No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

EXCEPTIONS TO THE FIRST REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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QUESTIONS PRESENTED

1. Whether the Special Master erred in his application of Fed. R. Civ. P. 12(b)(6) to Nebraska's Motion to Dismiss?

2. Whether the Special Master erred in addressing issues beyond the scope of Nebraska's Motion to Dismiss?

3. Whether the Special Master erred by not recommending that Nebraska's Motion to Dismiss be granted?

EXCEPTIONS TO THE FIRST REPORT OF THE SPECIAL MASTER

On June 21, 1999, this Court granted leave to Nebraska to file a Motion to Dismiss limited to the issue of whether the Republican River Compact restricts a State's consumption of groundwater. On August 2, 1999, the State of Nebraska filed a Motion to Dismiss on the limited issue specified by the Court. On November 15, 1999, the Court appointed the Honorable Vincent L. McKusick, Esquire of Portland, Maine as its Special Master. On January 28, 2000, following the submission of briefs and oral argument on Nebraska's Motion to Dismiss, the Special Master submitted the First Report of the Special Master making specific findings of fact and conclusions of law concerning Nebraska's Motion to Dismiss. The State of Nebraska takes exception to the Special Master's First Report in the following respects:

1. The Special Master failed to follow Fed. R. Civ. P. 12(b)(6) in ruling upon Nebraska's Motion to Dismiss. The Special Master misapplied Fed. R. Civ. P. 12(b)(6) and violated Nebraska's right to due process of law by considering matters outside the pleading and judging those matters to be true. After making factual findings, the Special Master relied on those findings to determine whether the non-moving party (*i.e.*, Kansas) was, in effect, entitled to summary judgment even though Kansas had made no such motion. Nebraska was not afforded an opportunity to offer evidence in rebuttal to the matters relied upon by the Special Master.

2. The Special Master decided issues that were beyond the scope of Nebraska's Motion to Dismiss and not before the Court.

3. The Special Master erred in recommending that the terms of the Compact restrict a state's consumption of groundwater. The Compact makes no mention of groundwater. Specifically, the Special Master failed to review the plain meaning of the Compact language within the context of state authority to regulate groundwater in 1943. The laws of the Compact states at the time the Compact was entered did not permit a state to regulate the consumption of groundwater. The Compact does not contain any language indicating that the parties intended to alter existing state law concerning groundwater use. In addition, the cumulative Congressional actions dealing with the Republican River indicate Congress did not intend to authorize the regulation of groundwater. Finally, the Special Master failed to review the Compact language with due regard for prior decisions of this Court and other federal courts.

The State of Nebraska respectfully urges the Court to: (1) reject the Conclusions and Recommendation in the First Report of the Special Master; (2) make an independent review of Nebraska's Motion to Dismiss; and (3) enter an Order granting Nebraska's Motion to Dismiss.

Respectfully submitted,

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BRIEF IN SUPPORT OF EXCEPTIONS TO FIRST REPORT OF THE SPECIAL MASTER

STATEMENT OF THE CASE

The State of Kansas ("Kansas") brought this original action against the State of Nebraska ("Nebraska") and the State of Colorado ("Colorado") to resolve disputes arising under the Republican River Compact (the "Compact"). On January 19, 1999, this Court granted Kansas leave to file its complaint, *Kansas v. Nebraska and Colorado*, 525 U.S. 1101 (1999). On June 21, 1999, this Court denied Kansas' Motion to Strike Nebraska's Counterclaims. In that same order, and at the suggestion of the United States ("Amicus Curiae"), this Court granted Nebraska leave to file a motion to dismiss "in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure, limited to the question whether the Republican River Compact restricts a State's consumption of groundwater." ___ U.S. ___, 119 S. Ct. 2364 (1999).[1] Nebraska followed the directive of this Court and filed a Motion to Dismiss on August 2, 1999.

On November 15, 1999, this Court appointed the Honorable Vincent L. McKusick, Esquire, of Portland, Maine to serve as Special Master in this matter and referred Nebraska's Motion to Dismiss to him. ___ U.S. ___, 120 S. Ct. 519 (1999). On January 4, 2000, Special Master McKusick received oral argument from the parties and the Amicus Curiae at a hearing conducted in Kansas

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[1] "[W]e suggest that . . . the Court should grant Nebraska leave to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6). . . . " *See* Brief for the United States as Amicus Curiae at 17.

City, Missouri. On January 28, 2000, Special Master McKusick issued his "First Report of the Special Master" (the "Report"). The Report contained four "Conclusions" based upon the pleadings and appendices/addenda attached to the briefs of Kansas and the Amicus Curiae. The Report also contained the following "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." *See* Report 44-45.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nebraska respectfully takes exception to Special Master McKusick's Report on procedural and substantive grounds. In his Report, the Special Master erred in three, interrelated ways.

Nebraska's first exception relates to the Special Master's failure to follow Fed. R. Civ. P. 12(b)(6). The Court granted Nebraska leave to file a motion to dismiss "in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure." As the Court is aware, Rule 12 tests the legal sufficiency of a complaint, assuming all well pled facts to be true. If a party offers matters outside the pleading, a court or special master may consider those matters only if the motion to dismiss is converted to a motion for summary judgment under Rule 56. If this conversion is made, the court or special master must determine whether there exist genuine issues of material fact. The court or special master may neither assume the

truth of the allegations contained in the complaint, nor weigh the evidence to reach a finding of fact.

The Special Master failed to review Nebraska's Motion to Dismiss as a test of the legal sufficiency of the Kansas Bill of Complaint. Instead, the Special Master employed a hybrid procedure that effectively converted Nebraska's Motion to Dismiss into a Kansas motion for summary judgment. Under this procedure, Nebraska assumed all of the burdens and none of the benefits of Rule 12 or Rule 56. Specifically, the Special Master examined matters outside the pleading, submitted by the non-moving party (*i.e.*, Kansas) and the Amicus Curiae (*i.e.*, United States), and judged those matters to be true without converting Nebraska's motion to a motion for summary judgment. In addition, the Special Master purported to make findings of fact and thereafter concluded the allegations contained in the Kansas Complaint were true without affording Nebraska the opportunity to offer any evidence.

Nebraska's second exception concerns the "Conclusions and Recommendation" section of the Report. The Special Master fashioned a "Recommendation" that goes beyond the scope of Nebraska's Motion to Dismiss and effectively offers judgment to the non-moving party (*i.e.*, Kansas) that is the opposite of that sought by Nebraska. Such a recommendation, if adopted by this Court, would have the effect of denying Nebraska due process of law.

Third, and most importantly, Nebraska takes exception to the Special Master's Report on a substantive level. The Special Master failed to follow well-established rules of contract and statutory interpretation by examining the

Compact without regard for the plain meaning of the Compact terms as they were written in 1943. In 1943, none of the Compact States possessed legal authority to restrict the use of groundwater. Moreover, no state court had recognized the Compact as a source of authority to restrict the use of groundwater. Indeed, this Court in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), found that Congress did not restrict groundwater use by its consent to the Compact. Although the wells at issue in *Sporhase* are the very same wells Kansas now seeks to restrict, the Special Master dismissed the *Sporhase* holding as inapplicable. The Special Master was forced to recognize the term groundwater was not in the Compact but included groundwater by *implication* in the phrase "waters of the Basin" in the Compact. This interpretation is directly at odds with interpretations made by this and other federal courts, which have expressly rejected the inclusion of hydrologically or hydraulically connected surface or groundwater by implication in statutory language such as "water of a river system" and "waters of the United States."

Nebraska respectfully submits the procedural analysis employed by the Special Master was fundamentally flawed. The Court should reject the Report, make an independent review of Nebraska's Motion to Dismiss and enter an Order granting that Motion.

ARGUMENT

I.

