U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

September 15, 2000

Honorable Vincent L. McKusick
Special Master
Pierce Atwood
One Monument Square
Portland, Maine 04101

Re: Kansas v. Nebraska, No. 126, Original

Dear Justice McKusisk:

In accordance with your Case Management Order No. 4, the United States submits the enclosed Pre-Conference Memorandum For The United States.

In accordance with our usual practice in Supreme Court original actions, the Solicitor General shall retain supervisory authority over the federal government's involvement in this litigation, but the United States shall normally be represented in proceedings before the Master by attorneys from the Environment and Natural Resources Division of the United States Department of Justice.

The assigned counsel, Mr. Walch and Mr. Gheleta, are experienced attorneys who specialize in water and natural resource disputes.

Sincerely,

Jeffrey P. Minear
Assistant to the Solicitor General

cc: Attached list

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IN THE SUPREME COURT OF THE UNITED STATES

KANSAS, STATE OF Petitioner	)	
vs.	)	No. 126, Original
STATE OF NEBRASKA & COLORADO	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **PRE-CONFERENCE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE** by Federal Express, on this 15th day of September 2000.

SETH P. WAXMAN
Solicitor General
Counsel of Record

September 15, 2000

See Attached Service List

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IN THE SUPREME COURT OF THE UNITED STATES

No. 126, Original

STATE OF KANSAS, Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO

BEFORE SPECIAL MASTER VINCENT L. McKUSICK
(Status Conference Scheduled For October 16, 2000)

PRE-CONFERENCE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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BEFORE SPECIAL MASTER VINCENT L. McKUSICK
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PRE-CONFERENCE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States submits this pre-conference memorandum in accordance with the Special Master's Case Management Order No. 4 (July 28, 2000), as amended.

Introduction

On May 26, 1998, the State of Kansas moved for leave to file a bill of complaint in the United States Supreme Court against the States of Nebraska and Colorado to enforce Kansas' rights under the Republican River Compact, which was approved by Congress in the Act of May 26, 1943, ch. 104, 57 Stat. 86. The Court invited the Solicitor General to file a brief amicus curiae expressing the views of the United States, *Kansas* v. *Nebraska*, 525 U.S. 805 (1998), and the United States urged the Court to allow the suit to proceed. See U.S. Amicus Brief I (Dec.

1998). On January 19, 1999, the Court granted Kansas' motion for leave to file a complaint. *Kansas* v. *Nebraska*, 525 U.S. 1101 (1999).

On March 19, 1999, the State of Colorado filed an answer to Kansas' complaint. On April 19, 1999, the State of Nebraska filed an answer and asserted counterclaims against Kansas. On June 21, 1999, the Court denied Kansas' motion to strike Nebraska's counterclaims and invited Nebraska to file a motion to dismiss limited to the question of whether Republican River Compact restricts a compacting State's consumption of groundwater. *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999). On August 2, 1999, Nebraska filed its motion to dismiss. The States of Kansas and Colorado and the United States, as amicus curiae, opposed that motion. See U.S. Amicus Brief II (Sept. 1999). On November 15, 1999, the Court appointed a Special Master and referred the case to him. *Kansas* v. *Nebraska*, 120 S. Ct. 519 (1999).

The Master held a hearing on January 4, 2000, and thereafter recommended that the Court deny Nebraska's motion to dismiss. See First Report Of The Special Master (Jan. 28, 2000). On February 22, 2000, the Court ordered that the Master's Report be filed and invited the parties to file exceptions. *Kansas* v. *Nebraska*, 120 S. Ct. 1224 (2000). Nebraska and Colorado excepted to the Master's recommendation. Kansas and the United States, as amicus curiae, opposed those exceptions. See U.S. Amicus Brief III (June 2000). On June 29, 2000, the Court entered an order denying Nebraska's motion to dismiss and recommitted the case to the Master. 120 S. Ct. 2764 (2000). On July 31, 2000, Nebraska filed a motion for leave to file an amended answer, amended counterclaims, and a cross-claim against Colorado.

