No. 126, Original

In the Supreme Court of the United States

STATE OF KANSAS, PLAINTIFF

v.

STATE OF NEBRASKA

AND

STATE OF COLORADO

ON MOTION TO DISMISS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO THE EXCEPTIONS TO THE FIRST REPORT OF THE SPECIAL MASTER

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QUESTION PRESENTED

Whether the Republican River Compact restricts a compacting State's consumption of groundwater.

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INTEREST OF THE UNITED STATES

The United States has a significant interest in the interpretation of the Republican River Compact. The States of Colorado, Kansas, and Nebraska entered into this Compact to apportion an interstate stream and to provide the basis for orderly planning and development of federal flood control and irrigation projects. Federal officials participated in the formulation of the Compact, and Congress ultimately approved the Compact pursuant to the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. See Act of May 26, 1943, ch. 104, 57 Stat. 86. This Court invited the Solicitor General to express the views of the United States in response to Kansas's motion for leave to file a bill of complaint, 525 U.S. 805 (1998). In response, the United States urged this Court to grant Kansas's motion for leave to file the complaint, but also urged the Court to grant Nebraska leave to file a motion to dismiss in order to resolve at the outset the central issue of whether the Compact restricts a compacting State's con-

sumption of groundwater. See U.S. Invitation Br. 16-20. The Court followed that course, and the United States filed a brief as amicus curiae in opposition to Nebraska's motion to dismiss, see U.S. Opp. Mot. Br. 13-30, and participated in the proceedings before the Special Master.

STATEMENT

The State of Kansas filed this original action to enforce its rights under the Republican River Compact, which allocates the "virgin water supply" of the Republican River Basin among the States of Colorado, Kansas, and Nebraska. See First Report of the Special Master (Rep.) 1. Kansas alleges, as its principal ground for relief, that Nebraska has exceeded its Compact allocation by allowing its citizens to pump and consume groundwater that should be included as part of the allocated water supply. See Compl. para. 7; Kan. Br. in Support of Compl. 2. Nebraska has denied that allegation, see Neb. Answer para. 7, and has additionally argued, among other defenses and counterclaims, that the Compact does not restrict Nebraska's right to consume groundwater, *id.* para. 19.[1]

In responding to this Court's request for the United States' views on whether Kansas should be granted leave to file a bill of complaint (*Kansas* v. *Nebraska*, 525 U.S. 805 (1998)), the United States noted that Kansas and Nebraska starkly disagreed at the threshold on the fundamental and potentially dispositive legal issue of whether the Republican

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[1] The Master's First Report sets out the text of the Republican River Compact (Rep. App. A1-A14), a map incorporated as part of the Compact (*id.* at A15), and a map of the Republican River Basin from Kansas's complaint (Rep. App. B). The Brief of the United States as Amicus Curiae in Opposition to the Motion to Dismiss describes the Republican River Basin (U.S. Opp. Mot. Br. 2-4), the formulation of the Compact (*id.* at 4-6), the terms of the Compact (*id.* at 6-9), post-Compact water resource developments (*id.* at 9), and the current controversy (*id.* at 10-12).

River Compact restricts a compacting State's consumption of groundwater. See U.S. Invitation Br. 11. The United States urged that an early resolution of that central legal issue through an appropriate pretrial mechanism would greatly facilitate the resolution of this case, and it suggested that the Court allow Nebraska to file a motion to dismiss limited to that issue. *Id.* at 16-20. Following Nebraska's submission of its answer to the complaint, 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, limited to the question whether the Republican River Compact restricts a State's consumption of groundwater." 119 S. Ct. 2364 (1999).

Nebraska filed a motion to dismiss predicated on three related arguments. Nebraska contended that: (1) the Compact, by its terms, apportions only surface flows and not groundwater; (2) this Court and the compacting States have interpreted the Compact as an agreement regarding rights to surface water; and (3) the parties did not intend to apportion groundwater under the Compact. See Neb. Br. in Support of Mot. to Dismiss (Neb. Br.) 5-6. In essence, Nebraska contended that the Republican River Compact treated surface water and groundwater as distinct resources, and it argued that the Republican River Compact, as a matter of law, "apportion[s] surface water only." *Id.* at 20.

Kansas and Colorado opposed Nebraska's motion, but they relied on different legal theories. Kansas essentially argued, based on the Republican River Compact's language and the history of its negotiation, that the Compact restricts a compacting State's consumption of groundwater to the extent necessary to maintain allocations of surface flows to downstream States. Kansas Br. in Opp. to Mot. to Dismiss (Kan. Br.) 9-22. Colorado contended, based primarily on the history of the Republican River Compact's negotiation and administration, that the Compact allocates alluvial ground-

water but does not include "Ogallala Aquifer" groundwater. Colo. Resp. to Neb. Mot. to Dismiss (Colo. Br.) 6-18, 20-23.[2]

The United States, as amicus curiae, opposed Nebraska's motion on grounds similar to those of Kansas. The United States explained that the Republican River Compact apportions the "virgin water supply," which is defined as "the water supply within the Basin undepleted by the activities of man" (Art. II (Rep. App. A3)). See U.S. Opp. Mot. Br. 15. The Compact calculates the virgin water supply in terms of the Basin stream flows, see Arts. II-IV (Rep. App. A3-A7), which, as a matter of settled hydrological principles, can originate from surface runoff, groundwater discharge, or both. U.S. Opp. Mot. Br. 16-19. Accordingly, if a compacting State consumes a portion of the groundwater that would otherwise constitute a component of the stream flows, then that consumption should be charged against the compacting State's allocation of the "virgin water supply." See *id.* at 19-27.[3]

After the motion to dismiss was fully briefed, this Court appointed Vincent L. McKusick as a Special Master and