THE SPECIAL MASTER ERRED IN HIS PROCEDURAL ANALYSIS OF NEBRASKA'S MOTION TO DISMISS

A. Application Of The Federal Rules Of Civil Procedure

Because this is an Original Action, "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules . . . may be taken as guides." Sup. Ct. R. 17.2. While the Federal Rules of Civil Procedure are a guide in Original Actions, this Court typically employs the conventional rules of analysis in determining whether to grant motions before it. *See Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993).

A motion to dismiss under Rule 12(b)(6) simply tests the legal sufficiency of the complaint. "The basic test on a motion to dismiss is whether the complaint, with all the well-pleaded material facts taken as true and construed in the light most favorable to the plaintiff, sets forth facts sufficient to state a legal claim." Federal Procedure, Lawyers Edition, § 62:510 at 273 (1996). A motion to dismiss should be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley*, 355 U.S. at 45-46). It is only well-pleaded material facts, not legal conclusions that are to be taken as admitted. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

B. The Special Master Erred In His Application Of Fed. R. Civ. P. 12(b)(6).

The Special Master committed his initial procedural error by considering matters outside the pleading to determine the intentions of the parties to a contract. *See* Report at 34 (Considering "records of the Compact negotiations and RRCA administrative action. . . . "); *see also* Report at 23-34 ("Extrinsic Evidence of the Intended Meaning of the Compact"). Consideration of matters outside the pleading requires that a motion to dismiss be converted to a motion for summary judgment and disposed of under Fed. R. Civ. P. 56. "[I]f, on a motion . . . asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . . " Fed. R. Civ. P. 12(b)(6). The conversion requirement of a motion to dismiss is strictly enforced to prevent a court from engaging in fact finding. *See Amaker v. Weiner*, 179 F.3d 48, 50 (2d Cir. 1999).

If a motion to dismiss is converted to a motion for summary judgment, matters outside the pleading are not to be judged as true, but rather are evaluated as to whether they demonstrate the existence of a genuine issue of material fact. "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Unlike a motion to

dismiss, the allegations contained in the complaint are not deemed to be true when considering a motion for summary judgment. *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990).

As the moving party, Nebraska could have submitted matters outside the pleading with the Motion to Dismiss. If Nebraska had done so, the Special Master would have had the option to convert Nebraska's Motion to a motion for summary judgment if he wished to consider those matters. Nebraska did not submit any matters outside the pleading. Matters outside the pleading came from Kansas, Colorado and the Amicus Curiae.[2] Matters submitted by a *non-moving party* and a *non-party* cannot convert a motion to dismiss to one for summary judgment. Even if it could, the "Analysis" section of the Report shows the Special Master did not make the requisite conversion. This error alone is sufficient to reject the Special Master's Report. *Lowe v. Town of Fairland, Oklahoma*, 143 F.3d 1378, 1381 (10th Cir. 1998) ("Reversible error may occur, however, if the district court considers matters outside the pleading but fails to convert the motion to dismiss into a motion for summary judgment."); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1301 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984) ("We have held that a district court

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[2] As Amicus Curiae, the United States has been permitted to participate in briefing. The United States should not, however, be permitted to submit evidence unless she becomes a party to this action. Nebraska maintains that consideration of any evidentiary matters submitted by the United States is improper.

commits reversible error when it considers matters extraneous to the pleadings while treating the motion as one to dismiss, rather than as one for summary judgment."). *See also Travel All Over the World, Inc. v. Saudi Arabia*, 73 F.3d 1423, 1430 (7th Cir. 1996).

Of course not all matters beyond the pleading are excluded from consideration on a motion to dismiss. For example, this Court is "not precluded in [its] review of the complaint from taking notice of items in the public record . . . The historical facts recited here . . . are not disputed by the parties." *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986). If items in the "public record" are considered, those matters must be undisputed. This is particularly true when the matters in the public record purport to indicate the intentions of parties to a contractual agreement.

The matters submitted in response to Nebraska's Motion are disputed both legally and factually. Those matters were not attached or referred to in the Complaint. Nebraska specifically objected to such matters as being irrelevant and barred by the parol evidence rule. *See* Nebraska's Brief in Response to Briefs of Kansas and United States in Opposition to Nebraska's Motion to Dismiss at 7-8 n.4. Moreover, those matters do not constitute a complete record of the Compact negotiations or Compact calculations. Within the procedural parameters created by Nebraska's Motion, none of the matters submitted by Kansas and the Amicus Curiae are appropriate for consideration. If, however, those matters were to be reviewed, they should have been reviewed with due consideration for the **entire** record. The entire record of negotiations and Compact calculations exceeds 1,000

pages. Taken as a whole, that record demonstrates that the parties did not discuss, debate or contemplate regulation of groundwater by the Compact.

The Special Master magnified his error by judging the matters outside the pleading as true. This approach is improper even if Nebraska's Motion had been converted to one for summary judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Had the Special Master followed the procedure applicable to a motion for summary judgment, he would have examined the 15 appendices attached to Kansas' Brief in Opposition to Nebraska's Motion to Dismiss ("Kansas' Brief") solely to determine whether those matters gave rise to a genuine issue of material fact. "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves. . . . " *Celotex,* 477 U.S. at 324. These matters are not to be weighed or judged for truthfulness but only to determine whether there is a genuine issue of material fact. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986). If the Special Master concluded that a genuine issue of material fact existed, his option was to simply recommend denial of Nebraska's Motion without more.

Not only did the Special Master judge these limited matters to be true, he did so without considering whether they comprised the entire record on the subject. As stated earlier, the matters submitted by Kansas and the Amicus Curiae do not comprise the entire historical or administrative record. The complete record evinces an absence of any intention by the parties to regulate the use of groundwater. It is significant that the Special Master failed to consider the lack of legislative history on the subject of

groundwater regulation. Only the Compact States' legislatures could bind the parties to the contract. Nowhere in the legislative debates of Kansas, Nebraska or Congress is there mention of an intention to restrict the use of groundwater.[3] If there is any such evidence in the public record, Kansas failed to present it. The lack of evidence plainly illustrates the intention of the legislative bodies was to maintain the existing laws concerning groundwater use. The Special Master's reliance on the limited matters offered by Kansas and the Amicus Curiae as a complete and true record was in error.

Even assuming the items submitted to the Court concerning the negotiation history comprised the entire record, the intentions of the Compact negotiators could not bind the sovereign. Only the legislative bodies of the Compact States and Congress have authority to bind the states to a contract. "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. . . . " Compact Article XI. Thus, only the intentions of the legislative bodies are relevant in determining the meaning of the contractual language.

The most significant procedural error of the Special Master, however, appears in the Conclusions and Recommendations section of the Report. That section offers judgment to the non-moving party (*i.e.*, Kansas) that is

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[3] *See Arizona v. California*, 292 U.S. 341, 360 (1934) ("There is no allegation that the alleged agreement between the negotiators made in 1922 was called to the attention of Congress in 1928 when enacting the act; nor that it was called to the attention of the Legislatures of the several states.").

basically the opposite of that requested by the movant, Nebraska. To reach such a ruling, the Special Master accepted as true the allegations contained in the Complaint and matters outside the pleading to determine that Kansas, as the non-moving party, is entitled to judgment. Kansas did not file a motion seeking any judgment. In her Brief in Opposition to Nebraska's Motion to Dismiss, Kansas requested only that Nebraska's Motion be denied. Kansas' Brief in Opposition to Nebraska's Motion to Dismiss at 36.

