

JUL 31 2000

In The  
Supreme Court of the United States

STATE OF KANSAS,

*Plaintiff,*

v.

STATE OF NEBRASKA,

*and*

STATE OF COLORADO,

*Defendants.*

MOTION FOR LEAVE TO FILE FIRST AMENDED  
ANSWER, COUNTERCLAIM AND CROSS-CLAIM,  
FIRST AMENDED ANSWER, COUNTERCLAIM AND  
CROSS-CLAIM, AND BRIEF IN SUPPORT OF  
MOTION FOR LEAVE TO FILE FIRST AMENDED  
ANSWER, COUNTERCLAIM AND CROSS-CLAIM

DON STENBERG  
Attorney General of Nebraska

DAVID D. COOKSON  
Assistant Attorney General  
*Counsel of Record*  
2115 State Capitol  
Post Office Box 98920  
Lincoln, Nebraska 68509-8920  
(402) 471-2682

BARTHOLOMEW L. MCLEAY  
DONALD G. BLANKENAU  
Special Assistant Attorneys General  
KUTAK ROCK  
The Omaha Building  
1650 Farnam Street  
Omaha, Nebraska 68102-2186  
(402) 346-6000

*Attorneys for State of Nebraska*



**MOTION FOR LEAVE TO FILE FIRST AMENDED  
ANSWER, COUNTERCLAIM AND CROSS-CLAIM**

Comes now the State of Nebraska, by and through the Attorney General of Nebraska Don Stenberg, pursuant to SUP. CT. R. 17.2, FED. R. CIV. P. 13(g) and FED. R. CIV. P. 15(a), and respectfully moves the Court for leave to file the attached, First Amended Answer, Counterclaim and Cross-Claim. As more fully explained in the Brief in Support, the request for leave to file the First Amended Answer, Counterclaim and Cross-Claim arises from the same cause of action asserted by the State of Kansas. Nebraska's First Amended Answer is identical to her original Answer except for the Seventeenth Affirmative Defense and the Cross-Claim. Nebraska's proposed Cross-Claim seeks to apply a uniform application of the Compact to all three Compact states.

Respectfully submitted,

DON STENBERG  
Attorney General of Nebraska

DAVID D. COOKSON  
Assistant Attorney General  
*Counsel of Record*  
2115 State Capitol  
Post Office Box 98920  
Lincoln, Nebraska 68102-2186  
(402) 471-2682

BARTHOLOMEW L. MCLEAY  
DONALD G. BLANKENAU  
Special Assistant Attorneys General  
KUTAK ROCK  
The Omaha Building  
1650 Farnam Street  
Omaha, Nebraska 68102-2186  
(402) 346-6000

*Attorneys for State of Nebraska*



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## **FIRST AMENDED ANSWER, COUNTERCLAIM AND CROSS-CLAIM**

The State of Nebraska ("Nebraska"), Defendant, pursuant to the Order of this Court of January 19, 1999, for its answer to the Bill of Complaint ("Complaint") filed by the State of Kansas ("Kansas"), Plaintiff, states:

1. Nebraska admits the averments set forth in Paragraph 1 of the Complaint to the extent that jurisdiction of this Court is founded under U.S. CONST. art. III, § 2, cl. 2. Nebraska denies the remaining averments set forth in Paragraph 1 for the reason that this Court's jurisdiction is not properly invoked in this case.

2. Nebraska admits the averments set forth in Paragraph 2 of the Complaint to the extent that the Republican River is an interstate river which rises in the plains of northeastern Colorado, northwestern Kansas, and southwestern Nebraska, flows east through southern Nebraska, roughly paralleling the Kansas-Nebraska state line, and then, at a point east of Guide Rock, Nebraska, it turns south into the State of Kansas where it joins the Smoky Hill River. Nebraska denies the remaining averments of Paragraph 2 of the Complaint.

3. Nebraska admits the averments set forth in Paragraph 3 of the Complaint, but denies those averments that suggest the only purposes of projects constructed and operated by the federal government are for flood control and irrigation.

4. Nebraska admits the averments set forth in Paragraph 4 of the Complaint, except the averment that the Compact is "enforceable," which Nebraska denies.

5. Nebraska denies the averments set forth in Paragraph 5 of the Complaint for the reason that Article III of the Compact speaks for itself.

