No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

FIRST REPORT OF THE SPECIAL MASTER (SUBJECT: NEBRASKA'S MOTION TO DISMISS)

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January 28, 2000

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FIRST REPORT OF THE SPECIAL MASTER (SUBJECT: NEBRASKA'S MOTION TO DISMISS)

At the very outset, this original jurisdiction action presents a fundamental question of construction of the 1943 Republican River Compact ("Compact") entered into, with Congressional approval, by the States of Colorado, Kansas and Nebraska. The Compact allocates the "virgin water supply"[1] in the Republican River Basin ("Basin")[2] for use within the compacting States. Kansas brought this action claiming that Nebraska is exceeding its Compact allocation, and thus is violating the Compact, by permitting excessive pumping of groundwater. By leave of the Court, Nebraska has filed a Motion to Dismiss, asserting that the Kansas Bill of Complaint fails to state a claim upon which relief may be granted. As limited by the Court's order, the sole question on Nebraska's Motion to Dismiss is: Does the Republican River Compact restrict a compacting State's consumption of groundwater?

My conclusions are as follows: The Compact fully allocates the entire natural stream flow of the Basin undepleted by the activities of man. By the factual pleading of

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[1] Article II of the Compact defines the "virgin water supply" as "the water supply within the [Republican River] Basin undepleted by the activities of man." Compact, Art. II. The text of the Compact is attached hereto as Appendix A.

[2] 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 attached as part of Appendix A, at A15.

the Kansas Complaint, which the Court can assume to be true for the purpose of ruling on the Motion to Dismiss, groundwater pumping in Nebraska, obviously an activity of man, is depleting that stream flow because the pumped groundwater and the stream flow are hydraulically connected.[3] To whatever extent groundwater pumping

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[3] Beyond being an assumed fact for the purpose of deciding this Motion, the hydraulic connection between stream flow and groundwater is a well established scientific fact. According to the United States Geological Survey:

> Streams interact with ground water in all types of landscapes. The interaction takes place in three basic ways: streams gain water from inflow of ground water through the streambed, they lose water to ground water by outflow through the streambed, or they do both, gaining in some reaches and losing in other reaches. For ground water to discharge into a stream channel, the altitude of the water table in the vicinity of the stream must be higher than the altitude of the stream-water surface. Conversely, for surface water to seep to ground water, the altitude of the water table in the vicinity of the stream must be lower than the altitude of the stream-water surface.

Thomas C. Winter, et al., *Ground Water and Surface Water: A Single Resource* (United States Geological Survey Circular 1139) 9 (1998) (citations to illustrations omitted) (previously lodged with the Court on Sept. 10, 1999 by amicus United States).

Groundwater pumping can cause stream flow depletion in two ways: (1) reduction of groundwater discharge to streams, and (2) seepage of water from the stream to the groundwater aquifer. *See* Bureau of Reclamation, United States Department of the Interior, *Republican River Basin Water Management Study: Colorado, Nebraska, Kansas* 41, 43 (1985). For ease of discussion, this Report refers to stream flow depletion caused by groundwater pumping as a reduction of groundwater discharge to streams. A determination of whether one or both types of

depletes the stream flow in the Basin, such depletion constitutes consumption of a part of the virgin water supply and must be counted against the allocated share of the pumping State. The use of a State's allocation through groundwater pumping is permissible, but such pumping is subject to the restrictions imposed by the Compact allocations.

In sum, I conclude that the Compact restricts groundwater consumption to whatever extent it depletes stream flow in the Republican River Basin. I therefore recommend that Nebraska's Motion to Dismiss be denied.

I. PROCEDURAL HISTORY OF THIS ACTION

This action commenced when, after full briefing by the parties and by the United States as amicus curiae, the Court on January 19, 1999, granted Kansas' Motion for Leave to File a Bill of Complaint. *Kansas v. Nebraska and Colorado,* 119 S. Ct. 865, 142 L. Ed. 2d 767 (1999). The gravamen of the Kansas Bill of 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.

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depletion occur in the streams of the Basin, and the quantification of that depletion, await factual development in an evidentiary hearing.

Kansas Bill of Complaint ¶ 7.[4] Kansas alleges 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." *Id.*[5]

In its answer, Nebraska denied the Kansas allegations and asserted numerous defenses and counterclaims, among them that the Compact does not apportion groundwater and that Kansas has failed to state a claim upon which relief can be granted. Nebraska Answer ¶¶ 19, 20. To resolve that fundamental and preliminary question of law, the Court granted Nebraska leave on June 21, 1999, to file the present Motion to Dismiss "in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure." *Kansas v. Nebraska and Colorado,* 119 S. Ct. 2364, 144 L. Ed. 2d 769 (1999). In the brief filed in support of its Motion to Dismiss, Nebraska argues that

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[4] The Kansas Complaint seeks no relief against Colorado, but names Colorado as a defendant because it is the third compacting State. *See* Kansas Brief in Support of Motion for Leave to File Bill of Complaint at 2.

[5] In response to the Kansas Complaint, Colorado filed its answer on March 19, 1999, and Nebraska filed its answer with counterclaims on April 19, 1999. Thereafter, Colorado filed an answer to Nebraska's counterclaims on May 14, 1999, and on May 21, 1999, Kansas filed a motion to strike Nebraska's counterclaims. The parties briefed the Kansas motion to strike and the Court denied that motion on June 21, 1999. *Kansas v. Nebraska and Colorado,* 119 S. Ct. 2364, 144 L. Ed. 2d 769 (1999). Thereafter, on July 21, 1999, Kansas filed its reply to Nebraska's counterclaims.

> (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.

Nebraska Brief in Support of Motion to Dismiss at 5-6 ("Nebraska Brief").

In its order of November 15, 1999, appointing me Special Master, the Court also referred Nebraska's Motion to Dismiss to me. *Kansas v. Nebraska and Colorado*, 120 S. Ct. 519 (1999). Previously, the Court had received briefs from both Kansas and amicus United States opposing the Motion to Dismiss, as well as the brief of Colorado, which also opposes the Motion but requests that the Court rule that the "Compact allocates alluvial ground water to each of the three compacting [S]tates and that the Compact does not include Ogallala Aquifer ground water."[6] Colorado Response to Motion to Dismiss at 23 ("Colorado

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[6] There are two types of groundwater in the Basin: alluvial and non-alluvial. Alluvial groundwater wells pump water from the alluvium, which is generally defined 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, Nebraska defines alluvium as "silts, sands, gravel and other water bearing material deposited by flowing water." Nebraska Brief at 19 n.7. 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 Motion, I assume that Ogallala Aquifer wells, upland wells and table-land wells are one and the same, and the parties appear to treat them as equivalents. It is irrelevant to this Motion, and I have no

Brief"). In considering the Motion, I have thoroughly reviewed all the briefs and other filings in the case and have received the oral argument of counsel at an extensive hearing held in Kansas City, Missouri on January 4, 2000. The transcript of the oral argument on the Motion to Dismiss ("Oral Arg. Tr.") is being deposited with the Court. Before presenting my analysis of the Motion, I move to an explanation of the broader context in which the Motion arises.

II. BACKGROUND

A. The Republican River Basin[7]

The Republican River is formed at the junction of two rivers that rise in the plains of northeastern Colorado: the Arikaree River and the North Fork Republican River. The North Fork Republican River flows northeasterly from Colorado into Nebraska, and the Arikaree flows northeasterly from Colorado, across the extreme northwest corner of Kansas, and then into Nebraska. The junction of the Arikaree and North Fork Republican Rivers occurs in extreme southwestern Nebraska near the town of Haigler.