The Master has now scheduled a Case Status Conference and has directed each party and the United States, as amicus curiae, to file a pre-conference memorandum. See Case

Management Order No. 4, ¶ 2. The Master has directed the United States to address two matters in its pre-conference memorandum. First, the Master has asked the United States to provide its perspective on the issues for resolution by the Master. See *id.* at ¶ 2(a). Second, the Master has asked the United States to explain in as much detail as possible the role that the United States expects to take in the remainder of the proceedings, including discovery and trial. See *id.* at ¶ 2(e).

I. The Issues For Resolution By The Special Master

Because the parties have primary responsibility for framing the issues before the Master, the United States describes its perspective on the issues in general terms. We will first review the essential elements of the pleadings and the consequences of the proceedings that already have taken place. We will then identify, based on those pleadings and proceedings, our view of the basic issues that are now before the Master.

A. The pleadings and proceedings to date

Kansas has stated, as the gravamen of its complaint, that Nebraska has breached the Republican River Compact by appropriating more than its allocated share of the waters from the Republican River Basin. See Kan. Complaint ¶ 7. Kansas has alleged that Nebraska has done so by allowing its citizens to pump groundwater that is hydraulically connected to surface flow, by failing to protect surface flows from unauthorized appropriation, and by other unidentified means. *Ibid.* Nebraska has denied those allegations. See Nebr. Answer ¶ 7. Nebraska has also asserted 16 affirmative defenses, including the defense that the Republican River Compact does not restrict a compacting State's consumption of groundwater. See Nebr. Answer ¶¶ 18-34. Kansas has not sought relief against Colorado, see Kan. Brief In Support Of Motion For Leave

To File Complaint 2 (May 1998), but Colorado, as a named party, has filed an answer to Kansas' complaint, see Colo. Answer To Kan. Complaint.

Nebraska has filed three counterclaims against Kansas. See Nebr. Counterclaims ¶¶ 1-26. Those counterclaims assert that: (1) Kansas has violated the Compact by consuming more than its allocated share of the Republican River waters in those portions of the Republican River Basin that are upstream of Nebraska (*id.* at ¶¶ 16-19); (2) Kansas has violated the Compact by failing to provide required information to the Republican River Compact Administration (*id.* at ¶¶ 20-23) ; and (3) Nebraska is entitled to declaratory judgment that Nebraska may put to beneficial use any waters of the Republican River Basin that are not put to beneficial use by Colorado and Kansas (*id.* at ¶¶ 24-26). Kansas has denied the central allegations contained in those counterclaims, see Kan. Reply To Counterclaims ¶¶ 1-26, and it has filed 12 affirmative defenses, *id.* at ¶¶ 27-38. Colorado also filed a response to Nebraska's counterclaims against Kansas. See Colo. Answer To Nebr. Counterclaims ¶¶ 1-26.

As noted above, Nebraska filed a motion to dismiss, in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, based on its first affirmative defense that the Republican River Compact does not restrict a compacting State's consumption of groundwater. The Master filed a comprehensive report on that issue, and the Court, in accordance with the Master's recommendation, denied Nebraska's motion to dismiss. *Kansas* v. *Nebraska*, 120 S. Ct. 2764 (2000). Nebraska has since filed a motion with the Court for leave to file a cross-claim against Colorado asserting that Colorado has violated the Compact by consuming more than Colorado's allocated share of the Republican River water in those portions of the Republican River Basin that are upstream of Nebraska. Nebr. Cross-Claim ¶¶ 7-11. The Court has not yet

acted on Nebraska's motion, and Colorado accordingly has not filed an answer.