The Special Master's application of Fed. R. Civ. P. 12(b)(6) is without precedent. Denying a motion to dismiss cannot result in a finding of fact or conclusion of law that is directly contrary to the position asserted by the moving party. There would be little incentive for any party to file a motion to dismiss if the inferences and assumptions given the non-moving party could be used to affirmatively resolve the issue against the movant. This is, however, precisely what the Special Master did. In effect, the Special Master examined the issue as though Kansas, not Nebraska, had filed a motion for summary judgment **but** gave Kansas all the inferences due the non-moving party under a motion to dismiss. This approach to Rule 12(b)(6), if adopted by the Court, would deny Nebraska due process of law.

II.

THE SPECIAL MASTER MADE FINDINGS CONCERNING ISSUES NOT BEFORE HIM

The only issue before the Special Master was whether the Compact, as a matter of law, altered existing state law

to allow a Compact State to restrict the consumption of groundwater. If, as Nebraska claims, the Compact did not include groundwater and did not intend to alter existing law governing groundwater use, Nebraska's Motion must be granted. Altenatively, the issue must be reserved for a later motion for summary judgment or for trial.

A. The Scope Of Nebraska's Motion

Nebraska's Motion seeks to eliminate from this case all claims relating to groundwater for the reason that the legislative bodies of the Compact parties did not agree to regulate the consumption of groundwater. If the plain meaning of the Compact language did not alter state law to allow for the regulation of groundwater use, the present Complaint should be dismissed. In her Brief in Opposition to Nebraska's Motion to Dismiss ("Kansas Brief"), Kansas argued the parties intended to "restrict a State's consumption of groundwater to the extent necessary to maintain allocations of surface flows to downstream States." *See* Kansas Brief at 11. The Kansas Brief concluded with the request, "Nebraska's Motion to Dismiss should be denied." *See* Kansas Brief at 36. This is a standard response for a party resisting a motion to dismiss. The relief sought is thereafter either granted or denied.

B. The Conclusions And Recommendation Address Issues Beyond The Scope Of Nebraska's Motion

As a consequence of the flawed application of Fed. R. Civ. P. 12(b)(6), the Special Master addressed issues not before the Court. Specifically, the Special Master found

that "Nebraska violates the Compact if . . . 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." *See* Conclusion (4), Report at 45. The issue of what actions constitute a violation of the Compact was not raised by Nebraska's Motion or any other motion. Had the issue been properly before the Special Master, an evidentiary hearing should have been held to gather evidence regarding Compact formulas ("Compact Formulas") for allocating waters in the Basin, the history of Compact enforcement, the history of river flow volumes entering Kansas and federal involvement in surface water distribution. Each of these items is complex and requires considerable factual development and, more importantly, is critical to determine if, when or how a Compact violation might occur.

For instance, the "basis and principle upon which the allocations of water" in the Compact are made is "beneficial consumptive use." *See* Compact, Art. II. Kansas annually receives more water than is allocated to her but is unable to put to beneficial consumptive use more than a small percentage of her annual allocation. *See* Nebraska's Brief in Opposition to Kansas' Motion for Leave to File Bill of Complaint at A-6 and A-7. The Special Master did not consider the basis for the allocations or Kansas' historic use before determining what constitutes a violation of the Compact. Moreover, Nebraska's Counterclaim, Third Claim for Relief, specifically addresses Kansas' inability to put to beneficial consumptive use the water she receives. The Special Master's sweeping Conclusion potentially impacts Nebraska's Counterclaim without

affording Nebraska any opportunity to address the issue. In so doing, Nebraska's right to due process has been denied.

The Special Master's Conclusion also failed to consider the role of the United States in the Basin. Had he adduced evidence on this issue, the Special Master would have learned that the United States significantly impacts the flow of the Republican River through its ownership and operation of nine major reservoirs.[4] Through the operation of those reservoirs, the United States has the ability to affect water flowing into Kansas. The history of reservoir operation and Kansas' efforts to change those operations is, therefore, critical in determining whether a state has violated the Compact. These issues are the specific focus of Nebraska's Tenth and Sixteenth Affirmative Defenses. Nebraska was afforded no opportunity to address how these issues bear on alleged Compact violations.

The Conclusion of the Special Master also effectively invalidates the Compact Formulas. While Nebraska contends the RRCA exceeded its authority by including groundwater in the Compact Formulas, the Compact Formulas have **always** specifically excluded "tableland wells" from the virgin water supply calculations. *See* Answer and Counterclaim of the State of Nebraska, A-2. Inexplicably, the Special Master concluded the virgin

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[4] "Between 1945 and 1964, the United States constructed nine federal reservoirs in the Republican River Basin." *See* Brief for the United States as Amicus Curiae in Opposition to the Motion to Dismiss, at 9.

water supply includes groundwater pumped from "tableland wells" even though the Compact Formulas do not include, and have never included, tableland wells.

The Special Master also failed to limit the geographic extent and degree of the groundwater allegedly regulated by the Compact. The Special Master created, sua sponte, a nearly limitless reach for groundwater regulation. For instance, a well located 20 miles outside the boundaries of the Compact may diminish stream flow by one gallon after 100 years of pumping. The Conclusion and Recommendation section of the report suggests that this well would be subject to regulation under the authority of the Compact.

The sole issue before the Special Master was whether the Complaint should be dismissed because the Compact did not change the existing law that prevented a Compact State from regulating the consumption of groundwater. The Special Master erred in his application of Fed. R. Civ. P. 12(b)(6) thereby making Conclusions and a Recommendation that go beyond the scope of any motion before him.

III.

THE SPECIAL MASTER ERRED IN HIS ANALYSIS OF THE COMPACT LANGUAGE

A compact is both a contract and a federal statute. *See Texas v. New Mexico*, 462 U.S. 554, 564 (1982). The Special Master failed to follow the accepted rules of contract and statutory interpretation. The Special Master disregarded the plain and ordinary meaning of the express terms of the Compact. The Special Master further erred by basing

his conclusions on an incorrect interpretation of only one of several terms defined in Article II and failed to reconcile that term with the remaining terms and provisions of the Compact as a whole. Further, the Special Master disregarded state and federal law in existence at the time of the Compact, despite the Compact's express reference to those laws in the Compact (Article IV). The Special Master also disregarded the subsequent interpretation of the Compact by this Court and by the States' courts. Finally, the Special Master's interpretation of the Compact is inconsistent with the interpretation of subsequently enacted federal water statutes. It was not within the power of the Special Master to vary the terms of the Compact, and his recommendation proposing that be done, should be rejected.[5]

A. The Special Master Failed To Follow Accepted Rules Of Contract And Statutory Interpretation

1. The Special Master's Recommendation Misinterprets The Express Terms Of The Compact

The canons of construction for contracts and statutes are the same. When the language of a compact is plain and unambiguous, no further judicial inquiry may be undertaken. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . " *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). " '[U]nless otherwise

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[5] *See Oklahoma v. New Mexico*, 501 U.S. 221, 242-43 (1992) (Rehnquist, C.J., dissenting).

defined, words will be interpreted as taking their ordinary, contemporary, common meaning' at the time Congress enacted the statute." *Amoco Production Company v. Southern Ute Indian Tribe*, 526 U.S. 865, 873-74 (1999) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). When properly applied, these accepted rules of statutory and contract interpretation lead only to the conclusion that the Compact apportions surface water consumption and does not restrict groundwater use.

The express terms of the Compact discuss and apportion only surface water.[6] Nowhere in the Special Master's Report is there a discussion of the ordinary meaning of the relevant express terms of the Compact as commonly understood in 1943. The question of what water use is or is not restricted by the Compact is governed by the express terms used in the Compact in light of the existing law of the states.[7]

The ordinary and common meaning of the Compact terms "Basin," "drained," and "drainage basin" in 1943

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[6] The United States concedes the Compact apportions only surface water. "In that limited sense, Nebraska is correct that the Compact apportions surface water and does not identify groundwater, *in situ*, as a separately apportioned resource. *See* Brief for the United States As Amicus Curiae at 15.

