No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

On Exceptions To The First Report
Of The Special Master

REPLY BRIEF FOR KANSAS OPPOSING THE EXCEPTIONS OF NEBRASKA AND COLORADO

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QUESTION PRESENTED

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

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REPLY BRIEF FOR KANSAS OPPOSING THE EXCEPTIONS OF NEBRASKA AND COLORADO

STATEMENT

Pertinent Procedural History

Kansas seeks by this action to enforce its rights under the Republican River Compact, 57 Stat. 86 (1943). The Court granted Kansas' Motion for Leave to File Bill of Complaint on January 19, 1999. 525 U.S. 1101 (1999).

On June 21, 1999, 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 its Motion to Dismiss and Brief in Support of Motion to Dismiss ("Neb. Motion Br."), arguing that the Republican River Compact does not restrict a State's consumption of groundwater. Kansas and the United States filed briefs in opposition. Colorado opposed the Motion to Dismiss but filed a responsive brief asserting that, while a State's alluvial groundwater consumption is restricted by the Compact, a State's Ogallala groundwater consumption is not restricted by the Compact.

Subsequently, the Court appointed the Honorable Vincent L. McKusick, Esq., of Portland, Maine, Special Master and referred to him the motion of Nebraska to dismiss the complaint. 120 S.Ct. 519 (November 15, 1999). Oral argument was had before the Special Master on January 4, 2000. The Special Master filed the First Report of The Special Master (Subject: Nebraska's Motion to

Dismiss) on January 28, 2000 ("Report"). The Special Master recommended denial of Nebraska's Motion to Dismiss on the basis that the Republican River Compact restricts a compacting State's consumption of groundwater (from either the alluvial or the Ogallala aquifers) to the extent that the consumption of groundwater depletes stream flow in the Republican River Basin. Report 45. The Court received and ordered filed the First Report of the Special Master and allowed exceptions. 120 S.Ct. 1224 (February 22, 2000). The States of Nebraska and Colorado filed Exceptions with supporting briefs: Nebraska's Exceptions to the First Report of the Special Master and Brief in Support of Exceptions ("Neb. Br.") and Colorado's Exception to the First Report of the Special Master and Brief in Support of Exception ("Colo. Br."). Nebraska stated its position in three separate Exceptions. Colorado stated one Exception. Kansas now replies to the Exceptions of both States.

The Physical Setting

The physical setting for this case is the Republican River Basin ("Basin") and the States of Kansas, Nebraska and Colorado. The Special Master describes the Republican River Basin. Report 6-9. Two maps of the Republican River Basin are attached to the Special Master's First Report. Report A15, B1. Other descriptions of the Basin are contained in the Kansas Brief in Support of Motion for Leave to File Bill of Complaint ("Kan. Br. For Leave") 2-5; Kansas' Brief in Opposition to Nebraska's Motion to Dismiss 1-3; ("Kan. Br. in Opp."); Brief for the United States as Amicus Curiae in Opposition to the Motion to Dismiss 2-4, 9 ("U.S. Br. in Opp.").

Groundwater is available from two sources in the Republican River Basin: (1) the shallow alluvial aquifer in sand and gravel deposits close to the Republican River and its major tributaries and (2) the deeper Ogallala formation, which underlies most of the Basin. See, *e.g.*, Bureau of Reclamation, U.S. Dep't of Interior, Special Report: Republican River Basin Management Study (1985) ("1985 Report"). Both groundwater aquifers are hydraulically connected to the surface flows of the Republican River and its tributaries. Jon M. Peckenpaugh et al., Simulated Response of the High Plains Aquifer to Ground-Water Withdrawals in the Upper Republican Natural Resources District, Nebraska 14 (U.S. Geological Survey Water-Resources Investigations Report 95-4014) (1995) ("Peckenpaugh").

The area of the alluvial aquifer in the Basin in Nebraska is approximately 1,000 square miles, while the area underlain by the Ogallala aquifer in the Basin in Nebraska is approximately 9,500 square miles. 1985 Report. 11-13; Republican River Compact Administration ("RRCA") Engineering Committee Exchange (1998); T. McGrath & J. Dugan, Water-Level Changes in the High Plains Aquifer – Predevelopment to 1991 (U.S. Geological Survey Water-Resources Investigations Report 93-3088), (1993) ("McGrath"). The alluvial area in the Basin in Colorado is approximately 115 square miles, while the area underlain by the Ogallala aquifer in the Basin in Colorado is approximately 7,700 square miles. *Id.* A map depicting the approximate areal extent of the alluvial aquifer and of the local Ogallala aquifer in relation to the Basin is attached to this Reply Brief as Appendix A.

Recent development of new wells in the Basin has occurred primarily in the Ogallala aquifer. See, *e.g.*,

Peckenpaugh 14-15. The potential for future development of groundwater also exists primarily with respect to the Ogallala aquifer, given its tremendous areal extent in the Basin and the capability of center pivot irrigation to irrigate crops on terrain not previously irrigated. See, *e.g.*, UNIVERSITY OF NEBRASKA, FLAT WATER: A HISTORY OF NEBRASKA AND ITS WATER 126 (1993). Thus the Ogallala pumping and its potential effect on the Republican River are not trivial.

There are currently more than 10,000 wells in the Republican River Basin in Nebraska. See Kan. Br. for Leave 4, App. C. Most of these are completed in the Ogallala aquifer. See Nebraska Dep't of Water Resources, 1995 Well Registration Database. Simultaneously with the increase in the number of wells, inflows to the U.S. Bureau of Reclamation and U.S. Army Corps of Engineer projects in the Basin, which are critical to Kansas' receiving its allocation of water under the Compact, have declined. Kan. Br. for Leave 4-5.

Nebraska, unlike most western states, has not chosen to exercise statewide control of groundwater pumping. Stephen D. Mossman, *"Whiskey is for Drinkin' But Water is for Fightin' About": A First-Hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108*, 30 Creighton L. Rev. 67 (1996). ("Mossman"). Local control is possible and has been instituted in the Upper Republican Natural Resources District, which includes areas in the counties of Dundy, Chase and Perkins where groundwater pumping controls have been implemented to protect Nebraska groundwater pumpers. Neb. Rev. Stat. §§ 46-656.01 *et seq.*; § 2-3214. New wells are freely allowed to be constructed in the rest of the Basin in Nebraska, and wells are being put in at an

alarming rate in those areas without any effective control from local Nebraska authorities. Essentially no control of groundwater pumping *to protect the Republican River* from depletion exists in Nebraska.

The Republican River Compact

The States of Kansas, Nebraska and Colorado negotiated the allocation of the waters of the Republican River Basin in a series of meetings from May 28, 1940 through March 19, 1941. See U.S. Br. in Opp. 4 n.1, 13a-42a. The first version of the compact was approved by Congress but vetoed by President Franklin D. Roosevelt. Report 9. The objections of the Federal Government to the first version of the compact were remedied, and the revised Republican River Compact ("Compact" or "RRC") was approved by Congress and the President. *Id.*, at 10-11; Act of May 26, 1943. The allocation provisions agreed to among the States, however, were not altered from their original form negotiated in 1940-41. *Id.*, at 10; M.C. Hinderlider, Explanatory Statement and Report to the 34th General Assembly [of Colorado] (1943), reprinted in Kan. Br. in Opp., at M9.

The Federal Government encouraged and assisted in the agreement of the States to an equitable apportionment of the flows of the Republican River by means of a compact. In fact, the Federal Government insisted upon a compact as a prerequisite for construction of federal projects in the Basin. Kan. Br. in Opp. 12; Report 8-9.