B. Legal and factual issues

1. Issues arising from alleged Compact violations

Kansas' complaint and Nebraska's counterclaims and proposed cross-claim seek enforcement of the Republican River Compact. The fundamental question is whether the alleged conduct of the party violates a right established under the Compact. See *Kansas* v. *Colorado*, 514 U.S. 673, 679-681 (1995); see also *Nebraska* v. *Wyoming*, 507 U.S. 584, 592 (1993) (distinguishing between suits to enforce and suits to modify a judicial decree apportioning an interstate stream). The pleadings identify three types of Compact rights that are at issue in this litigation. First, Kansas' complaint, as well as Nebraska's first counterclaim and proposed cross-claim, assert violations of the Compact's allocation of the virgin water supply on account of excessive diversions of surface water or hydraulically connected groundwater. See Kan. Complaint ¶¶ 7-9; Nebr. Counterclaims ¶¶ 16-20; Nebr. Cross-Claim ¶¶ 7-11. Second, Nebraska asserts that Kansas has violated the Compact by failing to provide Republican River flow data to the Republican River Compact Administration. See Nebr. Counterclaims ¶¶ 21-23. Third, Nebraska asserts that the Compact entitles Nebraska "to put to use any of the waters of the Republican River Basin that are not put to beneficial consumptive use within the Republican River Basin by Kansas or Colorado." *Id.* at ¶ 26.

a. Water allocations. The parties appear to be in agreement that a compacting State may not divert stream flows in excess of the Compact's express allocations. The parties have disagreed from the outset of this litigation, however, over the threshold legal issue of whether the Republican River Compact places limitations on the right of a compacting State to consume

groundwater. See Nebr. Brief In Opposition To Kan. Motion For Leave To File Complaint 10, 20; Nebr. Answer ¶ 19; see also U.S. Amicus Brief I, at 17. The Court invited Nebraska to file a motion to dismiss to resolve that issue, 527 U.S. at 1020, and the Court referred the matter to the Master for his consideration, 120 S. Ct. at 519. The Master recommended:

> 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.

First Report Of The Special Master 45. The Court, over the objections of Nebraska and Colorado, followed the Master's recommendation and denied Nebraska's motion to dismiss. 120 S. Ct. 2764. The Court's ruling effectively resolves, for purposes of future proceedings before the Master, the question of whether the Republican River Compact restricts a State's consumption of groundwater.

The Court's denial of the motion to dismiss establishes the Master's recommendation as the controlling rule of law for purposes of future proceedings before the Master. Consequently, the general legal principles governing stream flow depletions are, to a considerable extent, well defined. A State violates the Republican River Compact if it diverts stream flows in excess of the Compact's express allocations of the virgin water supply. In making that determination, the Master should consider the effects of groundwater pumping on streamflows. A compacting State "violates the Compact if, as a factual matter, [the State's] groundwater pumping, whether from alluvial or tableland wells, depletes streamflow in the Basin to the extent that [the State] exceeds its allocated share of the virgin water supply." First Report Of The Special Master 45. Neither Kansas nor Nebraska has expressly raised the issue whether the Master should consider the effects of other "activities of man," besides groundwater pumping, that might have an indirect

effect on streamflow. For example, farmers in the individual states could employ techniques, such as impounding surface runoff, that could conceivably affect streamflows. We leave it to the parties to determine whether their pleadings challenge such activities.

Regardless of the scope of that challenge, the central factual issue that divides the parties is whether any of the States has actually violated the Compact by consuming more than its allocated share of the Republican River's virgin water supply. The Compact sets out a specific annual allocation for each of the Republican River's sub-basins, which is subject to adjustment if the actual annual virgin water supply varies by more than 10 per cent from the virgin water supply projected in the Compact. See Compact Arts. III-IV. To determine, as a matter of fact, whether any of the States has violated its allocation, the Master likely will need to determine (1) the virgin water supply for each year in question for each sub-basin, and (2) each State's consumption of the virgin water supply for each year for each sub-basin, including depletions of streamflow caused by groundwater consumption. It appears from the pleadings that the parties are likely to dispute the appropriate means for making those determinations. Compare Nebr. Counterclaims ¶ 7 with Kan. Reply To Counterclaims ¶ 7 and Colo. Answer To Nebr. Counterclaims ¶ 7. Hence, we anticipate that the scientific methodology, as well as the appropriateness and availability of data, for determining water supply and consumption may be at issue in this case. See generally First Report Of The Special Master in *Kansas* v. *Colorado*, No. 105, Original, at 228-305 (July 1994) (discussing conflicting approaches to determination of usable flow in the Arkansas River Basin).