[7] "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' " *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-430 (1934) (quoting *Von Hoffman v. City of Quincy*, 4 Wall 535, 550 (1867)). In this case, the Compact goes a step further and expressly refers to the use of the water allocated in Article IV being subject to state law.

refer only to surface water. Article II of the Compact defines "Basin" as "all the area in Colorado, Kansas, and Nebraska, which is naturally **drained** by the Republican River, and its tributaries. . . . " (emphasis added). This definition is consistent with the ordinary understanding of "basin" both in 1943 and today.[8] While the term "drained" is not defined in the Compact, the common and ordinary understanding of "drained" in 1943, and today, is "[t]o discharge" or "carry away" "its surface water, streams, etc. . . . " *See Webster's New International Dictionary* 782 (2d ed. 1934); *Webster's New International Dictionary* 685 (3d ed. 1981). Nothing in the plain meaning of these terms refers to groundwater, either expressly or implicitly.

On matters of statutory interpretation the Court has stated: "Our task is to apply the text, not to improve on it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). "[N]o court may order relief inconsistent with [a Compact's] express terms . . . no matter what the equities of the circumstances might otherwise invite." *New Jersey v. New York*, 523 U.S. 767, 811 (1998). The interpretation proposed by the Special Master violates both of these tenets of statutory interpretation. The express terms of the Compact place no restriction on any state's consumption of groundwater. In order to restrict the consumption of groundwater, the Compact must first apportion groundwater. The Special Master and all the

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[8] "The entire tract of country drained by a river and its tributaries; – called specif[ically] river basin." *See Webster's New International Dictionary* 182 (3d ed. 1981). *See also Webster's New International Dictionary* 227 (2d ed. 1934).

parties to the Compact agree that the Compact does not apportion groundwater. The terms "groundwater" and "hydraulically connected" do not exist in the Compact.[9] Despite this absence, the Special Master concluded the Compact cannot mean what it says (or in this case does not say), and instead fashioned a restriction to which none of the parties freely and knowingly agreed.

The Special Master concluded it must have been the intent of the Compact drafters to include groundwater to "**the extent it depletes the stream flow in the Basin.**" *See* Report at 23 (emphasis added). This conclusion is contrary to the views expressed by this Court. "The emphasized terms do not appear anywhere in the Compact, and reflect not the intent of the parties, but instead the intent that the [Special Master] now imputes to them." *Oklahoma v. New Mexico*, 501 U.S. 221, 245 (1992) (Rehnquist, C.J., dissenting). Had the Legislatures of the three Compact States intended to limit their free and unrestricted use of groundwater "they would certainly have done so more directly." *Id.* at 247. "[U]nless the compact to which Congress has consented is somehow unconstiutional, no court

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[9] The Special Master acknowledges the Compact does not use "the express term 'groundwater.' " *See* Report at 22. Likewise the phrase "hydraulically connected" is not found in the Compact or the legislative history submitted by Kansas, Colorado and the United States. The Special Master improperly relies on extrinsic evidence from 1998 and 1985 studies by the USGS and Bureau of Reclamation, unrelated to the Compact, as grounds for finding by implication the phrase "hydraulically connected." *See* Report at 2-3 n.3. *See also Oklahoma v. New Mexico*, 501 U.S. 221, 250 (1992) (Rehnquist, C.J., dissenting).

may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

Likewise, "the States' failure to agree on one issue, however important, does not render the Compact void, nor does it provide a justification for altering its structure by judicial decree." *Texas v. New Mexico*, 462 U.S. 554, 565 (1983). What Kansas seeks is to apportion indirectly that which the parties did not agree to apportion directly. The express terms of the Compact provide no support for Kansas' position or the Special Master's conclusion.

2. The Special Master's Recommendation Fails To Interpret All Of The Express Terms Of The Compact

A fundamental rule of contract and statutory construction requires that "all provisions of a Compact must be read together in a meaningful manner." *Oklahoma v. New Mexico*, 501 U.S. 221, 246 (1992) (Rehnquist, C.J., dissenting) (citing *United States v. Utah, Nevada & California Stage Co.*, 199 U.S. 414, 423 (1905)). It is "an interpretative rule as familiar outside the law as it is within, for words and people are known by their companions." *Gutierrez v. Ada*, ___ U.S. ___ No. 99-51, Slip op. at 5 (2000). *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. ___ No. 98-1152, Slip op. at 9 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

The Special Master mistakenly limited his focus solely to the term "virgin water supply" as defined in the

Compact. *See* Report at 19-23. While Article II of the Compact defines "virgin water supply" as "the water supply within the Basin undepleted by the activities of man," the Special Master erroneously concluded that water supply means "all of it," failing to apply the limitation created by the modifying phrase "within the Basin." *See* Report at 20. The Compact expressly limits its scope to only the "water supply within the Basin." The use of the phrase, "within the Basin," and the commonly understood definition of "Basin" as relating only to stream flow, offers no support for the expansive definition of "water supply" adopted by the Special Master. Moreover, the Special Master cited no authority, commonly understood definition or other statutory precedent for his conclusion. *See* Report at 20.

In addition to the limitations on the meaning of "virgin water supply" expressed in the definition of the term in Article II, Article III of the Compact further limits the scope of the Compact to only the "computed average annual virgin water supply originating in the following designated drainage basins." The Special Master's recommendation disregarded the limitation created by the phrase "drainage basin." The common and ordinary meaning of "drainage basin," is the same as "basin." *See Webster's New International Dictionary* 782 (2d ed. 1934); *see Webster's New International Dictionary* 685 (3d ed. 1981).

Article III of the Compact also limits the scope of the Compact to allocating only the "computed average annual virgin water supply **originating** in the following designated drainage basins. . . . " (emphasis added). The Special Master's failure to consider the limitations of the

scope of "virgin water supply" in Article III is apparent because under the Special Master's reasoning, any groundwater that might find its way to the stream, regardless of origin, is within the scope of the Compact.

The Special Master acknowledged that the Compact "does not attempt to apportion groundwater as groundwater." *See* Report at 20. Even a cursory review of Articles III and IV reveals that the Compact was clearly not intended to allocate, regulate or restrict the use of the approximately 3.2 **billion** acre-feet of groundwater found in the Ogallala Aquifer. The water in the Ogallala Aquifer **originates** in an eight-state region. Within Nebraska, Kansas and Colorado, the Ogallala Aquifer underlies the geographic area covered by the Compact, as well as vast areas beyond the boundaries of the Compact.[10] Even assuming groundwater was implicitly included in the Compact, the limitation in the Compact to the "computed average annual virgin water supply originating in the following designated drainage basins" cannot be read to include groundwater that originates outside of the boundaries of the Compact before ultimately finding its way within those boundaries.

The Special Master also failed to consider all of the purposes of the Compact. A fundamental precept of the Compact is "beneficial consumptive use." The Special

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[10] This Court has acknowledged "[t]he multistate character of the Ogallala aquifer," underlying the lands in the Republican Basin in Colorado, Nebraska and Kansas, as well as lands beyond the Basin in those States and Texas, New Mexico and Oklahoma. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982).

Master mistakenly limited his analysis to only one of the purposes stated in the Compact, "to provide for an equitable division of such waters." *See* Report at 21. Article I, however, provides that "[t]he major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin . . . [and] to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use. . . . "[11] Beneficial consumptive use is also mentioned twice in Article II, five times in Article IV, once each in Articles V and VI, and three times in Article XI. The Special Master gave it no consideration, yet the pervasive references to beneficial consumptive use are the key to understanding the Compact. *Cf. Gutierrez v. Ada*, ___ U.S. ___ No. 99-51, Slip op. at 4 (2000) ("The key to understanding what the phrase 'in any election' means is also the most salient feature of the provision in which it occurs. The section contains six express references to an election for Governor. . . . ").