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evidence from which to determine, whether any table-land wells are pumping groundwater from outside the Ogallala Aquifer. *Cf.* Bureau of Reclamation, U.S. Dep't of the Interior, *Resource Management Assessment: Republican River Basin* 31-32 (1996) (surveying various geologic formations in the Basin, including groundwater-carrying formations other than the Ogallala Aquifer).

[7] A map of the Republican River Basin is attached hereto as Appendix B.

Some twenty miles east of that point, 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 to the east, roughly parallel to the Kansas-Nebraska state line, for about two-thirds of the length of that border. The Republican River finally crosses the state line into Kansas just west of Hardy, Nebraska. Shortly thereafter, 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.

The Republican River Basin drains a 24,900 square mile watershed covering parts of northeastern Colorado, southern Nebraska, and northern Kansas. *See* Bureau of Reclamation, U.S. Dep't of the Interior, *Resource Management Assessment: Republican River Basin* 3 (1996) ("RMA").[8] The watershed divides in area among the States as follows: Colorado – 7,700 square miles (31%); Kansas – 7,500 square miles (30%); and Nebraska – 9,700 square miles (39%). *Id.* The Basin further divides into discrete drainage basins (called herein "sub-basins"),

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[8] The Republican River lies between two other rivers (the Arkansas and the North Platte) that, also rising in Colorado, 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.

which are individually used in the Compact to compute and allocate the virgin water supply. *See infra* Part I.B.2. The sub-basins are identified as variously shaded areas on the map attached hereto as Appendix B.

The Basin, about 430 miles in length, is a sparsely populated, but active agricultural region producing winter wheat, sorghum grain and silage, dry beans, corn, and sugar beets. RMA at 3-4. Over ninety percent of the area in the Basin is used for agricultural purposes, *id.* at 4, and, as of 1992, there were 1,888,252 acres of irrigated land in the Basin. *Id.*, Attachment D, at Table D-7. For irrigation, as well as for municipal and industrial uses, the Basin contained 12,246 registered wells as of 1996. *Id.* at 30.

The agricultural activities in the Basin require an adequate and reliable water supply. When during the 1930s the Basin experienced an extended drought, interrupted in 1935 by a highly destructive flood, the need to regulate the flow of the Republican River became apparent. *See* 87 Cong. Rec. 9606-07; Oral Arg. Tr. at 7-8. 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. *See* H.R. Doc. No. 842, 76th Cong., 3d Sess. (1940). As a result of those examinations, and based on the recommendations of the United States Army Corps of Engineers ("Corps of Engineers"), Congress appropriated funds for construction of the Harlan County Reservoir in Nebraska. *See* Act of Aug. 18, 1941, ch. 377, 55 Stat. 646. Meanwhile, the Federal Bureau of Reclamation studied the feasibility

of irrigation projects in the Basin, but delayed construction of any such projects until Colorado, Kansas, and Nebraska reached agreement on an interstate compact to allocate the water in the Basin.

B. The Republican River Compact

1. Negotiation and Approval of the Compact

Negotiations for a compact apportioning use of the waters in the Basin began in 1940, and the three States reached an initial agreement on March 19, 1941. The Department of the Interior and the Federal Power Commission, however, objected to the proposed Compact because it diminished federal rights and privileges in the Basin. *See Republican River Compact: Hearings on H.R. 4647 and H.R. 5945 Before the House Comm. on Irrigation and Reclamation*, 77th Cong., 1st Sess. 1-4 (1941). The House Committee considering the Compact amended its bill to accommodate the federal agencies' objections, H.R. Rep. No. 1380, 77th Cong., 1st Sess. (1941), but the Senate rejected those amendments, *see* 87 Cong. Rec. at 9606-23, and the Senate bill prevailed in conference, *see* H.R. Conf. Rep. No. 1878, 77th Cong., 2d Sess. (1942). Both houses of Congress then approved the Compact as proposed by the States, *see* 88 Cong. Rec. at 2408-09, 2813-14, but President Roosevelt on April 2, 1942 vetoed the bill approving the Compact, *see* 88 Cong. Rec. at 3285-86; H.R. Doc. No. 690, 77th Cong., 2d Sess. (1942). The reason for the veto was not that the President had any fundamental problem with the concept of the proposed Compact, but rather that it unduly restricted federal jurisdiction and authority over

navigation and water projects within the Basin. *See* H.R. Doc. No. 690, at 1-2.

In response to the President's veto, Congress passed, and the President approved, a bill authorizing further compact negotiations with a federal representative to be involved. Act of Aug. 4, 1942, ch. 545, 56 Stat. 736. With the participation of a federal representative, the three States agreed to a new Republican River Compact on December 31, 1942. *See Minutes of the Tenth Meeting of the Republican River Compact Commission at Lincoln, Nebraska* (Dec. 29, 1942 to Jan. 1, 1943) (previously filed with the Court as part of Addendum B to the Brief for the United States as Amicus Curiae ("United States Brief") at 64a-80a). The substantive differences between the 1941 Compact and the newly drafted 1942 Compact addressed only the matters that had provoked the President's veto of the year before. The provisions of the Compact pertaining to the apportionment of the waters of the Basin remained unchanged. *Compare* Appendix A *with* H.R. Doc. No. 690, at 2-5.

All three States duly approved the Compact, *see* Act of March 15, 1943, 1943 Colo. Sess. Laws 362, codified at Colo. Rev. Stat. §§ 37-67-101 and 37-67-102 (1990); Act of February 22, 1943, 1943 Kan. Sess. Laws 612, codified at Kan. Stat. Ann. § 82a-518 (1991); Act of February 24, 1943, 1943 Neb. Laws 377, codified at 2A Neb. Rev. Stat., App. § 1-106 (1995), and they then submitted it to Congress for approval in accordance with the Compact Clause of the United States Constitution, art. I, § 10, cl. 3, and the authorizing Act of August 4, 1942. Congress held hearings on the new version of the Compact and in due

course both Congress and the President approved it. Act of May 26, 1943, ch. 104, 57 Stat. 86.

In the years following approval of the Republican River Compact, the Federal Bureau of Reclamation completed a system of seven reservoirs in the Basin, and the Corps of Engineers completed construction of, and has continued to operate, the Harlan County Reservoir in Nebraska and the Milford Reservoir in Kansas.

2. Substantive Provisions of the Compact

The Compact, the text of which is attached as Appendix A, is divided into eleven Articles. I summarize here only those Articles relevant to the issue raised by Nebraska's Motion to Dismiss.

Article I of the Compact sets forth its major purposes. Among them are:

> to provide for the most efficient use of the waters of 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; [and] to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use.

Article II of the Compact defines relevant terms. Most important among them for purposes of the present dispute are:

> (1) "Basin," defined 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;" and

(2) "Virgin Water Supply," defined as "the water supply within the Basin undepleted by the activities of man."

Article III of the Compact quantifies the historic average annual virgin water supply originating in the sub-basins within the Basin,[9] for an aggregate virgin water supply in the Basin of 478,900 acre-feet per year.[10] The aggregate amount of water to be allocated was derived 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) (previously filed with the Court as part of Addendum B to the United States Brief at 21a-24a) (*"Minutes of the Third Meeting"*).[11]

Article IV of the Compact allocates the total virgin water supply among the three compacting States in the

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[9] The sub-basins used to determine and allocate the virgin water supply are limited to those upstream from the lowest crossing of the river at the Nebraska-Kansas state line. Article IV of the Compact reserves for Kansas "the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line."