b. Obligations to provide information. It is unclear from Kansas' reply to Nebraska's counterclaims whether Kansas will contest Nebraska's assertion that Article IX of the

Republican River Compact imposes a legal requirement on Kansas to provide Republican River data to the Republican River Compact Administration. Compare Nebr. Counterclaims ¶¶ 21-23 with Kan. Reply To Counterclaims ¶¶ 21-23. Similarly, Colorado's answer to Nebraska's counterclaims does not reveal whether Colorado disagrees with Nebraska's interpretation of Article IX of the Compact. See Colo. Answer To Nebraska's Counterclaims ¶¶ 21-23. The pleadings indicate that, if the Republican River Compact imposes an obligation to provide information to the Republican River Compact Administration, Kansas would dispute, as a matter of fact, that it has failed or refused unjustifiably to provide required information. Compare Nebr. Counterclaims ¶¶ 22-23 with Kan. Reply To Counterclaims ¶¶ 22-23.

c. Beneficial Use Entitlements. It appears that both Kansas and Colorado contest Nebraska's assertion that "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" (Nebr. Counterclaims ¶ 26). See Kan. Reply To Counterclaims ¶ 26, Colo. Answer To Nebraska's Counterclaims ¶ 26. Nebraska asserts as a factual matter that "Kansas failed to put to beneficial consumptive use approximately two-thirds of the water it *received* from Nebraska from 1959 to 1994" (Nebraska Counterclaims ¶ 11). Kansas denies that allegation. Kan. Reply to Counterclaims ¶ 11. Hence, if Nebraska has a legal right to use otherwise unused water in excess of its Compact sub-basin limitations, there would remain a factual dispute over whether any such water exists.

2. Issues arising from affirmative defenses

Nebraska and Kansas each summarily assert numerous affirmative defenses, including estoppel, waiver, laches, failure to mitigate harm, impossibility of performance, consent, failure to join an indispensable party, unclean hands, set-off, and failure to exhaust administrative remedies. See Nebr. Answer ¶¶ 18-34; Kan. Reply To Counterclaims ¶¶ 27-38. Because each State asserts those defenses without elaboration, the underlying legal issues cannot be readily discerned. Indeed, it is unclear whether either State actually intends to pursue all of those defenses, or whether each has asserted those defenses as a precaution to avoid a later claim that the defenses have been waived by failure to plead them. Because the States have not described the bases for their affirmative defenses, their pleadings leave unclear to what extent those defenses would require resolution of disputed questions of fact. Many of those defenses, particularly equitable defenses such as laches or unclean hands, would likely require factual development respecting the conduct of the parties. See *Kansas* v. *Colorado*, 514 U.S. at 687-689 (discussing the application of the doctrine of laches in the context of enforcement of an interstate compact); see also First Report Of The Special Master in *Kansas* v. *Colorado*, at 147-170 (discussing equitable defenses). Other defenses, such as failure to exhaust administrative remedies, may require little or no factual development and could conceivably be resolved through motions for judgment on the pleadings or summary judgment. See *id.* at 21-22 (dismissal, on motion, of defense of failure to exhaust administrative remedies).

3. Issues arising from development of a remedy

If the Master determines that Kansas or Nebraska is entitled to relief, it will need to determine an appropriate remedy, which could potentially involve injunctive relief or money

damages. See *Texas* v. *New Mexico*, 482 U.S. 124, 130 (1987). The question of an appropriate remedy could involve a variety of legal and factual issues respecting the form, scope, and measure of the relief. Those issues are likely to come clearly into focus only after questions of liability have been determined. The Special Master assigned to *Kansas* v. *Colorado*, No. 105, Original, is currently considering such issues in the context of a similar action arising from enforcement of the Arkansas River Compact. See Third Report Of The Special Master in *Kansas* v. *Colorado*, No. 105, Original (Aug. 2000). See also Second Report Of The Special Master in *Kansas* v. *Colorado*, No. 105, Original (Sept. 1997); *Kansas* v. *Colorado*, 522 U.S. 1026 (1997) (per curiam) (overruling exceptions to the recommendations contained in the Second Report without prejudice to renewal at the conclusion of the Master's remedial proceedings).