The Special Master's conclusion that no groundwater is apportioned but that groundwater use may be restricted, could not have been the intent of the States as it is contrary to the stated purposes of the Compact.

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[11] Article I further states that among its purposes is "the control of destructive floods." The preamble of the Compact also speaks to promoting flood control. Both are direct references to surface water and consistent with federal law at the time of the Compact's adoption. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988) (Outlining the history of federal legislation dealing with flood control in the Missouri Basin, including the Republican River, both before and contemporaneously with the Compact).

Common sense dictates that a restriction of some groundwater use is a restriction of all groundwater use. The groundwater connection that the Special Master assumes to exist is located at the top of an underground pool. Under the Special Master's reasoning, all of the vast supplies of groundwater beneath that top level sit unapportioned and yet, are left incapable of "efficient utilization" because of the restriction now imposed. Such a conclusion is incompatible with the Compact's core objective of efficient utilization of the waters. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. ___ No. 98-1152, Slip op. at 19 (2000) ("What the FDA may not do is conclude that a drug . . . cannot be used safely . . . and yet, at the same time, allow that product to remain on the market. Such regulation is incompatible with the FDCA's core objective of ensuring that every drug or device is safe and effective.").

3. The Special Master Failed To Consider State And Federal Law In Existence At The Time Of The Compact's Adoption

To understand the intentions of the parties when they entered into the Compact, the terms of the agreement must be considered with due regard for the unique nature of surface and groundwater laws that constrained the parties in 1943.[12] The Special Master erred by failing to consider the Compact language in light of the laws that governed surface and groundwater property rights at the time the Compact was entered. In 1943, the Compact

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[12] *See* note 7, *supra*.

States did not possess the authority to regulate groundwater use. Unless the Compact language expressly limited or altered the existing regime of groundwater law to permit state regulation of groundwater, the pre-Compact limitation on state regulatory authority survived the adoption of the Compact.

Groundwater jurisprudence was well-established in Nebraska and Kansas by 1943. "From the very beginning as a territory and as a state, Kansas expressly adopted the common law in existence at that time. . . . For groundwater, Kansas applied the common law 'absolute ownership doctrine,' which allowed landowners to withdraw water and use it as they pleased, regardless of the effects on their neighbors." John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective*, 43 Kan. L. Rev. 735, 736-37 (1995). One year after the Compact became law, the Kansas Supreme Court upheld the common law rule that "underground waters are part of the real property in which they are situated." *State ex rel. Peterson v. Kansas State Board of Agriculture*, 158 Kan. 603, 609, 149 P.2d 604, 608 (1944). After an extensive review of all Kansas water law, the Kansas Supreme Court rejected Kansas' contention that it could restrict groundwater use by concluding, "No statute cited to us, and none which we have found by our own research, authorizes the defendants, or any of them, to regulate, allocate or distribute, or otherwise interfere with the use and consumption of underground waters." *Id.* at 611.

The Special Master attempted to distinguish *Peterson* on the grounds that the case did not involve "water within the Basin and did not mention the Compact in its

survey of Kansas statutes." *See* Report at 39. The Special Master was in error.

First, the Kansas Supreme Court's ruling in *Peterson* applied to the entire State of Kansas, including the area within the Basin. The Court surveyed Kansas' statutes looking for ***any*** authority to support state regulation of groundwater use. The Kansas Supreme Court failed to identify the Compact as even a nominal source of such authority. The absence of the Compact from the survey of Kansas' laws makes clear that it was never the intention of Kansas' legislature to regulate groundwater through the Compact. Had the then newly enacted Compact been believed or intended to allow for the regulation of groundwater within a 7,500 square mile area of Kansas – an area nearly the size of the State of Massachusetts – the Kansas Supreme Court certainly would have at least identified the new law as an example of such authority.

Second, *Peterson* was a landmark case that directly caused Kansas' legislature to adopt the Kansas Water Appropriation Act ("Act") in 1945. Kansas does not contest this fact. The Act "made a fundamental and profound change in Kansas water law and policy" precisely because the Act permitted, for the first time, the regulation of groundwater hydraulically connected to surface water. John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective*, 43 Kan. L. Rev. 735, 736 (1995). If the Compact was intended to create a similar "fundamental and profound change" within the 7,500 square mile area of the Basin in Kansas, the Kansas Supreme Court and others certainly would have said so.

Moreover, the Act was adopted based upon recommendations contained in a report prepared by a special committee appointed by Kansas Governor Andrew F. Schoeppel in response to the *Peterson* decision. Kansas' Compact negotiator, George S. Knapp, was chair of that committee. The committee report stated, "No statute authorizes the Division of Water Resources or the State Board of Agriculture or its chief engineer to regulate, allocate, or distribute, or otherwise interfere with the use and consumption of underground waters." *See The Appropriation of Water for Beneficial Purposes*, 39.[13] The report did not identify the Compact or make any exceptions for the Republican River Basin.

Like Kansas, Nebraska adopted separate legal doctrines governing the use of groundwater and surface water early in its history. In 1895, Nebraska adopted the prior appropriation doctrine through a constitutional amendment but strictly applied the doctrine only to surface water in natural streams but not groundwater. *Drainage Dist. No. 1 v. Suburban Irr. Dist.*, 139 Neb. 460, 298 N.W. 131, 135-36 (1941). Groundwater property rights were established by common law. *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933). The right to use groundwater was considered to be among the bundle of property rights associated with land ownership. "Landowners acquire rights to use groundwater by virtue of their ownership of overlying land." R. S. Harnsberger

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[13] The Committee Report, *The Appropriation of Water for Beneficial Purposes*, constitutes the legislative history of the Kansas Water Appropriation Act.

and N. W. Thorson, *Nebraska Water Law & Administration*, at 214 (1984).

The first legislation adopted in Nebraska concerning groundwater use occurred in 1957, fourteen years after the Compact was adopted. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614, 617 (1981) ("Legislative recognition of the state's power and the corresponding need to manage the state's ground water resource began in 1957 . . . "). The distinction in law between groundwater and surface water has been maintained even where there is a clear hydraulic connection between the two sources of water. *Metropolitan Utilities District v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966). In *Merritt Beach*, the Nebraska Supreme Court rejected the proposition that the subflow of a stream should be regulated as part of the stream: "While the rights of appropriators to the use of water from rivers and streams have been protected over the years, rights in the use of ground water have not been determined nor protected, nor the public policy with reference to the use of such underground waters legislatively declared." *Id.* at 636. At no time has the Nebraska Supreme Court recognized the Compact as creating authority to regulate groundwater.

Likewise, Colorado did not adopt legislation authorizing state water officials to regulate groundwater use until 1965. *See* Act of May 3, 1965, Chapter 318, § 1, 1965 Colo. Session Laws at 1244. At the time the Compact was approved by the Colorado General Assembly, no state official had the authority to deny landowners the right to drill a well on their property. The Colorado Water Adjudication Act of 1943 was based entirely "on the concept of

rivers and natural streams." *Witten v. Coit*, 153 Colo. 157, 164, 385 P.2d 131, 135 (1963).

In 1943, the laws of Kansas, Nebraska and Colorado did not permit the regulation of groundwater. While the connection between groundwater and surface water may have been understood in some scientific sense as suggested by the Special Master,[14] the laws of the Compact States in 1943 did not recognize that connection or attempt to manage such water conjunctively. In his review of the language used in the Compact, the Special Master erred by failing to consider the laws governing groundwater use at the time the Compact was entered.