The substantive provisions of the Compact relevant to the present issue are succinctly described by the Special Master. Report 11-14. Pursuant to Article IX of the

Compact the three States formed a three-member Republican River Compact Administration in 1959. The RRCA adopted formulas for the computation of annual virgin water supply and consumptive use. See Report 14-17. Article IX of the Compact requires unanimous consent of the three compacting States to adopt rules and regulations. Since their first adoption in 1961, the RRCA formulas have included accounting for alluvial groundwater pumping. There has thus been no dispute among the States since 1961 that alluvial groundwater pumping should be counted against each State's allocation, except that Nebraska began in 1990 to reject that position by denying that the Compact restricts the pumping of *any* groundwater. See, *e.g.*, RRCA, 30th Annual Report 13 (1990), Neb. Exception No. 3, Neb. Br. 17.

Groundwater pumping other than alluvial pumping has not been quantified for purposes of the RRCA formulas. Rather, beginning in 1961, the RRCA has stated and restated the position that the "determination of the effect of pumping by [Ogallala] wells on the flows of the streams in the Republican River Basin must await considerably more research and data." Report 16.

The Positions of the States and the United States

Kansas agrees with the Special Master that both alluvial and Ogallala groundwater consumption can and must be accounted for under the Compact. Nebraska's response is to assert that no groundwater pumping, even alluvial, is restricted by the Compact. Colorado, on the other hand, maintains that consumption of alluvial

groundwater should be counted against a State's Compact allocation but that consumption of Ogallala groundwater should not be counted against a State's Compact allocation. The United States agrees with Kansas and the Special Master that both alluvial and Ogallala groundwater consumption must be accounted for under the Compact.

SUMMARY OF ARGUMENT

The Republican River Compact allocates among Kansas, Nebraska and Colorado the virgin water supply of the Republican River undepleted by the activities of man. Nebraska and Colorado argue that they should be allowed, nevertheless, to deplete the virgin water supply of the Republican River by pumping groundwater and not be required to have such depletions counted against their Compact allocations. The Special Master has rejected the arguments by Nebraska and Colorado in his carefully reasoned and precisely written Report. The exceptions argued for by Nebraska and Colorado do not appear in the Compact, and the language and legislative history of the Compact confirm that no such exceptions were intended.

Nebraska has stated three separate Exceptions, two of which do not address the substantive issue referred to the Special Master and decided by him, but rather raise procedural objections that are largely irrelevant to the substantive issue the Court asked the parties to address. Nebraska's procedural arguments are fully addressed below. Kansas believes that those arguments are not viable on the merits and, further, are irrelevant because the

Court simply intended for the Special Master to address the specific question referred to him by the Court utilizing principles of compact construction delineated in previous decisions of this Court. This he has done.

The Special Master correctly concludes that the Compact is not ambiguous and that a straightforward reading of its terms yields the conclusions stated above. A reading of the Compact as a whole reveals that the Special Master is quite right in his analysis. The Compact seeks to apportion among the States all of the "virgin water supply" in the Republican River Basin and defines "virgin water supply" as "the water supply within the Basin undepleted by the activities of man." Nebraska's assertion that it may deplete the water supply within the Basin without counting such depletions against its allocation under the Compact is without support within the four corners of the Compact itself. Nevertheless, Nebraska would have the Court read such an exception into the Compact.

Nebraska also seeks to infer from decisions of the respective State courts an authoritative understanding of the intent of the Compact. Nebraska neglects, however, the fundamental fact that it is only this Court that can make authoritative interpretations of interstate rights under a compact. Nebraska also fails to recognize that none of the State Supreme Court cases that it cites were cases directly addressing the Compact. Nebraska attempts to draw definitive conclusions about the Republican River Compact from decisions of this and other courts that did not directly address the issue before the Court on the present Motion to Dismiss. Likewise, Nebraska cites non-compact statutes in an effort to draw conclusions about the Compact. These statutes are too far

removed, however, from present issues to be helpful. Furthermore, Nebraska seeks to distinguish the interpretations by this Court of the Pecos River and Arkansas River Compacts with respect to inclusion of groundwater consumption even though groundwater is not mentioned in either compact. These compact cases are much closer to the question presently before the Court than the other sources cited by Nebraska. They stand for the proposition that a compact that allocates all the waters of a basin among states includes no unexpressed exception for groundwater consumption by which one of the States could skew the allocations set out in the Compact.

The Nebraska brief is largely silent on the negotiating history as shown in the minutes of the negotiating sessions and the other undisputed documents relied on by the Special Master. And in the discussion that Nebraska does provide, it fails to point to any documents that refute the Special Master's interpretation of the legislative history.

Colorado agrees with the Special Master's recommendation that the Motion to Dismiss be denied. Colorado, nevertheless, takes issue with the position of the Special Master, Kansas and the United States that *all* groundwater consumption that depletes the surface flows of the Republican River must be accounted for under each State's allocation. While not questioning the Special Master's conclusion that a straightforward reading of the language of the Compact shows that the Compact does restrict consumption of alluvial groundwater, Colorado asserts the position that Ogallala groundwater consumption is excepted.

Like Nebraska, Colorado argues for an exception to the Compact that is found nowhere in the express language of the Compact. In essence, Colorado argues that consumption of Ogallala groundwater by a State subject to the Compact that depletes the allocated surface flows of the Republican River nevertheless should not be counted against that State's allocation. No distinction is made in the Compact, however, between alluvial and Ogallala groundwater that would support Colorado's position.

Colorado resorts to asserting that the Compact itself is ambiguous and that one must look to extrinsic evidence. Colorado relies heavily on the scope of a federal government study that was investigating the potential for groundwater development in the Republican Basin. There is no reason to conclude, however, that the Compact Commissioners chose to limit the general principles of allocation in the Compact to match that study.

Colorado also relies heavily on the fact that the Republican River Compact Administration has never included Ogallala depletions in its formulas. Colorado creatively, but unconvincingly, asserts that the reason that the States were unanimously calling for more information about the effect of Ogallala pumping on the Republican River was not to carry out the allocations under the Republican River Compact, but to provide the basis for a new or amended compact. This newly minted argument must fail, however, because the Republican River Compact Administration has authority only to administer the Republican River Compact, and not more.

Simply stated, Nebraska and Colorado are arguing for exceptions to the Republican River Compact that are

expressed nowhere in the Compact or its legislative history.

ARGUMENT

I. Nebraska's Exceptions

A. Nebraska's Procedural Exceptions

1. The Special Master Properly Considered the Compact's Language and History.

Nebraska's first argument is that the Special Master erred in his application of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Neb. Br. 5, 6; cf. Sup. Ct. R. 17.2 (providing that Federal Rules of Civil Procedure and Federal Rules of Evidence may be taken as "guides" in respects other than the form of pleadings and motions). Nebraska contends that the Special Master should not have resorted to extrinsic evidence in interpreting the Compact because "[c]onsideration 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." Neb. Br. 6. It bases its argument on the final sentence of Rule 12(b), which provides that a motion under Rule 12(b)(6) shall be treated and disposed of as one under Rule 56 when "matters outside the pleading are presented to and not excluded by the court." Fed. R. Civ. P. 12(b); see Neb. Br. 6. Nebraska concludes that the Special Master's "approach to Rule 12(b)(6), if adopted by the Court, would deny Nebraska due process of law." Neb. Br. 11.