6. Nebraska admits the averments set forth in Paragraph 6 of the Complaint to the extent that Article IV of the Compact allocates the virgin water supply of the Republican River Basin between the three compacting States for beneficial consumptive use. Nebraska denies the remaining averments of Paragraph 6 of the Complaint for the reason that Article III of the Compact speaks for itself.

7. Nebraska denies the averments set forth in Paragraph 7 of the Complaint.

8. Nebraska admits the averments set forth in Paragraph 8 of the Complaint to the extent that the Compact does not mention or refer to groundwater use. Nebraska denies the remaining averments set forth in Paragraph 8 of the Complaint.

9. Nebraska denies the averments set forth in Paragraph 9 of the Complaint.

10. Nebraska denies the averments set forth in Paragraph 10 of the Complaint.

11. Nebraska denies the averments set forth in Paragraph 11 of the Complaint.

12. Nebraska denies the averments set forth in Paragraph 12 of the Complaint.

13. Nebraska denies the averments set forth in Paragraph 13 of the Complaint.



14. Nebraska admits the averments set forth in Paragraph 14 of the Complaint to the extent that Nebraska has suggested, pursued, and participated in negotiations with Kansas to resolve disputes arising under the Compact and that no settlement agreement has been reached. Nebraska denies the remaining averments set forth in Paragraph 14 of the Complaint.

15. Nebraska denies the averments set forth in Paragraph 15 of the Complaint.

16. Nebraska denies the averments set forth in Paragraph 16 of the Complaint.

17. Nebraska denies any and all averments in any unnumbered paragraph or prayer in the Complaint except those averments expressly admitted herein or constituting an admission against the interest of Kansas.



## **AFFIRMATIVE DEFENSES**

18. Nebraska incorporates each and every admission, denial, and averment made by Nebraska in Paragraphs 1 through 17 as though fully set forth herein. Nebraska asserts separately and/or alternatively, even if inconsistent, the following affirmative defenses:

### **FIRST AFFIRMATIVE DEFENSE**

19. Kansas' claims are barred, in whole or in part, because groundwater is not apportioned under the Compact.

## **SECOND AFFIRMATIVE DEFENSE**

20. Kansas has failed to state a claim upon which relief may be granted.

## **THIRD AFFIRMATIVE DEFENSE**

21. Kansas' claims are barred, in whole or in part, by the doctrine of estoppel.

## **FOURTH AFFIRMATIVE DEFENSE**

22. Kansas' claims are barred, in whole or in part, by the doctrine of waiver.

## **FIFTH AFFIRMATIVE DEFENSE**

23. Kansas has failed to mitigate any harm or injury it may have suffered by Nebraska's alleged violations of the Compact.

## **SIXTH AFFIRMATIVE DEFENSE**

25. Kansas' claims are barred, in whole or in part, by the doctrine of laches.

## **SEVENTH AFFIRMATIVE DEFENSE**

26. Kansas' claims are barred, in whole or in part, by impossibility of performance.

**EIGHTH AFFIRMATIVE DEFENSE**

27. Kansas' claims are barred, in whole or in part, by Kansas' consent.

**NINTH AFFIRMATIVE DEFENSE**

28. Kansas' claims are barred, in whole or in part, by performance by Nebraska.

**TENTH AFFIRMATIVE DEFENSE**

29. Kansas' claims are barred by Kansas' failure to join an indispensable party.

**ELEVENTH AFFIRMATIVE DEFENSE**

30. Kansas' claims are barred, in whole or in part, by the doctrine of unclean hands.

**TWELFTH AFFIRMATIVE DEFENSE**

31. Nebraska is excused from performing the Compact by reason of Kansas' material breach of the Compact prior to any alleged breach by Nebraska.

