colorado and to allow whichever State can put the water to use to do so. To the contrary, the Compact states that its "major purposes" include "provid[ing] for the most efficient use of the waters of the Republican River Basin." Compact, Article I. The States entered into this Compact before significant development had occurred in the Basin and, therefore, had limited information about where the best and most efficient uses of the water might occur. It is reasonable to conclude that drafters of the Compact and Congress, in providing for "the most efficient use" of the waters, intended the States to have the measure of flexibility reflected in the proposed settlement.

The pragmatic compromise adopted in the proposed settlement is also consistent with the conduct of the States and the United States since the ratification and approval of the Compact. Specifically, the United States constructed Hugh Butler Lake-Red Willow Dam on a tributary of the Republican River in Nebraska. The United States' beneficial use of those waters, which includes reservoir evaporation, are therefore accounted for as a beneficial consumptive use by Nebraska. *See* Compact Articles I,

XI(a). The Compact identifies the virgin water supply in Red Willow Creek as 21,900 acre-feet (adjusted to an average of 25,000 acre-feet during the period 1959-1994). Nebraska is allocated 4,200 acre-feet of depletion from Red Willow Creek (adjusted to about 4,700 acre-feet during the period 1959-1994). The remainder of that stream is "otherwise unallocated." The net evaporation from Hugh Butler Lake was estimated to average 2,900 acre-feet between 1963 and 2001, and the Project diversions deplete an average of at least 4,500 acre-feet from Red Willow Creek during that same period. In addition, at the time the project was built, Nebraska users were depleting 800 acre-feet on the Creek. The Reclamation project thus contemplates depleting not only Nebraska's specific allocation on Red Willow Creek, but also a portion of the "otherwise unallocated" supply, which is accounted against Nebraska's main stem and state-wide allocations. The historic operation of the Reclamation project is consistent with the Compact interpretation adopted in the proposed settlement.

In sum, the States' resolution of the ambiguities arising from the Compact's identification of "otherwise unallocated" waters rests on a sensible compromise that is acceptable to all interested States and the United States. That compromise provides the States with greater certainty and allows for the most efficient use of the waters of the Basin, thereby promoting the Compact's stated purposes.

C. Additional Administration During Drier Years

The proposed settlement also provides greater certainty and stability by establishing a specific set of procedures that will apply when water is in short supply. Specifically, in Section V of the proposed settlement, the States have adopted additional water administration and accounting procedures to protect downstream users, including Harlan County Lake, during drier years. In general, those provisions identify two thresholds of irrigation supply at Harlan County Lake. If either of these thresholds is met, the States agree to restrict certain activities and take certain actions to improve flows into Harlan County Lake and increase flows available for the Bostwick Division Irrigation Districts. *See* Final Settlement Stipulation, Section V.

If the U.S. Bureau of Reclamation estimates that the irrigation supply at Harlan County Lake will be less than 130,000 acre-feet of storage, Nebraska will close junior appropriators and enforce priorities between Harlan County Dam and Guide Rock to protect the senior water rights for the Bureau of Reclamation's Bostwick Irrigation Project. *See* Final Settlement Stipulation, Subsection V.A.2. Nebraska will also take action to protect the delivery of stored water released from Harlan County Lake. *Id.*, Subsection V.A.3. If the Bureau of Reclamation estimates that the irrigation supply at Harlan County Lake will be less than 119,000 acre-feet of storage, then more significant actions are required. In any such water-short year, Nebraska and Kansas must each limit their beneficial consumptive use above Guide Rock to their share of water derived from sources upstream of Guide Rock. *Id.*, Subsections V.B.2.a. and V.B.4. In those years, Colorado also

agrees to limit its flexibility with respect to "otherwise unallocated" water by not exchanging any portion of its allocation from Beaver Creek to any other sub-basin. *Id.*, Subsection V.B.3. Further, during those water-short years, both Kansas's and Nebraska's compliance will be measured on a two-year running average rather than the generally applicable five-year running average. *See Id.*, Subsection V.B.2.e.i. and V.B.4.

The agreement affords Nebraska an alternative to the application of a two-year running average for compliance known as "Alternative Water Short Year Administration." *See* Final Settlement Stipulation, Subsection V.B.2.e.ii. and Appendix M. If the projected irrigation supply at Harlan County is below 130,000 acre-feet, Nebraska may elect to implement an Alternative Water Short Year Administration plan that has been pre-approved by the RRCA. In doing so, Nebraska will be undertaking to reduce the consumptive uses and increase its deliveries to Guide Rock before Water Short Year Administration goes into effect. In return for early actions to reduce consumption, Nebraska's compliance will be calculated on a three-year running average, rather than the two-year running average that would otherwise apply during Water Short Year Administration. Nebraska may elect to stop implementing its plan at any time, in which case, the two-year average will go into effect if Water Short Year Administration is in place. The details of this Alternative Water Short Year Administration are set forth in Appendix M to the proposed settlement.

Each of these provisions in the proposed settlement is designed to achieve efficient use of the waters of the Basin and ensure that the downstream States receive their fair

share of the water supply. Those provisions are consistent with the Compact and generally beneficial for all involved.