In assessing this argument, it is important to be clear about what matters the Special Master considered in reaching his recommendation. The question originally presented by Nebraska's motion was "whether the Republican River Compact restricts a compacting State's consumption of groundwater." Report 18. Pursuant to the rules applicable to motions to dismiss, the Special Master took Kansas' allegation as true that Nebraska's groundwater pumping has depleted stream flows of the Republican River. As a result, the Special Master distilled the original question to: "Does the Compact restrict groundwater pumping that depletes the stream flow in the Republican River Basin?" *Ibid.*

To answer this question the Special Master looked first to the language of the Compact. *Id.*, at 19-23. "If the text of the Compact, placed in its context, is unambiguous, it is conclusive." *Id.*, at 19. He concluded that the language of the Compact is unambiguous and that "[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." *Id.*, at 23; see also *id.*, at 44.

The Special Master then inquired whether the extrinsic, historical evidence of the compacting parties' intent would lead to a different interpretation if, *arguendo*, the Compact's language were ambiguous. *Id.*, at 23. He thus consulted "reliable indications of the parties' intent" beyond the Compact language, consisting of "items in the

public record such as the minutes of the Compact negotiations and the records of subsequent Compact administration." *Id.*, at 19. As authority for considering these historical records, the Special Master cited, among other precedents, the following passage from *Oklahoma v. New Mexico*:

> "We agree with the Master that it is appropriate to look to extrinsic evidence of the negotiation history of the Compact in order to interpret Article IV [of the Compact]. We previously have pointed out that a congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous. Furthermore, we have on occasion looked to evidence regarding the negotiating history of other interstate compacts. Thus, resort to extrinsic evidence of the compact negotiations in this case is entirely appropriate." 501 U.S. 221, 235 n.5 (1991), *cited at* Report 19.

Having reviewed the Compact's negotiation history and subsequent administration, the Special Master determined that the Compact was intended to govern groundwater insofar as the groundwater would become part of the stream flow in the Republican River Basin if undepleted by the activities of man. Report 44. The Special Master concluded his Report by reaching four legal conclusions and one recommendation. The recommendation was as follows:

> "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." Report 44-45.

The Special Master made no specific findings of fact.

The Special Master's recommendation to deny Nebraska's Motion to Dismiss rests on two independent grounds: (i) The language of the Compact unambiguously restricts the compacting States' consumption of groundwater insofar as such groundwater would become part of the stream flow in the Basin if undepleted by the activities of man; and (ii) assuming *arguendo* that the Compact is ambiguous, a review of the Compact's history and this Court's prior decisions leads to the same interpretation. Report 44-45. For a number of reasons, it is meritless to contend that Rule 12(b)(6) precluded the Special Master from reaching his result.

First, Nebraska does not dispute that the Special Master could properly consider the language of the Compact. Any dispute about the alternative ground for his recommendation – the meaning of the Compact to be gleaned from extrinsic evidence – is therefore moot. The Special Master discerned an intent to restrict consumption of groundwater in the Compact's plain language. That language is "conclusive" of both the Compact's application and Nebraska's Motion to Dismiss. Report 19. Thus, even if Nebraska could show that the Special Master erred in his alternative finding, the error would be harmless.[1]

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[1] *E.g.*, *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (affirming dismissal following from consideration of extrinsic materials where dismissal was

Second, while the Special Master plainly could not decide Nebraska's Motion to Dismiss without consulting the Compact's language, he certainly could consult extrinsic materials such as its negotiation history and subsequent administration to resolve any ambiguities in its language. The Compact is a law as well as a contract, *Texas v. New Mexico,* 482 U.S. 124, 128 (1987), and indeed it is *the* law by which the "sufficiency of the complaint" must be judged. See *Conley v. Gibson,* 355 U.S. 41, 45 (1957). Its negotiation history and subsequent administration are merely counterparts to a statute's legislative history and administration. These legislative facts are not considered matters "outside the pleading" for purposes of Rule 12(b) any more than a law itself is. *Anheuser-Busch, Inc. v. Schmoke,* 63 F.3d 1305, 1312 (4th Cir. 1995) ("For purposes of Rule 12(b)(6), the legislative history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law."), *vacated on other grounds,* 518 U.S. 1030 (1996), *readopted on remand,* 101 F.3d 332 (4th Cir. 1996), *cert. denied,* 520 U.S. 1204 (1997).[2]

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independently proper based on unambiguous treaty language), *cert. denied,* 119 S. Ct. 1459 (1999); accord *Miller v. Glanz,* 948 F.2d 1562, 1566 (10th Cir. 1991) (any error in considering extrinsic material is harmless when Rule 12(b)(6) determination can be justified without reference to such material); *Medina v. Rudman,* 545 F.2d 244, 247 (1st Cir. 1976) (same), *cert. denied,* 434 U.S. 891 (1977).

[2] See, *e.g., National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 261 (1994) (applying Rule 12(b)(6) and referring to legislative history); *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 237-249 (1989) (applying Rule 12(b)(6) and reviewing both statutory language and legislative history); *Hishon v. King &*

Third, Nebraska's contention that the Special Master should not have considered these legislative facts runs afoul of this Court's pronouncement that it is "entirely appropriate" to consider similar historical materials. See *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991), quoted, *supra*, at p. 13. Nebraska notably never acknowledges this contrary authority in *Oklahoma v. New Mexico* or the Special Master's reliance on it, Report 19, but instead limits its citation of that case to the dissent. Neb. Br. 16 n.5, 19 & n.9. It proposes, however, that under the peculiar strictures of a Rule 12(b)(6) motion a judge must put out of mind the usual subjects of interpretive judgment in the public record (with the apparent exception of the Compact itself) unless those subjects are wholly "undisputed." Neb. Br. 8. In fact, there is no such limitation on a court's consideration of legislative facts. See Fed. R. Evid. 201, Advisory Committee Notes, 1972 Proposed Rules, note to Subdivision (a) (discussing justification and need for courts freely to consider legislative facts without "any limitation in the form of indisputability").

Indeed, Nebraska itself, when it moved to dismiss, quoted this Court's pronouncement that "[c]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it." *Leo Sheep Co. v.*

Spalding, 467 U.S. 69, 73-76 & n.7 (1984) (same); *National Ass'n of Pharmaceutical Mfrs. v. Food & Drug Admin.*, 637 F.2d 877, 882-888 (2d Cir. 1981) (Friendly, J.) (applying Rule 12(b)(6) and reviewing legislative history at length).

United States, 440 U.S. 668, 669 (1979) (quoting *United States v. Union Pac. R. Co.*, 91 U.S. 72, 79 (1875)), *quoted at* Neb. Motion Br. 9 n.2.[3]

Moreover, independent of the distinction between legislative and adjudicative facts, this Court has ruled that historical matters of public record may be considered on a Rule 12(b) motion when their authenticity is not controverted, although their legal significance is disputed:

> "Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record. . . . The historical facts recited here comprise in large part the factual allegations of the complaint and are not disputed by the parties; the parties disagree only on the legal significance of these facts." *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986).

Nebraska does not contend that the historical record is inauthentic or that the statements and events reflected there are fabricated. Its disagreement here is over the

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[3] Accord *Alden v. Maine*, 527 U.S. 706, 741-55 (1999) (interpreting Eleventh Amendment "[i]n light of history, practice, precedent, and the structure of the Constitution"); *Printz v. United States*, 521 U.S. 898, 905 (1997) (observing that when question is not resolved by constitutional text, answer "must be sought in historical understanding and practice, in the Constitution's structure, and in this Court's jurisprudence."; *United States v. Lopez*, 514 U.S. 549, 552 (1995) (consulting extrinsic evidence of intent of Constitution's Framers); *id.*, at 576-77 (Kennedy, J., concurring) (same); *id.*, at 585-592 (Thomas, J., concurring) (same).

legal significance of events in the Compact's history – specifically, whether statements by Compact negotiators bound their sovereign principals and whether they thus are material to an understanding of the agreement ultimately reached in the Compact. See Neb. Br. 10 & n.3, 30 n.15 (citing *Arizona v. California*, 292 U.S. 341, 360 (1934), which held that oral statements of compact negotiators that were not communicated to sovereign principals were inadmissible absent showing of how they "could conceivably be material or competent evidence bearing upon the construction" of Colorado River Compact). Thus, Nebraska's disagreement over the inferences to be drawn from the Compact's history did not require the Special Master to ignore that history.