**THIRTEENTH AFFIRMATIVE DEFENSE**

32. Kansas' claims are barred, in whole or in part, by set-off.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

33. Kansas' claims are barred, in whole or in part, by its election of remedies.

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

34. Kansas' claims are barred, in whole or in part, by Kansas' failure to exhaust all administrative remedies.

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

35. Kansas' claims are barred, in whole or in part, by the intervening actions of the United States.

#### **SEVENTEENTH AFFIRMATIVE DEFENSE**

35. Kansas' claims are barred, in whole or in part, by the intervening actions of the State of Colorado.



#### **COUNTERCLAIMS**

Pursuant to FED. R. CIV. P. 8 and 13, Nebraska asserts the following counterclaims against Kansas, even if found to be alternative to or inconsistent with Nebraska's other claims or defenses in this action, stating and alleging as follows:

Pursuant to FED. R. CIV. P. 8 and 13, Nebraska asserts the following counterclaims against Kansas, even if found to be alternative to or inconsistent with Nebraska's other claims or defenses in this action, stating and alleging as follows:



## JURISDICTION AND VENUE

1. Jurisdiction and venue are proper before this Court pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States in conjunction with 28 U.S.C. § 1251(a) for the reason that this is a controversy between more than two States.

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## INTRODUCTION

2. The laws of Nebraska, Kansas and Colorado each share the long-established principle that water may be appropriated only for a *beneficial* use. This concept served as the philosophical bedrock of the Compact: "Beneficial consumptive use is the basis and principle upon which the allocations of water hereinafter made are predicated." See Compact Art. II.

3. At the time the Compact was entered, irrigation through the use of groundwater was neither well-developed nor envisioned as becoming significant in the Republican River Basin. While rivers like the North Platte and Arkansas were fully appropriated by 1942, the waters of the Republican were largely unappropriated. This situation allowed Kansas, Nebraska and Colorado greater flexibility to *fully* apportion the waters of the Republican River for beneficial consumptive use. Since enactment of the Compact, the construction and operation of federally owned reservoirs have allowed the beneficial use of water for irrigation in Kansas, Nebraska and Colorado. Water entering Kansas from Nebraska has consistently been measured to be in excess of Kansas' historical use and allocation.

4. Kansas has reported to the Compact Administration that its beneficial consumptive use of water within the Republican River Basin has been substantially less than Kansas' allocation under the Compact. Municipal desires *outside the Republican River Basin* have, however, led Kansas to demand more water from Nebraska. Since 1996, Kansas has interrupted the duties of the Compact Administration by failing and refusing to supply critical data to the Compact Administration as it had previously agreed.

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## STATEMENT OF FACTS

### Groundwater Under the Compact

5. The Republican River Compact equitably apportions the waters of the Republican River to the States of Colorado, Nebraska, and Kansas for beneficial consumptive use. See Compact Art. III. Because portions of Kansas lie both upstream as well as downstream of Nebraska, Kansas received apportionments of water covering two separate geographic areas. See Compact Art. IV. At the time the Compact was entered, none of the compacting States had laws authorizing the regulation of groundwater to protect surface water flows.

6. The term "groundwater" is not found in the Compact. Nebraska has consistently taken the position that use of groundwater is not governed by the Compact.

7. At the time the Compact was entered, the quantity of groundwater in the Republican River Basin was unknown and not included in the calculations of "virgin water supply" or the apportionment of the waters of the

Republican River. Only the surface water flow measurements were used in the calculations of "virgin water supply" and the apportionment. It is not possible today to include groundwater within the calculations or apportionment.

8. On July 15, 1959, officials from the States of Colorado, Kansas, and Nebraska met in Denver, Colorado to formally establish the Compact Administration and conduct its first annual meeting. At that meeting, Compact Administration officials discussed, among other things, the need to collect data pursuant to Article IX of the Compact. Article IX states, in pertinent part: "It shall be the duty of the three states . . . through the official in each state . . . charged with the duty of administering the public water supplies . . . to collect and correlate . . . 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." A Committee on Procedure for Computation of Annual Virgin Water Supply ("Compact Formula Committee") was later formed by Kansas, Nebraska and Colorado to create formulas ("Compact Formulas") for computing the water of the Republican River.

9. On April 27, 1964, the Compact Administration unanimously adopted Compact Formulas developed by the Compact Formula Committee that computed the annual "virgin water supply" and beneficial consumptive use of waters of the Republican River. Implementation of the Compact Formulas was, and has remained, completely dependent upon each State and the United States providing the data required by Article IX of the Compact.

See Appendices A and B, true and accurate copies of the "general procedures" of the Compact Formulas. ("Diversions from groundwater shall be limited to those by wells pumping from the alluvium along the stream channels. . . . The determination of the effect of pumping by upland wells on the flows of the streams in the Republican River Basin must await considerably more research and data.")