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[2] As the Master explained, the term "alluvial" groundwater basically describes groundwater pumped from the alluvium deposited by stream flow in the valley floors. See Rep. 5 n.6. The term "table-land" or "upland" groundwater describes non-alluvial groundwater. *Ibid.* The United States understands the term "Ogallala Aquifer" groundwater to describe non-alluvial groundwater that is pumped from an identifiable geologic stratum that underlies, and extends beyond, the Republican River Basin. For purposes of Nebraska's motion to dismiss, the Master has not distinguished between Ogallala Aquifer groundwater and other types of non-alluvial groundwater. *Ibid.*

[3] The United States noted that this common-sense conclusion finds support in (1) the text of the Compact (U.S. Opp. Mot. Br. 15, 19-21); (2) the Compact's negotiation history (*id.* at 15, 18-19); (3) the States' practical construction of the Compact, as reflected in their published formulas for computing the annual virgin water supply and water consumption (*id.* at 22-24); and (4) this Court's decisions construing other interstate water compacts (*id.* at 25-27).

referred the matter to him. 120 S. Ct. 519 (1999). The Master held a hearing and issued his First Report. Following a detailed analysis, the Master submitted the following recommendation to the Court:

> 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.

Rep. 45. In summarizing the basis of his recommendation, the Master explained that he relied on the unambiguous language of the Compact (*id.* at 44) and that, even if the Compact were ambiguous, the record of the Compact negotiations and Compact administration "reflects an identical interpretation." *Ibid.* He also noted that "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.'" *Ibid.*

The Master made clear that his inquiry was limited to the narrow legal issue identified in this Court's order granting Nebraska leave to file a motion to dismiss. Rep. 18. The Master's recommendation accordingly does not reach any factual questions concerning whether or to what extent Nebraska is liable under his recommended construction of the Compact. See *id.* at 45 ("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.").

SUMMARY OF ARGUMENT

A. Nebraska's motion to dismiss raises the fundamental legal issue at the center of this case: Whether the Republican River Compact restricts a compacting State's consumption of groundwater. The Master has examined that issue and

determined that the Compact restricts groundwater consumption to the extent the consumption depletes Basin stream flows. The Master has accordingly recommended that Nebraska's motion to dismiss should be denied. The Master's recommendation is sound and should be adopted by this Court. That course of action will facilitate the ultimate resolution of this action.

B. The Master correctly observed that the Republican River Compact apportions the "virgin water supply," which the Compact defines as "the water supply within the Basin undepleted by the activities of man." Art. II (Rep. App. A3). The Compact quantifies the virgin water supply in terms of stream flow. See Art. III (Rep. App. A4). The Master assumed, consistent with Kansas's factual allegations and incontrovertible hydrological principles, that the Republican River stream flows originate from both surface runoff and groundwater discharge. The Master accordingly concluded, based on the unambiguous Compact language, that "[t]o whatever extent groundwater pumping depletes the stream flow in the Basin, such depletion constitutes consumption of the virgin water supply and must be counted against the allocated share of the pumping State." Rep. 2-3. See *id.* at 44. The Master also properly concluded that, even if the Compact language were ambiguous, and the Court determined that it needed to consult the records of the Compact negotiations and Compact administration, those sources would lead to the same conclusion. See *ibid.*

C. Nebraska presents three objections to the Master's recommendation.

First, Nebraska contends that the Master erred as a matter of procedure because he considered matters outside the pleadings and effectively granted judgment to Kansas. Nebraska is mistaken. The Master made clear that his recommendation could stand solely on the basis of the Compact's unambiguous language. He nevertheless also reported that his recommendation was consistent with

extrinsic indicia of the compacting States' intent, including the official records of the Compact's negotiation and implementation. The Master committed no procedural error in bringing those matters to the Court's attention. The Court has discretion to consider those official records if it concludes that the Compact itself is ambiguous. The Master also did not enter judgment for Kansas. The Master made clear that Kansas can prevail only if it demonstrates, as a factual matter, that groundwater pumping in Nebraska has diminished Basin stream flows.

Second, Nebraska contends that the Master addressed issues not properly before him. Nebraska essentially argues that the Master could recommend granting or denying Nebraska's motion to dismiss, but he could not recommend that the Court make a legal ruling construing the Compact contrary to Nebraska's interpretation. Nebraska, again, is mistaken. In resolving a motion to dismiss, a court may decide a question of law. The interlocutory resolution of that question becomes law of the case and governs future proceedings. The Master has recommended that the Court deny Nebraska's motion to dismiss on the ground that the Compact regulates groundwater consumption that diminishes stream flow. If the Court agrees with the Master's construction of the Compact and denies the motion to dismiss on that basis, that ruling will establish certain legal principles that will be applied in later proceedings to determine whether, as a matter of fact, Kansas is entitled to relief.

Third, Nebraska claims that the Master misinterpreted the Compact. The Master's Report comprehensively addresses Nebraska's objections. As the Master explained, Nebraska's central argument—that the Compact apportions only "surface water"—fails to come to grips with the fact that stream flows consist of both surface runoff and groundwater discharge. The Master correctly recognized that a State's consumption of the groundwater discharge component of a stream flow necessarily results in reduction of the

stream flow. Nothing that Nebraska cites—including various judicial decisions, federal statutes, and other compacts—alters that fundamental aspect of the Compact's apportionment.

D. Colorado objects to the Master's recommendation that the Republican River Compact restricts consumption of groundwater in the Basin—whatever its source—to the extent the consumption depletes stream flow. In Colorado's view, the Compact draws a distinction between "alluvial" groundwater and "Ogallala Aquifer" groundwater, restricting consumption of the former but not the latter. The Master correctly rejected that argument. As he explained, the Compact's text is unambiguous and draws no such distinction. In addition, the official records of the Compact's administration show that the compacting States have long viewed both alluvial and non-alluvial groundwater as subject to Compact restrictions.