Fourth, the Special Master could judicially notice the Compact's history on a Rule 12(b)(6) motion even if Nebraska did stubbornly contest its authenticity. The circuit courts have uniformly ruled that consideration of matters outside the pleading but subject to judicial notice is proper under Rule 12(b)(6).[4] In *Menominee Indian Tribe*

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[4] *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999); *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1197 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996), *readopted on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1459 (1999); *Missouri ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102, 1107 (8th Cir.), *cert. denied*, 119 S. Ct. 2400 (1999); *Heliotrope, Inc.*

v. Thompson, 161 F.3d 449 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1459 (1999), for example, the Court of Appeals for the Seventh Circuit rejected the argument that Nebraska makes here, holding that the district court on a Rule 12(b)(6) motion could judicially notice historical papers chronicling the negotiations of four treaties as well as subsequent administrative reports of the Commissioner of Indian Affairs. *Id.*, at 455-456 ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper."). The negotiation history and subsequent administration of the Republican River Compact, like the similar historical materials reviewed in *Menominee Indian Tribe*, are therefore proper subjects for judicial notice.[5]

Fifth, Nebraska's Motion to Dismiss urged the Special Master to do exactly what it now protests. It argued, "In

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v. Ford Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999); *Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir. 1989) (*per curiam*), *cert. denied*, 493 U.S. 1059 (1990); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276-78 (11th Cir. 1999); *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 & n.6 (D.C. Cir. 1993). See generally 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 299 & n.1, § 1363, at 464-465 & nn.38, 40, § 1364, at 480 & n.42 (2d ed. 1990).

[5] See *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5; see also *Texas v. New Mexico*, 462 U.S. 554, 568 n.14 (1983) (construing ambiguous language in Pecos River Compact in light of negotiation history); *Arizona v. California*, 292 U.S. 341, 359-360 (1934) (recognizing that "when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning").

considering a motion to dismiss, this Court is 'not precluded in [its] review of the complaint from taking notice of items in the public record.' " Neb. Motion Br. 5 (quoting *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986)). It argued that courts may with propriety recur to the history of the times when a statute was enacted as necessary to ascertain the meaning of the statute. *Id.*, at 9 n.2. It urged the Special Master to consider such extrinsic facts as: (i) Kansas' "pre-Compact litigation with Colorado over the waters of the Arkansas River," *id.*, at 9; (ii) the "subsequent litigation between Kansas and Colorado, which occurred contemporaneously with the adoption of the Republican River Compact," *ibid.*; (iii) the volume and reach of the Ogallala aquifer as indicated on a United States Geological Survey map, *id.*, at 10 & Appendix A; (iv) the position taken by the compacting States in a brief of amici curiae, *id.*, at 12-13; (v) the absence "[a]t the time the Compact became law" of state laws permitting regulation of groundwater for the protection of surface water as recorded in a law review article, *id.*, at 16 & n.5; (vi) the Internal Revenue Service's view of the meaning of the Compact as expressed in a revenue ruling, *id.*, at 17 n.6; (vii) the "subsequent actions of Kansas and Nebraska in their dealings creating the Blue River Compact in 1971," *id.*, at 18; and (viii) the Republican River Compact Administration's calculation of "annual surface water supply of the Basin and the annual consumptive use of each state using formulas that it adopted," *ibid.*

The reason for converting a motion to dismiss into a motion for summary judgment when matters outside the pleadings are considered is "to avoid taking a party by surprise." Fed. R. Civ. P. 12, Advisory Committee Notes,

1946 Amendment, Subdivision (b). Nebraska is in no position to claim that it was taken by surprise when the Special Master did what it requested him to do.[6] Nor did Nebraska object, in its reply brief or at oral argument, to the Special Master's consideration of the extrinsic evidence that Kansas presented, other than to disparage it as "anecdotal," "parole evidence," and "not relevant." Nebraska's Brief in Response to Briefs of Kansas and United States in Opposition to Nebraska's Motion to Dismiss 7-8 & n.4. On the contrary, Nebraska went right on urging the Special Master to consider extrinsic actions of the parties and actions of the Republican River Compact Administration in interpreting the Compact. *Id.*, at 10-13. Nebraska now charges the Special Master with failing to review "the **entire** record." Neb. Br. 8 (Nebraska's emphasis). But Nebraska fully exercised its right to present argument, including argument from extrinsic matters. If any relevant portion of the record was not presented for the Special Master's consideration, it was not for want of opportunity.

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[6] See *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) (holding that party who introduces extrapleading matter on Rule 12(b)(6) motion "certainly cannot be heard to claim that he was surprised when the district court accepted his invitation"); *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998) (ruling that represented party who invites consideration of extrapleading matters has notice that court may use them to decide motion); *Laughlin v. Metropolitan Washington Airports Auth.*, 149 F.3d 253, 261 (4th Cir. 1998) (observing that district court "does not have an obligation to notify parties of the obvious").

2. The Special Master Confined His Recommendation to the Issue Referred to Him by the Court.

Nebraska incorrectly infers that the Special Master, through his conclusions and recommendation, "offer[ed] judgment" to Kansas. Neb. Br. 10. The Special Master did not offer judgment. He simply recommended that Nebraska's Motion to Dismiss be denied in accordance with his interpretation of the Compact:

> "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." Report 45.

Citing no authority, Nebraska asserts that "[d]enying 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," and it similarly complains of an outcome "that is basically the opposite of that requested by the movant, Nebraska." Neb. Br. 10-11. In fact, to deny a motion to dismiss is always to reach a conclusion of law adverse to the moving party – implicitly or explicitly, the "sufficiency of the complaint" is affirmed. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). And, of course, denial is always the opposite of what the moving party requested. That a party may lose a motion to dismiss – along with the legal position on which the motion is predicated – is a risk that the moving party must always bear. It is not a due process violation.

B. Nebraska's Substantive Exception

1. The Republican River Compact Unambiguously Restricts a Compacting State's Consumption of Water.

The language of the Compact clearly requires that depletions of stream flows of the Republican River be accounted for in implementing the allocations to the States. This understanding of the Compact held by Kansas, the United States and the Special Master results from the combination of a few simple elements that make up the allocation provisions of the Compact.

First, a major purpose of the Compact is to allocate *all* of the virgin flows of the Republican River. Article I provides:

> "The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the 'Basin') for multiple purposes; to provide for an equitable division of such waters;. . . . " RRC, Art. 1, ¶ 1.

No waters are excepted from the equitable division intended by the compacting parties.