10. To administer the Compact, the Compact Formulas provided only for consideration of water that is effectively part of the flow of the river, whether in or near the bed. The Compact Formulas used by the Compact Administration has, for more than three decades, defined that water. In this lawsuit, Kansas asks this Court to dismantle over thirty years of Compact interpretation by the parties and declare that groundwater, across thousands of square miles of the Republican River Basin, is apportioned under the Compact. The Compact Formulas do not so provide.

### **Use by Kansas**

11. Data supplied by Kansas to the Compact Administration shows that Kansas failed to put to beneficial consumptive use approximately two-thirds of the water it *received* from Nebraska for the years 1959 to 1994. Attached as Appendix C is a true and correct graphic representation of this data.

12. The data supplied by Kansas to the Compact Administration for the years 1966 to 1994 shows that Kansas overconsumed water allocated to it under the



Compact in that portion of Kansas that lies upstream of Nebraska.

13. At the 1997 and 1998 Annual Compact Meetings, Kansas officials failed and refused to supply data ("Republican River Data") to Nebraska, Colorado and the United States relating to streamflow and the consumptive use of Republican River water in accordance with Article IX of the Compact.

#### **United States as a Party to the Compact**

14. After passage of the Compact in 1943, the United States began construction, operation and maintenance of nine major reservoirs within the Republican River Basin. At that same time, the United States engaged in soil and water conservation efforts within the Republican River Basin. Through contracts with irrigation districts in the Republican River Basin, the United States can and does exercise control of the waters of the Republican River. The actions of the United States have impacted the water supply of the Republican River and contributed to any decline in streamflows entering Kansas.

15. By signing the Compact, the United States obligated itself to perform certain duties and retained certain rights and powers under the Compact pursuant to Articles IX, X, XI and Sec. 2(a).



### **FIRST CLAIM FOR RELIEF**

#### **(Breach of Compact by Overuse of Water Upstream in Kansas)**

16. Nebraska incorporates by reference the allegations in Paragraphs 1 through 15 of the Counterclaim as though fully set forth herein.

17. Kansas made a promise under the Compact to limit its consumption in accordance with the amounts specified in Article IV of the Compact.

18. Kansas breached its promise under Article IV of the Compact by consuming more water than allocated to it in that portion of the Republican River lying upstream of Nebraska.

19. Nebraska has been damaged as a result of Kansas' breach of Article IV of the Compact in an amount to be proven at trial.



### **SECOND CLAIM FOR RELIEF**

#### **(Breach of Compact for Failing to Supply Required Data)**

20. Nebraska incorporates by reference the allegations in Paragraphs 1 through 15 of the Counterclaim as though fully set forth herein.

21. Kansas made a promise to provide the Republican River Data to the Compact Administration under Article IX of the Compact.

22. Kansas breached its promise under Article IX of the Compact by failing and/or refusing to provide the

Republican River Data required by Article IX of the Compact.

23. Nebraska has been damaged as a result of Kansas' failure to provide the Republican River Data, in an amount to be proven at trial.



### **THIRD CLAIM FOR RELIEF**

#### **(Declaratory Judgment)**

24. Nebraska incorporates by reference the allegations in Paragraphs 1 through 15 of the Counterclaim as though fully set forth herein.

25. There is an actual controversy between Nebraska and Kansas regarding the use of the waters of the Republican River.

26. Under the Compact, Nebraska has the legal right to put to beneficial use any of the waters of the Republican River that are not put to beneficial consumptive use within the Republican River Basin by Kansas or Colorado.

WHEREFORE, Nebraska respectfully prays that the Court:

(a) Dismiss the Complaint filed by Kansas with prejudice;

(b) Award Nebraska any and all damages, including pre- and post-judgment interest, and any other and further relief appropriate to remedy the injuries suffered by Nebraska by reason of Kansas' past and continuing violations of the Compact;

(c) Order Kansas to supply Republican River Data for each of 1995, 1996 and 1997 as required by the Compact for purposes of Compact Administration;

(d) Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring Nebraska's right under the Compact to beneficially consume, within the Republican River Basin, such quantities of water that are not put to beneficial consumptive use by Kansas or Colorado; and

(e) Grant such costs and expenses, including reasonable attorney fees, to Nebraska as allowed by law or as the Court deems just and proper.