E. This Court should accept the Master's recommendation, deny Nebraska's motion to dismiss, and recommit the case to the Master for further proceedings. On recommittal, Kansas will bear the burden of establishing, as a matter of fact, that groundwater pumping in Nebraska has depleted Republican River Basin stream flows. In undertaking future proceedings, the parties should be mindful that the factual inquiry will be complex and that the Court's resolution of the longstanding legal dispute over the Compact's effect on groundwater consumption may provide a basis for a negotiated resolution of the remaining issues in this case.

ARGUMENT

THE SPECIAL MASTER HAS CORRECTLY INTERPRETED THE REPUBLICAN RIVER COMPACT AND PROPERLY RECOMMENDED DENIAL OF NEBRASKA'S MOTION TO DISMISS

A. Introduction

The United States' experience with original actions involving interstate water disputes suggests that those cases are likely to result in costly and protracted litigation that may span decades. See *e.g.*, *Nebraska* v. *Wyoming*, 515 U.S. 1, 4-8 (1995) (describing litigation over apportionment of the North Platte River); *Kansas* v. *Colorado*, 514 U.S. 673, 678-681 (1995) (describing litigation over enforcement of the Arkansas River Compact); *Arizona* v. *California*, 460 U.S. 605, 608-612 (1983) (describing litigation over apportionment of the Colorado River). The parties' typically raise factual issues that turn on complex questions of meteorology, hydrology, geology, engineering, and economics, which must be applied to thousands of square miles of varied terrain and land uses. The litigation, particularly discovery and trial preparation, correspondingly tends to be extraordinarily complicated, time-consuming, and expensive. See, *e.g.*, 1-4 First Report of the Special Master, *Kansas* v. *Colorado*, No. 105, Orig. (1994).[4]

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[4] The litigation in *Nebraska* v. *Wyoming*, *Kansas* v. *Colorado*, and *Arizona* v. *California* is ongoing to this day. In *Arizona* v. *California* (No. 8, Orig.), which was commenced in 1952, the Court is currently considering exceptions to the Master's most recent report. See 120 S. Ct. 296 (1999) (argued Apr. 25, 2000). In *Kansas* v. *Colorado* (No. 105, Orig.), which was commenced in 1985, the Master is preparing a report on the question of an appropriate remedy. In *Nebraska* v. *Wyoming* (No. 108, Orig.), which was commenced in 1986, the Master has postponed a trial, scheduled to begin on May 10, 2000, to facilitate a consensual resolution of the dispute. Newspaper reports describing that litigation state that Nebraska and Wyoming have each spent in excess of $20 million on the

The United States accordingly supports the view that, before invoking this Court's original jurisdiction, the parties should attempt consensual resolution of their differences. See *Texas* v. *New Mexico*, 462 U.S. 554, 575 (1983) ("Time and again we have counseled States engaged in litigation with one another before this Court that their dispute 'is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.'") (quoting *New York* v. *New Jersey*, 256 U.S. 296, 313 (1921)). If those differences cannot be resolved through consensual means, then the United States encourages the use of procedural mechanisms to clarify the issues and facilitate, to the extent possible, the ultimate termination of the litigation. See U.S. Invitation Br. 16-20; see also *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973) ("Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented.").

In this case, the United States determined from the pleadings and its experience in administering federal water projects on the Republican River, that Kansas and Nebraska disagree on a threshold legal issue: whether the Republican River Compact regulates a compacting States' consumption of groundwater. The United States concluded that this question, if resolved at the outset, either would largely terminate the litigation or would provide concrete guidance on the legal standard and direct the course of future proceedings. The United States accordingly recommended that the Court make available the pretrial mechanism of a motion to dismiss, in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure, limited to the question of

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case. See Julie Anderson, *States Ponder Deal on Platte*, Omaha World Herald, May 6, 2000 at 2; Joan Barron, *Wyo Lawyers Praised for North Platte Deal*, Casper Star, May 12, 2000, at B2.

whether, as a matter of law, the Republican River Compact limits Nebraska's right to consume groundwater. U.S. Invitation Br. 17.

The Court has followed that course, Nebraska has filed its motion to dismiss, and the Master has recommended a correct resolution of the issue, which will facilitate the determination of this litigation. We begin by explaining why the Master's analysis is correct, and we then address Nebraska's and Colorado's exceptions. Finally, we briefly discuss how the Master's decision should affect the future course of the litigation.[5]

B. The Master Correctly Concluded That The Republican River Compact Restricts A Compacting State's Consumption Of Groundwater To The Extent That The Consumption Depletes Basin Stream Flows

The Master has correctly determined that the Republican River Compact restricts a compacting State's consumption of groundwater. As the Master explained at the outset of his analysis, he has addressed that legal question through the familiar principles that would govern a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Rep. 19. He assumed that the factual allegations set out in the complaint are true, see *Neitzke* v. *Williams*, 490 U.S. 319, 326-327 (1989), and, because "the Compact is both a contract and a federal and State statute," he evaluated the legal issue through application of "the customary rules of contract interpretation and statutory construction." Rep. 19. Upon thorough examination, the Master concluded that the text of

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[5] The Brief of the United States as Amicus Curiae in Opposition to the Motion to Dismiss, which was filed in this Court and considered by the Master, provides a detailed analysis of the Compact. That brief, which we cross-reference herein, includes an addendum that reproduces the official minutes of the Compact negotiations (U.S. Opp. Mot. Br. Add. 13a-80a) and selected reports of the Republican River Compact Administration (RRCA) (*id.* at 81a-114a).

the Republican River Compact unambiguously restricts a compacting State's consumption of groundwater. *Id.* at 19-23. He additionally concluded that "even if the language of the Compact were thought to be ambiguous," the other sources that shed light on the construction of the Compact lead "clearly to the same conclusion." *Id.* at 23; see *id.* at 23-34.

