No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION TO DISMISS

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August 2, 1999

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MOTION TO DISMISS KANSAS' BILL OF COMPLAINT

Comes now Defendant-Counterclaimant State of Nebraska ("Nebraska"), pursuant to the Order of the Court dated June 21, 1999, and hereby moves the Court to dismiss the Bill of Complaint filed by the State of Kansas for the reason that the State of Kansas has failed to state a claim for which relief may be granted. Nebraska respectfully requests that this matter be set for oral argument.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This is an action brought by the State of Kansas ("Kansas") against the State of Nebraska ("Nebraska") and the State of Colorado ("Colorado") for alleged breach of the Republican River Compact ("Compact"). The three states ("Compact states") are parties to the Compact. The alleged breach concerns the amount of Republican River water flowing into Kansas generally and groundwater use in the Republican River basin ("Basin") in Nebraska specifically. In its Complaint, Kansas lays claim to vast quantities of groundwater located in Nebraska. Much of this groundwater is contained in a huge, multistate groundwater source, the Ogallala aquifer.[1] While most of the water in the Ogallala aquifer lies in Nebraska, the aquifer stretches into seven other states. No compact or court decree exists among those states apportioning the waters of the Ogallala aquifer.

This Court previously noted the Compact concerns surface water rather than groundwater. *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982). In that same case, both Kansas and Colorado represented to this Court that no compact or decree apportioned the groundwater found in the Ogallala aquifer. Kansas and Colorado argued that regulation of groundwater was a matter

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[1] Also referred to as the High Plains Aquifer, "the Ogallala aquifer lies beneath, and provides needed water supplies to, the 8 States of the High Plains Region: Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming." Pub. L. 99-662, Title XI, § 1121, Nov. 17, 1986, 100 Stat. 4239.

solely for the State within which the groundwater is located.

Contrary to the position it took in *Sporhase,* Kansas, under the guise of Compact enforcement, now lays claim to groundwater located in the Ogallala aquifer in Nebraska. A review of the plain language of the Compact, all applicable court decisions and a subsequent compact between Kansas and Nebraska on the Blue River, demonstrates the Compact was intended to apportion only the available surface water supplies of the Basin. It does not apportion groundwater. Groundwater is not discussed or identified in the Compact.

The facts are not in dispute. The Compact language is unambiguous and the issue is one of law appropriate for this Court. Nebraska respectfully requests that the Court grant its Motion to Dismiss.

STATEMENT OF FACTS

The focus of Kansas' complaint is the use of groundwater in Nebraska. Kansas alleges that "The State of Nebraska has breached its . . . obligation to abide by the Compact . . . by allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries . . . ". (Complaint 7). Kansas further alleges "The State of Nebraska is . . . allowing new wells, increased pumping, and increased use of groundwater in the Republican River Basin in Nebraska." (Complaint 11). The primary focus of these allegations is the groundwater of the Ogallala aquifer. (*See* Kansas'

Brief in Support of Motion for Leave to File Bill of Complaint at 7).

The Compact does not contain the words "groundwater," "underground water" or "subterranean water." At the time the Compact was entered, none of the Compact states had laws that authorized the regulation of groundwater for the purpose of surface water management. Each of the states had a system of statutory and common law rules regulating the use of surface water separate from groundwater. The Compact provides, "use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made." (Compact, Art. IV).

Historically, none of the states have viewed the Compact as authorizing the regulation, allocation or distribution of groundwater. The Nebraska Supreme Court has never held that the Compact authorizes the regulation, allocation or distribution of groundwater. *See State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981). Likewise, the Supreme Courts in Kansas and Colorado have not recognized the Compact as an agreement authorizing the regulation of groundwater. *See State v. Kansas State Board of Agriculture*, 158 Kan. 603, 149 P.2d 604 (1944) and *Pioneer Irrigation Districts v. State of Colorado*, 658 P.2d 842 (Colo. 1983).

