No. 126, Original

In the Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA AND
STATE OF COLORADO,

Defendants.

On Exceptions to the Report of the Special Master

EXCEPTIONS BY PLAINTIFF STATE OF KANSAS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS

Kansas excepts to the Report Of The Special Master in two critical respects:

1. The Court should reject the Master's invitation to rewrite the accounting procedures contained in the Final Settlement Stipulation that the Court approved in its 2003 Decree. The Final Settlement Stipulation was the result of lengthy, detailed, and unprecedented negotiations in which all parties and the United States were intimately involved. There was no "mutual mistake" that warrants the extraordinary step of this Court reforming the States' agreement.

2. The Court should augment the remedies the Master recommends for Nebraska's knowing violations of the Compact because the Master's recommendations are insufficient to ensure future compliance by Nebraska.

A. Specific injunctive relief—an order to comply with the Compact and the Final Settlement Stipulation—enforceable in this Court is warranted here.

B. Disgorgement of a substantial portion of Nebraska's gains from its knowing compact violations is warranted here.

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STATEMENT

I. The Republican River Basin And The Compact.

The Republican River ("the River") is an interstate river that runs for some 430 miles, draining a 24,900 square-mile basin ("the Basin") across Colorado, Nebraska, and Kansas ("the States"). Unfed by Rocky Mountain runoff, its upstream tributaries emerge from the arid plains of northeastern Colorado. The North Fork flows directly into Nebraska from Colorado, while the South Fork and the Arikaree River flow first into Kansas and then Nebraska, where they join the North Fork to form the River's mainstem. The mainstem flows east across southern Nebraska before entering Kansas near Hardy, Nebraska. From the Kansas-Nebraska line, the River flows southeasterly, joining the Smoky Hill River near Junction City, to form the Kansas River, which then flows eastward across Kansas to the Missouri River. Appendix A is a color map of the Basin.

The Dust Bowl drought, together with a massive flood in the Basin in 1935, made clear the need for federal action to provide an adequate and reliable water supply to the area. As a condition of receiving federal assistance, the United States required the States to enter into an interstate compact to allocate the Basin's waters. The States agreed to the Republican River Compact ("the Compact") in 1942, and Congress approved the Compact in 1943. *See* 57 Stat. 86. The Compact is reprinted as Appendix B to the Special Master's report ("Rep.") (dated November 15, 2013). The Compact allocates between the States the "virgin water supply" (defined as the Basin water

that is "undepleted by the activities of man") for the "beneficial consumptive use" of such water (the water consumed through human activity). Compact arts. II–IV, Rep. App. B3–B9.

Article IX provides that the Compact shall be administered jointly by the chief water officer of each State and implemented in collaboration with the United States Geological Survey. *Id.* at B11. The States "may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact." *Id.* Under Article IX, the States formed the Republican River Compact Administration (RRCA) in 1959 to administer the Compact. Each State has one vote on the RRCA and any action requires unanimity. *See id.*

Article X expressly protects the rights and interests of the United States in the Basin, *id.* at B11–B12, which include considerable investments in irrigation and flood control. Since 1943, the Bureau of Reclamation ("Reclamation") and the Army Corps of Engineers ("the Corps") have built nine multipurpose reservoirs in the Basin. They continue to administer these reservoirs and projects today. Most are dedicated to irrigation, including the Bostwick Project, which spans the Nebraska–Kansas state line. Over the years, federal entities have been central participants in efforts to enforce and administer the Compact, including the development of the groundwater model and accounting procedures now at issue.

II. Disputes Under The Compact.

A. Protracted Litigation Led To The Final Settlement Stipulation The Court Approved In 2003.

The development of large-scale groundwater pumping transformed the agricultural economy in the Basin—and its hydrology. What was once an agricultural area consisting of Reclamation projects, dryland farms, and rangeland, became an area dominated by groundwater pumping from the Ogallala Aquifer and the alluvium of the River. Between 1960 and 1990, the groundwater-irrigated acreage in Nebraska's part of the Basin expanded from about 175,000 acres to nearly a million acres. The increase in groundwater withdrawals began reducing the River's flow, causing Kansas to complain in the 1980s to the RRCA that such pumping in Nebraska was violating Kansas' rights under the Compact. Nebraska ignored these complaints, asserting that the Compact did not apply to groundwater pumping. The States engaged in mediated negotiations from 1995 to 1997, but failed to resolve the dispute. Kansas then initiated litigation in this Court in 1998.

The Court granted a motion by Kansas for leave to file a complaint, 525 U.S. 1101 (1999), granted Nebraska leave to file a motion to dismiss to test Nebraska's position that the Compact does not require accounting for the effects of groundwater pumping, 527 U.S. 1020 (1999), and referred the matter to Special Master Vincent McKusick, 528 U.S. 1001 (1999). Master McKusick found that the Compact requires an accounting for groundwater use that depletes streamflows in the Basin. On the Master's

recommendation, the Court denied Nebraska's motion and recommitted the case to Master McKusick. 530 U.S. 1272 (2000).

What happened next is an extraordinary accomplishment in interstate water litigation. The States and the United States dedicated themselves to technically extensive negotiations to produce appropriate methods and procedures to explicitly incorporate groundwater usage into Compact accounting. A year of negotiations produced a comprehensive and technically detailed settlement agreement, the Final Settlement Stipulation ("the FSS"). The first forty-two pages of the five-volume FSS are excerpted in Appendix E of the current Master's Report. The complete FSS is available on the Court's website.[1] The States (supported by the United States) submitted the FSS to Master McKusick on December 15, 2002.

Master McKusick explained that the FSS "is a series of bargained-for exchanges resulting from genuine negotiation and give-and-take among the States on many controversial issues that have divided them for years, and in some cases, decades." J4 at 73.[2]

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[1] http://www.supremecourt.gov/SpecMastRpt/SpecMastRpt.aspx.

[2] We cite to the record as follows: "Dkt. __" refers to filings on the Master's docket, available at http://media.ca1.uscourts.gov/special_master/; "K__," "N__," "C__," and "J__" are, respectively, citations to exhibits admitted into evidence at trial by Kansas, Nebraska, Colorado, and all parties jointly; "Tr." refers to the August 2012 trial transcript; "2013 Tr." refers to the August 2013 trial transcript; and other transcripts are preceded by the docket number, "Dkt. __ Tr. __." Appendix B to this brief contains a table

He commended the States' "compromise and collaborative effort" as "superior to any possible litigated result." *Id.* at 75-76. In the FSS, each State "gained much of what it most needed, rendering the settlement as fair and equitable as is practicably possible." *Id.* at 76. Thus, the FSS revived the Compact's system for administering the Basin's waters and avoided "a very long, complex, and costly trial." *Id.* at 76-77.

The United States—which actively participated in the FSS negotiations, *id.* at 24—filed a statement supporting the proposed settlement, emphasizing that "[t]he States have achieved consensus through the sort of 'co-operative study,' 'conference,' and 'mutual concession' that the Court envisioned in *Texas v. New Mexico*, 462 U.S. 554, 575 (1983).... As a consequence, the States have developed a sound basis for resolving their differences." *Id.* at 18-19. The Master concluded:

> The State parties' attainment of the Final Settlement Stipulation in the period of time allowed for its completion was a major accomplishment. It was only through the extraordinary dedication, determined perseverance, and cooperative commitment of the engineers, technical experts, and counsel for the three States and the United States that the parties were able to work out their differences

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of exhibits, pleadings, and transcripts cited. For Appendices G-I to the Report, the Master used letters in the text that do not match the letters he assigned in the table of contents (off by one letter in each case). Kansas cites these appendices using the letters the Master used in the Report's text.

> and achieve a settlement that not only resolves the complex questions posed in this litigation but also provides a sound framework for future Compact administration and enforcement. Fully in conformance with the controlling provisions and declared purposes of the Compact, their outstanding efforts have produced a settlement that I recommend for approval without reservation.

Id. at 25-26.

The Court approved the entire FSS without change, 538 U.S. 720 (2003), and recommitted the matter to Master McKusick for further negotiations to finalize the details of the groundwater model. The States and the United States soon completed those details and provided them to the Master, who submitted the final model to the Court in his Final Report dated September 17, 2003. The Court ordered that Report filed, 540 U.S. 964 (2003), and took no further action.

B. The FSS Accounting Procedures Made Deliberate Choices About Calculating Imported Water Supply And The Effects Of Groundwater Pumping.

The FSS is an extensive and technically detailed compromise in which the States bargained for provisions that benefit their respective interests in exchange for others that do not. For instance, Kansas waived any and all claims for Nebraska's violations of the Compact before December 15, 2002, and agreed to multi-year Compact accounting, which gives Nebraska much greater flexibility in its water use. Nebraska agreed to a moratorium on new groundwater wells in

its part of the Basin, and accepted the particular procedures that account for groundwater consumption under the Compact. All parties agreed to an elaborate groundwater model ("the Model") that estimates and determines the extent to which groundwater consumption depletes streamflows. The States also developed accounting procedures to administer the Compact. Rep. 20-21. The accounting procedures (Appendix C of the FSS) were a "principal feature" of the FSS. J4 at 26-28. In sum, all parties believed that the Model and accounting procedures provided a sound basis for determining future Compact compliance. *See id.* at 27, 37–39.

The Model and accounting procedures have two primary goals: to reasonably (1) replicate the Basin's actual physical and hydrologic conditions; and (2) account both for accretions resulting from imported water and depletions caused by groundwater pumping. *See* J5 at 6–7; Dkt. 495 at 3–4 (Pope); 2013 Tr. 92:23–93:8, 108:6–109:19 (Pope). (Imported water seeps into the Nebraska portion of the Basin as a result of return flows of irrigation water originally withdrawn from the Platte River to the north.) In developing the Model and procedures, the parties recognized that, during dry periods, tributary streams could and did dry up, which meant that if imported water flowed into those otherwise dry streams it might be counted as part of Nebraska's consumption. *See* Dkt. 495 at 4 (Pope); 2013 Tr. 55:21–56:7, 58:21–59:16 (Larson); *id.* at 73:12–74:10, 107:24–108:5 (Pope); *id.* at 175:6–14 (Schreüder); J7 at 9–10, Finding No. 24; J8 at 1310:11–1312:16, 1331:10–1332:18 (Barfield).

Well aware of this issue, the States and their experts made a deliberate choice not to attempt to track and separate out imported water to determine whether it was actually consumed. *See* 2013 Tr. 27:9-21 (Larson). Instead, they agreed to credit Nebraska for imported water through the accounting procedures they negotiated. J5 at 7; 2013 Tr. 27:22-25 (Larson). The States used the historical record for 1918-2000 to develop the method for calculating Nebraska's imported water supply credit. J5 at 8. Kansas negotiators understood that the FSS reasonably accounted for any discrepancies in the model regarding imported water supply and its consumption. *See* Dkt. 495 at 4 (Pope); 2013 Tr. 59:17–60:8 (Larson).