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### CROSS-CLAIM

Pursuant to SUP. CT. R. 17.2, FED. R. CIV. P. 13(g) and FED. R. CIV. P. 15, Nebraska asserts the following cross-claim against Colorado, even if found to be alternative to or inconsistent with Nebraska's other claims or defenses in this action, stating and alleging as follows:

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### JURISDICTION AND VENUE

1. Jurisdiction and venue are proper before this Court pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States in conjunction with 28 U.S.C. § 1251(a) for the reason that this is a controversy between more than two States.

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## STATEMENT OF FACTS

2. The Republican River Compact equitably apportions the waters of the Republican River to the States of Colorado, Nebraska and Kansas for beneficial consumptive use. *See* Compact Art. III.

3. On July 15, 1959, officials from Colorado, Kansas, and Nebraska met in Denver, Colorado to formally establish the Compact Administration and conduct its first annual meeting. At that meeting, Compact Administration officials discussed, among other things, the need to collect data pursuant to Article IX of the Compact. Article IX states, in pertinent part: "It shall be the duty of the three states . . . through the official in each state . . . charged with the duty of administering the public water supplies . . . to collect and correlate . . . 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." A Committee on Procedure for Computation of Annual Virgin Water Supply ("Compact Formula Committee") was later formed by Kansas, Nebraska and Colorado to create formulas ("Compact Formulas") for computing the "virgin water supply" of the Republican River.

4. On April 27, 1964, the Compact Administration unanimously adopted Compact Formulas developed by the Compact Formula Committee that computed the annual "virgin water supply" and beneficial consumptive use of waters of the Republican River. While the Compact Formulas expressly consider water withdrawn from the alluvium, they do not consider groundwater withdrawn

from formations beyond the alluvium. *See* Appendices A and B, true and accurate copies of the "general procedures" of the Compact Formulas. Implementation of the Compact Formulas was, and has remained, completely dependent upon each State and the United States providing the data required by Article IX of the Compact.

5. In its Bill of Complaint, Kansas has alleged "wells hydraulically connected to the Republican River and its tributaries" are subject to the allocations of the Compact. Bill of Complaint, paragraph 7. Since the Compact was entered, Colorado has allowed hundreds of wells to be placed in the Republican River Basin. Some of these wells are in hydraulic connection with the Republican River. Colorado has not reported to the Compact Administration the consumption of all groundwater hydraulically connected to the Republican River. If all groundwater that is hydraulically connected to the Republican River is subject to the allocations contained in the Compact, Colorado has consumed amounts of water in excess of its annual allocations.

6. The Compact States have not initiated any formal discovery in this matter.

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### CLAIM FOR RELIEF

#### **(Breach of Compact by Overuse of Hydraulically Connected Groundwater)**

7. Nebraska incorporates by reference the allegations in Paragraphs 1 through 6 of the Cross-Claim as though fully set forth herein.

8. Colorado made a promise under the Compact to limit its consumption in accordance with the amounts specified in Article IV of the Compact.

9. Colorado breached its promise under Article IV of the Compact by consuming amounts of water in excess of its annual allocations.

10. Nebraska has been and continues to be damaged as a result of Colorado's overuse of hydraulically connected groundwater in an amount to be proven at trial.

11. Colorado is liable to Nebraska for all or part of any amounts of water Kansas may have failed to receive in accordance with the terms of the Compact.

12. Nebraska's Cross-Claim arises out of the same transaction and/or occurrence that is the subject matter of Kansas' claims against Nebraska.

WHEREFORE, Nebraska respectfully prays that the Court:

(a) Award Nebraska any and all damages, including pre- and post-judgment interest, and any other and further relief appropriate to remedy the injuries suffered by Nebraska by reason of Colorado's past and continuing violations of the Compact;

(b) Issue its decree commanding the State of Colorado in the future to deliver the waters of the Republican River in accordance with the provisions of the Republican River Compact.

(c) Grant such costs and expenses, including reasonable attorney fees, to Nebraska as allowed by law or as the Court deems just and proper.