The intention expressed in Article I that *all* waters of the Basin be equitably divided in the Compact is implemented by other provisions of the Compact. Article III provides that the allocations are "derived from the computed average annual virgin water supply." In turn, the "virgin water supply" is defined to be "the water supply within the Basin *undepleted* by the activities of man." RRC, Art. II, ¶ 3 (emphasis added). Thus, the waters that are equitably divided by the Compact are "the water

supply within the Basin undepleted by the activities of man." Pumping and consumptive use of groundwater in Nebraska that diminish the groundwater discharges to, or draw water from, the Republican River and its tributaries, and thereby deplete those stream flows, would appear to constitute "depletions of the water supply within the Basin by the activities of man." It is hard to conceive of better words of general applicability that could have been used by the framers of the Compact to drive home the concept that they intended to allocate the entire water supply of the Republican River and to protect that allocation against any unaccounted-for depletions. In order to achieve that objective, it is necessary to account for *any* man-made depletions of stream flows in the three States. Consumptive use of groundwater pumped from the alluvial or Ogallala aquifer is assumed to deplete the stream flows of the Republican River for purposes of the present Motion to Dismiss. Such depletions result from the activities of man and therefore must be accounted for in determining the virgin water supply that the Compact allocates.

Nebraska places great emphasis on the lack of "groundwater" and similar terms in the Compact. *E.g.*, Neb. Br. 4, 19. As the Special Master points out, the Compact does not use the term "surface water" either. Report 22 n.16. Rather, the Compact uses the all-inclusive term "water supply." See, *e.g.*, RRC, Art. II, ¶ 3 ("Virgin Water Supply"); *id.*, Art III (allocations derived from annual virgin water supply). As the Special Master also points out, Nebraska misses the critical fact that must be assumed for purposes of the Motion to Dismiss, namely, that stream flow comes from both surface runoff and

groundwater discharge. Report 21-22. Therefore, depletion of groundwater discharges to the stream results in depletion of the stream flows. If that depletion of stream flows were not taken into account, it would alter the Compact allocation among the States. The same is true of groundwater pumping that draws water directly from the stream.

Nebraska places great emphasis in its discussion of the language of the Compact on the necessity of considering the terms of the Compact as they were understood in 1943, not today. Neb. Br. 3-4, 17. No distinction, however, is ever asserted by Nebraska between the meanings of words found in the Compact as they were understood in 1943 and today. Therefore, this argument is of little assistance in the present analysis.

It is assumed for purposes of the Motion to Dismiss that Kansas' allegation that Nebraska's alluvial and Ogallala groundwater consumption is depleting the stream flow of the Republican River is true. *E.g., Neitzke v. Williams,* 490 U.S. 319, 326-27 (1989).

2. The Legislative History of the Compact Shows That It Was Intended to Restrict a Compacting State's Consumption of Groundwater.

Nebraska avoids practically all discussion of the Republican River Compact Commission Minutes of the compact negotiations and closely associated official correspondence of the State Compact Commissioners and the officials of the Bureau of Reclamation involved in advising the negotiators. See Neb. Br. 7 ("Nebraska did not

submit any matters outside the pleading."). Although Nebraska claims that the documents constituting the legislative history are disputed, Neb. Br. 8, Nebraska does not assert that any of the documents relied upon by the Special Master are inauthentic. Nor does Nebraska take issue with the specific interpretation of the documents by the Special Master, except to say that "taken as a whole, that record demonstrates that the parties did not discuss, debate or contemplate regulation of groundwater by the Compact." Neb. Br. 8-9. This claim by Nebraska is contradicted by the documents specifically discussed by the Special Master. See Report 25-28.

In sum, the Special Master refers to Minutes of the Fourth Meeting of the Republican River Compact Commission that indicate that on the record the Commissioners of the States understood that groundwater pumping would affect surface flows and would need to be accounted for within the allocations to the respective States. Report 25-26. See also Kan. Br. in Opp. 13-19.

3. The States, by Unanimous Action, Have Consistently Construed the Compact to Restrict Consumption of Groundwater.

Nebraska accords only brief discussion to the parties' administration of the Compact. Neb. Br. 46-47. Even in the short discussion, however, Nebraska makes several errors.

First, an interstate body created by a compact that requires unanimous approval of the compacting States in order to act is not "analogous to that of a federal agency

implementing a federal statute." Neb. Br. 46. See *Texas v. New Mexico*, 462 U.S. 554, 566-571 (1983).

Second, Nebraska argues that "deference to the RRCA's interpretation is not automatic," citing *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000). Neb. Br. 47. In the present context, the question is not of deference to the RRCA's interpretation of the Compact, but whether long-standing RRCA interpretation of the Compact sheds any light upon the original intent of the compacting parties. As the Special Master explains, the formulas adopted by the RRCA strongly suggest that the original intent of the compacting parties was that depletions by groundwater pumping were one of the "activities of man" that needed to be taken into account in implementing the allocation among the States. Report 34.

Significantly, Nebraska does not take issue with the substance of the Special Master's interpretation of the administration of the Compact nor specifically with his interpretation of the formulas by the RRCA. Compare Neb. Br. 46-47 with Report 32-34.

4. The Special Master's Recommendation is Not Inconsistent With the Interpretation of Other Federal Water Statutes.

Nebraska makes the following argument: "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." Neb. Br. 38. On the contrary, the McCarran Amendment, 43 U.S.C. § 666, and the Clean Water Act, 33

U.S.C. §§ 1251-1376, are not "worded similarly" to the Republican River Compact, nor do they have the same purpose, nor were they enacted contemporaneously.

The Republican River Compact is not "worded similarly" to the McCarran Amendment or the Clean Water Act, as is shown by a direct comparison. The question on the present Motion to Dismiss concerns the scope of words such as "allocation" and "water supply within the [Republican River] Basin undepleted by the activities of man" ("virgin water supply"). In contrast, the issue under the McCarran Amendment in the case cited by Nebraska, *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995), was the scope of the words "adjudication of rights to the use of water of a river system or other source." And the issue identified by Nebraska under the Clean Water Act is the scope of the words "waters of the United States." 33 U.S.C. § 1362(7). These Acts can hardly be said to be similarly worded for present purposes.

Likewise, the context of the questions raised under each of these statutes is quite different, and the consequences are therefore quite different. In the present case, the specific question is whether the Republican River Compact restricts groundwater pumping in the compacting States. The corresponding question before the court in *United States v. Oregon* was whether the United States and Indian tribes would be required to participate in a state court adjudication. The controversy identified by Nebraska under the Clean Water Act was whether that Act required discharges to groundwater to be permitted.

In sum, the Nebraska attempt to compare two other federal statutes to the Republican River Compact is untenable. The McCarran Amendment and the Clean Water Act are not compacts; they have very different purposes; they have very different wording; and they were enacted at different points in time. There is no assurance, nor even objective suggestion, that Congress intended to apply the same principles to the Republican River Compact, the McCarran Amendment and the Clean Water Act. In fact, given their disparate purposes, wording, and timing, it would be highly unlikely if such were the case.

5. The Compacting States Possessed the Sovereign Power to Enter Into a Compact That Restricts Groundwater Pumping.

Nebraska asserts that "[i]n 1943, the Compact States did not possess the authority to regulate groundwater use." Neb. Br. 24-25. This statement cannot be true. Nebraska itself asserts that both Kansas and Colorado currently regulate groundwater use. See *id.*, at 26, 28. Kansas and Colorado have not received any additional power to regulate groundwater since 1943, yet they are admittedly doing so now. See, *e.g.*, Neb. Br. 25-26, 28-29.

This Court, in the case of *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), specifically held that states have sovereign power to limit the water rights of their citizens in the course of entering into a compact with another state:

> "Whether the apportionment of the water of an interstate stream be made by compact between

> the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Id.*, at 106.

In *Hinderlider* the question was whether *pre-compact* water rights could be limited by a compact. This Court held that they could. Here, Nebraska argues that *post-compact* rights could not be limited by compact. If pre-compact rights could be limited by compact, *a fortiori,* post-compact rights could be limited by compact.

Nebraska, citing *Hinderlider,* argues:

> "[T]he 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." '" Neb. Br. 30 (citations omitted).