No one ever assumed or claimed that the Model and accounting procedures perfectly measured every drop of water in the Basin. Rather, the Kansas negotiators believed—and the States and the United States seemed to believe—that the methodology to which all parties agreed was a fair and reasonable way to determine and allocate the Basin's waters under the Compact. 2013 Tr. 113:6–117:24 (Pope); *see* J4 at 25-29; *id.* App. E18-E19; J8 at 1331:10–1332:18 (Barfield) (Modeling Committee knew about the imported water issue when it agreed to the groundwater model); *id.* at 1310:25–1312:16 (Barfield) (the imported water credit calculations were deliberately adopted and part of the rationale for adopting five-year averaging).

C. Nebraska Immediately Exceeded Its Allocation.

In 2003, the first year of Compact accounting under the FSS, Nebraska exceeded its allocation by 25,420 acre-feet. Rep. 108. By spring 2004, Nebraska knew

that it had exceeded its 2003 allocation. *Id.* Yet in 2004, Nebraska exceeded its allocation again, this time by 36,640 acre-feet. *Id.* Kansas promptly pointed out the problem, but in 2005, Nebraska's overuse increased to 42,860 acre-feet. Rep. 109. Undeterred, Nebraska exceeded its allocation in 2006 by 28,009 acre-feet. Nebraska's 2005 and 2006 violations alone—70,869 acre-feet, Rep. 88-89—took enough water to sustain a city of one million people for a year. *See* Dkt. 1, at 10, ¶ 20. The Master candidly described Nebraska's attitude toward compliance as "at the very best [one of] reckless indifference," which changed "only because Kansas took great efforts to commit and commence this litigation." Tr. 1870:22-25 (Master). He found that Nebraska "knowingly failed" to comply with the Compact in 2005 and 2006. Rep. 112.

In 2007, Kansas initiated dispute resolution proceedings under Section VII of the FSS, resulting in a two-week arbitration before Karl Dreher, former State Engineer for Idaho. J7. In 2007, the RRCA Engineering Committee discussed a Nebraska proposal (now called the "5-Run Proposal") to change the accounting procedures, but took no action. Dkt. 353 at 3-4 (Larson). In the arbitration proceeding, Nebraska offered the so-called 16-Run Proposal. *Id.* at 4. In 2009, Arbitrator Dreher issued his non-binding ruling, finding violations by Nebraska and rejecting Nebraska's proposals to change the accounting procedures. J7 at 71-72.

III. Recent Proceedings In This Court And Before Special Master Kayatta.

Nebraska did not change its ways following the arbitrator's non-binding decision, so Kansas really had no choice but to file a motion for leave to file a petition in this Court. The Court granted that motion, 131 S. Ct. 1847 (2011), and committed further proceedings to Special Master William J. Kayatta, Jr.

Nebraska later requested leave to assert a counterclaim. Dkt. 21. The Master granted Nebraska's request, and allowed Nebraska to amend its counterclaim to bring a related cross-claim against Colorado. Dkt. 72 at 1-2; *see also* Dkt. 58. Nebraska's amended counterclaim alleged that "Kansas has breached the Compact and the FSS by attempting to perpetuate Accounting Procedures that fail to account for the true impact of consumption on the River and thus improperly determine the [Virgin Water Supply], allocations, and Beneficial Consumptive Use." *Id.* at 15, ¶ 45. The counterclaim thus asserted that Kansas was violating the Compact by not agreeing through the RRCA to change the accounting procedures, not that the current procedures were the result of a mutual mistake. Both Kansas and Colorado denied the allegations of Nebraska's amended counterclaim and cross-claim. Dkt. 69 at 10, ¶ 43, and 18, ¶ 32; Dkt. 70 at 8, ¶ 43. Colorado later reversed its position, after negotiating a deal with Nebraska that both states fought to keep secret from Kansas and the Master. Dkt. 216.

The Master conducted a trial on all issues on August 13-23, 2012. "Mutual mistake" in the accounting procedures was not one of the issues tried.

See Dkt. 351 at 6-7. Instead, the Master injected this issue into the case on September 6, 2012, when he directed the States to discuss in their post-trial briefs "[t]he manner in which, if any, the principles in section 155 of the Restatement (Second) of Contracts are informative in assessing Nebraska's claim regarding the RRCA Accounting Procedures." Dkt. 409 at 1, ¶ 1.

Jumping at the chance to reframe its counterclaim, Nebraska argued that "there was no mistake as to the intent of the FSS, only as to the performance of its terms through implementation" of the accounting procedures for imported water, Dkt. 383 at 75-76, which Nebraska distinguished from the FSS itself, Dkt. 391 at 1. Colorado basically echoed Nebraska's argument. Dkt. 384 at 19. Kansas maintained that the procedures are an integral part of the FSS and that there was no mistake in the procedures adopted. Dkt. 385 at 80. On January 9, 2013, the Master issued a Draft Report. Dkt. 416. After hearings in January and August, the Master issued his Report (November 15, 2013), which contains three recommendations to which Kansas respectfully takes exception.

First, the Master found that the procedures for imported water contain a technical mutual mistake that this Court should reform. The Master construed section IV.F. of the FSS to evince a clear and exclusive intent by the States to prohibit any State from being charged with consumption of any imported water. Rep. 23-24. He then found that the current procedures can potentially treat Nebraska's consumption of imported water supply as the consumption of virgin water supply when the drying of streams occurs. Rep. 33-35. Based on that finding, the Master held that the current

procedures conflict with section IV.F. and therefore constitute a mutual mistake. Rep. 36-37. Because he found no evidence that Kansas specifically bargained for that result, Rep. 24, the Master recommends that this Court reform the procedures by adopting Nebraska's 5-Run Proposal. Rep. 55-57.

Second, the Master recommends that this Court deny Kansas' request for injunctive relief, including an order to comply. He stressed that Kansas had failed to meet the traditional standards for injunctive relief. Rep. 180-84. Although the Master acknowledged the "substantial challenges" Nebraska faces in complying with the Compact, Rep. 183, he rejected Kansas' concern that Nebraska's history of knowingly violating the Compact presented a "cognizable danger of a recurrent violation," Rep. 116-22, 182-83. The Master also justified his recommendation by pointing to the fact that he was recommending disgorgement of some of Nebraska's gains and threatening more substantial disgorgement if Nebraska violates the Compact again. Dkt. 432 Tr. 49:17-23 (Master); Rep. 183.

Third, the Master recommends disgorging $1.8 million—"a small portion," Rep. Errata 2, of Nebraska's ill-gotten gains. He recommends this amount even though he found that "Nebraska's gain was ... very much larger than Kansas' loss, likely by more than several multiples," Rep. 178, and that Nebraska abused its upstream position to repeatedly violate the Compact. Rep. 108-10, 112.

SUMMARY OF ARGUMENT

Kansas takes exception to the Master's first recommendation—that the Court judicially rewrite the States' deliberate agreement regarding how to treat imported water in determining whether Nebraska has complied with its Compact obligations. Kansas also takes exception in part to the Master's sixth and seventh recommendations regarding remedies for Nebraska's repeated knowing violations of the Compact. In particular, the evidence here more than warrants an order that Nebraska comply with the Compact and the FSS, and it warrants disgorgement of more than "a small portion" of Nebraska's gains from multiple, knowing violations of the Compact.

When Kansas, Nebraska, and Colorado negotiated the Compact decades ago, and then negotiated the FSS more recently, Kansas bargained for certainty—a sustainable and reliable supply of Basin water for years to come. But for the first four years after the FSS was negotiated, the only certainty for Kansas was that Nebraska would violate the Compact. Although Nebraska has perhaps achieved better compliance in less dry years, to this day there remains a serious risk that Nebraska will again violate the Compact.

Kansas initiated this lawsuit not so much to seek recompense for past harm as to prevent future harm, which has always been the goal under the Compact. Kansas seeks remedies that will be effective in protecting its interests in the Basin, especially given that Kansas is predominantly a downstream State in the Basin with no leverage over Nebraska and Colorado other than litigation such as this case. The Master recognized Kansas' predicament and acknowledged

Nebraska's persistent and knowing violations of the FSS. Yet his remedy recommendations, if adopted, will do little to change the status quo. Equally troublesome, the Master's recommendation to judicially rewrite the accounting procedures will cut Nebraska even more slack in complying with its Compact obligations.

I. Based on the Master's theory of "mutual mistake," the Master first recommends that the Court reform the accounting procedures that specify how to treat imported water for purposes of calculating Nebraska's beneficial consumptive use under the Compact. The Master would have this Court judicially rewrite a deliberate compromise on a highly technical matter that was part of a hard-fought and unprecedented settlement between sovereigns. The fact that neither Nebraska nor Colorado thought that the accounting procedures contained a mutual mistake—at least not until the Master's post-trial prodding—is strong evidence that the FSS and accounting procedures accurately represent the States' purposeful agreement.

Indeed, all three States recognized that the accounting procedures would have to somehow account for imported water in determining beneficial consumptive use, and they deliberately selected the current procedures as a reasonable, though admittedly imperfect, solution. The States were well aware of the phenomenon the Master now thinks they were mistaken about, and all parties got what they bargained for. Further, instead of holding Nebraska to its burden to show mutual mistake by clear and convincing evidence (not to mention not holding Nebraska to the requirement that it plead such a

mistake), the Master improperly shifted the burden of proof to Kansas to prove a negative.

Reformation is an extraordinary judicial remedy, one rarely invoked and subject to high standards. Reformation is not warranted where one party later regrets the deal it knowingly made, or acquires more information to suggest that it could have made a better deal. Buyer's remorse is no basis for reformation. The Master's finding of mutual mistake is factually and procedurally flawed, and the law does not support invoking the remedy of reformation here.

II.A. The Master resisted recommending effective remedies that would ensure Nebraska's future compliance with the Compact. More than damages for past violations, this lawsuit is about future compliance. The Master recognized that the value of water, particularly in a dry year, is virtually immeasurable. Thus money damages for Kansas' quantifiable loss is an insufficient remedy for Nebraska's knowing violation of the Compact. Yet the Master gave Kansas few tools to ensure Nebraska complies with the Compact going forward.

B. Kansas takes exception to the Master's recommendation that the Court deny Kansas' request for an order requiring Nebraska to comply with its Compact obligations and the FSS. Nebraska has shown little ability to take the steps necessary to comply. The only thing that seems to have affected Nebraska's behavior is litigation in this Court. An order to comply, enforceable through contempt proceedings, would be a much more certain and effective tool for ensuring Nebraska's compliance than initiating new litigation in this Court (if the Court permits) again and again and

again. Ordering Nebraska to comply with its existing obligations is no hardship to Nebraska and is a typical form of relief in the Court's original jurisdiction cases.