[10] An acre-foot 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.

[11] Looking to the future, Article III also provides for adjustment of allocations if the virgin water supply of any sub-basin should be determined to vary more than 10% from the amount originally set by the Compact.

following annual amounts in the aggregate: 54,100 acre-feet to Colorado, 190,300 acre-feet to Kansas, and 234,500 acre-feet to Nebraska. The annual allocation for each State represents the sum of the allocations from the several sub-basins. For example, Article IV allocates to Kansas, in addition to "the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line," the following annual amounts of water from the specified upstream sub-basins:

Sub-basins	Kansas Allocation	(Total Virgin Water Supply)
	-----acre-feet	per year-----
Arikaree River	1,000	(19,610)
So. Fork of Republican River	23,000	(57,200)
Driftwood Creek	500	(7,300)
Beaver Creek	6,400	(16,500)
Sappa Creek	8,800	(21,400)
Prairie Dog Creek	12,600	(27,600)
Main Stem of the Republican River and other unallocated upstream sources	138,000[12]	(329,290)
Total	190,300	(478,900)

Article IX of the Compact provides for the administration of the Compact through the officials who administer the public water supplies in the three States. Those officials have the duty "to collect and correlate . . . the data necessary for the proper administration" of the

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[12] All or any portion of which Kansas may divert at or near Guide Rock, Nebraska.

Compact. They are authorized to adopt rules and regulations consistent with the Compact, but they may do so only by unanimous action.

3. Compact Administration

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. Each State appoints one member to the RRCA. Each year, the RRCA makes retrospective computations of the virgin water supply of each sub-basin and of the consumptive use in each State, for the purpose of determining whether each State has stayed within its allocation during the previous year.

To carry out that function, the RRCA, starting in 1961, has published and used formulas making these computations. *See* Committee on Procedure & Computation of Annual Virgin Water Supply, *Formulas for the Computation of Annual Virgin Water Supply* (Apr. 4, 1961) ("1961 Formulas"); Committee on Procedure & Computation of Annual Virgin Water Supply, *Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use*, (August 19, 1982, rev. June 1990) ("1990 Formulas") (together, "Formulas").[13] The Formulas specify the components of each sub-basin's virgin water supply. For example, the annual virgin water supply for the Beaver Creek Drainage Basin equals:

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[13] Relevant portions of the Formulas were previously filed with the Court as Appendix C to Addendum C (1961 Formulas) and Addendum D (1990 Formulas) to the United States Brief at 94a – 114a.

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

1990 Formulas at 111a of the United States Brief.

The Formulas for consumptive use, which are used to determine whether a State has exceed its allocation in a given year, are, like the Formulas for virgin water supply, broken down by sub-basin. For each State that has area within a sub-basin, the Formulas generally compute consumptive use from the measured water diversion within the sub-basin within that State minus the measured return flow within the sub-basin within that State. *See, e.g.*, 1990 Formulas at 112a-114a of the United States Brief.

The data for use in the Formulas comes 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.

1990 Formulas at 107a of the United States Brief.

Since the RRCA was formed, the States have considered and debated the extent to which groundwater usage should be included in the Formulas. In the 1961 Formulas, which constitute 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 equate alluvial groundwater pumping with direct stream diversions; that is, the consumption of one acre-foot of water pumped from alluvial wells counts as one acre-foot against a State's allocation. *See* Oral Arg. Tr. at 22, 35. For the time being, the RRCA treated "table-land" wells differently, omitting from its calculations stream flow diversions caused by pumping from such 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 the behavior of ground-water flow before even approximate information is available as to the monthly or annual effects on stream flows.

1961 Formulas at 97a of the United States Brief. 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. It has merely repeated the call for more research and data. *See* 1990 Formulas at 108a of the United States Brief. Therefore, each year since 1961, the calculations have reflected the effect on stream flow of groundwater pumping from the alluvium only.

C. The Present Dispute Between Kansas and Nebraska

Disagreement over the Compact's treatment of table-land groundwater pumping has sparked the present dispute. Kansas and Nebraska agree that the Compact limits direct diversions from the stream flow in the Basin. Their disagreement stems from the Kansas position that the Compact restricts groundwater use, whether from alluvial or table-land pumping, to the extent that groundwater pumping depletes the stream flow that forms the basis of the calculation of virgin water supply. In opposition, Nebraska asserts that the Compact limits the consumption of water directly diverted from the streams in the Basin, but does not restrict the consumption of water indirectly diverted from those streams through groundwater pumping even if it reduces the surface flow. In face of the dispute, the RRCA in 1995 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.

Kansas and Nebraska have made significant efforts since 1984 to reach a solution through the RRCA, public

meetings, a joint legislative committee meeting, and some fourteen months of professionally facilitated mediation, but the two States have been unable to reach agreement on the disputed issue. After all attempts to resolve the dispute failed, Kansas chose to seek redress in the present original jurisdiction action.

III. THE ISSUE RAISED BY NEBRASKA'S MOTION TO DISMISS

As defined by the Court's order granting Nebraska leave to file the Motion to Dismiss, the issue is whether the Republican River Compact restricts a compacting State's consumption of groundwater. *Kansas v. Nebraska and Colorado*, 119 S. Ct. at 2364. In view of the fact that on the Motion the factual allegations of the Kansas Complaint must be taken as true, the issue before the Court can be further limited. The Complaint alleges that Nebraska "by . . . the . . . use of thousands of wells hydraulically connected to the Republican River and its tributaries" and "by the failure to protect surface flows" has appropriated a larger share of the virgin water supply of the Republican River Basin than the Compact allocates to it. Kansas Bill of Complaint ¶ 7. This allegation that Nebraska's groundwater pumping has depleted "surface flows," or stream flows, in the Basin must, for the purposes of the Motion, be taken as fact. Thus, the issue is more narrowly stated: Does the Compact restrict groundwater pumping that depletes the stream flow in the Republican River Basin?

IV. ANALYSIS

In arriving at my recommendation, I have been guided by the rules for deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. I have assumed that the factual allegations in the Complaint are true, *see Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989), and have construed the Complaint in favor of the plaintiff, *see Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). In addition, since the Compact is both a contract and a federal and State statute, I have applied the customary rules of contract interpretation and statutory construction. If the text of the Compact, placed in its context, is unambiguous, it is conclusive. *See, e.g., New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Kansas v. Colorado*, 514 U.S. 673, 690 (1995); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If the language of the Compact is not conclusive, other reliable indications of the parties' intent are taken into account. Such sources include items in the public record such as the minutes of the Compact negotiations and the records of subsequent Compact administration. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986); *Air France v. Saks*, 470 U.S. 392, 396 (1985).

A. The Language of the Republican River Compact

Article II of the Compact defines "virgin water supply" as "the water supply within the Basin undepleted by the activities of man." In turn, 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." Based on the plain language defining these terms, I find that the Compact unambiguously governs the entire natural stream flow of the Basin, which includes all groundwater that would be part of the stream flow in the Basin except for depletion by the activities of man such as pumping.

To be noted first is the unqualified inclusiveness of the language defining what the Compact regulates: the "water supply within the Basin," not some of it, but all of it. And the water supply that is regulated is the "virgin" supply; that is, the full quantity of water in its natural state, "undepleted by the activities of man."