On the one occasion that the Compact has been presented to this Court, the Compact was referred to by this Court as an agreement "regarding rights to surface water." *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982). *Sporhase* concerned wells located in the

Basin that pumped groundwater from the Ogallala aquifer in Nebraska for use in Colorado. In their capacity as amici curiae, Kansas and Colorado represented to this Court that the groundwater Kansas now seeks is not subject to any compact or decree. Both Kansas and Colorado argued to this Court that each state is permitted to make beneficial use of all groundwater (and specifically groundwater within the Basin) within its borders without restriction by compact or decree.

The Compact is not the only agreement concerning water between Nebraska and Kansas. In 1971, Nebraska and Kansas entered the Kansas-Nebraska Big Blue River Compact ("Blue River Compact"). *See* 86 Stat. 193. The Blue River Compact expressly included geographically limited groundwater and provided for its regulation.

ARGUMENT

I.

STANDARD OF REVIEW

This 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 . . . ". *See* Order dated June 21, 1999. Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a claim to be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding." *Neitzke v. Williams*, 490

U.S. 319, 326-27 (1989). Operationally, a motion to dismiss is analyzed by construing the complaint in favor of the plaintiff and deeming all material allegations of the complaint as having been admitted. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). In considering a motion to dismiss, this Court is "not precluded in [their] review of the complaint from taking notice of items in the public record." *Papasan v. Allain*, 478 U.S. 265, 268, n. 1 (1986) ("The historical facts recited here comprise in large part the factual allegations on the complaint and are not disputed by the parties; the parties disagree only on the legal significance of these facts.").

The Court should grant Nebraska's Motion to Dismiss. Whether groundwater was apportioned by the Compact is a question of law. As will be further discussed, the Compact apportions only surface water flows, not groundwater. Kansas' claim to Nebraska's groundwater is, therefore, a claim for which Kansas cannot be granted relief.

II.

THE REPUBLICAN RIVER COMPACT DOES NOT RESTRICT A STATE'S CONSUMPTION OF GROUNDWATER

As a matter of law, the Compact does not restrict consumption of groundwater for the following reasons: (1) the Compact, by its plain and unambiguous terms, does not apportion or allocate consumption of groundwater; (2) this 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. Each of these reasons, standing alone, is sufficient for the Court to grant Nebraska's Motion to Dismiss.

A. The Compact Does Not Apportion or Allocate Consumption of Groundwater

1. The Unambiguous Compact Is Both a Federal Law and a Contract That Must Be Construed in Accordance With Its Terms

Under the Compact Clause, Art. I, of the Constitution of the United States, a compact between states is a contract among its parties. *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983). States may not act, however, without the consent of Congress. *See* U.S. CONST. art. I. § 10, cl. 3. "[C]ongressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *accord Texas v. New Mexico*, 462 U.S. 554, 564 (1983). "Just as if a court were addressing a federal statute, then, the 'first and last order of business' of a court addressing an approved interstate compact 'is interpreting the compact.' " *New Jersey v. New York*, 523 U.S. 767, 811 (1998). While elevated to the level of federal law, a compact "remains a contract which is subject to normal rules of enforcement and construction." *Oklahoma v. New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., dissenting).

When the language of a compact is plain and unambiguous, no further judicial inquiry may be undertaken. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253

(1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . Where the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete' ").

As a federal law, the Court may not grant relief to a party that is in any way inconsistent with the terms of the compact. In *Texas v. New Mexico*, 462 U.S. 554, 565 (1983), this Court stated, "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." In *New Jersey v. New York*, this Court succinctly added "no matter what the equities of the circumstance might otherwise invite." 523 U.S. 767 at 811 (1998). Where a compact that apportions waters has been approved by Congress, the Court cannot apply equitable apportionment principles to distribute the waters differently. *Arizona v. California*, 373 U.S. 546, 565-66 (1963) ("Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress."). *See also New Jersey v. New York*, 523 U.S. 767, 782, n. 4 (1998) ("[W]e have no occasion to interpret the terms of the Compact more broadly than the parties who have signed it."). Likewise, the Court should not add terms to the Compact within which they do not appear. In *Oklahoma v. New Mexico*, 501 U.S. 221, 245 (1991), Chief Justice Rehnquist noted in his dissent:

> The emphasized terms do not appear anywhere in the Compact, and reflect not the intent of the

> parties, but instead the intent that the Court now imputes to them. . . . Had the Compact's drafters intended to limit New Mexico's free and unrestricted use of the Canadian River waters originating above Conchas Dam in the manner announced today, they would certainly have done so more directly.