C. Ironically, the Master recommends denying Kansas' request for injunctive relief at least in part because he recommends disgorging some of the gains Nebraska accrued from its Compact violations. But the Master failed to give his disgorgement recommendation any real teeth, ultimately failing to recommend remedies that overall are likely to be effective. Kansas agrees that disgorgement is an appropriate remedy here. Kansas takes exception, however, to the Master's recommendation that the Court disgorge only $1.8 million of Nebraska's gains, gains which the Master recognized likely were many multiples of the amount he recommends.

The justification for disgorgement is to take *all* of the wrongdoer's gains as a deterrent to future misbehavior. Although the parties disputed Nebraska's total gains, and the Master did not decide on a specific number for the total, an award in the area of $11 million would be more suitable. That number is treble the actual loss the Master found Nebraska caused to Kansas ($3.7 million), is well within the proof on the actual gains to Nebraska, and would enforce a well-established deterrent remedy, a norm recognized in a variety of other settings under federal law.

Above all, Kansas begs the Court to impose effective remedies to ensure Nebraska's compliance with the Compact and FSS. The Court has broad discretion in a case such as this, and Kansas respectfully asks the Court to exercise that discretion in a way that achieves Compact compliance. Kansas cannot get back the water

Nebraska already has taken. But by imposing effective remedies, this Court can ensure that it does not happen again.

ARGUMENT

I. THE COURT SHOULD REJECT THE MASTER'S RECOMMENDATION TO REFORM THE FSS.

In the enforcement suit Kansas filed in 1998, Nebraska asserted an affirmative defense that irrigation water from the Platte River seeps into the Basin and should not be counted as part of virgin water supply. It is not scientifically possible to identify and measure what portion of Nebraska's groundwater consumption comes from any such seepage as opposed to native Basin water. 2013 Tr. 27:4-29:17 (Larson). But the FSS, which resolved that suit, incorporated calculations and a model that the States agreed reasonably quantified and accounted for Nebraska's consumption of such imported water.

After the Court approved the settlement, Nebraska soon began trying to undo the agreement. *See* Dkt. 353 at 3-4 (Larson). A new group of groundwater modelers and administrators in Nebraska sought to change the agreement's calculations to reduce Nebraska's annual overuse amount. *See* K127. The Master recommends that the Court, ten years later, should now reform the FSS to conform to Nebraska's changed position.

The extraordinary remedy of reformation, however, is available only to conform a written agreement to what the parties actually intended, *i.e.*, to correct a mutual mistake. Here, the parties got what they bargained for in 2002; there was no mutual mistake.

Indeed, Nebraska never pled mutual mistake, nor did it make such an argument until the Master raised the issue *after trial*.

A. Reformation Is An Extraordinary Remedy.

Reformation is an equitable remedy to judicially "reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties." *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385, 389 (1918). Reformation is available where:

> the parties, having reached an agreement and having then attempted to reduce it to writing, fail to express it correctly in the writing. Their mistake is one as to expression—one that relates to the contents or effect of the writing that is intended to express their agreement—and the appropriate remedy is reformation of that writing properly to reflect their agreement.

Rest. (Second) of Contracts § 155 cmt. a.

To reform a written agreement because of mutual mistake, the proponent must show: (1) the parties were mistaken in their belief regarding a fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of the mistake on the party seeking reformation. *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994); *see* 27 Williston on Contracts, § 70:23 (4th ed.); *cf. Indiana Ins. Co. v. Pana Cmty. Unit Sch. Dist. No. 8*, 314 F.3d 895, 904 (7th Cir.

2002). To justify reformation, "[t]he mistake must be mutual and common to both parties"; a "mistake on one side may be a ground for rescinding, but not for reforming, a contract." *Hearne v. Marine Ins. Co.*, 87 U.S. 488, 490-91 (1874).

Reformation is "an extraordinary equitable remedy that should be granted with great caution and only in clear cases of fraud or mistake." *Mark Andy, Inc. v. Hartford Fire Ins. Co.*, 229 F.3d 710, 716 (8th Cir. 2000); *see also Howland v. Blake*, 97 U.S. 624, 626 (1878) (the moving party must overcome the "strong presumption arising from the terms of a written instrument"). So claims for reformation based on mutual mistake are subject to both a heightened pleading standard and a heightened standard of proof. *Cf.* Fed. R. Civ. P. 9(b); *Philippine Sugar Estates*, 247 U.S. at 391; *Hearne*, 87 U.S. at 490-91; *Howland*, 97 U.S. at 626. These heightened standards reflect the extraordinary nature of reformation and the danger that a party will falsely claim a mutual mistake *post hoc* to shirk its contractual obligations. *See Collins v. Harrison-Bode*, 303 F.3d 429, 435 (2d Cir. 2002); 27 Williston on Contracts, § 70:23 (4th ed.) ("mistakes are the exception and not the rule").

Nebraska has failed to carry that heavy burden. As the ultimate factfinder here, *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984), this Court should reject the Master's finding that the procedures contain a mutual mistake and his recommendation that the Court reform those procedures.

B. The Accounting Procedures Do Not Contain A Mutual Mistake.

1. The Accounting Procedures Are An Essential Part Of The FSS.

According to the Master, the States reached a general agreement on the treatment of imported water, but failed to reduce that agreement to writing in the accounting procedures. The premise of the Master's finding is that the treatment of imported water in the procedures was unintentional. *E.g.*, Rep. 51 ("Nebraska does not seek ... to change any portion of the parties' agreement."). But that premise is fundamentally at odds with the careful and deliberate process used to develop those procedures. The States and the United States engaged in unprecedented and extensive settlement discussions, including a Joint Action Plan, thirty-eight technical and legal tasks, and five technical and legal committees. *See* J4 at 22-24. From 2001 to 2003, the parties spent more than thirty-two days in joint meetings with the full negotiating teams, and numerous additional meetings of the five committees. *Id.* at 24. Each State was armed with teams of technical experts. The Groundwater Modeling Committee examined in detail the outputs from applying the Model to data from 1918 to 2000, and confidently reported that the Model was sufficient for its intended purposes. *See* J5 at 51-52.

Master McKusick believed that the States knew what they were getting in the FSS, and they got what they bargained for. J4 at 73; *see* Tr. 877:4-878:16 (Pope). The Master here, however, recommends second-guessing the States, the United States, and Master McKusick—more than 10 years after the negotiations

concluded—based on a single sentence of section IV.F. of the FSS, which he takes out of context while discounting the bargained-for procedures as merely a "technical appendix" to the FSS, and not the result of specific negotiations. Rep. 43, 54. The Master cites no evidence to support his view, and there is none.

To the contrary, the accounting procedures are an essential component of the FSS. J4 at 26-28 (describing the accounting procedures as a "principal feature" of the FSS). The States defined the term "Stipulation" as "this Final Settlement Stipulation to be filed in *Kansas v. Nebraska and Colorado,* No. 126 Original, *including all Appendices attached hereto* ...." Rep. App. E13 (emphasis added). Section IV.A. of the FSS explicitly states that the imported water supply credit and consumptive use shall be determined "based on a methodology set forth in the RRCA Accounting Procedures, attached hereto as Appendix C." Rep. App. E25. Section IV.F. provides in full:

> F. Beneficial Consumptive Use of Imported Water Supply shall not count as Computed Beneficial Consumptive Use or Virgin Water Supply. Credit shall be given for any remaining Imported Water Supply that is reflected in increased stream flow, except as provided in Subsection V.B. ***Determination of Beneficial Consumptive Use from Imported Water Supply (whether determined expressly or by implication), and any Imported Water Supply Credit shall be calculated in accordance with the RRCA Accounting Procedures and by using the RRCA Groundwater Model.***

Rep. App. E35 (emphasis added). Indeed, the States included the accounting procedures in the first volume of the FSS precisely because those procedures were one of the "principal provisions of the Final Settlement Stipulation." *Id.* at E3, n.*.

The Master mistakenly focused on only the first sentence of section IV.F. As a result, he felt free to determine whether the accounting procedures are the *best possible method* for addressing groundwater consumption based on present-day understandings. Instead, he should have asked whether the parties agreed in 2002 that the procedures satisfactorily dealt with the known issue of imported water consumption. The answer to the latter, properly framed question, is yes. The States unambiguously intended that "Beneficial Consumptive Use from Imported Water Supply ... shall be calculated in accordance with the RRCA Accounting Procedures and by using the RRCA Groundwater Model." *Id.* at E35. The procedures adopted provide the intended methodology for determining imported water supply and Nebraska's credit for the use of such water. There was no mutual mistake.

The Master states that there is "no evidence ... that the parties intended the FSS to substitute for actual conditions an artificial construct that materially varies from reality." Rep. 24. Kansas does not disagree with this proposition as stating a general goal of the Compact and the FSS. But all groundwater models are at best representations of the physical world; none are perfect. The fact that the procedures may not perfectly capture the physical system, or that improvements may be possible, does not mean the States were "mistaken"

when they agreed to procedures that they knew would only approximate actual conditions. J5 at 51-52; Rep. 21, 54. Ample evidence shows the States deliberately adopted the procedures knowing that they were imperfect.

The current procedures expressly account for imported water supply, and do so through a combination of two model runs: first, the "base run" calculates the depletions with all groundwater pumping and imported water "on"; second, a Model run is done with the same model inputs, but with the imported water turned "off." Nebraska's "Imported Water Supply Credit" is the "difference in stream flows between those two model runs." J1 at C17. At a hearing addressing the FSS on January 6, 2003, Nebraska's counsel explained to Master McKusick that in "practical reality ... the model's constructed" as a "compromise" to calculate a credit to Nebraska for any imported water it consumes. J6 at 79:5-80:7 (Cookson). That explanation is fully consistent with the view of Kansas' chief engineer, a leader in the 2002 negotiations and a witness in this proceeding, who explained that although "certain stream depletions caused by groundwater pumping might be technically unaccounted for, in effect, they were accounted for by other compensating features of the Model and the RRCA Accounting Procedures, so that on balance, the overall accounting was consistent with the Compact." Dkt. 495 at 2 (Pope). Not surprisingly, Master McKusick's reports to the Court recognized the accounting procedures as integral, bargained-for features of the FSS, J4 at 26-28; *id.* at 73 ("integrated agreement"; "indivisible whole"), and he found that the

procedures represented the actual situation in the Basin to "a reasonable degree," *id.* at 51.

The Master's recommendation here contravenes the plain language of section IV.F. of the FSS when read as a whole, the contemporaneous understanding of Master McKusick, and the actual evidence of the parties' understanding of the FSS and accounting procedures.