Nebraska fails to note that the La Plata River Compact, the compact involved in the *Hinderlider* case, contained no such "surrender in unmistakable terms." Rather, it was simply a natural and necessary consequence of the existence of the Compact. See La Plata River Compact, 43 Stat. 796 (1925). The *Hinderlider* case and the La Plata River Compact also refute Nebraska's frequent statements such as the following:

> "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." Neb. Br. 25.

On the contrary, *Hinderlider* stands for the proposition that States can and have, by means of compacts, recognized limits on their water users that the States had not previously imposed. See *Hinderlider*, 304 U.S., at 102, 106.

6. The Special Master's Recommendation is Consistent With This Court's Interpretation of Other Interstate Water Allocation Compacts.

The attempts by Nebraska to distinguish the Pecos River Compact and the Arkansas River Compact are ineffective. Both of those compacts are like the Republican River Compact in that they allocate surface water. See Pecos River Compact, 63 Stat. 159, Art. I (1949) ("the major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River: . . . "); Arkansas River Compact, 63 Stat. 145, Art. I (1949) ("the major purposes of this Compact are to . . . Equitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River . . . . "). In addition, their enforcement has required, in both river systems, accounting for consumption of groundwater. See, *e.g.*, *Texas v. New Mexico*, 462 U.S. 554, 557 n.2 (1983) ("the nonflood 'base' flow of the Pecos below Alamogordo Dam is supplied to a large part by groundwater aquifers that empty into the river in the reach between Acme and Artesia, NM."; *Kansas v. Colorado*, 514 U.S. 673, 693-94 (the Special Master and the

Court had "no difficulty in concluding that [post-Compact] pumping in Colorado ha[d] caused material depletions of the usable Stateline flows of the Arkansas River, in violation of the Arkansas River Compact.") (brackets in original).

Nebraska also points to the Kansas-Nebraska Big Blue River Compact, 86 Stat. 193 (1972). Nebraska has failed to demonstrate, however, that the specific provisions for groundwater pumping regulation in the Blue River Compact, adopted to address conditions in the Blue River Basin, have any direct relevance to the intent of the States of Nebraska, Kansas and Colorado in the early 1940s in allocating the surface flows of the Republican River Basin.

7. The Special Master's Recommendation is Consistent With This Court's Decision in *Sporhase v. Nebraska ex rel. Douglas*.

The Special Master considered Nebraska's argument that Kansas' understanding of the Republican River Compact was inconsistent with this Court's holding in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). He determined that the identified statements in *Sporhase* were "wholly consistent with the position Kansas takes in the instant dispute." Report 38.

Nebraska refers to the following statement in *Sporhase*:

> "The interstate compacts to which [Nebraska] refers are agreements among States regarding rights to surface water. See The Council of State

> Governments, Interstate Compacts and Agencies 25-29, 31-32 (1979). [Nebraska] emphasizes a compact between Nebraska and Colorado involving water rights to the South Platte River, see 44 Stat. (part 2) 195, and a compact among Nebraska, Colorado, and Kansas involving water rights to the Republican River, see 57 Stat. 86." *Sporhase,* 458 U.S., at 959.

Nebraska's point is that this language refers to surface water, not groundwater. See *e.g.,* Neb.Br. 32-33. The Court's statement in *Sporhase,* however, is, as the Special Master states, wholly consistent with the Kansas position in this case. Report 38. Kansas understands the Republican River Compact to allocate the surface flows of the Republican River "undepleted by the activities of man." RRC, Art II, ¶ 3. It is the depletion of those surface flows by groundwater pumping that Kansas believes is restricted by the Republican River Compact in order to protect the allocation of surface flows.

It is also helpful to note that the compilation of interstate compacts cited by the Court in the above-quoted passage includes not only the Republican River Compact, but also the Arkansas River Compact and the Pecos River Compact. The Council of State Governments, Interstate Compacts and Agencies 23-25 (1979). Those compacts have been interpreted by this Court both to apportion surface water and to restrict the pumping of groundwater to the extent necessary to protect the surface water apportionment. See *Texas v. New Mexico,* 462 U.S. 554 (1983); *Kansas v. Colorado,* 514 U.S. 673 (1995). Nebraska also argues that the recognition in *Sporhase* that Congress had not adopted a comprehensive regulatory scheme to control overdraft of the Ogallala aquifer means

that the Court understood the Republican River Compact to place no restriction on consumption of groundwater. Neb. Br. 31-32. Nebraska mischaracterizes the Court's description. Protecting the surface flows of the Republican River from depletion by Ogallala and alluvial pumping does not relate in any direct way to whether Congress has enacted a comprehensive scheme to control overdraft of the eight-state Ogallala aquifer.

II. Colorado's Exception

A. The Exception

Colorado recommends that the Motion to Dismiss be denied. Colo. Br. 4. Colorado nevertheless opposes Kansas, the United States and the Special Master with regard to whether the Compact restricts a State's consumption of Ogallala groundwater. Colorado is also the only participant in this proceeding asserting that the language of the Compact is ambiguous. See Colo. Br. 5-9; Neb. Br. 16-20; U.S. Br. in Opp. 19-21; Kan. Br. in Opp. 9-11; *supra*, at pp. 23-25. Again, it is important to recall that for purposes of the Motion to Dismiss, the Kansas allegation that pumping and consumption of Ogallala groundwater is depleting the surface flows of the Republican River is taken as true. *E.g., Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

B. The Republican River Compact Unambiguously Restricts a Compacting State's Consumption of Ogallala Groundwater.

Colorado is, like Nebraska, asserting the existence of an exception to the allocation in the Compact that is not

stated in the Compact. Thus, almost *ipso facto,* the language of the Compact does not support the Colorado position. Further, the foregoing arguments with respect to the interpretation of the Compact language itself apply with equal force against the Colorado position. See pp. 23-25, *supra.*

Colorado makes the mistaken assumption that present-day hydrologic knowledge of the Ogallala aquifer and its relationship to the Republican River was necessary in order for the Compact Commissioners to state the general principle that the waters of the Republican River being allocated shall be the water supply within the Basin undepleted by the activities of man. If it can be shown that pumping and consumption of groundwater from the Ogallala aquifer are in fact depleting the virgin water supply of the Republican River, then it was the stated intent of the compacting parties that such depletions be taken into account in implementing the allocation in the Compact.

As the Special Master has articulated, there is no "administrative convenience exception" in the Compact for the considerations that concern Colorado, such as the difficulty in 1943 of ascertaining precisely what the depletions of the Republican River might be from Ogallala pumping. Report 42-43. As the Special Master has also stated, the existence and quantification of such depletions await factual development in an evidentiary proceeding. Report 2-3 n.3. Colorado's purpose here is to preclude such factual development and thus to exempt the effects of Ogallala pumping from the Compact allocation.

Colorado states that the Compact "was intended to remove all causes of present and future controversies and to promote interstate comity," and that the Compact "had to be capable of administration from the day it became effective." Colo. Br. 8. As the parties have agreed, the Republican River Basin was far from being fully appropriated at the time the Compact was adopted. See Kan. Br. for Leave 5; Neb. Motion Br. 10. And as this Court has stated, "Though the circumstances of [a compact's] drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Thus, it was not necessary from the day that the Compact was adopted to precisely quantify the effects of Ogallala pumping on the flows of the Republican River. The increases in water uses in Nebraska has subsequently made it necessary to do that. Modern groundwater analysis, including groundwater flow modeling using modern computer-aided hydrologic analysis, will provide the quantification of the effects of Ogallala pumping on the Republican River if Colorado's attempt to preclude evidence on the impact of Ogallala pumping is rejected.

