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In The
Supreme Court of the United States

October Term, 1997

STATE OF KANSAS,

Plaintiff,

vs.

STATE OF NEBRASKA,

and

STATE OF COLORADO,

Defendants.

**MOTION FOR LEAVE TO FILE SUR-REPLY
TO KANSAS' REPLY TO NEBRASKA'S
BRIEF IN OPPOSITION AND SUR-REPLY**

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BRIEF IN OPPOSITION**

COMES NOW the State of Nebraska, by and through its Attorney General Don Stenberg and Counsel of Record, and moves this Court for leave to file the accompanying Sur-Reply to Kansas' Reply to Nebraska's Brief in Opposition for the reason that numerous statements made by Kansas in its reply brief, if left uncorrected, would serve to impede the Court's ability to make a considered judgment on Kansas' pending motion for leave to commence an original action.

Respectfully submitted by:

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**SUR-REPLY TO KANSAS' REPLY TO
NEBRASKA'S BRIEF IN OPPOSITION**

ARGUMENT

**A. KANSAS DISREGARDS THE COURT'S
IMPORTANT GATEKEEPING FUNCTION.**

Kansas' Reply to Nebraska's Brief in Opposition ("Kansas' Reply Brief") leaves the impression that review of Kansas' claims against Nebraska by this Court is a matter of right, not of judicial discretion. Kansas minimizes the importance of the Court's gatekeeping function and its "substantial discretion to make case-by-case judgments of the practical necessity of an original forum. . . ." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

Kansas also misconstrues the purpose of the present gatekeeping procedures when it states that "Nebraska does not deny its failure to control groundwater use, nor does it deny exceeding the Compact allocation in many years." Kansas' Reply Brief at 2. Nebraska is not required to admit or deny the conclusory claims in Kansas' Bill of Complaint. Rather, Nebraska poses very fundamental questions: assuming groundwater is indeed governed by the Republican River Compact ("Compact"), should Kansas be allowed to sue Nebraska when official Compact figures ratified by Kansas reveal that 1.) Kansas has nevertheless received its full allocation of Republican River water (and more) every year with the exception of 1992; and 2.) Kansas has failed to beneficially consume most of the water delivered by Nebraska each and every year? Far from being "ancillary" or "irrelevant," Kansas' Reply Brief at 1, these issues are central to the determination of

whether Kansas' claims are of sufficient moment to warrant original jurisdiction.

B. KANSAS' REPLY CONTAINS FACTUAL INACCURACIES AND NEW CLAIMS NOT INCLUDED IN KANSAS' BILL OF COMPLAINT.

1. Water Deliveries by Nebraska to Kansas.

Understandably, Kansas has endeavored to distort Nebraska's position and diminish the importance of the Compact Commission's official data. Kansas initially does so by claiming that "Nebraska essentially admits a violation of the Compact in 1992. . . ." Kansas' Reply Brief at 2. Nebraska made no such admission. Rather, Nebraska cited Compact data which show that over the 55-year history of the Compact Kansas failed to receive its full allocation only once, in the drought year of 1992. The same official Compact data also show that Nebraska did not consume water in amounts exceeding its state-allocation in 1992. *See* Appendix G to Nebraska's Brief in Opposition to Kansas' Motion for Leave to File Bill of Complaint ("Opposition Brief").

Given that data show Kansas experienced a shortfall of water in only one year, Kansas now claims that Nebraska must make "seasonal" irrigation deliveries at Guide Rock. Kansas' Reply Brief at 4, 6. Kansas' Bill of Complaint contains no such allegation and, therefore, this claim is not properly before this Court. Nowhere in the Compact is such an entitlement to be found. Nor is there any indication in the Compact Commission's annual

reports that the Kansas' Commissioner claimed a right to seasonal flows of water. The Compact simply requires that each state is to receive an apportioned share of the water supply on an annual basis, but there is no provision requiring deliveries at specified times of the year. Kansas fails to reference any language in the Compact to support its claim to seasonal irrigation flows.