2. The Accounting Procedures Are The Result Of Extensive Negotiation And Compromise.

Lengthy negotiations which produce tangible, bargained-for results, are strong indicia that a written agreement properly reflects the parties' intent. Here, the Master suggested he could be persuaded by such evidence, Rep. 28-30, but he unfairly discounted the actual evidence. The record is replete with proof of trade-offs and compromises on a multitude of issues throughout the course of the negotiations that resulted in the FSS and its treatment of imported water.

Although no witness for Nebraska in this proceeding had been involved in the negotiation of the FSS, several Kansas and Colorado witnesses who were involved testified about the negotiations. One testified that the agreement was the result of "extensive discussion and evaluation of various alternatives." Tr. 714:4-5 (Schreüder). Another similarly testified that there "were many tradeoffs during the negotiations," Dkt. 495 at 3 (Pope), and the accounting methodology was specifically agreed to as part of the settlement, Tr. 645:4-12 (Pope). *See also* C05 at 1 (the States' agreement on the procedures was reached "with careful consideration of many facts and was reasonable."); J8

at 1318:7-9 (Barfield) ("We specifically said this is how we are going to determine the credits, using the procedures attached"); C01 at 12 ("The States agreed to the current method after careful deliberation and considering numerous facts"). One of the benefits that Kansas bargained for was "clear, detailed RRCA Accounting Procedures." 2013 Tr. 114:17 (Pope).

In the words of Colorado's expert:

> The Model is calibrated to historical conditions which included well development over time and surface water imports, and the effects of these mechanisms on water levels. In the current RRCA approved procedures, the Model runs start from this historical condition which is based upon actual measured data and deviates only as necessary to evaluate the impacts of the various activities of man. *In part this approach was selected to minimize the uncertainty in the results produced by the model.*

C01 at 12 (emphasis added). The States selected the historic baseline because they wanted to ensure that "everything balanced out." Dkt. 495 at 4 (Pope). When the States evaluated the residuals[3] under that baseline, the positive and negative residuals balanced. 2013 Tr. 42:7–43:12 (Larson).

The negotiators also considered several alternative model calibrations, and ultimately selected what is known as version 12p. *See* J5 App. U; *see also* 2013

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[3] When the impacts computed for individual States do not equal the impacts of the three States combined, they are called "residuals," Dkt. 287 at 6, and can be positive or negative.

Tr. 63:9–65:25, 67:7-16 (Larson). The States agreed that the calibration of version 12p reasonably preserved the system's balance in terms of accretions and depletions, and was reliable in computing stream depletions and accretions so that virgin water supply and computed beneficial use could be determined. *See* 2013 Tr. 92:23–93:8 (Pope).

The five-year averaging included in the procedures was chosen precisely to ensure that the calculation of imported water "comes out in the wash." J6 at 79-80 (Cookson). The "States recognized that the RRCA Groundwater Model is an imperfect analog of reality that cannot be perfectly accurate in every location for every year." C01 at 3. So "[t]o mitigate the Model's limitations, the States agreed to assess Compact Compliance using a five year running average." *Id.*; *see also* J8 at 1312:7-16, 1331:8–1334:22 (Barfield).

Put simply, the States made numerous tradeoffs and compromises to reach agreement in 2002, and the procedures for calculating imported water and Nebraska's credit were the result of deliberate choices, as explained further below.

3. The States Were Aware Of The Way That The Accounting Procedures Treated Imported Water.

Contrary to the Master's finding, the procedures' treatment of imported water was a deliberate choice. The issue of imported water and accounting for Nebraska's consumption of it "is an issue for which Kansas has always been concerned," J8 at 1268:16-22 (Book), and was the "subject of much discussion," J6 at 79 (Cookson). The actual consumption of native and

imported groundwater has never been directly measured, however, and the true value is unknown. The model and procedures were designed with all parties aware that any calculations would be imperfect. Rep. 19, 21; Tr. 722:10–726:7 (Schreüder); J8 at 1386:1-10 (Schreüder); J5 at 51. The Master finds that stream drying, and the nonlinearity[4] that it causes, is the "mistake" for which the parties did not account, Rep. 33-35, but the Master is incorrect for two related reasons.

First, when they negotiated the procedures, the States recognized the system's nonlinear nature, the related stream drying phenomenon, and the resulting impact on Nebraska's allocation. *See* 2013 Tr. 54:8–56:7, 58:21–59:16 (Larson); *id.* at 73:12–74:10, 107:24–108:5 (Pope); *id.* at 175:6-14 (Schreüder); C03 at 3-7; J6 at 79-80 (Cookson); J7 at 8-9, Finding Nos. 22-24; J8 at 1265:19–1266:11 (Book), 1310:11–1312:16 (Barfield), 1331:10–1332:18 (Barfield). One of Colorado's experts who was involved in negotiating the procedures explained that the "groundwater committee was fully aware of the non-linear behavior of the aquifer system when the model was developed in 2002-2003 and agreed that the [procedures] to determine the computed beneficial consumptive use of groundwater of each State was the most reasonable and fair approach to estimate the depletions to streamflows due to each State's groundwater pumping." C03 at 6; *see* Dkt. 495 at 4 (Pope) (Kansas "recognize[d] that the Model was not totally linear, and that there might be some discrepancies with respect to stream depletions and

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[4] A nonlinear groundwater system or model is one in which "the sum of the parts is not necessarily equal to the whole." C03 at 3.

Imported Water Supply Credit as a result"); 2013 Tr. 116:7-17 (Pope).[5]

Indeed, Kansas was very mindful that the methods chosen would have an effect on the "bottom line." 2013 Tr. 59:17–60:18 (Larson), 66:7–67:17 (Larson), 108:6–110:3 (Pope). Appendix U to Master McKusick's Final Report represents the "bottom line" on which the negotiators focused. 2013 Tr. 66:12–67:5 (Larson). Based on this bottom line, the Kansas negotiators understood that any discrepancies resulting from the Model's nonlinear properties were sufficiently balanced out by other aspects of the calculations. Dkt. 495 at 4 (Pope); 2013 Tr. 59:17–60:8 (Larson).

Second, the States were aware that the procedures would have the precise effect that the Master found is a mistake. Rep. 26. Dr. Schreüder testified that Colorado "intellectually understood" that the negotiated procedures would treat imported water as part of Nebraska's allocation under certain conditions. Tr. 676:5–677:23, 678:7–679:1, 717:24–718:10, 721:7-16, 727:12–728:3, 731:5-24 (admitting having "no good answer" for not incorporating a version of the 5-Run proposal in the FSS). He further testified that he raised the issue with the Colorado team, 2013 Tr. 125:13–127:18, 176:10–177:10, and that the States performed calculations to evaluate the way that the procedures treated imported water, J8 at 1402:9-24 ("The Modeling Committee similarly knew that the model was nonlinear and evaluated the contingencies

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[5] An arbitrator concluded that this issue "was anticipated by the Technical Groundwater Modeling Committee that developed the [Model and procedures]." J7 at 9-10 ¶ 24.

of that in determining the current approved procedure."). *See* C01 at 4; C03 at 6-7; C05 at 1. At the very least, the evidence establishes that Colorado was fully aware that use of imported water could be charged to Nebraska; there is no contrary evidence.

C. Nebraska Failed To Show A Mutual Mistake By Clear And Convincing Evidence.

Nebraska bears the burden to show by clear and convincing evidence that there is a mutual mistake. *See Nash Finch Co. v. Rubloff Hastings, L.L.C.*, 341 F.3d 846, 850 (8th Cir. 2003). Such proof must leave the factfinder with "an abiding conviction that the truth of its factual contentions are highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

Nebraska, however, offered no affirmative evidence of mutual mistake, much less any evidence that Nebraska's 5-Run Proposal is what the States actually intended to adopt in 2002. The only affirmative evidence in the record supports the contrary position—that the parties were well aware of the effect of the current procedures when they negotiated them. There was no "mistake."

Because the Master could not rely on any affirmative evidence, he premised his finding on the general language in the first sentence of section IV.F. of the FSS, reasoning as follows:

> [I]f one concludes as I do that the parties were sincere in their descriptions of the FSS to Special Master McKusick and to the Court, then it is clear that none of them believed that the procedures would treat material amounts of

> imported water as if it were virgin water supply of the Basin. If any Nebraska representative in 2002 had concluded that the Accounting Procedures would mislabel a substantial amount of imported water as virgin water supply, there is no reason why he would not have then raised the point to secure a correction.

Rep. 27. Thus, the Master relied upon speculation about the unexpressed understandings and motives of the parties to a complicated negotiation that occurred in 2002. Such speculation is no substitute for clear and convincing evidence.

Compounding his error, the Master tried to bolster his finding by pointing to what he perceived as an *absence* of evidence demonstrating that there was *not* such a mistake. *See* Rep. 24, 26, 28, 31, 52, 53. But that approach turns the inquiry on its head, effectively placing on Kansas the burden to prove a negative, *i.e.* no mistake. Any perceived absence of such evidence should not count against Kansas.

Moreover, the unfairness and irony of the Master's reasoning for finding a mistake is heightened by the circumstances. Nebraska never pled a claim of mutual mistake and the parties did not try that issue; it arose only after trial when the Master himself raised it. In fact, Nebraska had only argued that Kansas was violating the Compact by not agreeing—through the RRCA process—to adopt what Nebraska asserts are more accurate procedures based on information obtained post-2002.

It is not a "mutual mistake" when one party to a contract later obtains information that makes the party

wish for a different bargain, *Loewenson v. London Mkt. Cos.*, 351 F.3d 58, 61 (2d Cir. 2003) (refusing to reform "a methodology explicitly agreed to by the parties, even though that methodology is flawed"), or when that later information makes it possible to consider more effective procedures, *Russell v. Shell Petroleum Corp.*, 66 F.2d 864, 867 (10th Cir. 1933) (reformation to correct a mutual mistake is based not on "what the parties would have intended if they had known better, but what [they did] intend at the time, informed as they were"). At a minimum, the Master's rewriting of Nebraska's counterclaim after the trial deprived Kansas of the opportunity to marshal direct evidence on the mistake issue.

In sum, the record cannot sustain the Master's finding that there was a mutual mistake.

D. Reformation Is Not An Appropriate Remedy Here In Any Event.

Reformation is appropriate only to rewrite a contract to accurately reflect the parties' intentions at the time of the agreement. *See Schongalla v. Hickey*, 149 F.2d 687, 690 (2d Cir. 1945) (reforming a contract does not change the terms of the parties' agreement, "it merely declares what those terms were"). Put another way, the remedy of reformation is only used to correct truly unintended drafting errors. *See United States v. Gibson*, 356 F.3d 761, 766 n.3 (7th Cir. 2004). This is why the party alleging mutual mistake must show "not only that mistake ... exists, but exactly what was really agreed upon between the parties." *Loewenson*, 351 F.3d at 62-63.