Respectfully submitted,

DON STENBERG  
Attorney General of Nebraska

DAVID D. COOKSON  
Assistant Attorney General  
*Counsel of Record*  
2115 State Capitol  
Post Office Box 98920  
Lincoln, Nebraska 68509-8920  
(402) 471-2682

BARTHOLOMEW L. McLEAY  
DONALD G. BLANKENAU  
Special Assistant Attorneys  
General

KUTAK ROCK  
The Omaha Building  
1650 Farnam Street  
Omaha, Nebraska 68102-2186  
(402) 346-6000

*Attorneys for State of Nebraska*



**BRIEF IN SUPPORT OF MOTION FOR LEAVE  
TO FILE FIRST AMENDED ANSWER,  
COUNTERCLAIM AND CROSS-CLAIM**

**STATEMENT OF THE CASE**

The State of Kansas ("Kansas") brought this original action against the State of Nebraska ("Nebraska") and the State of Colorado ("Colorado") to resolve disputes arising under the Republican River Compact (the "Compact"). In its Brief in Support of Motion for Leave to File Bill of Complaint, Kansas stated, "The State of Colorado is named as a defendant because it is the third compacting State under the Republican River Compact, but no relief is sought against Colorado in the Bill of Complaint." Kansas' Brief in Support of Motion for Leave to File Bill of Complaint at 2. On August 2, 1999, Nebraska filed a Motion to Dismiss on the limited issue specified by the Court in its Order of June 21, 1999, 527 U.S. 1020 (1999). On June 29, 2000, the Court issued the following Order: "The Motion of Nebraska to dismiss is denied, and the case is recommitted to the Special Master for further proceedings." \_\_U.S.\_\_.

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**STATEMENT OF FACTS**

The Frenchman River, Buffalo Creek, North Fork of the Republican River, Arikaree River and South Fork of the Republican River and associated tributaries arise in the plains of northeastern Colorado and flow into southwestern Nebraska and northwestern Kansas. These streams are all within the Republican River Basin ("Basin") and are subject to the terms of the Compact. See

Appendix B of Kansas' Bill of Complaint at A-4 and the Compact.

On July 15, 1959, officials from Colorado, Kansas and Nebraska met in Denver, Colorado to formally establish the Compact Administration and conduct its first annual meeting. At that meeting, Compact Administration officials discussed, among other things, the need to collect data pursuant to Article IX of the Compact. Article IX states, in pertinent part: "It shall be the duty of the three states . . . charged with the duty of administering the public water supplies . . . to collect and correlate . . . 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." A Committee on Procedure for Computation of Annual Virgin Water Supply ("Compact Formula Committee") was later formed by Kansas, Nebraska and Colorado to create formulas ("Compact Formulas") for computing the "virgin water supply" of the Republican River.

On April 27, 1964, the Compact Administration unanimously adopted Compact Formulas developed by the Compact Formula Committee that computed the annual "virgin water supply" and beneficial consumptive use of waters of the Republican River. Implementation of the Compact Formulas was, and has remained, completely dependent upon each State and the United States providing the data required by Article IX of the Compact. The Compact Formulas expressly included the use of water withdrawn from the alluvium but did not include groundwater withdrawn from other geologic formations.

See Appendices A and B, true and accurate copies of the "general procedures" of the Compact Formulas.

Since the Compact was entered, Colorado has allowed thousands of wells to be placed in the Basin. Some of these wells may be in hydraulic connection to the Republican River and its tributaries.

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## ARGUMENT

Supreme Court Rule 17 applies to original actions before this Court. Rule 17 was amended in 1990 to mandate that states comply with the "form of pleadings" stated in the Federal Rules of Civil Procedure. *See* SUP. CT. R. 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules . . . may be taken as guides"). An "answer," "counterclaim" and "cross-claim" are "pleadings." *See* FED. R. CIV. P. 7(a).

Under FED. R. CIV. P. 15(a), a pleading may be amended "by leave of court." Rule 15(a). Rule 15(a) states that "leave shall be freely given when justice so requires." The proposed pleading amendments need only be scrutinized to determine whether they would take the litigation beyond what the Court reasonably anticipated when leave was granted to file the initial pleading. "[P]roposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleading." *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995).

Colorado is already actively involved in this litigation. Nebraska's proposed pleading amendment merely seeks to apply the Compact uniformly to all the states that are presently parties, including Colorado. The proposed amendment could not be viewed as taking this matter beyond what the Court reasonably anticipated when it granted leave to Kansas to file its Bill of Complaint.