Further, it can hardly be expected that allowing one State unilaterally to change the allocation set out in the Compact by intercepting flows of Ogallala groundwater that would otherwise discharge into the Republican River would "remove all causes of present and future controversies" or "promote interstate comity." If, as Colorado contends elsewhere, a Compact "is intended to create fixed, defined rights," Colo. Br. 20-21, then Colorado's interpretation of the Republican River Compact creates

the opposite result by effectively allowing a unilateral reallocation.

C. The Legislative History of the Compact Shows That It Was Intended to Restrict a Compacting State's Consumption of Ogallala Groundwater.

Colorado admits that the documents constituting the legislative history of the Compact do not distinguish among different types of groundwater. Colo. Br. 10. Thus, the foregoing analysis, with respect to the inclusion of groundwater in Compact accounting, applies to groundwater from any source, including the Ogallala aquifer.

Colorado places a great deal of reliance for its interpretation of the Compact on a presentation to the Republican River Compact Commission by Mr. Burleigh, an official of the Bureau of Agricultural Economics ("BAE") of the U.S. Department of Agriculture and on a report by the BAE entitled "Water Facilities Area Plan for the Upper Republican Basin in Nebraska, Kansas and Colorado" ("BAE Report"). Colo. Br. 10-16. Colorado's reliance is misplaced. Colorado mistakenly understands a reference in Mr. Burleigh's presentation to alluvial groundwater as "additional evidence that Mr. Burleigh *and the commissioners* were only concerned about alluvial wells," Colo. Br. 11-12 n.5 (emphasis added). It is unreasonable to assume that the Commissioners limited the scope of the Compact to the scope of the BAE proposals. Colorado cites no statement of the Commission to this effect.

The fact that the Compact Commissioners did not decide to limit the water being allocated by the Compact,

with regard to groundwater, to the scope of the proposals being developed by Mr. Burleigh for the Bureau of Agricultural Economics is positively shown by the discussion at the fourth meeting of the Commission and in follow-up correspondence. On this point, the Minutes read as follows:

> "Mr. Burleigh advised the Commission that, in view of the fact that numerous applications had been made to his department by land owners thruout [sic] the basin, he was desirous of obtaining a statement from the Commission as to whether the amounts of underground waters he had determined would be feasibly possible of use, would, in the opinion of the Commission, exceed the allotments of water to each state which the Commission may have agreed upon; that his department did not want to recommend developments of underground water supplies in excess of the allocations of water to each state." Minutes of the Fourth Meeting of the Republican River Compact Commission, reprinted as App. B to Kan. Br. in Opp., at B3.

The fourth meeting of the Republican Compact Commission occurred January 27-28, 1941. Three days after the meeting, Colorado Commissioner Hinderlider addressed a letter to his fellow Commissioners Knapp and Scott, which stated as follows:

> "It is my understanding that Mr. Knapp will address a letter to Engineer Burleigh of the Bureau of Agricultural Economics, advising him that the commissioners are in agreement that the estimated amount of ground water which may be developed in each of the tributary basins of

> the Republican River Basin *are within the allocations* which the Commission has tentatively made." Letter from M.C. Hinderlider to George S. Knapp and Wardner G. Scott (January 31, 1941), reprinted as Appendix C to Kan. Br. in Opp., at C1 (emphasis added).

Actually, Commissioner Knapp had already addressed his letter to Mr. Burleigh on the day before, January 30, 1941. In that letter Commissioner Knapp stated:

> "We, the Republican River Compact Commissioners on the Republican River, meeting at Topeka on January 28, examined the tables which you submitted to us on the 27th indicating the approximate recommendations for consumptive use of water by basins in the three states, and find that the total estimated annual consumptive use of water is *within* the amount of the water supply available in the basin above Hardy, and that the proposed allocations in each of the several states fall *within* the amounts which the Commission may see fit to allocate to each state." Letter from Geo. S. Knapp to Harry P. Burleigh (January 30, 1941), reprinted in Kan. Br. in Opp. 15-16 (emphasis added).

These letters show that the Commissioners were very careful *not* to limit the scope of the Compact allocations to the scope of the study that Mr. Burleigh was developing. Thus, the proposed amount of groundwater development was merely "within" the allocations being considered by the Commission – the proposals by Mr. Burleigh did not constitute the limit of the Compact allocations.

Colorado also mistakenly understands a reference to the BAE Report in a letter to the Governor of Colorado

from the Colorado Commissioner, Mr. Hinderlider, to be a limitation on the expansive description of the scope of the Compact given elsewhere in the same letter. The negotiation of the allocations to the States had concluded the day before. See Letter from M.C. Hinderlider to Ralph L. Carr (March 20, 1941), reprinted as Appendix E to Kan. Br. in Opp. In that letter, Commissioner Hinderlider describes the Compact allocation as follows:

> "The compact allocates to Colorado, its citizens, agencies, associations and corporations *all of the surface and underground water supplies* originating in Colorado within the Frenchman and Red Willow Creek drainage basins; about 25 per cent of those of the North Fork of the Republican; 80 per cent of those of the Arikaree River; 77 per cent of those of the South Fork of the Republican; and an estimated 100 per cent of those of the Beaver Creek basin, which it is believed is the limit of consumptive use which it is practicable to make in Colorado of the waters from these stream basins." *Id.*, at E2 (emphasis added).

Colorado again believes that there is an exception to this straightforward and all-encompassing language of its own Commissioner. Colorado goes back two paragraphs in the same letter to a paragraph in which Commissioner Hinderlider mentions reports or investigations of the Corps of U.S. Engineers, the U.S. Bureau of Reclamation and the Bureau of Agricultural Economics to which "the Commission gave careful consideration." *Id.*, at E1-E2. As can be seen from considering the letter itself, there is no suggestion by Commissioner Hinderlider that the Commissioners decided to limit the scope of the waters being

apportioned under the Compact, with regard to groundwater, to the scope of the proposals that were being developed by the Bureau of Agricultural Economics.[7]

Further confirmation that the Colorado Commissioner understood the Compact allocations not to be limited to consumption of alluvial groundwater affecting surface flows, but that those allocations also included the effects of consumptive use of other groundwater, such as the Ogallala groundwater, is found in Colorado Commissioner Hinderlider's Explanatory Statement and Report to the 34th General Assembly [of Colorado]. In that document, Commissioner Hinderlider stated as follows:

> "It is believed that this Compact equitably apportions the *total* available average annual virgin water supplies of the Basin, *both surface and underground,* among the three signatory States,. . . . " M. C. Hinderlider, Explanatory Statement and Report to the 34th General Assembly (1943), reprinted as Appendix M to the Kan. Br. in Opp., at M10.

Here is Colorado's own Commissioner making clear that the *total* surface and underground waters of the Basin are accounted for in the apportionment of the Compact. It is therefore not credible to assert that there was intended an exception that the Commissioner failed to mention to his State's legislature. Furthermore, Commissioner Hinderlider communicated this description of the Compact to his fellow Commissioners and the Federal Representative appointed by the President, the transmittal of which

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[7] The BAE Report was not actually finalized until June 1941. See U.S. Brief in Opp. 19 n.10.

included the statement, "I would be pleased to have your observations, criticisms, etc., on my explanatory article." Letter from M.C. Hinderlider to Glenn L. Parker (February 5, 1943), reprinted as Appendix N to the Kan. Br. in Opp. Thus, the Colorado Commissioner, through his very thorough documentation of the intent to account for all groundwater in the allocations made in the Compact and his transmittal of that declaration to his own legislature and to the Commissioners of the other States and the Federal Representative to the Commission, leaves no doubt that Ogallala groundwater consumption was meant to be accounted for in the Compact allocations and was fully communicated to the governments that became parties to the Compact.