But here the Master is not recommending correction of an unintended drafting error; he proposes to rewrite the FSS to fundamentally change the way the States address imported water. No longer would the procedures be based on historic data, include a calibrated baseline, or balance out the positive and negative residuals, as the States negotiated in 2002. Rather, the procedures would be rewritten to use a very different calculation methodology. 2013 Tr. 40:5-7 (Larson) ("when you look at the 5-run solution, it represents a very different change from what was agreed to under the FSS").

There is no evidence in the record to suggest that the States intended to adopt the 5-Run Proposal in 2002. Nebraska does not argue otherwise. During trial, the Master did not attempt to determine whether the States actually intended the 5-Run methodology; instead, he focused on whether that methodology was technically feasible and appropriate. *See* Dkt. 431 at ¶ 1.2. Thus, the 5-Run Proposal is not "reformation"; it is the creation of a new methodology.

Nebraska may have more information about the Basin now than it did in 2002, but that does not justify reformation. "A mistake as to the existing situation, which leads either one or both of the parties to enter into a contract which they would not have entered into had they been apprised of the actual facts, will not justify reformation. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were." *United States v. Williams*, 198 F.3d 988, 993-94 (7th Cir. 1999); *see Loewenson*, 351 F.3d at 61.

The 5-Run Proposal changes the balance of positive and negative residuals under the existing procedures, 2013 Tr. 40:17-42:24 (Larson), resulting in a significant bias with respect to allocations against Kansas, *id.* at 21:20–23:23 (Larson). All three States agree that under the 5-Run Proposal, Kansas will receive significantly less water than under the current procedures. *Id.* at 66:7–67:5 (Larson), 157:17–158:4 (Schreüder), 165:9-24 (Steinbrecher); C10. Given this impact on the "bottom line" for which Kansas negotiated, there is no evidence that Kansas would have agreed to the 5-Run Proposal in 2002.

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), twenty-four years after a decree of the Court fixing the New Hampshire / Maine boundary, New Hampshire asked the Court to amend the decree because that State now believed the agreement setting the boundary was a mistake. 532 U.S. at 744, 753. The Court strongly rejected the "mistake" claim:

> [T]he consent decree was sufficiently favorable to New Hampshire to garner its approval. Although New Hampshire now suggests that it "compromised in Maine's favor" on the definition of "Middle of the River" in the 1970's litigation, that "compromise" enabled New Hampshire to settle the case on terms beneficial to both States. Notably, in their joint motion for entry of the consent decree, New Hampshire and Maine represented to this Court that the proposed judgment was "in the best interest of each State." Relying on that representation, the Court

> accepted the boundary proposed by the two States.

Id. at 752 (citations omitted).

The same is true in this case. In 2002-2003, Kansas, Nebraska and Colorado all had ample opportunity to study and evaluate the accounting procedures, and did so with extensive assistance from the United States. Following protracted and technically extensive negotiations, the States agreed that the current method for determining imported water supply was acceptable. They asked the Master to recommend approval, and then asked the Court to adopt the Master's recommendation. The Court approved. That Nebraska subsequently changed its opinion of the deal it struck is not a sufficient reason to change the procedures. *Cf. id.* at 756 ("What has changed between 1976 and today is New Hampshire's interpretation").

Here, in 2002-2003, the States actually followed the Court's oft-repeated advice to resolve interstate disputes through cooperation and mutual concession. *E.g.*, *Arizona v. California*, 373 U.S. 546, 564 (1963). Indeed, the litigation that ended in 2003 was the first instance in which an interstate water dispute was resolved without a trial. To "reform" the parties' agreement now, based on speculation that the parties made a "mistake," or notions that there might be ways to improve the agreement's procedures, would have a chilling effect on settlement efforts in future interstate disputes.[6]

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[6] Nebraska is not without recourse. The Compact (Art. IX) establishes a body (the RRCA) through which the States can

II. THE COURT SHOULD IMPOSE STRONGER AND MORE EFFECTIVE REMEDIES THAN THE MASTER RECOMMENDS.

A. The Court Seeks To Impose Effective Remedies In Original Cases.

Under the Constitution, the States necessarily "gave this Court complete judicial power to adjudicate disputes among them, and this power includes the capacity to provide one State a remedy for the breach of another." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). There is no question that "this Court's jurisdiction to resolve controversies between two States extends ... to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). Thus, when an upstream State by its actions harms the interests and rights of a downstream state, it "needs no argument ... that resort may be had to this court for relief." *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923).

Beginning with the very first interstate river dispute (*Kansas v. Colorado*, 185 U.S. 125 (1902)), the Court recognized that "the scope of relief" is flexible, and that the Court may order "such appropriate decree as the facts might be found to justify ...." *Id.* at 145. Indeed, the Court has emphasized that the State with possession of land or control over water is unlikely to

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change the procedures. Rep. App. B11. In fact, the States through the RRCA have agreed to changes on multiple occasions. Rep. 22. The FSS also provides for non-binding arbitration of disputes. Rep. App. E49.

voluntarily give up the same, or even enter into a compact regarding such matters, absent a credible threat of judicial involvement that includes the possibility of effective judicial remedies. *Id.* at 144. As the Master correctly recognized here, the Court generally charges masters "with deciding on the form of remedy based on an equitable consideration of what is suitable under all of the circumstances of the case." Rep. 134.

B. An Order To Comply Is Warranted In This Case.

1. Injunctive Relief Is A Proper And Typical Remedy In Original Cases.

The relief that the Court has deemed "appropriate" in original cases frequently has included injunctive decrees, a remedy Kansas seeks in this case. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208 (1900) (suit to enjoin the deposit of noxious germs by an upstream state into interstate waters); *Kansas v. Colorado*, 185 U.S. 125 (1902) (suit to enjoin diversion of water by an upstream state from an interstate river); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (similar); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (enjoining one state from enforcing a statute that would prohibit or impede the flow of natural gas in interstate commerce). Injunctive relief is a significant benefit to a downstream State because such relief can be enforced by contempt proceedings, a long-recognized remedy in this Court. *See, e.g.*, *In re Chiles*, 89 U.S. 157 (1874); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904).

In *Wyoming v. Colorado*, 309 U.S. 572 (1940), the Court entertained a petition by Wyoming to find

Colorado in contempt for violating the Court's decree. The Court rejected Colorado's argument that Wyoming had failed to show injury, holding that "such a defense is inadmissible." 309 U.S. at 581. In the Court's view, "Colorado is bound by the decree not to permit a greater withdrawal [of water] and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights." *Id.* The Court declared that if "nothing further were shown, it would be our duty to grant the petition of Wyoming and to adjudge Colorado in contempt for her violation of the decree." *Id.* Ultimately, however, the Court did not find Colorado in contempt because "there was a period of uncertainty and room for misunderstanding" under the decree. *Id.* at 582.

Thus, for decades the Court has recognized the propriety of injunctive relief in original cases. Kansas' request for an order to comply in this case is hardly novel or unprecedented. In fact, the Court typically has enjoined future violations of interstate water compacts as a matter of course. *See, e.g.*, *Texas v. New Mexico*, 485 U.S. 388, 389 (1988); *Kansas v. Colorado*, 556 U.S. 98 (2009); Fifth And Final Report, *Kansas v. Colorado*, No. 105, Orig., Vol. II, at 2-3. The Court should not accept the Master's recommendation to decline such an order here.

2. The Equities Favor Entering An Order To Comply.

Nebraska has engaged in a pattern of violations, repeatedly and knowingly violating the Compact. That fact alone warrants ordering Nebraska to comply with the Compact and the FSS. Even though this proceeding

and earlier litigation in this Court has forced Nebraska to take some steps to address its Compact obligations, "the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). For several reasons, the Master erred in recommending that Kansas be denied an order to comply.

First, the very nature of this situation justifies an order to comply. This Court is the only tribunal capable of peacefully and finally resolving a *casus belli* between the States. But invoking the Court's original jurisdiction is costly, both in time and money. And there is no guarantee that the Court will agree to hear a particular case. The Court's original jurisdiction can be an effective last resort for quarrelling States, but for Kansas it seems to be the only option. Time and again Nebraska has proven that it is not deterred by anything else, and not really even by the threat of Kansas filing yet another request to initiate an original jurisdiction proceeding in this Court. In recognition of the costs, lag time, and uncertainty of such litigation, the Court should enter an order to comply that will be readily enforceable in the event of future non-compliance.

Second, the harm Kansas suffers when Nebraska overuses water is irreparable. There is inherent uncertainty in comparing water provided in the future to water taken in the past. As the Master explained:

> A gallon delivered during irrigation season in a water-short year when clear skies persist and crop prices are high is hardly the same as a gallon delivered in the fall of an ideal year with bumper crops. Location matters, too. A gallon

> not used well above Guide Rock is worth more to Kansas than a gallon not used below Guide Rock because it can be regulated through Harlan County Lake and diverted through the Courtland Canal.

Rep. 129. Thus, compensatory damages alone are unlikely to protect Kansas.

Third, because Kansas is predominantly downstream of Nebraska, there is an inherent structural imbalance. In dry periods, when water matters most, Kansas is at the mercy of Nebraska and needs readily available enforcement tools to deter future Compact violations. Currently, Nebraska holds all of the cards.

Fourth, the Master correctly concluded that "Nebraska's gain was ... very much larger than Kansas' loss, likely by more than several multiples." Rep. 178. But he did not recommend full disgorgement of Nebraska's gains from its 2005 and 2006 violations, Rep. 179 & Errata, and did not even recommend full disgorgement for future violations. Combined, the Master's recommendations will allow Nebraska to pocket the vast majority of its ill-gotten gains from 2005 and 2006, and to repeat its behavior in the future.

Fifth, an order to comply imposes no costs on Nebraska so long as Nebraska complies with the Compact and the FSS, as Nebraska now claims it intends to do. If Nebraska follows through, then it has nothing to worry about; complying with its Compact obligations is not a "hardship" in the equity sense. Kansas, on the other hand, faces a very real risk of harm from future violations, especially given

Nebraska's history of non-compliance and Kansas' disadvantage as a predominantly downstream state in the Basin.

Taken together, the circumstances here justify an order to comply.