The Supreme Court's ultimate resolution of the remedial issues in *Kansas* v. *Colorado*, which also involves enforcement of a congressionally approved compact governing the apportionment of an interstate stream, is likely to provide useful guidance to the Master respecting remedial issues that might arise in this case.

II. The Role Of The United States In Future Proceedings

The United States initially participated as amicus curiae in this case at the Court's invitation. We urged that the Court grant Kansas's motion for leave to file a bill of complaint, and we also urged that the Court invite Nebraska to file a motion to dismiss limited to the question of whether the Republican River Compact regulates a compacting State's consumption of groundwater. U.S. Amicus Brief I. We have since filed a brief and presented oral argument in response to Nebraska's motion, U.S. Amicus Brief II, and we have filed a brief opposing

Nebraska's exception to the Master's recommendation on that issue, U.S. Amicus Br. III.

The United States intends to continue to participate as amicus curiae in the proceedings before the Master. As amicus curiae, the United States does not expect to participate directly in discovery or in the presentation of an affirmative case on factual issues at trial. Nevertheless, the United States plans to monitor the progress of the case, both to ensure that federal interests are protected and to provide assistance to the Master and the parties in resolving the issues. In addition, the United States expects that, if the Master files reports with the Court, the United States would file briefs as amicus curiae in response to exceptions to the Master's recommendations.

We outline our anticipated scope of participation below with the understanding that the federal government's level of involvement could conceivably change as the case progresses. Because we understand that the Master may use Nebraska's proposed "comprehensive case management plan" (NPCCMP), as a guide for developing his own case management plan, we make reference to Nebraska's proposal where appropriate.

A. Status conferences and case management orders

The United States wishes to receive notice of and attend status conferences concerning this case. See NPCCMP § 5. The United States' representatives will generally be trial attorneys from the Justice Department's Environment and Natural Resources Division, who specialize in the resolution of water and natural resources disputes. If the Master directs the parties to prepare a proposed joint agenda for status conferences, see NPCCMP § 5(a), the United States wishes to participate in preparing the agenda. The United States also wishes to receive, without the need to make a special request, copies of all case management orders. Cf. NPCCMP § 5(b) (requiring

amici to request case management orders).

B. Designation of "parties" and "non-parties"

Nebraska's proposed comprehensive case management plan designates Kansas, Nebraska, and Colorado as the "parties" in this case. See NPCCMP § 6(a). It designates all other entities – including the United States -- as "non-parties"and subjects them to the same obligations for purposes of case management. See NPCCMP § 6(b). We suggest that the United States should be distinguished from other "non-parties." While the United States is not an indispensable party, it does have a unique perspective on the issues presented here. The United States participated in the drafting and approval of the Compact, which was intended to facilitate the construction of federal water resource projects. Furthermore, the federal agencies that operate those projects and conduct scientific research have special knowledge of the water resources at issue. The Supreme Court has already affirmed the United States' special role in this litigation by inviting its participation as amicus curiae. At the same time, as we explain in greater detail in Section II(C) below, special rules apply to discovery requests directed to federal agencies that do not apply to other parties. We therefore believe that the Master's comprehensive case management plan should distinguish between the United States and other non-parties for purposes of the plan.

C. Receipt of information from federal agencies

The States are likely to request information from federal agencies respecting the Republican River Basin and federal water resources projects therein. Those requests are subject to the limitations imposed by federal law. The United States intends to cooperate with the States in making available pertinent agency information consistent with those limitations.