To be noted also is that the Compact calculated the historic average virgin water supply in terms of stream flow, *see* Compact, Art. III; *Minutes of the Third Meeting* at 21a, 23a of the United States Brief, and then apportioned the virgin water supply among the States on the same basis of stream flow, *see* Compact, Art. IV; *Minutes of the Fourth Meeting of the Republican River Compact Commission at Topeka, Kansas* (Jan. 27-28, 1941) (previously filed with the Court as part of Addendum B to the United States Brief at 27a-31a) ("*Minutes of the Fourth Meeting*"). Thus, the Compact apportions stream flow but does not attempt to apportion groundwater as groundwater (i.e., groundwater in the ground, or *in situ* as the United States Brief puts it). On the other hand, for purposes of the Motion to Dismiss, it is an assumed fact that groundwater consumption in Nebraska is depleting stream flows in the Basin. Implicit in that factual assumption is the hydraulic connection between groundwater pumping and stream flow. Any groundwater pumping that depletes the stream flow is an "activity of man" by which the virgin water supply

of the Basin is beneficially consumed,[14] and therefore the depletion caused by that groundwater pumping must be reflected in the measurements of the virgin water supply and of consumptive use. Put differently, by removing groundwater before it would otherwise discharge into and augment the stream flow, Nebraska may well have consumed more than its Compact allocation, thereby violating the Compact.

This construction of the Compact accords with its express purposes. The Compact endeavors "to provide for an equitable division of such waters," *see* Art. I, and neither the parties to the Compact, nor the Congress and the President who approved it, could have intended that an upstream State[15] could, with impunity, unilaterally enlarge its allocation by taking some of the virgin water supply before it reached the stream flow. None of them could have intended that an upstream State could, with impunity, interfere with groundwater discharge that, except for "the activities of man," would augment stream flow in the Basin.

Nebraska's assertion that the Compact does not restrict groundwater pumping because it never mentions groundwater misses a critical fact: Although the Compact

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[14] The Compact defines "beneficial consumptive use" as "that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation." Compact, Art. II.

[15] The upstream state is sometimes referred to as the "upper" State, as contrasted with a "lower" State. *See, e.g.*, Compact, Art. VII.

never uses the word "groundwater,"[16] stream flow, which the Compact fully allocates, comes from both surface runoff and groundwater discharge. *See supra* note 3. Interception of either of those stream flow sources can cause a State to receive more than its Compact allocation and violate the Compact. Because of the factual assumption on this Motion to Dismiss of a hydraulic connection between groundwater and stream flow in the Basin, any stream flow depletion by groundwater pumping in Nebraska must be counted against Nebraska's Compact allocation. Therefore, excessive amounts of such pumping can cause Nebraska to consume more than its allocation of the virgin water supply in violation of the Compact. Thus, the comprehensive definition of virgin water supply, even without use of the express term "groundwater," requires a conclusion that, as a matter of law, a State can violate the Compact through excessive pumping of groundwater hydraulically connected to the Republican River and its tributaries.

Contrary to Nebraska's claim, Kansas does not seek to apportion to itself millions of acre-feet of water in the Ogallala Aquifer or any other table-land groundwater source *in situ*. *See* Nebraska Brief at 10. Rather, Kansas seeks only to protect what the Compact promises – its full apportionment of the virgin water supply within the Basin as measured by stream flow, no matter what its source.

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[16] The Compact does not use the term "surface water" either.

In sum, the language of the Compact is not ambiguous. A straightforward reading of its terms yields the conclusion that a State's groundwater pumping, to the extent it depletes the stream flow in the Basin, is intended to be allocated as part of the virgin water supply and to be counted as consumptive use by the pumping State. However, even if the language of the Compact were thought to be ambiguous, extrinsic evidence of the parties' intent leads clearly to the same conclusion. To consideration of that other evidence I now turn.

B. Extrinsic Evidence of the Intended Meaning of the Compact

1. The Negotiation and Approval of the Compact

Although the hydraulic connection between groundwater pumping and stream flow is already assumed for purposes of this Motion, the further fact that the hydraulic connection was well known by the early 1940s is significant in reinforcing my conclusion that the Compact negotiators did not ignore the effect of groundwater pumping on stream flow. The connection between groundwater discharge and stream flow was a widely known scientific fact well before the Compact was drafted and recognition of that connection is plain from the records of the Compact negotiations.

Much earlier, this Court had recognized the hydraulic connection between groundwater and surface water. *See Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.*, 260 U.S. 596, 598 (1923) ("The waters intercepted and collected . . . are percolating waters, which . . . found their

way naturally . . . through the rocks, gravel, and soil of the mountain into open springs near the stream, and thence by surface channels into the stream. At all seasons this was one of the stream's sources of supply . . . . The amount of water so naturally finding its way underground into the springs and thence into the stream has been materially diminished . . . . "); *Kansas v. Colorado*, 206 U.S. 46, 114-15 (1907) ("If the bed of a stream is not solid rock, but earth through which water will percolate, . . . undoubtedly water will be found many feet below the surface, and the lighter the soil the more easily will it find its way downward and the more water will be discoverable by wells . . . . ").

In addition, the scientific community well understood that hydraulic connection. *See* C.F. Tolman & Amy C. Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 Or. L. Rev. 113, 115-29 (1942) (reviewing the principles of interrelation between surface flow and groundwater and stating that "[t]he significance of the fact that ground water never occurs as a stationary water body should be stressed. Ordinarily, the subsurface reservoir is continuously receiving additions by influent seepage from rainfall and surface water bodies and is always discharging water by natural processes. In the subsurface reservoir ground water is percolating toward the discharge area; no static ground-water bodies are known to exist."); Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1921) (pointing out that "[a]lthough varying greatly in degree, connection between surface streams and groundwater is usual, and in fact invariable").

Most significantly, documents from the negotiation and drafting of the Compact demonstrate that the Commissioners who represented the compacting States were well aware (1) that groundwater diversion prior to its entrance into the stream flow can have the effect of depleting the virgin water supply and (2) that groundwater contributions to the virgin water supply would be allocated under the Compact. Based upon the following evidence, it is clear that the Compact negotiators intended the Compact to regulate all the natural stream flow in the Basin, including any groundwater contributions to that flow.

At the fourth meeting of the Commission formed by the three States to negotiate the Republican River Compact, on January 27-28, 1941, Mr. Harry P. Burleigh of the United States Bureau of Agricultural Economics appeared and "outlined the scope of the work which the Bureau has been carrying on thruout [sic] the Republican River basin to determine the extent and useability of the underground waters of the basin." *Minutes of the Fourth Meeting* at 28a of the United States Brief. Mr. Burleigh "presented the Commission with a tabular statement showing estimated amounts of underground water available . . . in the three states." *Id.* He also

> advised the Commission that . . . he was desirous of obtaining a statement from the Commission as to whether the amounts of underground waters he had determined would be feasibly possible of use, would . . . exceed the allotments of water to each state which the Commission may have agreed upon; [and] that his department did not want to recommend

> developments of underground water supplies in excess of the allocations of water to each state.
>
> . . . . Upon inquiry, Mr. Burleigh advised the Commission that *all of the underground waters of the basin above Scandia, Kansas, are included in the total water supplies of the basin,* as reflected in measurements of stream flow at Scandia and other points in the basin, and that *any underground water developments must be considered as reducing to that extent the amount of surface water available for use within the basin.*

Id. at 29a (emphasis added). Mr. Burleigh's statements and activities clearly show that the States in negotiating the Compact (1) understood the connection between groundwater use and surface water depletion, and (2) were thinking about the impact of groundwater pumping at the time of the Compact negotiations.