1. The Master correctly observed that the Republican River Compact apportions the "virgin water supply" of the Republican River Basin, which the Compact defines as "the water supply within the Basin undepleted by the activities of man." Rep. 19 (quoting Art. II). The Master also correctly discerned that the Compact quantifies the "virgin water supply" in terms of stream flow. *Id.* at 20 (citing Art. III). The Master assumed, consistent with Kansas's factual allegations and incontrovertible hydrological principles, that Republican River stream flows originate from both surface runoff and groundwater discharge. *Id.* at 2 n.3, 19-22. He therefore correctly concluded:

> To whatever extent groundwater pumping 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.

Id. at 2-3. This Master correctly determined that "the language of the Compact is not ambiguous." *Id.* at 23. To the contrary, "[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." *Ibid.*; see also *id.* at 44. The Compact's unambiguous text conclu-

sively resolves the legal issue. See *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998); *Kansas* v. *Colorado*, 514 U.S. at 690; *Texas* v. *New Mexico*, 462 U.S. at 567-568.

2. The Master recognized that there was no need for the legal analysis to proceed further. See Rep. 19, 23, 44. He nevertheless observed that, when interpreting an interstate compact, the Court may examine other reliable indicia of intent, including "items in the public record such as the minutes of the Compact negotiations and the records of subsequent Compact administration." *Id.* at 19. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas* v. *New Mexico*, 462 U.S. at 568 n.14; *Arizona* v. *California*, 292 U.S. 341, 359-360 (1934); see also *Air France* v. *Saks*, 470 U.S. 392, 396 (1985); *New Jersey* v. *New York*, 523 U.S. at 830-831 (Scalia, J., dissenting). The Master therefore reported on those additional indicia of the Compact's meaning. See Rep. 23-34.

The Master observed that "the hydraulic connection between groundwater pumping and stream flow is already assumed for purposes of [Nebraska's] Motion," but he also properly took notice that "[t]he connection between groundwater discharge and stream flow was a widely known scientific fact well before the Compact was drafted." Rep. 23. The Master cited decisions of this Court, as well scientific and legal commentary of the pre-Compact era, reflecting an understanding of the hydraulic connection. See *id.* at 23-24 (citing *Snake Creek Mining & Tunnel Co.* v. *Midway Irrigation Co.*, 260 U.S. 596, 598 (1923); *Kansas* v. *Colorado*, 206 U.S. 46, 114-115 (1907); C.F. Tolman & Amy C. Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 Ore. L. Rev. 113, 115-129 (1942); Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1921)).

The Master also recognized that the "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." Rep. 25. The Master specifically pointed to the official minutes of the Compact negotiations, which "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." *Id.* at 26.

In evaluating the Compact's meaning, the Master also reported on the parties' practical construction of the Compact. Rep. 32-33. As the Master explained, in 1959, the States created the Republican River Compact Administration (RRCA) to administer the Compact. *Id.* at 14. As part of its duties, the RRCA has published formulas for calculating the virgin water supply and each State's consumption. *Id.* at 14-16. The Master took notice of those official published formulas and correctly observed:

> 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.

Id. at 32; see also *id.* at 32-34. "The RRCA, through its call for 'more research and data' to quantify the hydraulic connection between table-land pumping and stream flow, has repeatedly indicated its intention later to include the effect of table-land groundwater pumping in the Formulas." *Id.* at 34.

Based on all of the information discussed above, the Master "conlude[d] 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." Rep. 34.[6]

C. The Court Should Reject Nebraska's Exceptions To The Master's Recommendation

Nebraska argues that the Court should reject the Master's recommendation on the grounds that he: (1) committed procedural errors by considering matters outside the pleadings and granting a "judgment" to Kansas; (2) made findings concerning matters not before him; and (3) misapplied the Compact. Each of those arguments is unpersuasive.

1. *The Master Did Not Commit Procedural Error.* Nebraska raises two claims of procedural error. First, the State contends (Neb. Except. Br. 6-10) that the Master committed an "initial procedural error" because, in considering the State's motion to dismiss, the Master did not follow Rule 12(b)(6)'s direction that, if "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," which governs the granting of summary judgment. See Fed. R. Civ. P. 12(b)(6). Second, Nebraska contends that the Master's recommendation "offers judgment to the non-moving party (*i.e.*, Kansas) that is basically the opposite of that requested by the movant." Neb. Except Br. 10-11. Those arguments are without merit.

a. "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke* v. *Williams*,

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[6] The Master also discussed judicial precedent cited by the parties (Rep. 34-38) and Colorado's position on the motion to dismiss, which draws a distinction between pumping groundwater from the alluvium and pumping groundwater from the Ogallaia Aquifer (*id.* at 41-44). We discuss those matters *infra* in response to the Nebraska and Colorado exceptions.

490 U.S. 319, 326 (1989). "This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding." *Id.* at 326-327. Rule 12(b)(6) does not, however, allow "dismissals based on a judge's disbelief of a complaint's factual allegations." *Ibid.* Rule 12(b)(6)'s conversion requirement ensures that, when a motion to dismiss raises potentially disputable factual matters that are not a part of the complaint, Rule 56's summary judgment procedures will be utilized to identify whether there is a factual dispute that requires a trial. See generally 2 James Wm. Moore, *Moore's Federal Practice* § 12.34[2] (Matthew Bender 3d ed. 1997); Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1364 (1990).