Id. at 245.

The Compact is not ambiguous. Kansas is attempting to expand the scope of the Compact to allocate all groundwater found within the Basin. Kansas' position is fundamentally at odds with the principles of compact interpretation. The language of the Compact does not mention, refer to or even allude to groundwater. Had the parties intended to allocate the vast reserves of the Ogallala aquifer or other groundwater within the Basin, the Compact would contain some mention of it. It does not. The language in the Compact, chosen by the parties and adopted by Congress, speaks only in terms consistent with the allocation of surface water.

2. The Absence of Groundwater in the Compact Does Not Create an Ambiguity

The silence of a compact or statute does not give rise to an ambiguity. *See New Jersey v. New York*, 523 U.S. 767 at 783 n. 6. At the time the Compact was entered, none of the Compact States had laws providing for or authorizing the regulation of groundwater. The Compact could not, and was not intended to, regulate groundwater in the Basin. The Compact also does not contain language requiring the states to adopt laws for groundwater regulation. To the contrary, the Compact recognized that use

of Basin water ". . . shall be subject to the laws of the State, for use in which the allocations are made." (Compact, Art. IV).

The absence of the word "groundwater" from the Compact is consistent with the absence of groundwater regulation.[2] The omission of groundwater does not create an ambiguity as to whether groundwater was apportioned. That Kansas was aware of the distinction between surface water and groundwater is apparent from its pre-Compact litigation with Colorado over the waters of the Arkansas River. Prior to executing the Compact, Kansas sought an order from this Court to apportion not only the surface flow of the Arkansas River but also a subterranean stream beneath the river "distinct from underground or percolating waters." *Kansas v. Colorado,* 206 U.S. 46, 61 (1907). The distinction between surface water and groundwater also was recognized in the subsequent litigation between Kansas and Colorado, which occurred contemporaneously with the adoption of the Republican River Compact. *See Kansas v. Colorado,* 320 U.S. 383, 399 (1943).

Further evidence of the intentional omission of groundwater from the Compact is demonstrated by the water supply figures contained in the Compact. The acre-feet description of water to be allocated annually totals

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[2] *See Leo Sheep Co. v. United States,* 440 U.S. 668, 669 (1979) (" '[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it. *United States v. Union P. R. Co.,* 91 U.S. 72, 79 (1875)' ").

478,900 acre-feet. *See* Compact, Art. III. This amount is minuscule in comparison to the millions of acre-feet of water in the Ogallala aquifer that Kansas now seeks to apportion to itself[3].

Kansas may argue this Court previously found groundwater to be apportioned by compacts that did not contain the word "groundwater." Kansas' anticipated argument is without merit. The defendants in those Original Actions failed to plead or argue that groundwater was **not** subject to their respective compacts. As a result, "groundwater" was not a contested issue. *See Kansas v. Colorado*, No. 105 Orig.; *Texas v. New Mexico*, No. 65, Orig. Likewise, the language and intent of those compacts differ significantly. Kansas has recognized this distinction. *See* Kansas' Brief in Support of Motion for Leave to File Bill of Complaint at 5 ("This lack of development on the Republican River is quite different from the situation in the Arkansas River Valley when the Arkansas River Compact was adopted."). The Compact's failure to refer to groundwater does not create an ambiguity. Nebraska's Motion to Dismiss should be granted.

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[3] Significantly, the Ogallala aquifer does not extend to the lower Basin in Kansas. See Saturated Thickness of High Plains Aquifer-1990, United States Geological Survey, attached to this brief as Appendix A.