Congress has provided for release of agency documents through the Freedom of Information Act (FOIA), 5 U.S.C. 552, which sets out the procedures that agencies must follow, and the limits that they must observe, in disclosing federal information. The Department of the Army (which includes the Army Corps of Engineers) and the Department of the Interior (which includes the Bureau of Reclamation and the United States Geological Survey) have issued regulations implementing FOIA. See 32 C.F.R. Part 518 (Department of the Army regulations); 43 C.F.R. Part 2 (Department of the Interior regulations).

We suggest that the Master's comprehensive case management order should expressly direct that the States shall obtain documents from the agencies in compliance with FOIA and the agencies' regulations. The United States and the States should confer to establish a protocol for information requests to facilitate production, avoid duplicative inquiries, and ensure that the parties have equal access to information that is subject to disclosure. See Letter from Andrew F. Walch to David Cookson *et al.*, Re: Document Acquisition from Federal Agencies (July 17, 2000) (copy attached) (proposing possible procedures). That protocol must, of course, be consistent with FOIA and the federal agencies' regulations, including substantive limitations on disclosure. See, *e.g.*, 5 U.S.C. 552(b). The protocol may also provide informal mechanisms for resolving any disputes over production of information. Under FOIA, a party may file a judicial action in federal district court to challenge an agency's refusal to release a document. See 5 U.S.C. 552(a)(4)(B). We envision that a consensual protocol could avoid the need for district court involvement.

The United States submits that the Master should not authorize the parties to seek agency information through the use of compulsory process directed at the federal agency itself. Cf.

NPCCMP § § 6(b), 8(c)(1)(D), 8(c)(2), 8((g) (apparently contemplating that approach). A request for information through a subpoena would be subject to the same substantive disclosure limitations that would apply if the request were made pursuant to the agency's FOIA procedures. See, *e.g.*, 32 C.F.R. § 516.44 (Department of the Army regulations). Furthermore, judicial review of the agency's decision whether to furnish information sought in a subpoena would be governed by the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq*. See, *e.g.*, *Comsat Corp.* v. *National Science Foundation*, 190 F.3d 269 (4th Cir. 1999). Just as the United States or one of its agencies is immune from suit except to the extent and under the conditions that Congress has prescribed, the federal government possesses sovereign immunity from the subpoena power of a court except to the extent that Congress has waived that immunity. The APA provides a limited waiver that is applicable in "a court of the United States." 5 U.S.C. 702. As the Fourth Circuit explained:

> The APA waives sovereign immunity and permits a federal court to order a non-party agency to comply with a subpoena if the government has refused production in an arbitrary, capricious, or otherwise unlawful manner.

Id. at 277; see 5 U.S.C. 706. As that court also recognized, an agency's decision to provide information that is subject to release to the public under FOIA in accordance with the provisions of FOIA would invariably be reasonable. See *id.* at 277-278 (holding that the agency was entitled to refuse to release information sought by a subpoena that was available through FOIA).[1]

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[1] The United States also submits that the Master should not authorize the parties to seek agency information through the use of compulsory process directed at federal employees. The sovereign immunity bar would continue to apply in that circumstance. That course would also raise another obstacle. Congress has authorized federal agencies to prescribe regulations respecting internal governance, including record keeping and document custody. See 5 U.S.C.

We accordingly suggest that the United States and the States confer to develop a cooperative approach to production of federal agency information that may be of use to the parties in this litigation. That approach would serve the interests of all the participants in a fair and efficient process for production of pertinent information.

D. Participation in discovery

The United States, as amicus curiae, does not expect to conduct discovery. Nevertheless, the United States does wish to monitor the course of the litigation and therefore wishes to receive service of discovery requests, including interrogatories, requests for admission, requests for production of documents, and notices of depositions. The United States also wishes to receive answers to the interrogatories, requests for admission and production of documents, with leave to make copies of the production at the federal government's expense. The United States does not anticipate that it would attend most depositions, but it may wish to attend particular depositions of interest and may wish to obtain copies of deposition transcripts at the federal government's expense. See NPCCMP § 7(b).