Rule 12(b)(6)'s conversion requirement does not, however, prevent a court from considering, without conversion, "facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice." 2 *Moore's Federal Practice* § 12.34[2]. A judge may take judicial notice of "public records." *Ibid.* See, *e.g.*, *Bowles* v. *United States*, 319 U.S. 33, 35 (1943). Under the Federal Rules of Evidence, a judge may also take judicial notice of an "adjudicative fact" if that fact is:

> not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably questioned.

Fed. R. Evid. 201(b). See also Fed. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding.").

Finally, when interpreting a statute, a court may draw upon various intrinsic and extrinsic sources to determine the meaning of the statutory text. See, *e.g.*, *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 460 n.5 (1998) (when interpreting

statutes, courts "look to the provisions of the whole law, and to its object and policy"); see also Fed. R. Evid. 201 note (a) (discussing the distinction between adjudicative and legislative facts); see generally 2A Norman J. Singer, *Statutes and Statutory Construction* (6th ed. 2000). "It is only through custom, usage, and convention that language acquires established meanings." *Id.* § 45.02, at 13. Accordingly, a court not only may, but to some degree must, consider "matters outside the pleading"—such as a dictionary, or in appropriate cases, legislative history, or administrative constructions of the legislation—to determine legislative intent. The limitations on what aids to statutory construction may be considered derive principally from their pertinence and reliability as guides to the legislation's meaning, see *id.* §§ 47.01-48.20, rather than from the formal conversion requirement set out in Rule 12(b)(6).

Rule 12(b)(6)'s conversion requirement has limited relevance in this proceeding because the Master ruled that the Compact's text, by itself, is unambiguous and sufficient to resolve the legal question presented. See Rep. 44.[7] If the Court agrees, then there is no need to proceed further. Any procedural question respecting consideration of extrinsic materials arises only if the Court concludes that the Compact is ambiguous and wishes to look beyond the text to other indicia of intent. The parties discussed those indicia in varying degrees in the proceedings before the Master, and he has reported on them. The Master's Report, however, contains only an advisory recommendation. This Court remains the trial court with original jurisdiction over the matter. This Court has sole authority to determine whether consideration of extrinsic materials is necessary or appropri-

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[7] As the Master noted, Rule 12(b)(6) required him to assume the fact of an hydraulic connection between stream flow and groundwater for purposes of the motion to dismiss. Rep. 1-2, 20-21. He also noted, however, that this connection "is a well established scientific fact." *Id.* at 2 n.3.

ate, and whether conversion is required. Indeed, the Federal Rules themselves are taken only "as guides." Sup. Ct. R. 17.2. See *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973).

If the Court decides to consider extrinsic materials, then the Court may certainly consider the official minutes of the Compact negotiations and the reports of the RRCA for purposes of resolving the legal issue presented here. See U.S. Opp. Mot. Br. Add. 13a-114a.[8] The United States appended those materials to its Opposition Brief because they are matters of public record that bear on the meaning of the Compact. See *id.* at 13-14 & n.6.[9] Nebraska has not

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[8] Nebraska acknowledged below that the Court may take notice of items in the public record (Neb. Br. 5), and it did not ask the Master to recommend conversion of the proceeding to one for summary judgment.

[9] A Compact is federal legislation, and parties may therefore examine those official materials, which are analogous to legislative history or administrative interpretations, as an aid in determining the Compact's meaning. To the extent that the Compact is also a contract, those records are subject to judicial notice. See, *e.g.*, *Tucker* v. *Texas*, 326 U.S. 517, 519 n.1 (1946) (judicial notice of regulations of the Federal Public Housing Authority); *Bowles* v. *United States*, 319 U.S. 33, 35 (1943) (judicial notice of a decision of the Director of the Selective Service); *Thornton* v. *United States*, 271 U.S. 414, 420 (1926) (judicial notice of regulations issued by the Secretary of Agriculture); *The Paquete Habana*, 175 U.S. 677, 696 (1900) (judicial notice of records of the Navy Department); *Underhill* v. *Hernandez*, 168 U.S. 250, 253 (1897) (judicial notice of materials within the archives of the State Department); *Caha* v. *United States*, 152 U.S. 211, 221-222 (1894) (judicial notice of rules and regulations of the Interior Department); see also 2 *Moore's Federal Practice* § 12.34[2] (collecting lower court cases). To the extent a compact resembles a treaty, reference to minutes and other aspects of the negotiating history, as well as subsequent understandings and administration are relevant. See, *e.g.*, *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 197-199 (1999); *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 167, 170, 172-174 (1999); *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 334, 336, 347, 351-354 (1998); *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 184-187 (1993); *Menominee Indian Tribe* v. *Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (court may take judicial notice on historical docu-

challenged the authenticity of those public records, which were readily available to the parties, and the parties disagree only on the legal significance of those materials. Those materials provide no basis for converting Nebraska's motion to one for summary judgment, because Nebraska has not in any concrete way suggested that those materials give rise to a disputed issue of fact. See *Papasan* v. *Allain*, 478 U.S. 265, 268 n.1 (1986).[10]

b. Nebraska also claims that the Master committed a procedural error by effectively granting a "judgment" to Kansas. Neb. Exc. Br. 10-11. That argument rests on a mischaracterization of the Master's recommendation. The Master has recommended that the Court make a legal ruling, in response to Nebraska's motion to dismiss, that the Compact restricts a compacting State's consumption of groundwater to the extent the consumption depletes the virgin water supply, which is measured by reference to Basin stream flows. Rep. 45. That legal determination does not result in a judgment in favor of Kansas because it leaves open a crucial factual issue: whether Nebraska's groundwater consumption has that effect. See *id.* at 3 ("I conclude that the Compact restricts groundwater consumption *to whatever extent it depletes stream flow in the Republican River Basin.*") (emphasis added). If the Court adopts the Master's recommendation, the Court's ruling will, however, establish law of the case. The law-of-the-case doctrine "posits that when a court decides upon a rule of law, that

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ments bearing on the meaning of an Indian treaty), cert. denied., 119 S. Ct. 1459 (1999).