D. The States, by Unanimous Action, Have Consistently Construed the Compact to Restrict Consumption of Ogallala Groundwater.

The Special Master determined that the formulas adopted by the Compact Administration at its inception in 1961 and re-adopted in later years indicated an understanding that the effect of consumptive use of Ogallala groundwater was required to be accounted for by the Compact and would be included in the computations of virgin water supply and consumptive use as soon as sufficient information became available. The Special Master concluded by saying:

> "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." Report 34.

Colorado nevertheless asserts that the Special Master's conclusion that the RRCA has construed the Compact to restrict Ogallala (table-land) pumping "is belied by RRCA's actual course of conduct." Colo. Br. 19. Colorado is mistaken in two respects. First, the RRCA's actual course of conduct includes its repeated assertions of the need for more research and data on Ogallala pumping effects, thus making clear its position that Ogallala pumping is relevant to the administration of the Republican River Compact. Second, Colorado forgets that the RRCA can act only when all States agree. This Court has previously pointed to the ability of one State under such circumstances to block compact administration and thus deprive a downstream State of its rightful allocation, absent intervention by the Court. See *Texas v. New Mexico*, 462 U.S. 554, 568 (1983) ("As New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme flood conditions, the commission's failure to take action to enforce New Mexico's obligations . . . would invariably work to New Mexico's benefit.").

Colorado also takes a separate, creative, but speculative, approach to responding to the Special Master's interpretation of the RRCA formulas. Colorado suggests that the reason that the officials of the three States unanimously called for more research and data on the effect of Ogallala pumping on the Republican River was to serve as a basis for amending the Compact or negotiating a new compact specifically for the Ogallala. Colo. Br. 20. This suggestion by Colorado is pure speculation. It is also a

newly developed argument that was not presented to the Special Master. Furthermore, it cannot be correct because the RRCA is not authorized to undertake any activity related to another compact. Art. IX of the Republican River Compact provides in pertinent part:

> "It shall be the duty of the three States to *administer this compact* through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper *administration of the provisions* of *this compact.* Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of *this compact.*" (emphasis added).

This is the provision of the Compact under which the RRCA was created and under which the formulas were adopted. The RRCA's creation and its authorization are limited to implementing the provisions of *this Compact.* The RRCA was not authorized to do what Colorado now suggests it was doing.

CONCLUSION

The Exceptions of Nebraska and Colorado should be overruled and the case remanded to the Special Master for determination of the unresolved issues.

Respectfully submitted,

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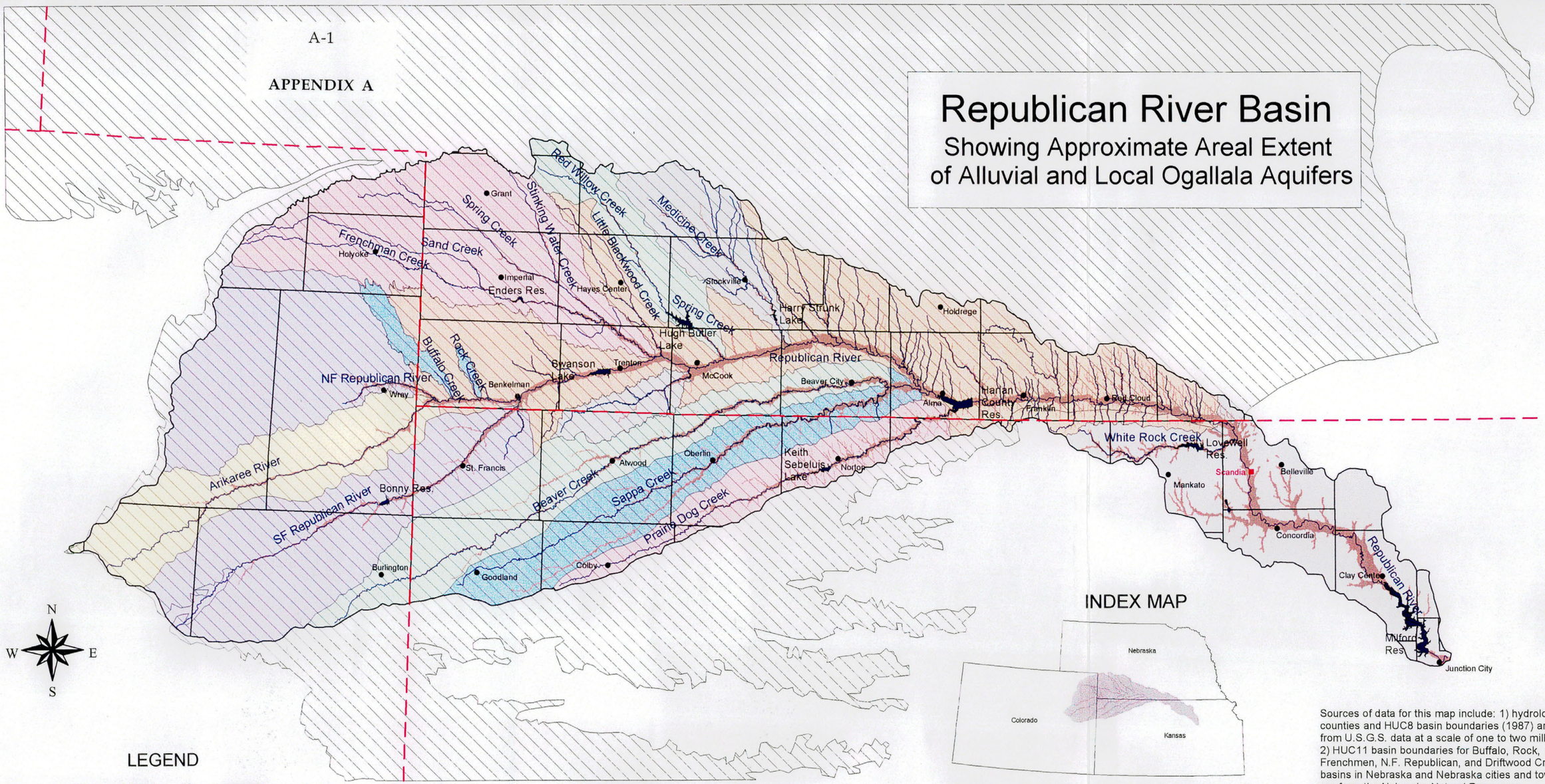
APPENDIX A

Republican River Basin

Showing Approximate Areal Extent of Alluvial and Local Ogallala Aquifers



INDEX MAP

LEGEND

- County Seats
- State Boundaries
- County Boundaries
- Streams
- Lakes
- Alluvium
- Ogallala

Kansas Department of Agriculture
Division of Water Resources
Technical Services Section
May 18, 2000

50 0 50 100 Miles

Sources of data for this map include: 1) hydrology, counties and HUC8 basin boundaries (1987) are from U.S.G.S. data at a scale of one to two million, 2) HUC11 basin boundaries for Buffalo, Rock, Frenchmen, N.F. Republican, and Driftwood Creek basins in Nebraska and Nebraska cities and towns are from the Nebraska Natural Resources Commission, 3) areal extent of the local Ogallala aquifer is from the U.S.G.S. (McGrath and Dugan, 1993), and 4) approximate alluvial extent for Nebraska, Colorado, and Northwest Kansas is as submitted by each of the states in an engineering committee exchange (1998) and from the Kansas Geological Survey (map M-23, 1991) for the lower Republican River in Kansas.