3. The Master Erred In Finding No Cognizable Danger Of Future Violations.

The Master also recommends denying injunctive relief to Kansas in part on the ground that Kansas has not proven a cognizable danger of Nebraska violating the Compact and the FSS in the future. Rep. 116-27, 182. This recommendation, however, does not square with the evidence in the record and the history and character of Nebraska's past violations. The Master relied on three propositions for his finding, but none withstand scrutiny. **First**, he opined that no Kansas expert could pinpoint when Nebraska might violate the Compact or the FSS in a future dry period. Rep. 119-20. But nothing in the Court's precedents requires *certainty* of future violations, *see, e.g.*, *W.T. Grant*, 345 U.S. at 633, especially not when the offending party already has breached its obligations multiple times in the past.[7]

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[7] The Master's own findings support the conclusion that the risk of future violations has not been eliminated: "Kansas is correct that the complexity of Nebraska's relevant governing structure and the absence of a statewide consensus among surface water users and groundwater pumpers pose substantial challenges to the continuous and effective enforcement of the IMPs." Rep. 183. Further, even after the Court approved the FSS in 2003, Nebraska "failed to act either promptly or effectively" to control its consumption, Rep. 107, with the result that by 2006 it was

Second, the Master criticized Kansas' projections of future conditions because Kansas did not incorporate Nebraska's proposed revisions to the accounting procedures. This critique is baseless. Throughout the litigation, including in this Court, Kansas has opposed Nebraska's attempt to judicially rewrite the FSS and alter the mutually negotiated procedures. Even if the States' agreement is judicially rewritten, however, that would not change the fact that Nebraska has repeatedly and knowingly violated the Compact, and (absent more effective remedies than the Master recommends), will have strong incentives to do so whenever water is short.

Granted, Kansas did not assume "additional management actions by Nebraska, such as surface water controls and augmentation projects," Rep. 120, but there was no reason to do so. Nebraska's compliance plans do not specify what additional actions Nebraska may take, when they would be implemented, or their likely effects. The only surface water controls Nebraska described in any detail at trial were the closing notices used during "Compact Call Year administration" that are intended for "shepherding the water through the system" rather than generating additional water. Tr. 574 (Schneider). Nebraska's own expert testified that the closing notices would "[n]ot necessarily" have an effect on surface water CBCU. *Id.* at 573 (Schneider). As for "augmentation plans," those

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apparent Nebraska was not in compliance with the Compact and the FSS, and had not been for some years. In light of this historical record, Kansas understandably and justifiably has "skepticism (born of experience) that Nebraska has the will to use the IMPs to ensure [future] compliance." Rep. 183.

require RRCA approval, *see* FSS § III.B.1.k., Rep. App. E22-E23, and there is no evidence in the record about the approval of such plans. Kansas was not required to rely on Nebraska's purported, speculative aspirations.

Third, the Master faulted Kansas for assuming that present conditions in the Basin would continue. Rep. 120-22. But the Master identified no evidence that in the future there will be more water in the Basin or that Nebraska will use less. To the contrary, he acknowledged that "most changes over time have resulted in or coincided with increased levels of consumption." Rep. 121. The most he suggested was that "[i]t does not follow ... that future change from the static state assumed by Kansas will not result in lower levels of consumption or greater sources of alternative supply." Rep. 121. At best, the Master's observation proves only that the future is uncertain, much like the admonition that "life is a fountain," *cf. H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (Scalia, J. concurring), not that Kansas is more likely to receive its full allocation in future dry periods.

Importantly, the record identifies no specific "sources of alternative supply" to support the Master's rosy view. He observed that it was possible "that the Basin will experience projects or purchases augmenting the virgin water supply," but he did not and could not on the evidence make any findings about what these might be. Rep. 122. Nothing in the historical record supports the idea that tighter water regulations and increased water supply are the likely outcome once this lawsuit ends. Instead, history strongly suggests the opposite.

Thus, the Master erred when he concluded that there is no realistic risk of Nebraska's future non-compliance. In fact, he essentially undermined his own conclusion when he agreed with Kansas that there exist "substantial challenges to the continuous and effective enforcement of the IMPs." Rep. 183. To deny that conclusion is to deny history. The circumstances here favor the entry of an order to ensure Nebraska's future compliance with the Compact and the FSS. *Cf. Texas v. New Mexico*, 485 U.S. at 389 (ordering "The State of New Mexico, its officers, attorneys, agents, and employees" to "comply with Article III(a) of the Pecos River Compact and to meet the obligation thereof by delivering water to Texas at the state line as prescribed in this Decree.").

The Master also erred when he concluded that "[i]t is not apparent an order to comply with the Compact would add anything meaningful to the mix." Rep. 183. To the contrary, just as in *Texas v. New Mexico*, such an order would serve important functions. As the Master recognized, Nebraska has strong financial and economic (and perhaps political) incentives to violate the Compact and exceed its allocations. Yet nothing the Master recommends will ensure that Nebraska complies with the Compact. Instead, Kansas will have to pursue any future violations by initiating a new breach of Compact action in this Court.

Kansas has learned through bitter experience that Nebraska responds only to the threat of judicial enforcement. Nebraska's repeated and knowing violations of the Compact justify an order enjoining future violations. By entering an enforceable order to comply now, the Court would establish a clear path for

swift action in the event of any future non-compliance with the Compact and the FSS.

C. Disgorgement Of Nebraska's Gains Would Be An Effective Remedy.

1. Money Damages Can Be An Appropriate Remedy In Original Cases.

The Court's endorsement of money damages as a remedy available in original cases has just as long a pedigree as the Court's reliance on injunctive relief. *See Texas v. New Mexico*, 482 U.S. 124, 131 (1987) ("The Court has recognized the propriety of money judgments against a State in an original action.") (citing *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *United States v. Michigan*, 190 U.S. 379 (1903); *Virginia v. West Virginia*, 246 U.S. 565 (1918)). Importantly, the Court has recognized that "[a] Compact is, after all, a contract," *Texas v. New Mexico*, 482 U.S. at 128, as well as a statute, *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-280 (1959), and the Court has made clear that there is no bar to the Court providing retrospective relief—including money damages—for past breach of a Compact. 482 U.S. at 128.

The Court has flexible, equitable power to mold the relief in original cases to fit the circumstances and provide effective remedies. The Court's authority in original cases does not come from statute, but from the Constitution itself. *See Texas v. New Mexico*, 482 U.S. at 132 n.8 (rejecting the argument that the Court could not grant post-judgment interest absent statutory authority because "we are not bound by this rule in exercising our original jurisdiction"); *Kansas v.*

Colorado, 556 U.S. 98 (2009) (choosing as a matter of discretion to apply a federal statute regarding recoverable "costs" but expressly not deciding whether Congress actually could limit the remedies the Court may award in original cases); *id.* at 109-10 (Roberts, C.J., concurring) (joining the Court's opinion "because the opinion expressly and carefully makes clear that it in no way infringes this Court's authority to decide on its own, in original cases," the costs and fees that may be awarded: it is "our responsibility to determine matters related to our original jurisdiction, including the availability and amount of witness fees").[8]

Although the Court has never addressed the *measure* of a disgorgement award in an interstate river case, there can be no doubt that the Court has the power to make such an award. In fact, all parties and the Master agree in this case that *some* damage award to Kansas is appropriate for Nebraska's past violations of the Compact, Rep. 129; the only issue is how much? For the reasons set forth below, the Master's generally laudable recommendation in this regard did not go far enough, and fails to provide an effective remedy. Kansas respectfully requests that the Court both issue

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[8] Chief Justice Taney wrote for the Court "that in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice." *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 98 (1861). *See also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451, 463-64, 467, 479 (1793) (the Court's original jurisdiction is self-executing); *Rhode Island v. Massachusetts*, 39 U.S. 210, 257 (1840) (Court has power to "mould the rules" in original cases).

an order to comply with the Compact / FSS and order disgorgement of Nebraska's gains from its past breaches. *Porter v. Warner Holding Co.*, 328 U.S. 395, 399-400 (1946) (disgorgement "may be considered as an equitable adjunct to an injunction decree" and "as an order appropriate and necessary to enforce compliance").

2. Disgorgement Is A Proper And Appropriate Remedy In This Context.

Nebraska's knowing violations of the Compact coupled with its history of non-compliance demand a remedy that minimizes the profit Nebraska realized in order to deter future recalcitrance. *See Texas v. New Mexico*, 482 U.S. at 132 (1987). The Court has broad equitable discretion in original jurisdiction cases, giving it the authority to disgorge a significant portion of Nebraska's gains. Here, such an award is the next reasonable step to prevent an opportunistic upstream state from yet again breaching an interstate water compact. *Cf. Texas v. New Mexico*, 482 U.S. at 133 n.8 (adopting incremental approach to Compact remedies); Second Report, *Kansas v. Colorado*, No. 105, Orig., at 82 (Sept. 9, 1997) (in a future case it might be appropriate to "look[] to upstream gain" to "provide complete relief").

In this case, Kansas, Nebraska, and Colorado "all ... agree that the remedy should be in dollars, not water." Rep. 129. So the issue is not whether damages should be awarded to Kansas, but what amount? Here, Nebraska opportunistically breached the Compact, knowingly interfered with real property (downstream water rights) in violation of federal law (the Compact) and disregarded its Compact obligations to manage its

portion of the Basin in part for the benefit of a sister state. Thus, the Master correctly concluded that disgorgement of Nebraska's gains should be part of the damages awarded to Kansas. Rep. 179.

a. Nebraska's Opportunistic Breach Of The Compact Warrants The Remedy Of Disgorgement.

Despite its commitment to the FSS, Nebraska immediately exceeded its Compact allocations in 2003 and 2004. Rep. 108. Nebraska also concedes that it took more water than it was entitled to under the Compact in 2005 and 2006, thereby interfering with downstream water rights, Rep. 17, and the Master found that Nebraska did so *knowingly*. Rep. 130. Nebraska argues that the Compact should be treated as an ordinary commercial contract, one that Nebraska can breach whenever it is economically advantageous for Nebraska to do so, as long as Nebraska pays Kansas for any short-term actual damages. *See* Dkt. 249 at 1. The Master correctly rejected Nebraska's devaluation of the Compact, recognizing that Nebraska's view "pays too little heed to the public interest in the flow" of the River. Rep. 133.

Although the Compact is in some respects a contract, *Texas v. New Mexico*, 482 U.S. at 128, it is no ordinary private contract in which "Kansas' reasonably foreseeable loss would provide the measure of damages." Rep. 131. Even aside from the Compact's status as federal law, it is an agreement to equitably apportion water among sovereign States with unequal access to the shared resource. An upstream state like Nebraska is in a position to exploit the structural imbalance inherent in that situation and profit from an

"opportunistic breach" for which disgorgement is an appropriate remedy. Rest. (Third) of Restitution § 39 cmt. b (the "label suggests the reasons why a breach of this character is condemned, but there is no requirement under this section that the claimant prove the motivation of the breaching party").