The United States does not anticipate that there would be a need to depose any federal employee in this case. Federal regulations generally prohibit federal employees from testifying about official information in the absence of a showing that there is an exceptional need for that

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301. Agency regulations generally prohibit federal employees from disclosing agency information without permission from their superiors, even when directed to do so by subpoena. See, *e.g.*, 32 C.F.R. Part 516, Subpart G (Department of the Army regulations); 42 C.F.R. § 2.80 *et seq.* (Department of the Interior regulations). The Supreme Court has ruled that, where a federal agency has directed a federal employee not to provide information in response to a subpoena, the employee is under an obligation to respect those instructions and may not be held in contempt for failure to obey the subpoena. *Touhy* v. *Ragen*, 340 U.S. 462, 468-470 (1951). Any judicial review of the agency's decision not to allow the employee to testify or produce documents must be in accordance with the APA.

testimony. See 32 C.F.R. §§ 516.47-516.50 (Department of the Army regulations); 43 C.F.R. § 2.82 (Department of the Interior regulations). See, *e.g.*, *Comsat*, 190 F.3d at 278 ("When the government is not a party, the decision to permit employee testimony is committed to the agency's discretion."). No such need is currently apparent in this case.

E. Dispositive motions

The United States suggests that, before formal discovery begins, the parties should identify issues, including affirmative defenses, that can be resolved without additional factual development through motions for judgment on the pleadings or summary judgment. In the United States' experience, interstate water disputes pose significant trial management problems because of the number and complexity of the issues that the parties present. The discovery phase of this case is likely to be lengthy, complex, and expensive. The parties should therefore tender for resolution, before discovery begins, any issues that could potentially resolve the case, in whole or in part, without the need for discovery. The Master's early resolution of those issues could lead to a prompt termination of this litigation. But even if the Master's resolution of those issues does not have that result, the determination of those questions will narrow the issues and confine the breadth of the case. The United States will decide whether to respond to any such motions, as amicus curiae, on a case-by-case basis, taking into account whether the matter at issue affects the interests of the United States and whether the federal government's views would be of material assistance to the Master.

F. Settlement discussions

The United States believes that it may be useful to set aside a fixed time period, before formal discovery begins, for the parties to confer on whether settlement of some or all of the issues is possible at this stage. As the United States has explained to the Supreme Court, this case presents extraordinarily complex factual issues that may require the collection of a substantial amount of hydrological data covering a large geographic area and may entail resort to novel or expensive scientific techniques. In our experience, the adversarial process is not the ideal mechanism for resolving such factual disputes. See U.S. Amicus Br. III, at 29-30. The matters in dispute here are likely ones that could be "wisely solved by co-operative study and by conference and mutual concession." *Texas* v. *New Mexico*, 462 U.S. 554, 575 (1983).

The Republican River Compact imposes a duty on Colorado, Kansas, and Nebraska to administer the Compact through cooperative efforts. See Compact Art. IX. Up until this point, the States' ability to reach agreement on what restrictions should be placed on groundwater consumption has been hampered, at least in part, by their disagreement over whether the Compact restricts groundwater consumption at all. The Court's resolution of that legal question may provide the basis for the States to reach a pragmatic accord on how to regulate groundwater pumping that affects streamflow. We therefore suggest that the States should have an opportunity to explore that possibility, as well as the possibilities for settlement of other related issues, before formal discovery begins. The United States Department of Justice has considerable experience in facilitating settlement of complex water disputes through direct participation in negotiations and through alternative dispute resolution techniques. Although the Justice Department does not mediate disputes itself, it can assist the States in establishing a cost-

effective mediation process.[2]

If the Master is receptive to the idea of setting aside a fixed time period for settlement discussions, but is concerned about the prospect that settlement discussions could delay the progress of the case, he could direct that the parties simultaneously proceed with settlement discussions and with other aspects of the case that do not depend on initiation of discovery. For example, the Master could set aside a discrete time period during which the States are to conduct settlement discussions with the aim of resolving significant outstanding issues and during which time there would be a moratorium on discovery. The Master could also direct that, during the same time period, the States shall file and brief motions on issues that may be resolved as a matter of law without formal discovery. At the conclusion of the time period, the Master and the States should have a clear perspective on whether discovery is necessary and, if so, what the focus of that discovery should be.