B. The Court and the Parties Previously Understood the Compact as an Agreement Regarding Rights to Surface Water as Distinguished From Groundwater

1. The *Sporhase* Decision

This Court already has touched upon the question of whether groundwater is part of the Compact. This Court found the Compact addressed only surface water. Specifically, in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), this Court concluded the Compact was limited to surface water in the course of finding that groundwater, withdrawn from the Republican River Basin, was an article of commerce that could not be unreasonably burdened by state regulation under the Constitution of the United States: "The interstate compacts to which the appellee refers are agreements among States *regarding rights to surface water* . . . Appellee emphasizes . . . a compact . . . involving rights to the Republican River." *Id.* at 960. (emphasis added).

Furthermore, Chief Justice Rehnquist and Justice O'Connor noted the Commerce Clause vested Congress with the authority to regulate groundwater use if it found "groundwater overdraft has a substantial economic effect on interstate commerce." *Id.* at 962 (Rehnquist, C.J., and O'Connor, J., dissenting). The dissent further noted Congress had not taken any such action: "It is therefore wholly unnecessary to decide whether Congress could regulate ground-water overdraft in order to decide this case; since Congress has not undertaken such a regulation." *Id.* at 962.

Thus, the majority and dissent in *Sporhase* recognized the Compact, ratified by Congress, did not act to restrict, regulate or allocate consumption of groundwater in the

Republican River Basin. If the Compact is a Congressional act governing the use of groundwater, this Court would have so found and the lengthy discussion of Congressional waiver would have been unnecessary.

2. The Compact States Told This Court in *Sporhase* No Compact or Decree Governed Groundwater in the Basin

This Court did not reach its conclusion in *Sporhase* without input from Kansas and the other Compact States. Nebraska stated the Compact did not deal with the groundwater wells that were the subject of the case, a position it has maintained since the start of negotiations of the Compact. Kansas agreed and took the issue one step further. Kansas joined Colorado and other states in a brief as amici curiae to contend that Ogallala aquifer groundwater was not regulated by **any** compact or decree.

In addition to admitting the very groundwater which it now seeks to include in the Compact was not in any compact, Kansas correctly noted a *de facto* apportionment of groundwater in the Ogallala aquifer had already occurred: "At present, there is a *de facto* equitable apportionment of ground water in the Ogallala Aquifer. Each state overlying the aquifer allocates for beneficial use only that quantity of ground water which can be diverted within the state." *See* Brief of Amici Curiae, States of Colorado, Kansas, et al. at 10, *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941 (1982) (Doc. No. 81613). Kansas

further noted an infringement on state authority to regulate groundwater would result in an equitable apportionment action or a compact concerning groundwater in the future: "Equitable apportionment, by decree or compact, would be the likely result." *Id.*

Clearly, Kansas did not believe in *Sporhase* that groundwater is regulated by the Compact.

3. The Supreme Courts of Kansas and Colorado Have Interpreted the Compact as Regulating Only Surface Water Consumption

The Kansas Supreme Court has never recognized the Compact as a state or federal law creating the authority to regulate the use of groundwater. The Compact became state law in 1943. *See* Kan. Stat. Ann. § 82a-518 (1997). One year later, in 1944, the Kansas Supreme Court decided *State v. Kansas State Board of Agriculture,* 158 Kan. 603, 149 P.2d 604 (1944), an action against the Kansas State Board of Agriculture, the Division of Water Resources and its chief engineer, George S. Knapp, to determine whether the State of Kansas possessed any authority to regulate or allocate the use of groundwater. The defendant, George S. Knapp, served as the Kansas Compact Commissioner and signed the Compact on behalf of Kansas. After a thorough analysis of Kansas water law, the Kansas Supreme Court held:

> No statute cited to us, and none which we have found by our own research, authorizes the defendants, or any of them, to regulate, allocate or distribute, or otherwise interfere with the use and consumption of underground waters

> or . . . for the allocation, distribution or regulation of the use of such waters.

Id. at 611.

Simply stated, the Kansas Supreme Court did not interpret the Compact (a Kansas statute) as authorizing or requiring defendants Kansas or Knapp to undertake the regulation, allocation or distribution of use and consumption of groundwater.[4] It is difficult to believe that the Kansas Supreme Court simply overlooked the Compact that was ratified a year earlier, especially given the dual role of George Knapp as Compact Commissioner and defendant.