Viewed in light of the existing law, the Compact does not contain any language that suggests the Compact States intended to drastically alter their existing law to assert regulatory control over groundwater use. Indeed, as interpreted by the Supreme Courts of each of the Compact States, none of the Compact States had the authority, express or implied, to regulate groundwater at the time the Compact was entered. Nor did the Compact

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[14] The Special Master contends that the "connection between groundwater discharge and stream flow was a widely known scientific fact well before the Compact was drafted. . . ." *See* Report at 23. This is an overstatement. To support his conclusion, the Special Master cited *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.*, 260 U.S. 596 (1923). The Special Master failed to recognize that the central issue in *Snake Creek* did not involve the interpretation of an interstate agreement or federal law but simply a determination of how to treat such water under state water law in Utah. 260 U.S. 598-99. Furthermore, the recognition of a hydrologic connection in *Snake Creek* came after an evidentiary hearing.

States express any intent to create such authority through the adoption of the Compact. As noted in *Hinderlider v. La Platta River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), the Compact States could have subordinated individual water rights to the Compact had they so desired. The Compact contains no language indicating that the Compact states intended to relinquish sovereignty and create restrictions on groundwater use. "Such a waiver of sovereign authority will not be implied, but instead must be 'surrendered in unmistakable terms.' *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986), quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)." *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987).[15]

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[15] The Special Master's reliance on extrinsic evidence of correspondence between Compact Commissioners is misplaced. *See Arizona v. California*, 292 U.S. 341, 360 (1934) ("There is no allegation that the alleged agreement between the negotiators made in 1922 was called to the attention of Congress in 1928 when enacting the act; nor that it was called to the attention of the Legislatures of the several states."). There is no evidence submitted in this case that the discussions between the negotiators regarding groundwater was ever submitted to Congress and the Legislatures of Kansas and Nebraska. The materials prepared by the Colorado negotiator were not called to the attention of Congress or the Legislatures of Nebraska and Kansas. *See Flood Control in the Basin of the Republican River: Hearing on S. 649 Before the Senate Comm. On Irrigation and Reclamation*, 78th Cong., 1st Sess. (1943); *Republican River Compact: Hearings on H.R. 1679 and H.R. 2482 Before the House Comm. on Irrigation and Reclamation*, 78th Cong., 1st Sess. (1943).

B. The Special Master's Recommendation Is Contrary To Federal Law

1. The Special Master's Recommendation Is Contrary To This Court's Decision In *Sporhase v. Nebraska Ex Rel. Douglas*

This Court previously addressed the absence of congressional regulation of groundwater in the Basin. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982). In *Sporhase*, this Court recognized the Compact States did not regulate groundwater by means of the Compact. The issue before the Court in *Sporhase* involved the constitutionality of the State of Nebraska's regulation of groundwater pumped for use outside the state under the "Dormant Commerce Clause." *See South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984). In writing for the majority, Justice Stevens declined to find congressional authorization for state-imposed burdens on interstate commerce in groundwater. To reach that result, it was necessary for the Court to first determine if Congress had regulated groundwater or, in the alternative, whether Congress had consented to Nebraska's regulation of groundwater in a manner which would not otherwise be permissible. *Sporhase*, 458 U.S. at 959-960.

There is no question that Congress consented to the Compact. The majority of this Court found no regulation of groundwater was made by Congress. On this point, the dissent agreed. "It is therefore wholly unnecessary to decide whether Congress could regulate ground-water overdraft in order to decide this case; since Congress has not undertaken such a regulation." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 962 (1982) (Rehnquist, C.J., and

O'Connor, J., dissenting). Consent to the Compact by Congress is by definition Congressional regulation. In other words, for the majority and dissent in *Sporhase* to reach the conclusion that there was no existing Congressional regulation of groundwater, both had to first conclude that the Compact does not restrict groundwater use. *See New York State Dairy Food, Inc. v. Northeast Dairy Compact Commission*, 198 F.3d 1, 9 (1st Cir. 1999), *petition for cert. filed* (U.S. Feb. 28, 2000) (No. 99-1438) ("The standard for finding congressional consent is high. Such consent must be either 'expressly stated,' or 'made unmistakably clear.' " (Quoting *Sporhase* and *South-Central*)). Clearly, "Congress read the Compact and approved it." 198 F.3d at 12. This Court found that Congress did not consent to a restriction on groundwater use. *Sporhase*, 458 U.S. at 960. *See South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 90 (1984). ("For example, in *Sporhase v. Nebraska ex rel. Douglas, supra*, the Court declined to find congressional authorization for state-imposed burdens on interstate commerce in ground water despite 37 federal statutes and a number of interstate compacts that demonstrated Congress' deference to state water law.")

Although the analysis could end here, *Sporhase* offers still more to prove the Compact does not restrict groundwater use. Nebraska and the Amici Curiae, including Kansas, argued that Congress had consented to state regulatory authority over water through its approval of interstate compacts. In her brief, Nebraska cited the Compact as an example of Congressional deference to state regulatory authority. This Court noted that: "the interstate compacts to which the appellee refers are agreements among States regarding rights to **surface**

water . . . Appellee emphasizes . . . a compact . . . involving rights to the Republican River." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982) (emphasis added).

Kansas and Colorado, as Amici Curiae, agreed with Nebraska that there was no existing restriction on groundwater use by compact, only an informal agreement.

> At present, there is a *de facto* equitable apportionment of groundwater in the Ogallala aquifer. Each state overlying the aquifer allocates for beneficial use only that quantity of ground water which can be diverted with the state." If [the Supreme Court] were to strike down the Nebraska statute . . . [e]quitable apportionment [of the groundwater], by decree or compact, would be the likely result.

Brief of Amicus Curiae, State of Colorado, Kansas, et al. at 10, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Doc. No. 81613).

Kansas' argument in *Sporhase* is in direct conflict with the position she advocates here. Had Kansas believed in 1982 that the Compact governed the use of hydraulically connected groundwater, however near or far from the stream, she would have so indicated to this Court. At the very least, Kansas would have raised the issue at the next annual meeting of the RRCA. Neither Kansas nor Colorado did.

The Special Master considered *Sporhase* but concluded this Court's analysis applied only to groundwater that was **not** in hydraulic connection to streams. *See* Report at 38. The Special Master's conclusion is incorrect.

This Court made no distinction in *Sporhase*, between Ogallala groundwater hydraulically connected to stream flow and Ogallala groundwater that was not connected to stream flow. The briefs submitted by the parties and Amici Curiae in *Sporhase* provided a description of the complex and interrelated hydrology of the Ogallala aquifer throughout the Midwest and West. If it had been this Court's intention in *Sporhase* to restrict its ruling only to isolated Ogallala groundwater, the decision would have contained that qualification. More importantly, the wells at issue in *Sporhase* are among the very **same tableland wells** that the Special Master concluded are subject to Congressional regulation under the Compact. *See* Report at 45. ("Nebraska violates the Compact if . . . Nebraska's groundwater pumping, whether alluvial or tableland wells, depletes stream flow. . . . ") The wells at issue in *Sporhase* are located only a short distance from a tributary specifically identified in the Compact.

This Court's decision in *Sporhase* found that Congress and the Compact States did not agree to restrict the use of groundwater by means of the Compact and that no such intention can be implied from the express language of the agreement. If the Compact restricts any groundwater use, Congress, by consenting to the Compact, would already have restricted groundwater use and the Dormant Commerce Clause analysis by the majority and dissenting opinions in *Sporhase* would have been unnecessary. To the contrary, this Court, the parties and Amici Curiae did not find or contend that the Compact was a federal law that restricted or regulated groundwater use. The recommendation of the Special Master that the Compact restricts

groundwater use is in direct conflict with the ruling of this Court in *Sporhase*.

2. The Special Master's Recommendation Is Contrary To The Compact States' Supreme Courts' Interpretation Of The Compact

Whether the legislatures of the Compact States intended to alter the then existing regime of groundwater property law by adopting the Compact can also be determined through the examination of post-Compact state court cases addressing groundwater regulation. None of these decisions cite the Compact as authority permitting the regulation of groundwater use. Indeed, the cases show that the regime of groundwater property law remained unchanged by the Compact.

