

In the Supreme Court of the United States

STATE OF KANSAS, PLAINTIFF

v.

STATE OF NEBRASKA

AND

STATE OF COLORADO

ON MOTION TO DISMISS

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN OPPOSITION TO THE
MOTION TO DISMISS**

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QUESTION PRESENTED

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

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INTEREST OF THE UNITED STATES

The United States has a significant interest in the interpretation of the Republican River Compact. The States of Colorado, Kansas, and Nebraska entered into this Compact to apportion an interstate stream and to provide the basis for orderly planning and development of federal flood control and irrigation projects. Federal officials participated in the formulation of the Compact, and Congress ultimately approved the Compact pursuant to the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. This Court invited the Solicitor General to express the views of the United States in response to Kansas's motion for leave to file a bill of complaint, 119 S. Ct. 36 (1998), and the United States urged the Court to grant Nebraska leave to file a motion to dismiss in order to resolve the central issue of whether the Compact

restricts a compacting State's consumption of groundwater. See U.S. Amicus Br. 16-20 (Dec. 1998).

STATEMENT

The State of Kansas has filed an original action to enforce its rights under the Republican River Compact, which was approved by Congress in the Act of May 26, 1943, ch. 104, 57 Stat. 86. See Add. 1a-12a. The Compact allocates the "virgin water supply" of the Republican River Basin for use within the States of Colorado, Kansas, and Nebraska. See Compact Arts. II-IV (Add. 3a-7a). Kansas alleges that Nebraska has exceeded its Compact allocation by allowing pumping and consumption of groundwater that should be included as part of the allocated water supply. See Compl. para. 7, Br. in Support of Compl. 2. Nebraska has denied that allegation, see Neb. Answer para. 7, and has additionally argued, among other defenses and counterclaims, that the Compact does not restrict Nebraska's right to consume groundwater, *id.* para. 18. With the leave of this Court, Nebraska has filed a motion to dismiss, in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, limited to the question whether the Republican River Compact restricts a State's consumption of groundwater. See Neb. Br. in Support of Mot. to Dis. (Neb. Br.).

A. The Republican River Basin

The Republican River Basin is a 24,900 square mile watershed, approximately 430 miles in length, that encompasses parts of northeastern Colorado (7700 square miles), southwestern Nebraska (9700 square miles), and northern Kansas (7500 square miles). The Basin is drained by the Republican River, which is formed by the junction of two streams that originate in Colorado, the Arrikaree and North Fork Republican Rivers. From that originating point, near Haigler, Nebraska, the Republican River flows easterly through Nebraska and then southeasterly to Junction City, Kansas,

where it joins the Smoky Hill River to form the Kansas River. The Republican River Basin also includes numerous smaller streams that flow into the Republican River. The Basin, which is part of the Great Plains, is sparsely populated. It contains fertile farmland and typically receives from 18 to 30 inches of precipitation per year. See Bureau of Reclamation, U.S. Dept. of Interior, *Resource Management Assessment: Republican River Basin* 3-6, 43, 44-48 (July 1996) (A copy of this report has previously been lodged with the Clerk of the Court.).

During the 1930s, the United States, as well as the States of Colorado, Kansas, and Nebraska, developed an interest in harnessing the water resources of the Republican River Basin. The Basin had experienced an extended drought, interrupted in 1935 by a deadly and destructive flood. In light of those experiences, the federal and state governments examined whether the Republican River's spring flows could be impounded in reservoirs for flood control and released in the late summer and fall for irrigation. See H.R. Doc. No. 842, 76th Cong., 3d Sess. (1940) (Corp of Engineers' preliminary examination and survey of the Republican River); see also H.R. Doc. No. 195, 73d Cong., 2d Sess. 158-186 (1934) (Corps of Engineers' preliminary examination and survey of the Kansas River, discussing irrigation potential in the Republican River Basin). Based on the Corps of Engineers' recommendations in House Document No. 842, Congress authorized appropriations to construct the Harlan County Reservoir, in Nebraska, for flood control purposes. See Act of Aug. 18, 1941, ch. 377, 55 Stat. 646.

The Interior Department's Bureau of Reclamation, which has primary responsibility for irrigation projects, also studied the Republican River Basin, relying in part on the Corps of Engineers' examination set forth in House Document No. 195, *supra*. See Bureau of Reclamation, U.S. Dept. of Interior, *Project Investigations Report No. 41*, at 1-2 (1940). The Bureau concluded that federal irrigation pro-

jects were feasible. *Id.* at A-D (Synopsis). It indicated, however, that those projects should not be constructed until the three States had resolved the question of interstate allocation of the Basin's water resources. *Id.* at 1 ("To avoid expensive litigation as a result of possible conflicting uses of water in the various states, further developments for irrigation should be preceded by a three-state compact or other similar agreement on use of water."). Meanwhile, the States of Colorado, Kansas, and Nebraska, which had been discussing the possibility of an interstate agreement for a number of years, entered into negotiations to formulate an interstate compact.¹

B. The Compact Approval Process

In 1941, the States completed their negotiations and ratified a proposed compact, which they then submitted to Congress for approval in accordance with the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. See S. 1361, 77th Cong., 1st Sess. (1941); H.R. 5945, 77th Cong., 1st Sess.