In a case decided five years later, the Kansas Supreme Court again affirmed the Compact did not authorize or require Kansas to undertake the regulation, allocation or distribution of use or consumption of groundwater. *State v. Knapp*, 167 Kan. 546, 207 P.2d 440, 444-45 (1949). The primary issue in *Knapp* concerned the constitutionality of a surface water irrigation district formed to implement part of Kansas' allocation of water under the Compact. The Kansas Supreme Court in *Knapp* set forth the history of Kansas' water law, including the Compact, noting the Compact was entered "for the beneficial consumptive use of the waters of the Republican River." *Id.* at 444. The Kansas Supreme Court noted the Compact was binding upon the judicial branch and, in

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[4] The Compact required defendant Knapp, as the "official . . . charged with the duty of administering the public water supplies" to administer the Compact, including allocations contained in the Compact. *See* Republican River Compact, Art. IX, 57 Stat. 86.

the next sentence, reaffirmed its holding in *Kansas State Board of Agriculture*, 158 Kan. 603, 149 P.2d 604, that no statute (*i.e.* the Compact) or caselaw authorized any Kansas official to regulate, allocate or distribute groundwater. *Id.* at 444-45.

Likewise, the Colorado Supreme Court concluded the Compact regulates surface water only and does not affect the actions of Colorado's Ground Water Commission in the Basin. *Pioneer Irrigation Districts v. State of Colorado*, 658 P.2d 842 (Colo. 1983). In *Pioneer*, the Colorado Supreme Court affirmed the jurisdiction of the Colorado Ground Water Commission and distinguished between "surface water rights" in the Basin and "ground water" found in the aquifer:

> The ground water found in the Ogallala-Aluvium aquifer . . . is ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights. . . . The vested surface water rights within the designated ground water basin are recognized and specifically noted as being without the jurisdiction of the Ground Water Commission and are wholly governed by the provisions of the Republican River Compact. . . .

Id. at 844, n. 1.

Prior to the filing of the Bill of Complaint by Kansas in the present case, each of the Compact States held or affirmed the view that groundwater was distinct and separate from, and not covered by, the Compact.

C. The Parties Did Not Intend To Apportion Groundwater.

Consistent with the express terms of the Compact, Nebraska has steadfastly maintained that groundwater is not part of the Compact apportionment. The Compact expressly honored the authority of state law under Article IV: "The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made." At the time the Compact became law, none of the Compact States had laws permitting regulation of groundwater for the protection of surface water. Legislative regulation of groundwater was not considered a possibility in Nebraska until late in the 1950s. *See State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981) ("Legislative recognition of the state's power and the corresponding need to manage the state's ground water resource began in 1957 . . . "). To date, no Nebraska court has held the Compact is a law restricting or otherwise impacting the use of groundwater. Had the three States intended to adopt what would then have been extraordinary groundwater laws, some discussion or mention of groundwater would have been made in the Compact.[5]

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[5] *See* Tarlock and Frownfelter, *State Groundwater Sovereignty After Sporhase: The Case of the Hueco Bolson*, 43 Okla. L. Rev. 27, 27 (Spring 1990) ("When, if ever, must one state share an interstate aquifer with users in another state? Prior to 1982, all states thought the answer to that question was 'never.' Groundwater was presumed a subject of exclusive state control because it was the property of either the state or of the owner of the overlying land. Furthermore, the United States Supreme Court had never directly equitably apportioned an aquifer").

The United States is a party to the Compact and was involved in negotiating the final language Congress approved. In light of the multi-basin and multi-state extent of the Ogallala aquifer, Congress would not have granted its approval to a compact allocating groundwater of the Ogallala aquifer without considering the rights of the remaining five states. *See* 100 Stat. 4239 ("[T]he Ogallala aquifer lies beneath, and provides needed water supplies to, the 8 States of the High Plains Region: Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas, and Wyoming;").[6] To the contrary, Congress did not address the Ogallala aquifer until it amended the Water Resources Act of 1984, 98 Stat. 97 ("WRA"), to create the High Plains Study Council as part of Ogallala Aquifer Research and Development. *See* 100 Stat. 4239. No compact or court decree among the eight states allocates the groundwater found in the Ogallala aquifer.