The Commissioners of the three States agreed that Mr. Burleigh's estimated amount of groundwater that might be developed in each of the sub-basins was within the allocations that the Commission had tentatively made, and notified Mr. Burleigh of their agreement. *See* Letter from M.C. Hinderlider, Commissioner from Colorado, to George S. Knapp, Commissioner from Kansas, and Wardner G. Scott, Commissioner from Nebraska (Jan. 31, 1941); Letter from George S. Knapp to Harry P. Burleigh (Jan. 30, 1941).[17] The Colorado Commissioner subsequently reaffirmed the inclusion of groundwater in the

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[17] All letters and memoranda cited in this Report have been deposited previously with the Court, accompanied by the certifying Affidavit of Douglas R. Littlefield.

allocations, writing to Ralph L. Carr, Governor of Colorado, that the Commission had given "careful consideration . . . to a voluminous report of the Bureau of Agricultural Economics . . . on the underground water resources of the Republican River basin," and that "[t]he compact allocates to Colorado . . . all of the surface and underground water supplies originating in Colorado within the Frenchman and Willow Creek drainage basins [and lesser percentages in other sub-basins]." Letter from M.C. Hinderlider to Ralph L. Carr 1-2 (Mar. 20, 1941).

After President Roosevelt vetoed the bill approving the initial Compact and the Compact was renegotiated, Colorado Commissioner M.C. Hinderlider wrote to Governor Carr and confirmed the Compact's restrictions on groundwater pumping, stating that "[t]hese allocations include not only surface, but also sub-surface, or underground water supplies." Letter from M.C. Hinderlider to Ralph L. Carr 3-4 (Jan. 9, 1943). Similarly, Commissioner Hinderlider authored a report, which he submitted to the General Assembly of Colorado and the Commissioners of Kansas and Nebraska, *see* Letter from M.C. Hinderlider to Federal Representative Glenn L. Parker (Feb. 5, 1943), in which he reiterated, "It is believed that this Compact equitably apportions the total available average annual virgin water supplies of the Basin, both surface and underground, among the three signatory States . . . . " M.C. Hinderlider, *Explanatory Statement and Report to the Thirty-fourth General Assembly* (previously filed with the Court as Appendix M to the Kansas Brief in Opposition to Nebraska's Motion to Dismiss; the quoted passage appears at M10).

In addition to the State Commissioners, federal officials understood that the Compact would restrict groundwater pumping. J.R. Riter of the United States Bureau of Reclamation discussed the term "virgin water supply" in a memorandum to the Bureau of Reclamation's Chief Engineer, S.O. Harper, stating:

> Under the compact each state is accorded a limited "beneficial consumptive use" regardless of whether such waters are derived from virginal natural flow, captured storage water, return flow from irrigation, *ground waters recovered by pumping*, recovered waste water, or otherwise. In short, *the compact merely defines the extent to which streams may be depleted regardless of the methods of use.*

Memorandum from J.R. Riter to S.O. Harper 3 (May 21, 1941) (emphasis added).

Another official of the Bureau of Reclamation, C.T. Judah, also wrote to the Bureau's Chief Engineer, describing meetings held with county land use planners. His memorandum stated, in part:

> A special effort was made to impress on local people that water supplies for both ground water pumping and for gravity stream diversions were from the same source and that new developments supplied by either source would be limited to the amount of water allocated to each state under the proposed compact.

Memorandum from C.T. Judah to S.O. Harper (May 31, 1941).

In the face of this evidence, it is irrelevant that, at the time the Compact was negotiated and approved, none of

the compacting States had laws permitting regulation of groundwater for the protection of surface water. Article IV of the Compact, which explicitly makes reference to state law, states in pertinent part: "The *use* of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made." (emphasis added). By its plain terms, this sentence of Article IV merely states that it is up to each State to decide how to use the water it is allocated; it says nothing about *which* water is allocated under the Compact.

Furthermore, the Compact is a duly adopted statute of all three compacting States, as well as a federal law. Although none of the compacting States in 1943 put any limit on groundwater consumption within its borders, those States could, and did, enter an interstate agreement apportioning among the States the entire stream flow of the Basin undisturbed by the activities of man, whatever the source of that flow. The negotiators agreed to be "guided by [the Court's decision in *La Plata River and Cherry Creek Ditch Co. v. Hinderlider*, 304 U.S. 92 (1938)] establishing the right of states to make an equitable division of the waters of an interstate stream, regardless of its effect upon presumably vested interests in either of the signatory states." *Minutes of the Third Meeting* at 23a of the United States Brief.

Finally, it is irrelevant that the 1971 Kansas-Nebraska Big Blue River Compact, which apportions the flow of the Big Blue River and its tributaries, explicitly provides for regulation of geographically defined groundwater. Kansas-Nebraska Big Blue River Compact, 86 Stat. 193, 194 ("Blue River Compact"). The fact that the Republican

River Compact does not expressly use the word "groundwater" while another compact does is of no import, even where those compacts involve the same States. The Blue River Compact includes "ground-water infiltration to the stream" among the specifically enumerated components of the defined term "natural flow." Blue River Compact, Section 1.8. By comparison, the Republican River Compact includes in the definition of "virgin water supply" the entire water supply in the Basin undepleted by the activities of man. If anything, the Republican River Compact's definition is more inclusive, even though it does not use the specific term "groundwater." Both compacts restrict consumption of groundwater to the extent it enters the stream flow, and they merely use different language to accomplish that restriction.[18]

The very nature of the apportionment in the Blue River Compact necessitated express language about groundwater pumping. The Blue River Compact requires

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[18] Nebraska also points out that Section 3.4 of the Blue River Compact requires the compact administration to "establish[ ] such . . . groundwater observation wells . . . as are necessary for administering th[e] Compact." *See* Nebraska Brief in Opposition to Kansas' Motion for Leave to File Bill of Complaint at 20. Requiring the administration to establish specific means, including groundwater observation wells, to administer the Blue River Compact does not suggest that the Republican River Compact, without such a specific provision, fails to restrict groundwater pumping. The Republican River Compact, instead of specifying various means for data collection, gives a broad general direction. Article IX of the Compact simply directs its administrators to "collect . . . the data necessary for the proper administration of . . . th[e] [C]ompact."

Nebraska to maintain a certain stream flow at the Kansas-Nebraska state line by, among other actions:

> [r]egulat[ing], in the same manner that diversion of natural flows is regulated, withdrawals of water from irrigation wells . . . in the alluvium and valley side terrace deposits within one mile from the thread of the river between the mouth of Walnut Creek and the Kansas-Nebraska State line on the Little Blue River and between the mouth of Turkey Creek and the Kansas-Nebraska State line on the Big Blue River . . . provided that, if the regulation of such wells fails to yield any measurable increases in flows . . . the regulation of such wells shall be discontinued. Determination of the effect on streamflow of the pumping of such wells shall rest with the administration.

86 Stat. 193, 196-97, Blue River Compact, Section 5.2(b)(4). In making this commitment to monitor groundwater pumping in a specific limited area, the drafters of the Blue River Compact necessarily mentioned groundwater pumping. In addition, the passage expresses the same intention to get data on the effect of groundwater pumping as the RRCA in its Formulas expressed with respect to table-land wells. By its adoption of the Formulas, the RRCA clearly demonstrated its intention to consider the effect of groundwater pumping from all wells located in the Basin, not merely those "within one mile from the thread of the river."