[10] Kansas submitted additional materials to the Master, including correspondence and internal governmental memoranda, and provided an authenticating affidavit. See Kan. Br. 12 n.1; see also Kan. Br. App. 1a-11a. It is unnecessary to determine whether each of those items may be considered in deciding a motion under Rule 12(b)(6), because the records of the Compact negotiations and the RRCA records, individually and collectively, are more than adequate to resolve any Compact ambiguities.

decision should continue to govern the same issues in subsequent stages in the same case." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). In this case, the Court's decision will establish the legal rule that will govern future proceedings, which in turn will "promote[] the finality and efficiency of the judicial process." *Ibid.* See generally 18 *Moore's Federal Practice* § 134.20.

2. *The Master's Recommendation Addresses The Issue Before Him.* Nebraska next makes the novel argument that its motion to dismiss does not allow the Master to recommend, or this Court to make, a binding legal determination that is adverse to Nebraska. See Neb. Except. Br. 10-11. According to Nebraska, the motion left the Master with two choices: He could recommend that the Court grant the motion and dismiss the case or he could recommend that the Court deny the motion without reaching any legal conclusion. See Neb. Except. Br. 11-15. Nebraska's argument rests on a fundamental misconception about the function of a motion to dismiss. As noted above, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke*, 490 U.S. at 326. This Court granted Nebraska leave to file a motion to dismiss to resolve a threshold issue of Compact construction that will determine the course of future proceedings. The Master has made a recommendation, based on a reasoned analysis, and interpreted the Compact in accordance with the views of Kansas and the United States, and contrary to the views of Nebraska and Colorado. The question before this Court is whether the Master's construction is correct. The Court must decide, one way or the other, what the Compact means. That ruling becomes the law of the case and governs future proceedings. See *Christianson*, 486 U.S. at 815-816.

3. *The Master Did Not Err In His Analysis Of The Compact Language.* Nebraska contends that the Master's construction of the Compact is erroneous because it assertedly: (a) misinterprets the text of the Compact (Neb.

Except. Br. 16-31); (b) is inconsistent with other federal law (*id.* at 31-46); and (c) improperly relies on the RRCA formulas (*id.* at 46-47).

a. All of Nebraska's textual objections to the Master's construction of the Compact derive from its central premise that "[t]he express terms of the Compact discuss and apportion only surface water." Neb. Except. Br. 17. The Compact, however, does not use the term "surface water," and the terms that Nebraska relies on to suggest that the Compact apportions only surface water—"Basin," "drained," and "drainage basin" (*id.* at 17-23)—do not suggest in any way that the Compact allows unlimited groundwater pumping regardless of its effects. To the contrary, the Compact allocates stream flows, and consumption of the groundwater discharge component of a stream necessarily diminishes the stream flow. Under Nebraska's approach, by contrast, a State could receive more than its Compact allocation by simply intercepting that component before it reaches the stream. Likewise, and contrary to Nebraska's contentions (*id.* at 22-24), the Compact's failure to mention groundwater or its apportionment is irrelevant. 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." Rep. 22. See U.S. Opp. Mot. Br. 15-19.

Nebraska is also mistaken in asserting (Neb. Except. Br. 24-31) that the Master failed to consider contemporaneous federal and state laws that bear on the meaning of the Compact. As the Master correctly noted, this Court retains the "final power to pass upon the meaning and validity of compacts." *State ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951). Federal and state laws and judicial decisions may provide interpretive guidance, but they cannot override a compact's text and proper meaning. Furthermore, compacting States

are not "constrained" (Neb. Except. Br. 24) by their own existing common or statutory law from formulating new solutions to interstate problems that depart from settled practices.

Nebraska essentially contends that the Compact should be interpreted to impose no limits on groundwater pumping in light of a series of state-law cases that discussed the regulation of groundwater in various contexts. The Master correctly concluded that there is "nothing in those state court decisions that runs counter to the natural inclusive construction of the Compact's definition of 'virgin water supply.'" Rep. 39. For example, Nebraska suggests that *State ex rel. Peterson* v. *Kansas State Board of Agriculture*, 149 P.2d 604 (Kan. 1944), indicates that the Compact does not regulate groundwater because the Kansas Supreme Court in that case surveyed Kansas water law and concluded that "[n]o statute cited to us, and none which we have found by our own research," gave Kansas officials the authority to regulate groundwater. *Id.* at 611. See Neb. Except. Br. 25. The Kansas Supreme Court offered that statement in the context of the State's power to regulate pumping from the Equus Beds, an intrastate groundwater source. See Rep. 40 n.20. The court had no reason to consider the interstate obligations arising from the Republican River Compact, which creates duties among sovereign States and had no application to the precise issue at hand. See *id.* at 39-40. Furthermore, although the Compact in our view obligated Nebraska to adopt appropriate measures in the future (by new legislation if necessary) to restrict groundwater consumption if necessary to maintain required stream flows, it does not follow that the Compact itself must be read to confer that authority on Kansas officials. Accordingly, the Kansas Supreme Court's failure in *Peterson* to mention the Compact as a source of authority for Kansas officials to regulate groundwater, and the subsequent enactment of a law in 1945 to regulate groundwater in that State (see Neb. Except. Br. 26-

27), in no way detracts from the Master's interpretation of the Compact.