Disgorgement is particularly appropriate here because history has shown that Kansas' "contractual position is vulnerable to abuse." *Id.* Kansas has no way to replace the water Nebraska has taken. *See id.*; E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1384 (1985) (disgorgement is appropriate where the breaching party gains and leaves the injured party "with a defective performance and no opportunity to use ... return performance to obtain a substitute"). Traditional breach-of-contract remedies are inadequate because the value of water in a dry year is difficult to quantify and Nebraska's incentive to breach will be "very much larger than Kansas' loss, likely by more than several multiples." Rep. 178; *see also Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 751 (7th Cir. 1988) ("Not all breaches of contract are involuntary or otherwise efficient. Some are opportunistic; the promisor ... exploits the inadequacies of purely compensatory remedies"); Rest. (Third) of Restitution § 39, cmt. b (compensatory remedies inadequate because of "the likelihood of undercompensation in any case in which the promisee faces difficulty in proving or quantifying the extent of his injury").

b. Nebraska's Violation Of The Compact—Which Has The Status and Legal Effect Of A Statute—Warrants The Remedy Of Disgorgement.

The Compact "is not just a contract; it is a federal statute enacted by Congress ...." *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010). The Court has "comprehensive[] ... equitable jurisdiction" and broad "inherent equitable powers" to "disgorge profits, rents or property acquired in violation" of federal law. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-91 (1960) (same); Rest. (Third) of Restitution § 44 ("conscious interference" with "legally protected interests" warrants disgorgement). Where, as here, the public interest is involved, "those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398; *see Texas v. New Mexico*, 482 U.S. at 133 & n.8, 134 (the Court has power to craft a "fair and equitable solution that is consistent with the Compact terms," and is "not bound" by constraints that might apply in other cases).

Thus, in determining the appropriate remedies for Nebraska's knowing violation of the Compact, the Court should "act primarily to effectuate the polic[ies]" of the Compact and "to protect the public interest." *Porter*, 328 U.S. at 400. The Compact's fundamental purposes are to allocate equitably the waters in the Basin between Colorado, Nebraska and Kansas, to provide certainty regarding the States' rights and expectations, and to minimize conflict over the waters in the Basin. *See* Rep. App. B2. Indeed, as the previous

Master in this case recognized, "[t]his litigation is at least as much about ensuring compliance in the future as it is about damages for past violations." J4 at 45; *see also* Rep. 116 ("What Kansas is really concerned about, though, is how Nebraska will fare in future dry years"). Given Nebraska's economic incentives to violate the Compact, and its demonstrated tendency to do so, disgorging a significant portion of Nebraska's gains would promote the purposes of the Compact by "more definitely assur[ing]" Nebraska's "[f]uture compliance." *Porter*, 328 U.S. at 400.

c. Nebraska's Effective Taking Of Real Property—Downstream Water Rights—Warrants The Remedy Of Disgorgement.

Nebraska's knowing violations of the Compact not only breached a contract and violated a statute, but also involved the intentional taking of water with a consequent impact on downstream water rights—which are real property—a circumstance that the Master correctly recognized justifies the remedy of disgorgement. *See* Rep. 133. Nebraska has explicitly recognized a Nebraska water right for the Kansas Bostwick Irrigation District. FSS, § V.A.1., Rep. App. E35-E36. Water rights in an interstate river are real property rights; a proposition that this Court's cases recognize, the treatises endorse, and that is established under Kansas and Nebraska law. *See Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1954); *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945); 93 C.J.S. Waters § 2; 78 Am. Jur. 2d Waters § 6; Kan. Stat. Ann. § 82a-701(g); Neb. Rev. Stat. § 46-510.

Because Nebraska knowingly and effectively took real property for Nebraska's own benefit, Rep. 130, Nebraska should be "stripped of gains from unauthorized interference" with that property. Rest. (Third) of Restitution § 40 cmt. b (disgorgement of a "conscious wrongdoer's" gains). *See id.* § 51(3) ("conscious wrongdoer" is one who acts "with knowledge of the underlying wrong" or "despite a known risk that the conduct in question violates the rights" of another).

d. Nebraska's Breach Is Analogous To Breaching A Fiduciary Duty—Because Nebraska Is An Upstream State With Compact Obligations—Another Recognized Basis For Awarding Disgorgement.

The relationship between Nebraska and Kansas under the Compact is like a fiduciary relationship. Chad O. Dorr, Comment, *"Unless and Until it Proves to be Necessary": Applying Water Interest to Prevent Unjust Enrichment in Interstate Water Disputes*, 101 CAL. L. REV. 1763, 1773 (2013). Because Nebraska predominantly is upstream in the Basin relative to Kansas, the Compact necessarily requires Nebraska to steward water in Nebraska to ensure that Kansas receives its allocation. *Cf. Wyoming v. Colorado*, 259 U.S. 419, 484 (1922), *vacated on joint motion by parties*, 353 U.S. 953 (1957) (doctrine of appropriation "lays on each of these states a duty to exercise her right reasonably and in a manner calculated to conserve the common supply").

A recognized remedy against one who obtains a benefit "in breach of a fiduciary duty" or "in breach of

an equivalent duty imposed by a relation of trust and confidence" is disgorgement of gains to enforce "the special duties of the fiduciary." Rest. (Third) of Restitution § 43 & cmt. a, cmt. b.; *see Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (when a trustee breaches a fiduciary duty to beneficiaries, they may "maintain an action for ... disgorgement of proceeds (if [the property is] already disposed of)"). A violation of a fiduciary (or equivalent) duty may be presumed where, as here, circumstances pose a "great risk of violation." Rest. (Third) of Restitution § 43 cmt. b.

To be clear, Kansas is not arguing that the Compact literally creates a fiduciary duty or any implied duty. But the Compact requires Nebraska to manage its use of water in the Basin in part for the benefit of Kansas, a situation analogous to a fiduciary duty. *See* Tr. 574 (Schneider) (discussing the need to "shepherd" water to Kansas). Nebraska's failure to do so justifies disgorgement.

Kansas agrees with the Master's conclusion that Nebraska's knowing violations of the Compact warrant disgorgement, a conclusion on solid legal ground. Further, Kansas welcomes any amount of disgorgement. But Kansas takes exception to the Master's recommendation that Nebraska disgorge only a "small" portion of its gains. In part the Master seemed to justify that recommendation on the suggestion that a future violation would result in "a higher degree of disgorgement," Rep. 180, but his suggestion is both contrary to the Restatement disgorgement principles on which he relied and not reassuring to Kansas. The possibility of an effective

remedy in a later case (after many more years of costly litigation) is cold comfort to Kansas.

3. Nebraska Should Be Ordered To Pay Both The Loss To Kansas And A Significant Disgorgement Award.

The Master described his recommendations to award $3.7 million for the loss to Kansas and $1.8 million as disgorgement as resulting in a total amount that "moves substantially towards turning the actual recovery by Kansas, net of reasonable transaction costs, into an amount that approximates a full recovery for the harm suffered." Rep. 179. Kansas welcomes the Master's recommendation that disgorgement be awarded here, but the $1.8 million he recommends is so "small," Rep. Errata 2, that it is unlikely to accomplish the remedial and deterrent purposes of disgorgement.

There is no question that "Nebraska's gain was ... very much larger than Kansas' loss, *likely by more than several multiples.*" Rep. 178 (emphasis added). The logic of the Restatement (Third) of Restitution, on which the Master primarily relied, is to disgorge *all* ill-gotten gains. *See* Rest. *See* § 40 cmt. b ("conscious wrongdoer will be stripped of gains from unauthorized interference with another's property"); *see also* Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 561 (2006) (only "perfect disgorgement" would remove the economic incentive to breach the contract). Yet the Master recommended disgorging only "a small portion of the amount by which Nebraska's gain exceeds Kansas' loss"—$1.8 million. Rep. 179; Rep. Errata at 2.

The purpose of disgorgement—"to eliminate the possibility of profit from conscious wrongdoing"—is a "cornerstone of restitution." Rest. (Third) of Restitution § 51 cmt. e. That norm should be enforced here because the Compact delineates longstanding sovereign water rights and involves important public interests. Simply paying Kansas for any short-term loss Kansas can prove is insufficient, both in terms of protecting the public interest and in deterring future violations, as the Master correctly recognized. *See* Rep. 133 ("Few people in Kansas, for example, would agree to a return to the dust bowl in exchange for relocation to an economically equivalent residence and livelihood elsewhere"); *see also New Jersey v. New York*, 283 U.S. 336, 342 (1931) ("Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war.").

To be effective, any disgorgement remedy must neutralize, or at least greatly minimize, the economic incentive Nebraska has to violate the Compact. Unfortunately, here the Master's recommendation fails to accomplish that objective.

a. The Master Correctly Found That Kansas Lost At Least $3.7 Million From Nebraska Knowingly Violating The Compact.

The Master found it "indisputable" that Kansas suffered loss because of Nebraska's knowing violations of the Compact. Rep. 136. He estimated that Kansas lost approximately $3.7 million in 2012 dollars, Rep. 170-72, as a direct result of Nebraska taking 70,869 acre-feet Kansas' water. Rep. 2, 132, 170-72. The record

contains ample evidence that Kansas' losses were *at least* $3.7 million.

Expert witnesses for Kansas and Nebraska presented competing theories regarding the correct calculation of these damages, which the Master's Report addresses in detail, discussing their relative strengths and weaknesses. Rep. 136-70. Although Kansas calculated its direct damages to be greater than $3.7 million, Kansas, for its part, accepts the Master's finding that Kansas lost approximately $3.7 million as a result of Nebraska's Compact violations. Nebraska, on the other hand, has sought to minimize the harm its Compact violations caused in Kansas, even arguing that Kansas actually *benefitted* from Nebraska's breaches because Nebraskans may have spent some of their ill-gotten gains in Kansas. Rep. 163-64. The Master correctly rejected Nebraska's arguments as "neither understandable nor persuasive." Rep. 162.

As explained below, the Master's finding that Kansas suffered $3.7 million in harm is an appropriate starting point for determining the amount of disgorgement.

b. The Special Master Suggested That Nebraska May Have Gained At Least $25 Million From Its Violations.

Nebraska undoubtedly gained immensely from violating the Compact. By taking nearly 71,000 acre-feet of water in 2005 and 2006, Nebraska largely avoided the effects of two dry years at the expense of Kansas farmers. The very fact that these violations remain in litigation and without a remedy to Kansas nine years after the fact underscores a fundamental

point: absent significant disgorgement or other equally effective remedies, Kansas has no way to get what it wants most—the water the Compact allocates to Kansas.

Determining the appropriate amount of disgorgement requires first looking at Nebraska's gain, which the Master found difficult to measure. He rejected the parties' proposed calculations of Nebraska's gain, and ultimately did not make an explicit finding as to the total of Nebraska's gain. Nonetheless, he concluded that Nebraska's gains were many multiples of the loss to Kansas, and he suggested one way to think about calculating the total gain. In particular, using sale and lease transactions in Nebraska (based on evidence Nebraska presented), the Master valued the water Nebraska took at $362 per acre-foot of reduced Compact consumption. *See* Rep. App. J. He then multiplied that value by 70,869 acre-feet—Nebraska's total overuse—to suggest a possible "total gain to Nebraska of over $25 million," Rep. 177, or $25,654,578 to be exact.