Whether the use of groundwater is subject to regulation under the terms of the Compact is one of the more significant issues in this case. Kansas alleged in its Bill of Complaint that Nebraska failed "to deliver water to Kansas in quantities allocated under the Compact" in part because of her use of groundwater. *See* Bill of Complaint, ¶ 9. Kansas further argued that hydraulically connected groundwater is subject to regulation under the terms of the Compact. *See* Kansas' Brief in Opposition to Nebraska's Motion to Dismiss at 22 ("Kansas is simply claiming that Nebraska has exceeded its consumptive use limitations . . . when all consumptive use of . . . hydraulically connected groundwaters in the alluvial and Ogallala aquifers is taken into account.").

By contrast, Nebraska argued to the Court that groundwater use was not subject to regulation under the terms of the Compact. *See* Nebraska's Brief in Opposition to Kansas' Motion for Leave to File Bill of Complaint, Motion to Dismiss, Brief in Support of Motion to Dismiss and Exceptions to the First Report of the Special Master. The Compact Formulas have historically concerned only surface water and water withdrawn from the alluvium. Consequently, Nebraska believes Kansas' allegations greatly expand the regulatory scope of the Compact.

If Kansas is successful in advancing its theory of Compact regulatory authority, the expanded scope of that authority may result in additional groundwater consumption being assessed to all states, including Colorado. In that event, Nebraska should be permitted to show that Colorado has consumed quantities of water, including hydraulically connected groundwater, in excess of its allocation to the detriment of Nebraska. If Kansas proves it has not received the full amount of her allocation, Nebraska should be permitted to show that the intervening actions of Colorado contributed in whole or in part to such a shortfall.

Since the Compact was entered, Colorado has allowed thousands of wells to be placed in the Republican River Basin. The waters from all of the streams within the Colorado portion of the Basin eventually flow into Nebraska and Kansas. Many of those streams have experienced significant declines in streamflow since Colorado's well development began. While the Compact Formulas suggest that Colorado's historic consumptive use has been within the limits of its allocations, those Compact Formulas may not have taken into account the use of all hydraulically connected groundwater. Nebraska now simply seeks to assert through her cross-claim, that if the use of hydraulically connected groundwater is subject to the Compact, Colorado's use must be accounted for in a manner similar to the one Kansas seeks to impose on Nebraska.

It bears mentioning that Nebraska's proposed cross-claim is similar to the Counterclaim Nebraska filed against Kansas. *See Answer and Counterclaim of State of Nebraska at 12.* Kansas sought to have Nebraska's Counterclaim stricken because it would "broaden the scope of

the litigation . . . beyond what [the Court] reasonably anticipated when [the Court] granted leave to file the initial pleading.” Brief in Support of Kansas’ Motion to Strike Counterclaims at 4. This Court disagreed with Kansas by denying her Motion to Strike Counterclaims on June 21, 1999. *See Kansas v. Nebraska and Colorado*, 527 U.S. 1020 (1999).

Finally, Colorado and Kansas will not be prejudiced by the proposed amendment. The parties have yet to begin formal discovery. Nebraska’s amendment is wholly consistent with the present posture of this case and arises from the same controversy this Court agreed to hear.



## CONCLUSION

The Motion for Leave to File First Amended Answer, Counterclaim and Cross-Claim should be granted.

Respectfully submitted,

DON STENBERG  
Attorney General of Nebraska

DAVID D. COOKSON  
Assistant Attorney General  
*Counsel of Record*  
2115 State Capitol  
Post Office Box 98920  
Lincoln, Nebraska 68509-8920  
(402) 471-2682

BARTHOLOMEW L. MCLEAY  
DONALD G. BLANKENAU  
Special Assistant Attorneys  
General

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1650 Farnam Street  
Omaha, Nebraska 68102-2186  
(402) 346-6000