The other cases that Nebraska cites similarly shed no light on the meaning of the Compact. For example, Nebraska relies (Neb. Except. Br. 27-28) on several cases showing that Nebraska limited its application of the prior appropriation doctrine to surface water and, until 1957, did not regulate a surface owner's pumping of groundwater. See *State ex rel. Douglas* v. *Sporhase*, 305 N.W.2d 614 (Neb. 1981); *Drainage Dist. No. 1* v. *Suburban Irrigation Dist.*, 298 N.W. 131 (Neb. 1941); *Olson* v. *City of Wahoo*, 248 N.W. 304 (Neb. 1933). The mere fact that Nebraska had not taken action to regulate groundwater at the time it entered into the Compact does not mean, however, that Nebraska did not assume an obligation to do so *if* groundwater consumption in Nebraska interfered with the Compact's apportionment of stream flows. See Rep. 39. Contrary to Nebraska's suggestions (Neb. Except. Br. 29-30), a State's entry into an interstate compact may result in the State assuming new duties, enforceable as a matter of federal law, to protect the rights of the other compacting States. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938); U.S. Opp. Mot. Br. 28 n.16.[11]

b. Nebraska contends that the Master's recommendation is: (i) contrary to this Court's decision in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Neb. Except. Br. 31-35); (ii) contrary to state supreme court interpretations of the Compact (*id.* at 35-37); (iii) inconsistent with various

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[11] The Compact negotiators expressly stated that their deliberations were "guided by [this Court's decision in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938)], establishing the rights of states to make an equitable division of the waters of an interstate stream, regardless of its effect upon the presumably vested interests in either of the signatory states." *Minutes of the Third Meeting of the Republican River Compact Commission at Lincoln, Nebraska*, U.S. Br. Opp. Mot. Add. 23a.

federal statutes (*id.* at 38-43); and (iv) contrary to this Court's interpretation of other interstate compacts (*id.* at 43-46). Each of those contentions is without merit.

Nebraska contends that this Court's decision in *Sporhase* demonstrates the Court's understanding that the Republican River Compact does not restrict a compacting State's consumption of groundwater. That contention, however, reads far too much into *Sporhase*. The Court ruled in that case that groundwater is an article of commerce that is subject to Commerce Clause restrictions (458 U.S. at 945-954), that Nebraska's restriction on interstate groundwater transfers impose an impermissible burden on commerce (*id.* at 954-958), and that Congress has not affirmatively authorized that otherwise impermissible burden (*id.* at 958-960). The Court remarked, in that context, that various interstate compacts, including the Republican River Compact, "are agreements among States regarding rights to surface water." *Id.* at 959. As the Master explained, that remark sheds no light on the meaning of the Compact. Rep. 37-38. It "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." *Id.* at 38. In any event, the Court's remark is consistent with the Master's construction. The Master has not interpreted the Compact to apportion groundwater as an in situ resource. See U.S. Opp. Mot. Br. 15-16. Rather, he has concluded that the Compact restricts Nebraska's groundwater consumption to the extent that the consumption interferes with the Compact's apportionment of stream flows. See Rep. 37-38.

Nebraska also contends (Neb. Except. Br. 35-37) that the Master's interpretation of the Compact conflicts with state supreme court interpretations of the Compact. Three of the cited cases, however, provide no insight into the Compact's meaning. See *State* v. *Knapp*, 207 P.2d 440 (1949); *State ex rel. Douglas* v. *Sporhase*, 305 N.W.2d 614 (1981); *Metropolitan Utilities Distr.* v. *Merritt Beach Co.*, 140 N.W.2d 626

(1966). See Rep. 39-40. The fourth case, *Pioneer Irrigation Dists.* v. *Danielson*, 658 P.2d 842 (Colo. 1983), discusses the Compact, but has no bearing on the question presented here. As the Master explained, "[t]he 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." Rep. 41.

Nebraska next contends that judicial decisions interpreting two completely unrelated statutes—the McCarran Amendment and the Clean Water Act—"have rejected an implied inclusion of hydrologically or hydraulically connected water (whether surface or ground) to those statutes." Neb. Except. Br. 38. The McCarran Amendment, 43 U.S.C. 666, provides a waiver of the United States' immunity from suit in general stream adjudications, while the Clean Water Act, 33 U.S.C. 1251 *et seq.*, addresses water quality issues. The only common feature that the Compact and those enactments share is that each involves water. That feature is insufficient to support the inference that Congress intended those laws and the Compact to be interpreted in para materia. See *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995) ("a characterization fitting in certain contexts may be unsuitable in others"); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932) (courts properly give words "the meaning which the legislature intended [they] should have in each instance").

There is similarly no merit to Nebraska's argument (Neb. Except. Br. 43-46) that the Master's recommendation conflicts with this Court's construction of other compacts. To the contrary, the Court's decisions indicate that there is nothing novel in recognizing that an interstate compact that apportions stream flows can limit a compacting State's groundwater usage. This Court has twice faced that question. In *Kansas* v. *Colorado*, No. 105, Orig., the Court

adopted the Special Master's uncontested recommendation that the Court find that Colorado had violated the Arkansas River Compact, Pub. L. No. 82, 63 Stat. 145, through excessive groundwater pumping. 514 U.S. 673 (1995). And in *Texas* v. *New Mexico*, No. 65, Orig., the Court issued a series of rulings respecting the Pecos River Compact, Pub. L. No. 91, 63 Stat. 159, which reflected the understanding that the Compact limited New Mexico's right to consume groundwater. See 446 U.S. 540 (1980); 462 U.S. 554 (1983); 482 U.S. 124 (1987). In each of those original actions, the Compact in question did not expressly apportion groundwater. See Rep. 34-37; see generally U.S. Opp. Mot. Br. 24-27.