Further indication that groundwater was not intended to be allocated by the Compact is shown by the

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[6] In 1982, the Internal Revenue Service (I.R.S.) indicated that it does not believe the Compact apportioned groundwater. In Rev. Rul. 82-214, 1982-2 CB115, the I.R.S. announced that it would allow a cost depletion to irrigators who withdraw groundwater from the Ogallala Aquifer. The Compact Administration has taken no action in opposition to the I.R.S. ruling even though the ruling provides a strong incentive to irrigators to increase groundwater use. See Duncan, *High Noon on the Ogallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone*, 27 Washburn L.J. 17, at 27 (1987). ("By permitting deductions worth more than $50,000,000.00 per year to Kansas farmers alone, government policy not only encourages irrigation on the Ogallala, it also subsidizes it.").

subsequent actions of Kansas and Nebraska in their dealings creating the Blue River Compact in 1971. *See* 86 Stat. 193. In the Blue River Compact, Nebraska and Kansas again agreed to apportion the flow of a river. In contrast to the Republican River Compact, however, the Blue River Compact went further and expressly allowed for regulation of geographically limited "groundwater." *See* 86 Stat. 193, Kansas-Nebraska Big Blue River Compact, art. I, 1.8.

The specific inclusion of groundwater in the Blue River Compact is telling. The position advocated by Kansas in its Bill of Complaint would result in greater restrictions on groundwater users under the Republican River Compact, where groundwater is not addressed, than under the Blue River Compact, where it is specifically addressed. Had the two states believed a prior compact (Republican River) between them implicitly apportioned related groundwater, there would have been no need to explicitly address groundwater in the Blue River Compact.

Nebraska anticipates that Kansas may also point to formulas adopted by the Compact Administration as evidence that groundwater is part of the Compact. Reliance on those formulas is misplaced. The unambiguous language of the formulas specifically excludes Ogallala groundwater from regulation. From 1961 to 1996, the Compact Administration calculated the annual surface water supply of the Basin and the annual consumptive use of each state using formulas that it adopted. *See* Compact, Art. IX ("[S]uch officials may, by unanimous action, adopt rules and regulations consistent with the provisions of the compact."). The formulas defined the

surface water to include water flowing in the stream as well as water found in the adjacent alluvium.[7]

The formulas specifically exclude groundwater from the Ogallala aquifer or "upland wells." *See* Nebraska's Answer and Counterclaim, Appendices A and B. Kansas admits these formulas were adopted by the Compact Administration. *See* Kansas' Reply to Nebraska's Counterclaims, Paragraph 9. Certainly if Kansas previously thought that Ogallala aquifer groundwater was apportioned by the formulas used by the Compact Commission more than thirty years ago, she would not have told this Court in *Sporhase,* that no compact or decree apportioned Ogallala aquifer groundwater.

CONCLUSION

Kansas is attempting to affect an equitable apportionment of groundwater located in Nebraska under the guise of Compact enforcement. As noted in *Arizona v. California,* 373 U.S. 546, this is relief that Kansas cannot be granted. In *Sporhase,* this Court, and Kansas, recognized

[7] The alluvium consists of silts, sands, gravel and other water bearing material deposited by flowing water.

the Compact as an agreement apportioning surface water only. Nebraska's Motion to Dismiss should be granted.

DATED this 2nd day of August 1999.