The first case dealing directly with groundwater regulation in the Basin emerged from Kansas. In *State v. Knapp*, 167 Kan. 546, 207 P.2d 440 (1949), the constitutionality of the Kansas Water Appropriation Act ("Act") of 1945 was challenged. In upholding the authority of the Act, the Kansas Supreme Court reaffirmed its ruling in *Peterson*, 158 Kan. 603, 149 P.2d 604 (1944). The Kansas Supreme Court in *Knapp*, specifically noted that prior to 1945, no statute (*i.e.*, the Compact) or case law authorized any Kansas official to regulate, allocate or distribute groundwater. *Id.* at 444-45. *Knapp* is important because the Kansas Supreme Court specifically addressed water regulation in the Basin, noted the authority of the Compact but found the Act to be the sole authority for regulating the use of groundwater. The Kansas Supreme Court did not believe its legislature granted the authority to

regulate groundwater through the Compact, or it would have so stated in *Knapp*. Indeed it would have so stated in *Peterson*.

The Nebraska Legislature did not exercise its authority to restrict the use of groundwater until 1957. In *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), the Nebraska Supreme Court considered whether wells pumping groundwater near a tributary of the Republican River could be exported to Colorado. In reviewing state authority to regulate groundwater use, the Nebraska Supreme Court stated, "Legislative recognition of the state's power and the corresponding need to manage the state's ground water resources began in 1957. . . . " *Id.* at 617. Obviously the Nebraska Legislature could not have authorized the regulation of groundwater in 1943 if it did not believe it was legally able to do so until 1957. In *Sporhase*, the Nebraska Supreme Court cited *Metropolitan Utilities District*, 179 Neb. 783, 140 N.W.2d 626 (1966) regarding the legislative authority to regulate groundwater use. As mentioned earlier, that case rejected the proposition that groundwater subflow should be treated as stream flow. The Special Master's Report represents a significantly different understanding of Nebraska groundwater law and history than that held by Nebraska's own Supreme Court.

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

water rights" in the Basin and "ground water" found in the "Ogallala-Aluvium aquifer." At issue in Pioneer was an order of the Colorado Ground Water Commission that found:

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

Id. at 844 n.1.

To escape the conclusions of the Compact States' highest courts, Kansas argues that these state law decisions have no precedential value. The Special Master appears to tacitly agree by his failure to substantively address these decisions. That position, however, is contrary to established practice and statements of this Court:

> To determine the nature and scope of obligations as between States . . . is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged.

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1941).

3. The Special Master's Recommendation Is Inconsistent With The Interpretation Of Other Federal Water Statutes

The Special Master's interpretation of the Compact is contrary to the judicial and administrative interpretations of similarly worded federal water statutes, including the McCarran Amendment of 1952 and the Clean Water Act of 1972. Neither the Special Master nor Kansas and the United States cite any authority for the proposition that "hydraulically" or "hydrologically" connected groundwater has been implied into any federal statute prior to or near the time the Compact was enacted. To the contrary, those courts interpreting the subsequently passed McCarran Amendment and Clean Water Act have rejected an implied inclusion of hydrologically or hydraulically connected water (whether surface or ground) to those statutes.

a. McCarran Amendment

Passed by Congress in 1952, the McCarran Amendment serves as a waiver of sovereign immunity for the United States when a state engages in an "adjudication of rights to the use of water of a river system or other source. . . . " 43 U.S.C. § 666(a).[16] Like the Compact, the

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[16] Senator Pat McCarran, for whom the McCarran Amendment is named, presided as Acting Chairman at the Senate Committee Hearing to ratifiy the Compact. *See Flood Control in the Basin of the Republican River: Hearing on S. 649 Before the Senate Comm. On Irrigation and Reclamation,* 78th Cong., 1st Sess. (1943).

McCarran Amendment is a federal law that does not mention groundwater. This Court and the Ninth Circuit Court of Appeals rejected the contention that hydrologically connected water, whether from surface or ground, is implied in the phrase "water of a river system."

In *United States v. District Court for Eagle County*, 401 U.S. 520, 523 (1970), this Court rejected the United States' proposed statutory interpretation that a comprehensive adjudication of the "water of a river system" pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), must include, by implication, all hydrologically related water. In *Eagle County* the United States argued that because the Eagle River was hydrologically related to the Colorado River under the McCarran Amendment, a comprehensive adjudication of the Eagle River in Colorado must include an adjudication of the Colorado River. This Court rejected the United States' contention that the definition of "river system" included hydrologically related water by implication. This Court characterized the United States' position as "almost frivolous." *Eagle County*, 401 U.S. at 523.

The Ninth Circuit Court of Appeals reached a similar result with regard to hydrologically related surface and groundwater in the Klamath River Basin. In *United States v. State of Oregon*, 44 F.3d 758 (9th Cir. 1994), the United States advanced a statutory interpretation similar to the one advocated by Kansas in this case. "Arguing that the ground and surface waters of the region are hydrologically interrelated, the United States contends that the failure to include groundwater claims deprives the adjudication of the comprehensiveness intended by Congress." *Id.* at 768. The Ninth Circuit Court first noted that

"On its face, the statute applies to the 'water of a river system or other source' . . . For the United States' argument to succeed, we must read 'river system' to include not only the water of the river, but hydrologically-related groundwater systems as well." *Id.* at 768. The Ninth Circuit Court rejected this argument stating:

> The United States can point to no other case law, statutory text or legislative history that specifically requires groundwater to be adjudicated as part of the [McCarran Amendment] adjudication of a 'river system.' The United States argues instead that the purposes of the Amendment are best served by an interpretation that requires the adjudication of all hydrologically-related water sources. . . . [W]e do not believe that Congress intended to carry the requirement of comprehensiveness as far as the United States would have us do.

Id. at 769.

In rejecting the United States' interpretation of the McCarran Amendment, the Ninth Circuit Court concluded that a McCarran Amendment adjudication need not determine the rights of users of all hydrologically related water sources:

> Scientists have long delighted in pointing out to lawyers that all waters are interrelated in one continuous hydrologic cycle. As a result, it has become fashionable to argue that an effective legal regime should govern all forms and uses of water in a consistent and uniform manner. The law is otherwise.
>
> One of the ways in which the law has traditionally ignored the exhortation of the scientists

> is by treating ground and surface water as distinct subjects, often applying separate law to each . . . The United States is correct in arguing that an increased recognition of the relationship between ground and surface water has led some states to attempt better coordination between the allocation of surface and groundwater rights . . . but that recognition was still emerging at the time the McCarran Amendment was passed. . . .

Id. at 769 (citations omitted).

Based on this historical analysis, the Court held that:

> While the trend has been toward a greater legal recognition of the connection between ground and surface waters, that recognition is too recent and too incomplete to infer that Congress intended to require comprehensive stream adjudications under the McCarran Amendment to include the adjudication of groundwater rights as well as rights to surface water.

Id. at 769-70. *Cf. Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 873 (1999) ("While the modern science of coal provides a useful backdrop for our discussion, it does not answer the question present before us. The question is not whether, given what scientists know today, it makes sense . . . but whether Congress so regarded it in 1909 and 1910.")

b. Clean Water Act

The scope of a federal water statute has also been addressed by federal courts interpreting the Clean Water Act (the "CWA"). The operative phrase at issue in CWA cases is "waters of the United States" which are covered

by the CWA. *See* 33 U.S.C. § 1362(7). The First, Fifth and Seventh Circuits have held that the CWA's permitting provisions applicable to the "waters of the United States" do not apply to any groundwater. *See Town of Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438-1451 (1st Cir. 1992); *Exxon Corp. v. Train*, 554 F.2d 1310 1318-19 (5th Cir. 1977) (emphasizing not deciding regulatory jurisdiction but noting EPA disclaims jurisdiction); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964-65 (7th Cir. 1994). Several district courts have reached similar results. *Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F. Supp. 1085, 1091 (D.S.D. 1998); *Umatilla Waterquality Protect. v. Smith Frozen*, 962 F. Supp. 1312 (D. Or. 1997); *Kelly v. United States*, 618 F. Supp. 1103, 1105 (W.D. Mich. 1985). Admittedly, a few district courts have held the CWA applies to groundwater that effects surface water. *See Friends of Santa Fe County v. LAC Minerals*, 892 F. Supp. 1333, 1357-59 (D.N.M. 1995); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 989-90 (E.D. Wash. 1994); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993).