Nebraska offers the Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, 86 Stat. 193, as an example of an interstate compact that expressly restricts groundwater consumption. That compact does so by apportioning "natural flow" and defining that term to include "ground-water infiltration to the stream." 86 Stat. 194. Nebraska essentially argues that, because the compacting States expressly addressed groundwater effects on stream flow in the Blue River Compact, compacts that do not do so should be construed to exclude groundwater effects. The Master properly rejected that argument, explaining that "[b]oth compacts restrict consumption of groundwater to the extent it enters the stream flow, and they merely use different language to accomplish that restriction." Rep. 30.

c. Nebraska contends that the Master erred in considering the RRCA's administration of the Compact as an indicium of the compacting States' intent. Neb. Except. Br. 46-47. The Master correctly discerned that the RRCA's practices, as recorded in its official records, are highly relevant. Rep. 32-34. The Court is under no obligation to consider those records. See pp. 13-15, 17-19, *supra*. Nevertheless, they set out formulas for calculating the virgin water supply and consumption that reflect an understanding among the

compacting States that the Compact restricts groundwater consumption:

> 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 . . . ." * * * The Formulas specifically identify alluvial groundwater as groundwater and include groundwater diversions by pumping in the calculation of 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.

Rep. 33-34. See U.S. Opp. Mot. Br. 22-24; see also U.S. Opp. Mot. Br. Add. 81a-102a (First Annual Report of the RRCA); *id.* at 103a-114a (Formulas).

D. The Court Should Reject Colorado's Exception To The Master's Recommendation

Colorado has also filed an exception to the Master's recommendation, but its exception rests on a different theory. In Colorado's view, the Republican River Compact's text is ambiguous on the question of whether it imposes restrictions on groundwater pumping. Colo. Except. Br. 5-9. Colorado accordingly urges the Court to consult the record of the Compact negotiations and administration, which, in Colorado's view, demonstrates that the compacting States intended the Compact to restrict groundwater pumping from alluvial sources, but not from the Ogallala Aquifer. The Master correctly rejected that argument. Rep. 41-44.

The Master concluded that the "Colorado contention is impossible to square with the Compact's broad and inclusive definition of 'virgin water supply.'" Rep. 42-43. He noted

that "the express language of the Compact * * * allocates the entire water supply of the Basin 'undepleted by the activities of man.'" *Id.* at 42. Contrary to Colorado's assertions (Colo. Except. Br. 10-21), the Compact does not create any exceptions based on the origins of the water or "the difficulty of quantifying the effect of one form of depletion (i.e., table-land groundwater pumping)." Rep. 43. Rather, "the drafter's true concern was to take into account *any* form of depletion—whether by alluvial or table-land pumping or otherwise." *Ibid.* "To protect each State's Compact allocation—the most important substantive right each State receives in the Compact—the drafters surely intended to forbid a State's consumptive use of Basin stream flows in excess of that State's allocation, by whatever means that excessive use occurs." *Ibid.*

As the Master additionally noted, "the RRCA has put a practical construction on the Compact adverse to the Colorado position." Rep. 43. The RRCA's First Annual Report demonstrates that the RRCA was aware that groundwater pumping from non-alluvial sources could deplete Republican River Basin stream flows. See U.S. Opp. Mot. Br. Add. 87a-88a, 90a-91a. The RRCA made clear that it included only alluvial groundwater pumping in its virgin water supply formulas because the RRCA did not have sufficient data, at that time, to estimate the effects of non-alluvial groundwater pumping. See *ibid.*; see also *id.* at 97a-98a. Since that time, the RRCA has repeatedly called for more data and research to determine those effects. Rep. 43-44. "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." *Id.* at 44. See U.S. Opp. Mot. Br. 22-24.

E. The Court Should Deny The Motion To Dismiss And Recommit The Case To The Special Master For Further Proceedings

For the foregoing reasons, this Court should overrule the objections of Nebraska and Colorado, accept the Special Master's recommendation, and rule that 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. In accordance with the Court's normal practice, the case should be recommitted to the Master for further proceedings consistent with that ruling.

If the Court adopts the Master's recommendation, the Court's ruling will provide the parties with clear guidance for future proceedings on the merits of Kansas's primary claim. Kansas will bear the burden of establishing, as a matter of fact, that groundwater pumping in Nebraska has depleted Republican River Basin stream flows. To make that showing, Kansas will need to demonstrate the hydrological connection between Basin stream flows and groundwater pumping—whether from alluvial or table-land wells—and Kansas will need to establish the net stream flow losses resulting from groundwater consumption. In our experience, the adversarial process is not the ideal mechanism for carrying those inquiries. The resolution of those factual issues may entail the collection of a substantial amount of data covering a large geographic area and may require resort to novel or expensive scientific techniques.

The Court might accordingly wish to remind the parties that consensual mechanisms remain available to resolve their differences. The Republican River Compact imposes a duty on Colorado, Kansas, and Nebraska to administer the Compact through cooperative efforts. See Art. IX (Rep. App. A9). This Court's clarification of an outstanding legal issue that has hampered interstate cooperation may provide

the basis for the States to reach a pragmatic accord on how to regulate groundwater pumping that affects stream flow. The dispute over groundwater effects is likely to be one that could be "wisely solved by co-operative study and by conference and mutual concession." *Texas* v. *New Mexico*, 462 U.S. at 575.[12]

CONCLUSION

The motion to dismiss should be denied and the case should be recommitted to the Special Master.

Respectfully submitted.

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[12] The United States Geological Survey (USGS) is currently conducting a study of groundwater resources in the Republican River Basin. That study, which the USGS expects to complete in early 2001, is likely to provide additional information respecting those resources that may assist the States in reaching an accord.