Kansas estimated Nebraska's gain at closer to $60 million. *See* Rep. 172. But what is clear, and what the Master expressly found, is that the total gains to Nebraska were "more than several multiples" of the $3.7 million loss to Kansas.

c. Absent An Explicit Finding Of Nebraska's Total Gain, A Fair Disgorgement Award Would Be $11.1 Million.

Disgorgement of at least a significant portion of Nebraska's gains should be part of the remedy here.

The logic of the Restatement and other authorities on disgorgement, which is to eliminate the economic incentive to commit the wrong, counsels in favor of disgorging *all* of Nebraska's gains. Nevertheless, Kansas recognizes that the Master ultimately did not determine a total amount for Nebraska's gains. Further, this Court, exercising its broad equitable discretion, may opt for disgorgement of some amount less than Nebraska's full gains. Kansas thus suggests two guides that may assist the Court in exercising its discretion.

First, the Master recommends that "it makes ... sense for the Court to look at loss and gain as end points on a spectrum of damages, and then to calibrate the selection of a fair point on that spectrum in a manner that recognizes the numerous interests" at stake. Rep. 135. Kansas agrees. But what the Master actually recommends—$1.8 million—is less than ten percent of what even he suggested may have been Nebraska's total gains, and he provides little, if any, justification for choosing disgorgement of $1.8 million.

Second, in "calibrat[ing] the selection of a fair point on th[e] spectrum" of disgorgement, treble damages of $11.1 million would provide the Court a familiar landmark. *See, e.g.*, Clayton Act, 15 U.S.C. § 15; Lanham Act, 15 U.S.C. § 1117(b); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c); False Claims Act, 31 U.S.C. § 3729(a)(1)(G), (a)(2)(C). Treble damages are well-recognized as an appropriate deterrent and remedial measure in various contexts. *See, e.g.*, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985) (RICO); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614,

635 (1985) (antitrust); *cf. Brady v. Daly*, 175 U.S. 148, 154 (1899) (fixed damages under the Copyright Act account for "the difficulty of determining the amount of damages in copyright infringement cases").

Like disgorgement, treble damages are designed to "to deter violators and deprive them of the fruits of their illegality, and to compensate victims ... for their injuries." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 315 (1978); *see Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). Although disgorgement of the full amount of Nebraska's gains is warranted, treble damages of $11.1 million would provide a meaningful disgorgement award. Experience has shown that only litigation has any effect on Nebraska's compliance, because Nebraska stands to gain far more from non-compliance than it will ever have to pay Kansas in estimated losses. Thus, as the Master correctly recognized, a remedy based solely on Kansas' quantifiable losses will never ensure Compact compliance. Nor will collecting money at some unknown point in the distant future make Kansas and Kansans whole for water they lost in the past.

The "broader function of disgorgement ... is not merely to frustrate conscious wrongdoers but to reinforce the stability of the contract itself, enhancing the ability of the parties to negotiate for a contractual performance that may not be easily valued in money." Rest. (Third) of Restitution § 39 cmt. b. The incongruity between a *post hoc* compensatory damages remedy and actual compliance with one's obligations is at the very heart of disgorgement as a remedy: "Disgorgement yields a remedial equivalent after the fact, returning the breaching party to the same position that (enforced)

adherence to the contract would have produced." *Id.* So "[i]f a court with the benefit of hindsight would have granted a remedy by injunction or specific performance, restitution by the rule of this section is appropriate after the fact." *Id.* § 39 cmt. c.

In this original action, the Court sits as the trier of fact, not as an appellate court of last resort. In that role, there can be little doubt that if this Court were provided a timely opportunity to prevent an upstream State from violating its Compact obligations, the Court would enjoin such a breach, *ex ante*. Disgorgement here is thus the best equivalent remedy to a pre-breach injunction. To be effective, the ultimate disgorgement award must be substantial.

Kansas fully recognizes that this Court exercises considerable discretion in determining the remedies in original jurisdiction cases. Kansas begs the Court to use that discretion here to impose stronger remedies that will in fact be effective in ensuring Nebraska's compliance with the Compact. Kansas respectfully believes that such effective remedies would include an order that Nebraska comply with the Compact and the FSS, and an award of substantial disgorgement of Nebraska's ill-gotten gains from its past violations.

CONCLUSION

For the reasons set forth above, Kansas respectfully requests that the Court reject the Master's recommendations to reform the FSS accounting procedures, to deny an order to comply with the Compact and the FSS, and to award only $1.8 million as a disgorgement remedy. Kansas does not challenge the Master's other recommendations.

Respectfully submitted,

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APPENDIX

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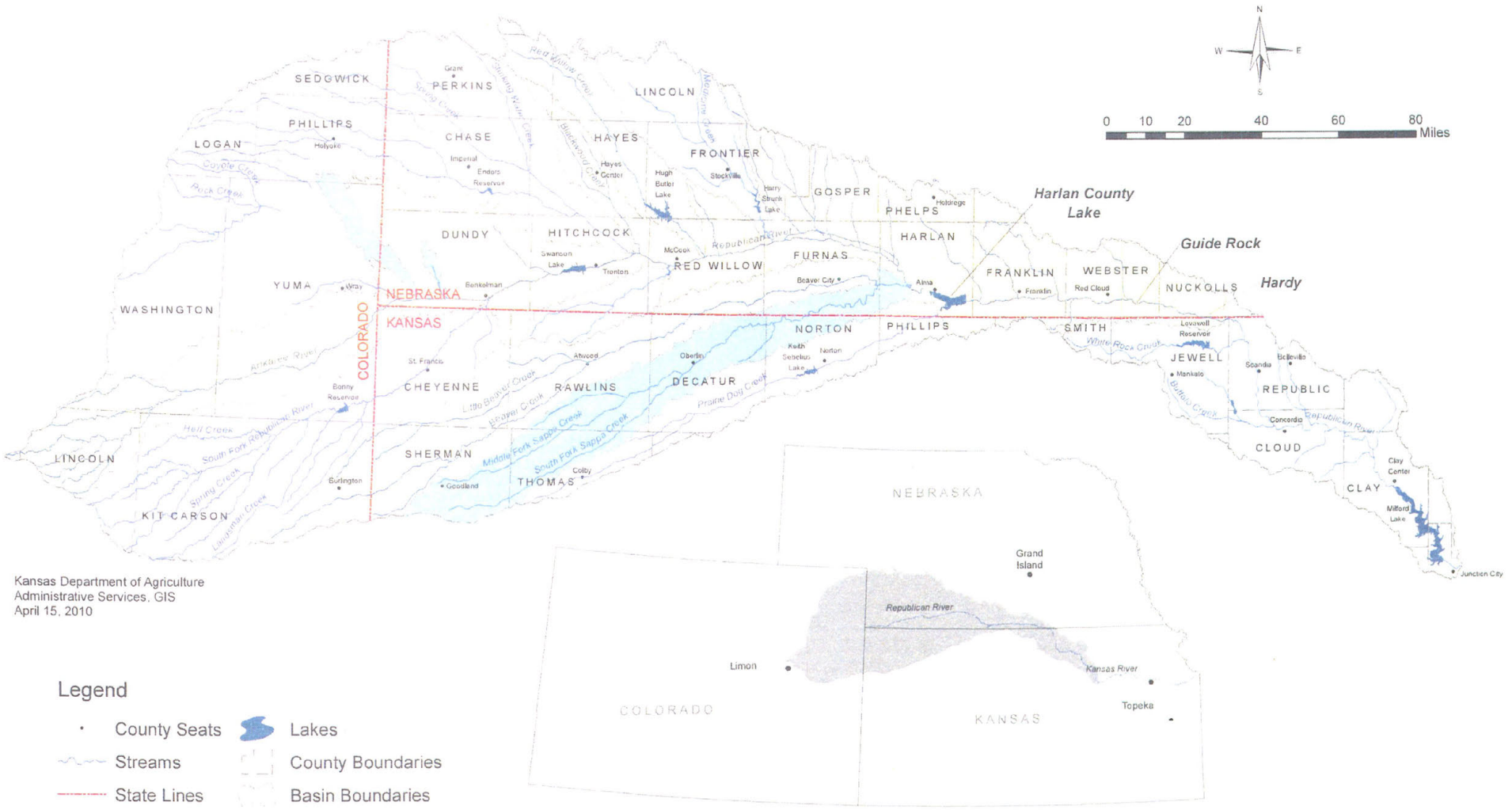
Map

[*Fold-Out Exhibit, see next page*]

APPENDIX 1

Republican River Basin



APPENDIX B

Table Of Exhibits, Pleadings, And Transcripts Cited In Kansas Exceptions And Brief

Table 1: Exhibits Cited In Kansas' Brief:

Exhibit Number	**Description**	**Page Cited In Brief**
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C01	Colorado's Report in Response to Nebraska Expert Report in Support of Counterclaim and Crossclaim: Nebraska's Proposed Changes to the RRCA Accounting Procedures, Willem A. Schreüder, Ph.D (March 15, 2012)	25, 26, 29
C03	*Kansas v. Nebraska and Colorado*, No. 126 Original—Expert Opinion Report Prepared on Behalf of the State of Colorado, James E. Slattery, P.E. (March 15, 2012)	27, 29

C05	Summary of Opinion to be Expressed at Trial, Basis Therefore, and any Data or Information Considered, Dick Wolfe, P.E., State Engineer, State of Colorado (March 15, 2012)	24, 29
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J5	Final Report of the Special Master with Certificate of Adoption of RRCA Groundwater Model, *Kansas v. Nebraska & Colorado*, No. 126, Orig. (September 17, 2003)	7, 8, 20, 23, 25, 27
J6	Transcript of Hearing Before Special Master McKusick, *Kansas v. Nebraska & Colorado*, No. 126, Orig. (January 6, 2003)	23, 26, 27

J7	Arbitrator's Final Decision, Non-Binding Arbitration Pursuant to Arbitration Agreement October 23, 2008 (June 30, 2009, Corrected July 13, 2009)	7, 9, 27, 28

Table 2: Pleadings Cited In Kansas' Brief:

Pleading	**Docket Number**	**Page Cited In Brief**
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Answer of the State of Colorado to the State of Nebraska's Amended Counterclaims and Cross-Claim (August 8, 2011)	69	10

Table 3: Transcripts Cited In Kansas' Brief:

Transcript	**Citation**	**Page Cited In Brief**
Transcript of Arbitration Proceedings before Karl J. Dreher, Arbitrator (March & April 2009)	J8	7, 8, 24, 26, 27, 28

Transcript of Proceedings before Hon. William J. Kayatta, Jr.(August 13 to August 23, 2012)	Tr.	7, 20, 24, 27, 28, 41, 52
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