Regardless of which position is ultimately found correct, the very absence of agreement as to Congressional intent in passing the CWA in 1972, vitiates the Special Master's conclusion that the connection between surface water and groundwater was so obvious to everyone in 1943 that Congress clearly intended to include groundwater by implication in 1943. If Congress did not contemplate the adjudication of integrated groundwater and surface water rights in 1952 when it passed the McCarran Amendment and in 1972 when it passed the CWA, it certainly did not in 1943. Kansas and the United States

were unable to offer any congressional history to suggest otherwise.[17]

4. The Special Master's Recommendation Is Contrary To The Interpretation Of Other Compacts

The Special Master incorrectly concludes that other Compacts provide support for the inclusion of groundwater by implication. Specifically, the Special Master relies on this Court's holdings in *Kansas v. Colorado*, 514 U.S. 673 (1995), and *Texas v. New Mexico*, 462 U.S. 554 (1982). In that same vein, the Special Master ignores the subsequent actions of Kansas and Nebraska in using express language to include groundwater in the Blue River Compact.

First, the Court's holdings in *Kansas v. Colorado*, 514 U.S. 673 (1995), and *Texas v. New Mexico*, 462 U.S. 554 (1982) are factually distinguishable and are therefore, of no precedential value in this case. In his limited analysis of *Texas v. New Mexico*, the Special Master overlooked the fact that the Pecos River Compact expressly included groundwater by way of incorporation of the "Report of the Engineering Advisory Committee" (1947 Study) in Article II(f) and (g). *Texas v. New Mexico*, 462 U.S. at 559. The 1947 Study contained an express groundwater component. *Id.* at 558 n.5. Likewise, the Special Master overlooked the inclusion of groundwater wells in *Kansas v.*

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[17] The extrinsic Congressional evidence cited by the United States refers repeatedly to waters of the river and waters of the streams. No mention is made of groundwater as a separate source or as a component of stream flow. *See* Brief for the United States As Amicus Curiae at 21-22.

Colorado, in Article IV of the Arkansas River Compact, wherein Colorado did not argue, plead or otherwise dispute the interpretation of the phrase "other works" in Article IV to include alluvial groundwater wells. Moreover, in neither *Kansas v. Colorado* nor *Texas v. New Mexico* was groundwater consumption included by implication from the definition of virgin water supply. In fact, neither the Arkansas River Compact nor Pecos River Compact makes reference to or uses the phrase "virgin water supply."

Second, the Arkansas River Compact and the Pecos River Compact expressly provide that they do not establish any "general principles" or "precedent" relative to other interstate streams (i.e., Republican River). Article VII of the Arkansas River Compact states: "This Compact establishes no general principle or precedent with respect to any other interstate stream." (emphasis added). Similarly Article XIII of the Pecos River Compact states: "This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams." (emphasis added).

Finally, the Arkansas and Pecos River Compacts both include provisions that expressly prohibit any future material depletions of the surface flows below the levels set in the respective compacts. *See Kansas v. Colorado*, 514 U.S. 673, 679 (1994); *Texas v. New Mexico*, 462 U.S. 554, 559 (1983). The "shall not" provisions of these other compacts are not found in the Republican River Compact and the Special Master is "not free to rewrite it." *Texas v. New Mexico*, 462 U.S. at 565. Indeed, the Republican River Compact was entered to **promote** the "beneficial consumptive use" of the surface flows of the river. Unlike the

situation in the Arkansas or Pecos compacts, additional use of the waters of the Republican River was intended. Changes in the amount of water supply were to be dealt with by a proportional increase or decrease in each State's allocation. *See* Compact Article V. Notwithstanding a stated purpose to consume without a restriction requiring maintenance of a minimum level of flow, substantial amounts of water continue to flow into Kansas in excess of its apportionment and in excess of her ability to beneficially consume. *See* Nebraska's Brief in Opposition to Kansas' Motion for Leave to File Bill of Complaint at 10-13.

By contrast, Nebraska and Kansas, with the approval of Congress, have demonstrated their willingness to expressly restrict groundwater consumption by means of compact language when they so intended. The Blue River Compact between Kansas and Nebraska became law in 1971. *See* 86 Stat. 193. The Blue River Compact specifically includes certain groundwater within the definition of the water supply subject to the Blue River Compact. If Kansas, Nebraska and Congress believed the Republican River Compact implicitly permitted the regulation of groundwater by the definition of "virgin water supply," it would have been unnecessary to expressly address groundwater by the definition of the water supply in the Blue River Compact.[18] More importantly, Kansas'

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[18] Article I, section 1.8 defines "natural flow" as "that portion of the flow in a natural stream that consists of direct runoff from precipitation on the land surface, ground-water infiltration to the stream. . . . " Article V of the Blue River Compact requires Nebraska to regulate "irrigation wells . . . in the alluvium and valley side terrace deposits within one mile of the thread of the river. . . . " (*See* 86 Stat. 193)

argument here would reach the anomalous result of imposing greater restrictions on groundwater use under the Republican River Compact where the term "groundwater" is absent than under the Blue River Compact where it is specifically included.

C. The Special Master's Reliance On The Compact Administration Formulas As Evidence Of The Compact's Intent To Restrict Groundwater Use Is Misplaced.

The Special Master erred in relying on the formulas adopted by the RRCA in 1959 as evidence that the Compact was intended to restrict groundwater use in 1943. *See* Report at 32-34. In this case, the position occupied by the RRCA is analogous to that of a federal agency implementing a federal statute. The rules of statutory interpretation require that "although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing 'court as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. ___, No. 98-1152, Slip op. p. 2 (2000) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). There is no ambiguity that would permit the RRCA to vary the terms of the Compact. Indeed, the Compact itself does not give the RRCA authority to vary its terms. Article IX provides that the RRCA may only "adopt rules and regulations consistent with the provisions of this compact." *See Kansas v. Colorado*, 514 U.S. 673, 683 (1995) (Finding that the Compact Administration must act "consistent with the provisions of the Compact.") This Court in *Kansas v. Colorado*

affirmed the Special Master's finding that the "Compact Administration was not delegated power to change the Compact." *Id.*

Even assuming the Compact is ambiguous, deference to the RRCA's interpretation is not automatic. "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions . . . This is hardly an ordinary case." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. ___, No. 98-1152, Slip op. p. 37 (2000) (citation omitted).

Reliance upon the formulas as evidence of intent requires a conclusion contrary to the decision of this Court in *Sporhase*, the decisions of the State's highest courts and the interpretation of similar Compacts and other federal water laws. This Court's decisions in *FDA* and *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), cited therein, point to the fallacy in relying on the RRCA's formulas. Rather than supporting the notion of an intention to restrict groundwater use by implication, the absence of express Compact language illustrates that Congress and the States did not intend "to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA*, 529 U.S. ___ No. 98-1152, Slip op. at 38 (2000).

CONCLUSION

Nebraska respectfully submits that the Court should reject the Conclusions and Recommendation of the First Report of the Special Master, make an independent

review of Nebraska's Motion to Dismiss and enter an Order granting that Motion.

Respectfully submitted,

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