2. The Parties' Administration of the Compact

From the outset, the RRCA has, by its unanimous action, construed the Compact to restrict any kind of groundwater pumping by a compacting State to the extent it depletes stream flow in the Basin. The RRCA immediately applied that general principle to alluvial groundwater pumping and deferred applying it to table-land groundwater pumping only because of the need to obtain further data to quantify the effect of the table-land pumping on Basin stream flow. The 1961 Formulas, after including the effect of alluvial groundwater pumping in its calculations of virgin water supply and consumptive use, state that

> [t]he 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.

1961 Formulas at 97a of the United States Brief. The RRCA continued to make the same statement through at least 1990. *See* 1990 Formulas at 108a of the United States Brief. If the RRCA had thought that the Compact did not restrict the pumping of table-land groundwater, it would have had no reason to seek "more research and data" for the purpose of administering the Compact. Whether the Compact restricts the consumption of table-land groundwater appears to have never been in doubt if its effect is to deplete Basin stream flow; the only obstacle to including the effect of table-land pumping in the Formulas was

quantification of the relationship between that pumping and stream flow.

In its brief in support of the Motion to Dismiss, Nebraska argues that the RRCA Formulas are consistent with the exclusion of groundwater pumping from the restrictions of the Compact because (1) "[t]he [F]ormulas defined the surface water to include water flowing in the stream as well as water found in the adjacent alluvium"[19] and (2) "[t]he unambiguous language of the [F]ormulas specifically excludes Ogallala groundwater from regulation." Nebraska Brief at 18-19. What the RRCA actually did squarely contradicts Nebraska's characterization of that action; plainly, the RRCA acted to implement the Compact's inclusion of both types of groundwater, not to exclude them. First, with respect to alluvial groundwater, the Formulas simply do not "define" alluvial water as part of stream flow; rather, they expressly state: "Diversions from *groundwater* shall be limited to those by wells pumping from the alluvium along the stream channels . . . . " 1990 Formulas at 108a of the United States Brief (emphasis added). The Formulas specifically identify alluvial groundwater as groundwater and include groundwater diversions by pumping in the calculation of

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[19] At oral argument Nebraska's counsel appeared to take a different position; namely, that alluvial water is indeed groundwater but that the Compact does not restrict any groundwater pumping, and that therefore the RRCA acted beyond its authority in including alluvial groundwater in the Formulas. Oral Arg. Tr. at 13. The fact remains that for over three decades the RRCA by unanimous action has administered the Compact to restrict alluvial groundwater pumping (and has called for more research and data on the effect of table-land pumping).

the virgin water supply for every sub-basin. Second, with respect to table-land groundwater, the Formulas merely deferred for the time being inclusion of table-land diversions because of the lack of sufficient data to quantify their effect. 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.

In sum, a straightforward reading of the comprehensive definition of the term "virgin water supply," backed up by the records of Compact negotiations and RRCA administrative action, shows an unambiguous intention to include in the measurement of virgin water supply all the natural stream flow in the Basin, including that depleted by groundwater pumping of any kind. I conclude that, as a matter of law, the Compact restricts, and allocates as part of the virgin water supply, any groundwater that would become part of the stream flow in the Basin if not previously depleted through an activity of man such as pumping.

C. Review of Judicial Precedent Cited by the Parties

1. Supreme Court Cases

a. *Texas v. New Mexico* and *Kansas v. Colorado*

Decisions of this Court involving other interstate compacts provide support for the proposition that a compact apportioning stream flows can restrict groundwater usage even though the term "groundwater" is not

used. In each of the two cases, *Kansas v. Colorado*, No. 105, Original, and *Texas v. New Mexico*, No. 65, Original, the relevant compact makes no specific reference to groundwater use.

Article IV-D of the Arkansas River Compact, ch. 155, 63 Stat. 145, at issue in *Kansas v. Colorado*, No. 105, Original, allows Colorado to undertake future water resource development, as long as the waters of the Arkansas River are not "materially depleted in usable quantity or availability" at the state line. 63 Stat. at 147. The Special Master in *Kansas v. Colorado* not only recognized the existence of the relationship between stream flow and groundwater, *see* Report of the Special Master, No. 105, Original, at 37 (July 1994), but also concluded that the Arkansas River Compact forbids "material depletion caused by any increased consumptive use, including the construction of new wells or increased levels of pumping from precompact wells." *Id.* at 108. Accordingly, the Special Master recommended that the Court find Colorado liable for groundwater pumping that materially depleted the usable flow. *Id.* at 263. The Court agreed with the Special Master that " 'new wells . . . and increased pumping from [pre-Compact] wells all come within [Article IV-D],' " *Kansas v. Colorado*, 514 U.S. at 691 (quoting the Report of the Special Master) (second and third alterations in original), and, despite the lack of the use of the term "groundwater," held that groundwater pumping in Colorado had violated the Arkansas River Compact, *id.* at 693-94.

Texas v. New Mexico focused on Article III of the Pecos River Compact, ch. 184, 63 Stat. 159, which provides that "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state

line below an amount which will give to Texas a quantity of water equivalent to that available under the 1947 condition." 63 Stat. at 161; *see Texas v. New Mexico*, 462 U.S. 554, 559-60 (1983). In the Texas suit against New Mexico for allegedly violating that provision, one of the principal disagreements concerned the correct method for measuring depletions. *See Texas v. New Mexico*, 462 U.S. at 571-74; 446 U.S. 540, 541 (1980). Even though Article III speaks only of depletion of stream flow, the methodology that the Court approved for determining whether Article III is violated takes groundwater use into account. *See Texas v. New Mexico*, 482 U.S. 124, 127-28 (1987); 462 U.S. at 558-59 & n.5.

Contrary to Nebraska's assertion, the fact that the defendant States in those original jurisdiction actions failed to plead or argue that their respective compacts did not restrict groundwater consumption does not render those cases irrelevant to the present case. By the time the complaint was filed in each case, the defendant State had officially recognized that groundwater pumping can deplete stream flow. Therefore, the defendant States would not have made the argument that Nebraska makes in this case because it would have availed them nothing. In *Kansas v. Colorado*, No. 105, Original, the Court granted leave to file the complaint in 1986, 475 U.S. 1079 (1986); previously, in 1965, Colorado had enacted legislation requiring administration of surface water, "including the underground waters tributary thereto," *see* Act of May 3, 1965, 1965 Colo. Sess. Laws 1244. In *Texas v. New Mexico*, the Court granted leave to file the complaint in 1975, 421 U.S. 927 (1975); previously, in 1962, the New Mexico

Supreme Court had recognized that groundwater pumping could deplete surface flow, *see City of Albuquerque v. Reynolds*, 379 P.2d 73, 79 (1962).

Nebraska also argues that the Arkansas River Compact and Pecos River Compact are irrelevant to this action because their language is different from the Republican River Compact. Nebraska Brief at 10. Although the language is not the same in all three compacts, the issue in all three cases is the extent to which the compact's water apportionment restricts groundwater pumping, and in all three cases, the language of the compact is clearly broad enough to include the effects of groundwater pumping despite the absence of the term "groundwater."

b. *Sporhase v. Nebraska ex rel. Douglas*

In support of its Motion to Dismiss, Nebraska relies in part on *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), in which the Court remarked that "[t]he interstate compacts to which appellee refers [including the Republican River Compact] are agreements among States regarding rights to surface water." *Id.* at 959. Contrary to Nebraska's contention, the Court did not conclude that the Compact does not restrict groundwater pumping. First, the Court was not faced with, and did not decide, the question whether those compacts regulate only direct diversions from surface water. Rather, the Court decided (1) "whether [a] Nebraska restriction on the interstate transfer of ground water imposes an impermissible burden on commerce;" and (2) "whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible." 458

U.S. at 943. In considering the latter issue, the Court examined 37 statutes and several interstate compacts before concluding that Nebraska's suggestion that Congress had authorized States to impose otherwise impermissible burdens on interstate commerce in groundwater was "not well founded." 458 U.S. at 958. In that context, the Court's characterization of the compacts as "agreements . . . regarding rights to surface water" is not a specific determination that all of the cited interstate compacts apply, or that any particular compact applies, only to direct surface water diversions.