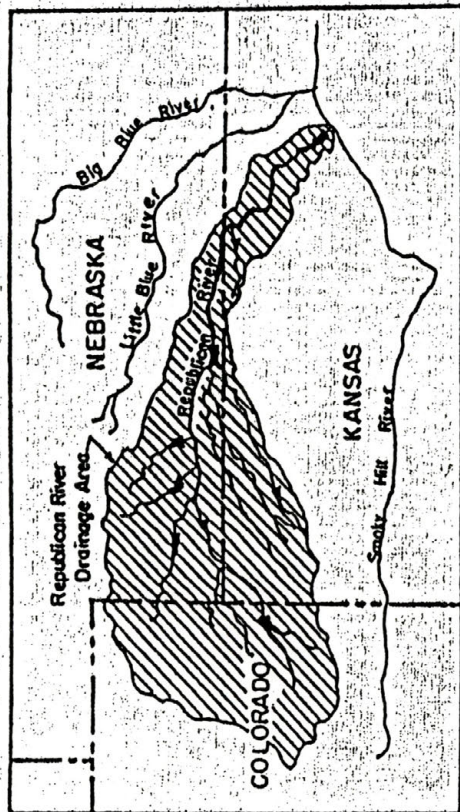
*Attorneys for State of Nebraska*





APPENDIX A

# REPUBLICAN RIVER COMPACT ADMINISTRATION



## Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use

Revised  
June 1990

## GENERAL PROCEDURES

Net reservoir evaporation shall be the total evaporation corrected for the precipitation upon the reservoir surface area.

Average monthly reservoir surface areas shall be computed by applying the average of the daily reservoir elevations to the most recent area table.

Depletion of stream flows due to erosion control practices, stockwater ponds, and municipal and industrial diversions of less than 50 acre-feet have not been included in the present virgin water supply formulas.

Diversions from surface water for this computation shall include diversions for irrigation, municipal and industrial uses.

Diversions from groundwater shall be limited to those by wells pumping from the alluvium along the stream channels for municipal, industrial and irrigation uses. The determination of the effect of pumping by upland wells on the flows of the streams in the Republican River Basin must await considerably more research and data. The wells in the Frenchman Creek drainage basin in Colorado have been considered as upland wells.

Return flows from the lands irrigated by major project developments flowing into two or more designated drainage basins shall be divided in the ratio of the irrigated lands from which the water returns to each drainage basin.

Return flows are considered to be reflected in stream discharge records during the same year the diversions are made.

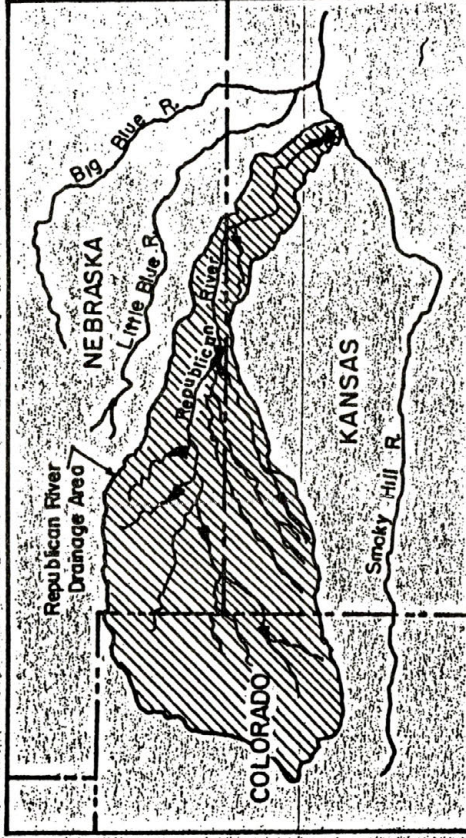
Industrial uses shall include diversions relating to manufacturing and commercial practices.

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APPENDIX B

# REPUBLICAN RIVER COMPACT ADMINISTRATION



## Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use

Revised  
August 1982

## GENERAL PROCEDURES

Net reservoir evaporation shall be the total evaporation corrected for the precipitation upon the reservoir surface area.

Average monthly reservoir surface areas shall be computed by applying the average of the daily reservoir elevations to the most recent area table.

Depletion of stream flows due to erosion control practices, stockwater ponds, and municipal and industrial diversions of less than 50 acre-feet have not been included in the present virgin water supply formulas.

Diversions from surface water for this computation shall include diversions for irrigation, municipal and industrial uses.

Diversions from groundwater shall be limited to those by wells pumping from the alluvium along the stream channels for municipal, industrial and irrigation uses. The determination of the effect of pumping by upland wells on the flows of the streams in the Republican River Basin must await considerably more research and data. The wells in the Frenchman Creek drainage basin in Colorado have been considered as upland wells.

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Industrial uses shall include diversions relating to manufacturing and commercial practices.

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