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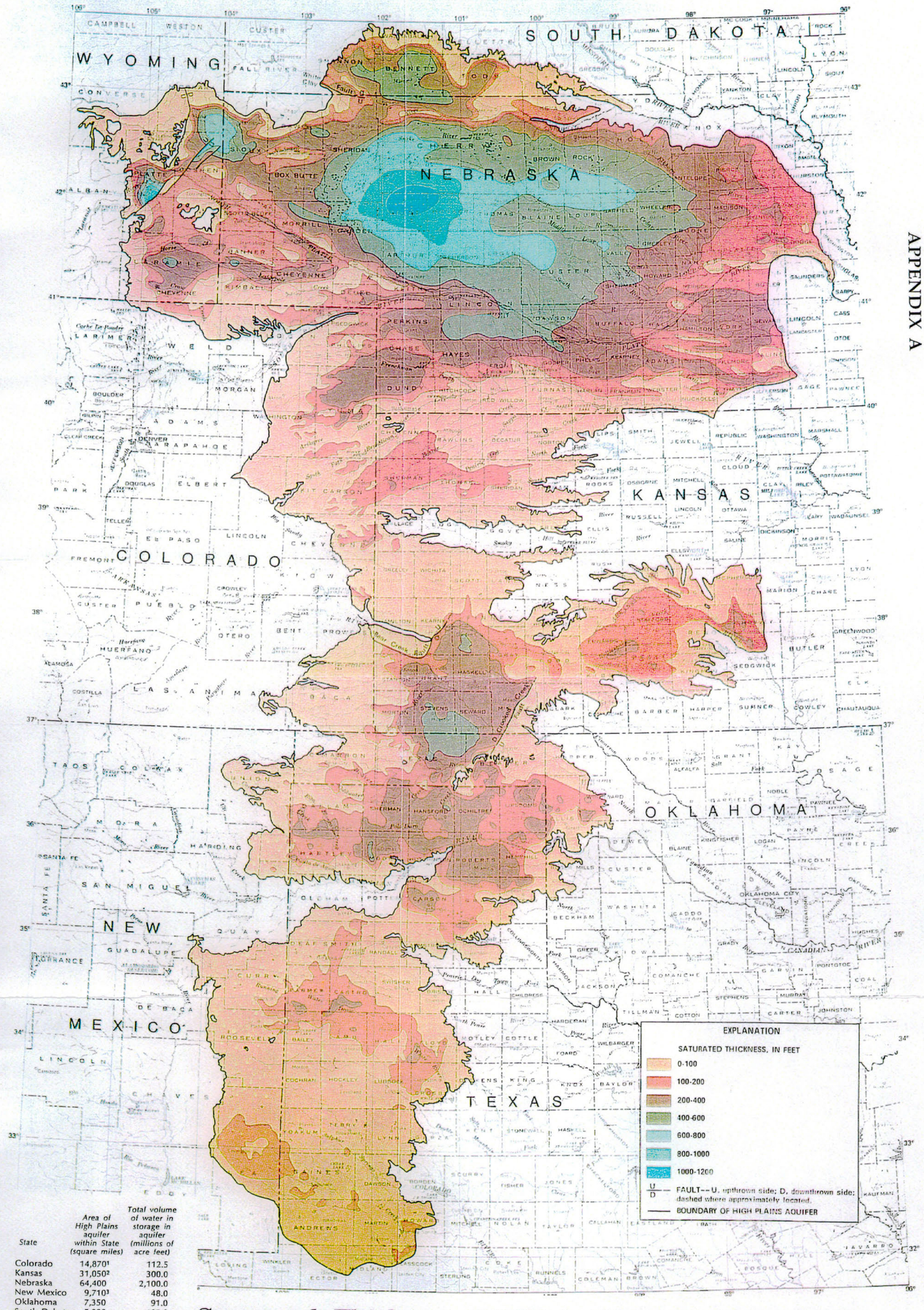
August 2, 1999

HIGH PLAINS UNDERGROUND WATER CONSERVATION DISTRICT NO. 1

APPENDIX A



State	Area of High Plains aquifer within State (square miles)	Total volume of water in storage in aquifer (millions of acre feet)
Colorado	14,870[1]	112.5
Kansas	31,050[2]	300.0
Nebraska	64,400	2,100.0
New Mexico	9,710[3]	48.0
Oklahoma	7,350	91.0
South Dakota	5,290	105.0
Texas	36,080	375.0
Wyoming	8,190	138.0
TOTAL	176,940[4]	3,270.0

[1] 11,200*
[2] 23,200*
[3] 32,600*
[4] 47,000*
*Square miles with little or no saturated thickness included.

Saturated Thickness Of High Plains Aquifer–1980

by John B. Weeks and Edwin D. Gutentag

United States Geological Survey, 1200 South Eads Street, Arlington, VA 22202

Hydrologic Investigations Atlas HA-648