Second, *Sporhase* does not support Nebraska's Motion to Dismiss because the Court's characterization of the compacts is wholly consistent with the position Kansas takes in the instant dispute. The virgin water supply regulated by the Compact is the stream flow in the Basin undepleted by the activities of man. In that sense, the Compact was appropriately described by the Court as an "agreement[ ] among states regarding rights to surface water." Kansas does not argue that the Compact governs groundwater *in situ* or that it apportions the multistate Ogallala Aquifer. Rather, based on the principle that surface water derives from both surface runoff and groundwater discharge, Kansas maintains that the Compact governs groundwater that is part of the virgin water supply because it would be part of the stream flow if undepleted by the activities of man.

2. State Court Decisions

In addition to this Court's *Sporhase* decision, Nebraska argues that four decisions from the three compacting States support its position. As an initial matter, no state court decision can provide a controlling interpretation of the Compact. Only the highest Court in the Nation can make that ruling in a controversy between or among States. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). In any event, however, I find nothing in those state court decisions that runs counter to the natural inclusive construction of the Compact's definition of "virgin water supply."

The first, a Nebraska case, *State ex rel. Douglas v. Sporhase*, 305 N.W.2d 614 (Neb. 1981), the decision that was under review in the Supreme Court's *Sporhase* decision, did not even mention the Compact because the Compact had no bearing on the constitutionality of a Nebraska statute forbidding the pumping of groundwater for use in a neighboring state. *Sporhase* has no relevance in the current dispute, which, in contrast to *Sporhase*, concerns groundwater not as a separate commodity but as a contributor to, and component of, stream flow.

The two Kansas cases cited by Nebraska are similarly irrelevant. The first, *State ex rel. Peterson v. Kansas State Board of Agriculture*, 149 P.2d 604 (Kan. 1944), did not involve water within the Basin and did not mention the Compact in its survey of Kansas statutes "pertaining to waters." *Id.* at 609-11. *Peterson* addressed groundwater in the Equus Beds in southern Kansas and held that Kansas officials had not been given the authority under state law

to regulate groundwater pumping from those beds.[20] The second Kansas decision, *State ex rel. Emery v. Knapp*, 207 P.2d 440 (Kan. 1949), analyzed whether the Chief Engineer of Water Resources had authority to establish, and appropriate waters for, an irrigation district under a Kansas water appropriation statute adopted partially in response to *Peterson*. *Emery* did not consider whether the Compact restricts groundwater pumping that depletes the stream flow.[21]

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[20] In *Peterson*, the Supreme Court of Kansas held that:

> No statute cited to us, and none which we have found by our own research, authorizes the defendants [Kansas officials], or any of them, to regulate, allocate or distribute, or otherwise interfere with the use and consumption of underground waters or to conduct a hearing upon the application of any one desiring to use such waters, or for the allocation, distribution or regulation of the use of such waters.

149 P.2d at 611.

Based on this statement, Nebraska argues that the Kansas Supreme Court did not interpret the Compact (a Kansas statute) as authorizing or requiring Kansas officials to undertake the regulation of groundwater use. However, the Supreme Court of Kansas did not specifically consider the Compact, an interstate agreement and federal statute, because it was irrelevant to whether Kansas officials could regulate water in the Equus Beds, an intrastate issue. Furthermore, unlike the present action, *Peterson* involved the regulation of groundwater *in situ*, and not the regulation of groundwater pumping as it might affect surface water rights.

[21] Nebraska focuses on the Kansas Supreme Court's statement that the Compact was entered into for the beneficial consumptive use of the waters of the Republican River. *Knapp*, 207 P.2d at 444; Nebraska Brief at 14. That statement does not support Nebraska's position. The Compact of course governs

Finally, contrary to Nebraska's contention, the Colorado Supreme Court did not, in *Pioneer Irrigation Districts v. Danielson*, 658 P.2d 842 (Colo. 1983), decide that the Compact regulates only direct diversions of surface water. The sole issue in *Pioneer* was the division of jurisdiction between two state tribunals and the court had no occasion to consider whether the Compact restricts the pumping of groundwater hydraulically connected to surface flow. The case addressed which tribunal has jurisdiction to decide whether particular groundwater is groundwater that, under Colorado law, either (1) is not available for the fulfillment of surface water rights or (2) does not have a hydraulic connection to any stream.

D. The Position of Colorado on the Motion to Dismiss

The Kansas Complaint against Nebraska names Colorado, the third compacting State, as a party defendant, but seeks no relief against it. Colorado, however, has taken an active role in the briefing and oral argument on Nebraska's Motion to Dismiss. It first argues that the Compact does restrict a compacting State's consumption of *alluvial* groundwater to the extent that the consumption depletes the stream flow in the Basin. *See* Colorado Brief at 6-13; Oral Arg. Tr. at 49. Accordingly, it joins

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the consumptive use of the waters of the Republican River Basin. However, Nebraska's argument fails to recognize that groundwater pumping, to the extent it depletes the stream flow in the Basin, constitutes itself a consumptive use of allocated water.

Kansas and the United States in opposing Nebraska's Motion to Dismiss.

Colorado, however, breaks ranks with Kansas and the United States on the further question whether the Compact restricts the pumping of *non-alluvial* groundwater. It seeks a ruling that the Compact does not restrict the consumption of table-land or Ogallala groundwater even if the effect of that consumption is to deplete stream flow in the Basin. *See* Colorado Brief at 2-3, 23; Oral Arg. Tr. at 51, 66-67. Colorado's counsel asserts the following premise for its argument:

> The intent of the framers was to create a Compact that could be administered, that could be complied with, with certainty.

Oral Arg. Tr. at 63. Applying that certainty test, Colorado's counsel points to the following distinction between alluvial and Ogallala groundwater pumping: The impact of alluvial pumping on stream flow was well understood and fairly easily quantified in 1940; such was not equally true for Ogallala groundwater pumping in 1940, and is not even today. *See id.* at 58. Colorado then argues that, given the desire for certainty and the complexity of quantifying the hydraulic connection between Ogallala pumping and stream flow depletion, the drafters intended to exclude Ogallala groundwater pumping from the Compact's allocation restrictions. *See id.* at 60-61.

In assessing Colorado's argument, it is well to turn again to the express language of the Compact, which allocates the entire water supply of the Basin "undepleted by the activities of man." The Colorado contention is

impossible to square with the Compact's broad and inclusive definition of "virgin water supply." *See supra* Part IV.A. The Compact makes no exception for any depletion of the virgin water supply merely because of the difficulty of quantifying that depletion; there is no "administrative convenience" exception. If the drafters were in fact concerned about the difficulty of quantifying the effect of one form of depletion (i.e., table-land groundwater pumping), they could very easily have drafted an exception to the definition of virgin water supply. They did not do so. The absence of any exception shows that the drafters' true concern was to take into account *any* form of depletion – whether by alluvial or table-land pumping or otherwise.