G. Trial

The United States, as amicus curiae, may have an interest in monitoring any trial proceedings, but does not anticipate that it will need to participate actively in the presentation of evidence. For the reasons set out in Section II(D) above, the United States does not expect that any federal employee would testify at trial. If a trial is necessary, the Master may wish to follow

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[2] We also note that the United States Geological Survey (USGS) is currently concluding a multi-million dollar study of groundwater resources and the interaction of groundwater and surface water in the Republican River Basin. The USGS expects to complete that study early next year. Although the USGS is conducting that study for general water resource management purposes – and not specifically to provide a solution to this litigation – the results of the study may assist the States in reaching a negotiated settlement. At a minimum, the study may shed light on the specific factual disputes in this case and refine the issues for trial. The United States plans to brief the States jointly on the current status of the USGS study on October 17, 2000.

the practice in *Kansas* v. *Colorado*, *supra*, and bifurcate the liability and remedy phases of the proceedings.

H. Reports of the Special Master

The United States expects that the Master will issue reports and make recommendations to the Court at appropriate stages of this case. In light of the Court's initial invitation to the United States to participate as amicus curiae in this case, the United States expects that it would file a brief amicus curiae in response to exceptions to the Master's recommendations.

Conclusion

The United States plans to continue to participate as amicus curiae through significant, but limited, involvement in the proceedings before the Master. We do not expect that the federal government's participation will pose any burdens on the process. To the contrary, we are hopeful that the United States' participation will provide the Master and the States with material assistance in resolving this case.

Respectfully submitted.

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Trial Attorney

Environment and Natural Resources Division
United States Department of Justice

September 2000

U.S. Department of Justice

Environment and Natural Resources Division

WMC:AFWAlch

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July 17, 2000

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Re: *Kansas v. Nebraska* - Document Acquisition from Federal Agencies

Dear David, John and Wendy,

I was advised by the Bureau of Reclamation people in McCook that an inquiry had been made by Nebraska to review and copy documents from its office pertaining to Harlan County Reservoir, and I understand a similar request has been made to the Corps of Engineers, although I am less certain about that.

The United States wishes to cooperate in making agency information held by the Bureau or the Corps that is relevant to the issues in the case available to the States. In order to insure that the Bureau and the Corps are not responding to duplicate requests at different times and to provide an efficient means of making pertinent information available to all parties, we suggest the following procedures for your consideration:

1) The requesting State shall provide written notice of its request to review and copy documents to the agency and to the other two States, with a copy to the undersigned, identifying the subject matter with sufficient specificity as to allow the agency to locate pertinent documents, and proposing a time and location to review the documents. The requesting State shall be responsible for coordinating the document review with the agency and the other two States.

2) The agency will make available all documents that are non-privileged or otherwise exempt from disclosure under FOIA, and may seek clarification of the request from the requesting State if there is some question about the subject matter or large volumes are involved.

3) The requesting State and any other State desiring copies of particular documents shall make arrangements with the agency to either copy the documents in-house or to contract with a private, local firm to copy documents, and will pay associated costs.

4) At the option of the United States, an index or copy of each document copied by a State will be provided to the agency without charge so that it may have a record of what has been

produced.

Please contact me if you have any question about this proposal, or suggested changes. Neither the Bureau nor the Corps has had an opportunity to fully review this proposal, so I am hoping that they will take the opportunity to comment, as well, or confirm that these procedures are acceptable. If we all are in agreement on how to handle these inquiries, I would like to apprize Special Master McKusick during our conference call on July 27. However, I will be on travel during the entire period and may have a little difficulty coordinating this by that date. You may reach me by leaving a message at my office, 303-312-7316, or by email at andrew.f.walch@usdoj.gov. Thank you for your assistance in this matter.

Sincerely,

Andrew F. Walch/md

Andrew F. Walch
Senior Counsel

cc: Don Blankenau
Donald Pitts
John Chaffin
Robert Mahoney