2. Groundwater Use in Nebraska.

Kansas next asserts that Compact data will need to be adjusted "[once] the effects of the enormous and undocumented Ogallala pumping are quantified and added to the consumptive use figures admitted to by Nebraska. . . ." Kansas' Reply Brief at 2. There are several problems with this argument. First, Kansas has already ratified data showing consumptive uses in Nebraska for the period of 1959 through 1994. Second, Kansas has previously approved the Compact Commission's formula for quantifying groundwater usage. That formula, revised and approved in 1990, provides that "[d]iversions from groundwater shall be limited to those wells pumping from the alluvium along the stream channels. . . ." Republican River Compact Administration's Report at 7 (Revised June 1990). Thus, Kansas clearly exaggerates its claims of unregulated groundwater pumping by reference to "undocumented Ogallala [aquifer] pumping." The Ogallala formation extends through eight states, including Texas, Oklahoma, New Mexico, Colorado, Wyoming, South Dakota, as well as Kansas and Nebraska. If Kansas believes that groundwater pumping from the Ogallala

aquifer is subject to the Compact, it should certainly have so pled.¹

3. Consumptive Use Data by Kansas.

Kansas additionally attempts to minimize the Compact Commission's official data by claiming Nebraska did not fairly identify all the consumptive water uses in Kansas to include out-of-basin municipal and industrial uses. Kansas' Reply Brief at 5. If this is true, then the misrepresentation was made by Kansas, not Nebraska. The consumptive use figures relied upon by Nebraska and reported to this Court are the identical figures Kansas presented to the Compact Commission at each annual meeting. If those data are inaccurate, as Kansas now alleges, it is because Kansas chose to present incomplete data to the other Commissioners.

More importantly, Kansas' Bill of Complaint does not quantify Kansas' consumptive uses of Republican River water nor does it state which years, if any, Kansas claims to have fully and beneficially consumed all of the water delivered by Nebraska.

In an effort to deflect attention from its refusal to share data with the other Compact states, Kansas claims

¹ Kansas similarly exaggerates its groundwater pumping claims in Appendix C to Kansas' Brief in Support of Motion for Leave to File Bill of Complaint by charting all wells located in the Republican River Basin in Nebraska. Only approximately 2,500 of the over 10,000 wells depicted in Kansas' Appendix C are alluvial wells subject to the Compact Commission's consumptive use formula.

on page 7 of its Reply Brief that "no state has supplied consumptive use data to the Compact Administration for water years since 1995." Both Nebraska and Colorado have prepared and been willing to share consumptive use numbers with Kansas. Only Kansas has refused to prepare and share those figures with the Compact Commissioners in recent years, resulting in the Compact Commission's inability to publish complete data.

4. Existence of Official Compact Data.

Finally, Kansas disingenuously claims that the annual reports of the Republican River Compact Commission do not contain data showing "the actual amount of water delivered to Kansas 1959-1994, and annual allocations 1959-1977" which are depicted in Appendix B to Nebraska's Opposition Brief. Kansas' Reply Brief at 5. Kansas does not (and cannot) dispute the **underlying data** used to make these calculations have been adopted and ratified by the Compact Commission on an annual basis. While it is true that stream flow data maintained by the United States Geological Survey must be used to make the actual calculations, this was explained in detail by Nebraska's Compact Commissioner in Appendix A to Nebraska's Opposition Brief. Reliance upon data maintained by the federal government is contemplated by Article IX of the Compact which provides:

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.

C. KANSAS FAILS TO ESTABLISH THAT ITS CLAIMS ARE RIPE FOR REVIEW, AND CANNOT BE RESOLVED IN AN ALTERNATIVE FORUM.

Nebraska's concern regarding the conclusory nature of Kansas' Bill of Complaint is further underscored by claims made or elaborated upon in Kansas' Reply Brief – claims which have never previously been raised by Kansas in the annual Compact meetings. Kansas should be required to plead, for example, that its claims regarding basin-wide and Ogallala groundwater pumping have been presented to the Compact Commission. Kansas cannot so plead at this time, however, because these claims have not been presented to the Compact Commission. Likewise, Kansas' claims regarding an entitlement to seasonal irrigation flows should first be shared with the other Compact Commissioners. As for those out-of-basin municipal and industrial uses alleged by Kansas, never in the history of the Compact has Kansas asserted those uses as a right. If Kansas believes that uses outside the Republican River Basin are protected under the Compact, its first forum should be the annual meetings of the Compact Commission. It should also endeavor to share with the other compact states consumptive use figures relating to these municipal and industrial uses. Until Kansas presents these claims to the other Compact Commissioners, Kansas' complaints are not ripe for review.

CONCLUSION

Ultimately, despite Kansas' efforts to confuse, one issue remains: are the claims in Kansas' Bill of Complaint factually specific enough and of such a serious nature that the Court should accept original jurisdiction at this time? Given that Nebraska has delivered more water to Kansas than Kansas was allocated, and in view of the fact that Kansas' own consumptive use figures provided to the Compact Commission reveal that most water delivered by Nebraska is not beneficially consumed by Kansas, the answer should be no. Moreover, if the Court has any question regarding the official Compact data or the accuracy of representations made to this Court, Nebraska respectfully requests that input be obtained from the United States Solicitor General's Office.

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