In their desire for certainty, the drafters of the Compact surely wanted to achieve certainty in the availability of the full amount of each State's allocation. I find no reason to believe that the drafters' desire to protect the full virgin water supply for allocation was overridden by the possibility that some form of stream flow depletion, then contemplated or thereafter arising, might be difficult to quantify. To protect each State's Compact allocation – the most important substantive right that each compacting State receives in the Compact – the drafters surely intended to forbid a State's consumptive use of Basin stream flow in excess of that State's allocation, by whatever means that excessive use occurs.

Furthermore, the RRCA has put a practical construction on the Compact adverse to the Colorado position. As addressed in Part IV.B.2 above, the RRCA, starting in 1961, has repeatedly called for research and data to quantify the effect of non-alluvial groundwater pumping on

stream flow. The RRCA would have no reason to make that repeated call if it did not understand itself to be bound by the Compact to incorporate the results of that research in its Formulas for calculating virgin water supply and consumptive use.

E. Conclusions

From the foregoing analysis, I conclude:

(1) The language of the Compact unambiguously governs the entire stream flow of the Basin, which includes all groundwater that would become part of the stream flow in the Basin if undepleted by the activities of man;

(2) Even if the Compact were ambiguous, the record of the Compact negotiations shows that the Compact was intended to govern the entire stream flow of the Basin, including all groundwater that would become part of the stream flow in the Basin if undepleted by the activities of man, and the RRCA's administration of the Compact reflects an identical interpretation;

(3) Prior decisions of this Court are entirely consistent with the view that an interstate compact can restrict groundwater use even though that compact does not expressly use the term "groundwater," and no decision of either this Court or any court of any of the compacting States detracts from the plain and inclusive meaning of the term "virgin water supply" as defined in the Compact: "the water supply within the

Basin undepleted by the activities of man"; and

(4) Nebraska violates the Compact if, as a factual matter, Nebraska's groundwater pumping, whether from alluvial or tableland wells, depletes stream flow in the Basin to the extent that Nebraska exceeds its allocated share of the virgin water supply.

V. **RECOMMENDATION: 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.**

A proposed Order to implement this recommendation is attached as Appendix C.

Respectfully submitted,

VINCENT L. MCKUSICK
Special Master
One Monument Square
Portland, Maine 04101
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January 28, 2000

APPENDIX A

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 545, 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. Knapp, 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 Creek 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 unallocated 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 of taxes to 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.

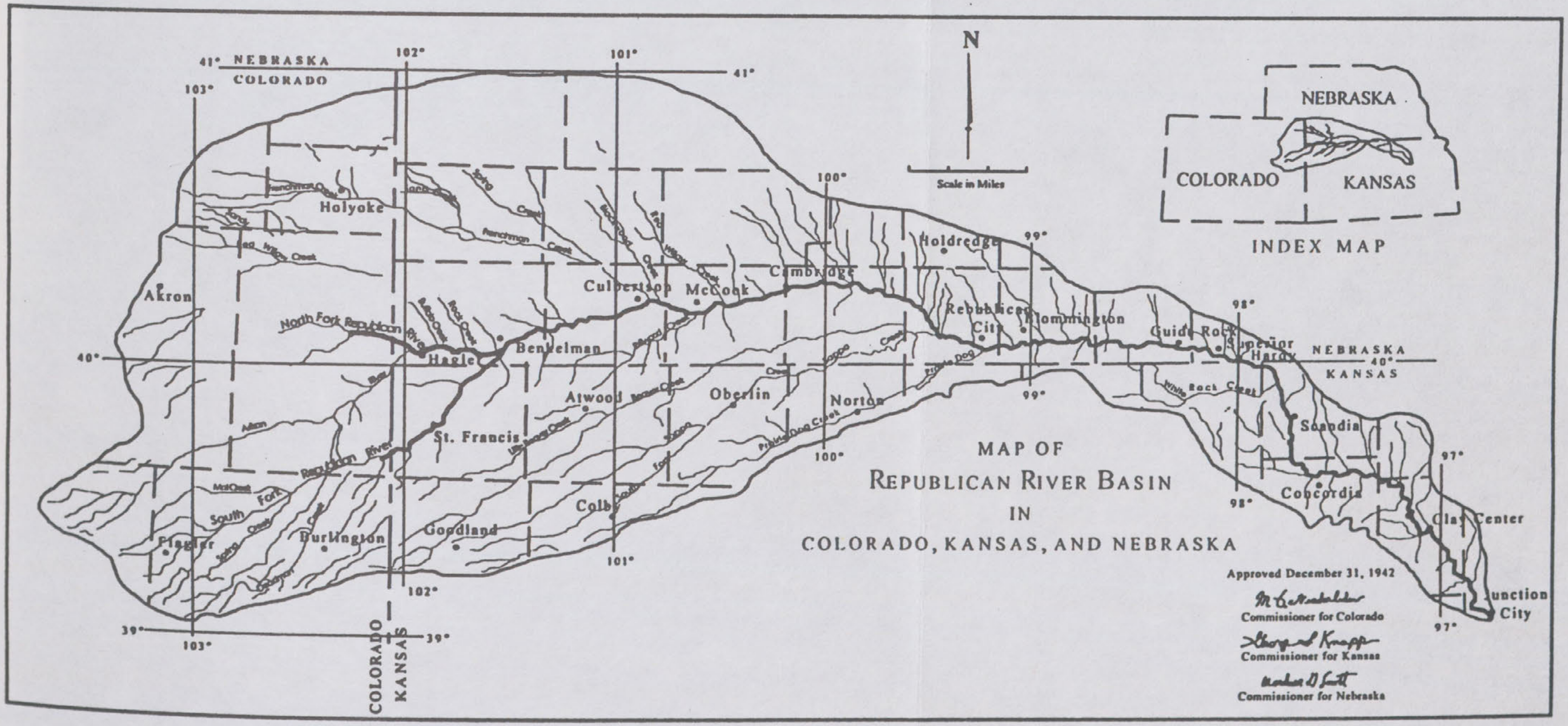
(3) the United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by such compact which may be impaired by the exercise of Federal jurisdiction in, over, and to such waters: *Provided*, That such use is 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.


MAP OF
REPUBLICAN RIVER BASIN
IN
COLORADO, KANSAS, AND NEBRASKA
Approved December 31, 1942
Commissioner for Colorado
Commissioner for Kansas
Commissioner for Nebraska
INDEX MAP
NEBRASKA
COLORADO
KANSAS
N
Scale in Miles
41°
40°
39°
103°
102°
101°
100°
99°
98°
97°
NEBRASKA
COLORADO
KANSAS
Holyoke
Akron
North Fork Republican River
Frenchman Creek
Red Willow Creek
Culbertson
McCook
Cambridge
Holdredge
Benkelman
Haigler
Atwood
Oberlin
Norton
Prairie Dog Creek
St. Francis
Republican River
South Fork
Burlington
Flagler
Goodland
Colby
Guide Rock
Superior
Hardy
White Rock Creek
Scandia
Concordia
Clay Center
Junction City

APPENDIX B

B1

Republican River Basin

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S

miles
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 C

PROPOSED ORDER

STATE OF KANSAS v. STATE OF NEBRASKA
AND STATE OF COLORADO

No. 126, Original

_____, 2000

ORDER

Having considered the briefs of the three States as parties and of the United States as amicus curiae in support of or opposition to the Motion to Dismiss filed in this action by the State of Nebraska, and having received and considered the First Report (Subject: Nebraska's Motion to Dismiss) of the Special Master heretofore appointed by the Court, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. 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.

2. The Motion to Dismiss is DENIED.