D. Soil and Water Conservation Measures

In its 1960 Report, the RRCA stated that "[d]epletions of stream flows due to erosion control practices and stock-water ponds have not been included in the present virgin water supply formulas . . . [because] there has been no success in isolating the effect of such practices of stream flow." In 1990, the Compact Administration reported that depletions of stream flows due to erosion control practices could not be included in the computation until further research and data were generated. Accordingly, under the current accounting procedures, the States are not accounting, as beneficial consumptive uses, any depletions in stream flow due to soil and water conservation measures. The United States has expressed concern regarding the failure to account for conservation measures as beneficial consumptive uses of the water supply due to the activities of man. The proposed settlement addresses the issue of conservation measures in two ways. First, the States have agreed to account for evaporation from larger farm ponds and other non-federal reservoirs (*i.e.*, those with a capacity greater than 15 acre-feet) as a beneficial consumptive use. *See* Final Settlement Stipulation, Subsection IV.A. Second, the States have agreed to participate in a study of the effect of terraces and farm ponds on stream flows. *See id.*, Subsection IV.B.

Those provisions provide a reasonable, if interim, resolution of the conservation practices issue. The United States believes that the Compact requires the States to

account for the discernible effects of conservation practices, while the States have disagreed with that view. Nevertheless, the United States and the States concur that information regarding the nature and extent of the effect of conservation measures on stream flow is limited and have further agreed to undertake a study that should provide useful information on the subject. While the settlement terms do not finally resolve the question whether the Compact requires accounting for conservation practices, and the States have reserved their right to argue that conservation measures need not be included, the proposed study is likely to shed further light on the practical relationship between conservation measures and stream flow. That information may ultimately provide the basis for consensus on the broader question of whether the Compact requires accounting for stream depletions resulting from conservation practices and whether an adjustment to the accounting procedures by RRCA may be required.

E. General Provisions

The proposed settlement also addresses issues relating to its implementation and the avoidance of future disputes. Section I provides for the dismissal of claims with prejudice upon completion of the groundwater model. *See* Final Settlement Stipulation, Subsection I.C. and Appendix K. It additionally provides that the RRCA, which can act only through unanimous agreement among the States, may modify the accounting formulas "in any manner consistent with the Compact" and the parties' stipulation. Section II provides the definitions for terms used in the settlement document. Section VII provides procedures for resolution of disputes arising after the

dismissal of claims. In essence, the States have agreed to engage in alternatives to litigation before any State will bring a claim to the Supreme Court for adjudication. The United States, which is not a party to the proposed settlement, is not subject to the specified alternative dispute resolution procedures, but some of the provisions envision that the United States may participate as an *amicus curiae*. Section VIII provides that the agreement is not severable, while Section IX provides that the stipulation represents the entirety of the agreement.

Finally, Section X provides that the Special Master retains jurisdiction until completion of the groundwater model. If the States cannot agree upon the proper model, they may request the Special Master to select an arbitrator, from a list supplied by the States, for the narrow and limited purposes of resolving that technical dispute. The Master may also resolve disputes among the States regarding the exchange of information necessary to complete the groundwater model. In the view of the United States, neither of those provisions requires the Master to undertake an impermissible "arbitral" function, within the contemplation of *Vermont* v. *New York*, 417 U.S. 270, 277 (1974). *See New Hampshire* v. *Maine*, 426 U.S. 363, 367-370 (1976); *see also New Hampshire* v. *Maine*, 532 U.S. 742, 752-753 (2001). Rather, the Master is exercising the same permissible functions that a trial judge might exercise in assisting the parties to reach closure on a minor point in the settlement process.

F. Other Considerations

The United States supports the States' proposed settlement because it provides a sound resolution of the

issues in litigation on terms consistent with the Compact. Additionally, the proposed settlement avoids the costs and delays that have been experienced in other similar cases. As the United States noted at the outset of this litigation:

> Interstate water disputes pose complex trial-management problems once they proceed past the pleading stage . . . . The factual issues turn on complex questions of meteorology, hydrology, geology, engineering, and economics, which must be applied to thousands of square miles of varied terrain and land uses. The litigation, particular discovery and trial preparation, correspondingly tends to be extraordinarily complicated, time-consuming, and expensive . . . . At the same time, the complexity and high stakes of the litigation may encourage wasteful pretrial skirmishing far removed from the core controversy that prompted the lawsuit.

Brief of the United States as *Amicus Curiae* On Motion for Leave to File Bill of Complaint, at 18-19 (December 1998). The States have avoided those potential obstacles to efficient resolution of their differences through earnest, good-faith efforts to craft a proposed settlement that addresses the current core concerns of each State and provides mechanisms for resolving future disputes in a manner likely to reduce the risk of litigation.

The States have achieved consensus through the sort of "co-operative study," "conference," and "mutual concession" that the Court envisioned in *Texas* v. *New Mexico*, 462 U.S. 554, 575 (1983). It is manifest that the Special Master's management of this action contributed significantly to the achievement of consensus. The early resolution of key legal issues, and the establishment of firm and clear deadlines for completing discovery and briefing

substantive legal issues, encouraged the parties to focus on the issues central to the litigation and minimize issues far removed from those core concerns. As a consequence, the States have developed a sound basis for resolving their differences.

III. Conclusion

The United States, as *amicus curiae*, submits that the Special Master should prepare a report recommending approval of the proposed settlement.

Respectfully submitted.

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