¹ The States initially sought congressional authorization to enter into a compact before they had negotiated its terms. See H.R. J. Res. 406, 76th Cong., 3d Sess. (1940); see also 86 Cong. Rec. 58 (1940) (remarks of Rep. Curtis). The Department of War objected on the ground that Congress should not give its consent to a compact without knowing its content, and the House Committee on Flood Control responded by amending House Joint Resolution 406 to require congressional approval before the compact could take effect. See H.R. Rep. No. 2707, 76th Cong., 3d Sess. (1940). That resolution, however, did not pass, and the States entered into negotiations without advance congressional authorization or direct participation by the federal government. See 87 Cong. Rec. A2179 (1941) (remarks of Rep. Curtis). The state representatives met eight times between May 28, 1940, and March 19, 1941, to formulate a compact. See Glenn L. Parker, *The First Republican River Compact* (1943) (collecting minutes of the first through eighth meetings of the Compact Commissioners) (available from the U.S. Geological Survey Library, Dept. of the Interior: 798(200) R29 1943). We have reprinted the minutes of those eight meetings in Addendum B of this brief. See Add. 13a-42a. See also note 2, *infra*.

(1941); S. Rep. No. 841, 77th Cong., 1st Sess. (1941). The Department of the Interior and the Federal Power Commission objected to the compact primarily because it contained language curtailing federal jurisdiction over the Republican River. See *Republican River Compact: Hearings on H.R. 4647 and H.R. 5945 Before the House Comm. on Irrigation and Reclamation*, 77th Cong., 1st Sess. 1-4 (1941) (*H.R. 4647 Hearings*).

The House Committee on Irrigation and Reclamation amended the House bill in response to the federal agencies' objections, H.R. Rep. No. 1380, 77th Cong., 1st Sess. (1941), but the Senate rejected the House amendments, 87 Cong. Rec. at 9606-9623. The Senate's proposed legislation prevailed in conference, and the Senate and the House approved the conference proposal. See H.R. Conf. Rep. No. 1878, 77th Cong., 2d Sess. (1942); 88 Cong. Rec. at 2408-2409; *id.* at 2813-2814. The President, however, vetoed the bill on the basis of the federal agencies' objections. See *id.* at 3285-3286; H.R. Doc. No. 690, 77th Cong., 2d Sess. (1942) (veto message). The President explained that he "would be glad to approve a bill, which, in assenting to the compact, specifically reserves to the United States all of the rights and responsibilities which it now has in the use and control of the waters of the basin." *Id.* at 2.

Following the President's veto, Congress enacted legislation authorizing state commissioners to conduct further compact negotiations and providing for participation by a federal representative. See Act of Aug. 4, 1942, ch. 545, 56 Stat. 736. The state commissioners and the federal representative, Glenn L. Parker, met on two additional occasions and completed their negotiations on December 31, 1942.² The

² See Colorado Water Conservation Board, *The Republican River Compact* (1943) (collecting minutes of the ninth and tenth meetings of the Compact Commissioners) (available from the U.S. Geological Survey Library, Dept. of the Interior: 798(200) R29 1943). We have reprinted the

revised compact retained the water allocations of the previous compact, but added new provisions addressing the federal interests. Compare Add. 1a-12a with H.R. Doc. No. 690, *supra*, at 2-5. The state legislatures of Colorado, Kansas, and Nebraska promptly ratified the proposed compact. See Colo. Rev. Stat. Ann. §§ 37-67-101 *et seq.* (West 1990); Kan. Stat. Ann. § 82a-518 (1991); 2A Neb. Rev. Stat. App. § 1-106 (1995). The States then submitted the agreement to Congress for approval in accordance with the Compact Clause and the Act of Aug. 4, 1942. Congress held hearings, reported favorably on the proposed compact, and passed a bill granting congressional approval, which the President signed. Act of May 26, 1943, ch. 104, 57 Stat. 86.³

C. The Republican River Compact

The Republican River Compact consists of eleven articles that set out a mechanism for dividing the water supply of the Republican River Basin and address issues arising from the prescribed allocation.

Article I identifies the purposes of the Compact as follows: (1) "to provide for the most efficient use of the waters of the Republican River Basin"; (2) "to provide for an equitable division of such waters"; (3) "to remove all causes, present and future, which might lead to controversies"; (4) "to promote interstate comity"; (5) "to recognize that the most

minutes of those two meetings in Addendum B of this brief (Add. 13a-80a). See Add. 43a-80a. See also note 1, *supra*.

³ See S. 649, 78th Cong., 1st Sess. (1943); H.R. 1679, 78th Cong., 1st Sess. (1943); H.R. 2482, 78th Cong., 1st Sess. (1943); *Flood Control in the Basin of the Republican River: Hearing on S. 649 Before the Senate Comm. on Irrigation and Reclamation*, 78th Cong., 1st Sess. (1943) (S. 649 *Hearing*); *Republican River Compact: Hearings on H.R. 1679 and H.R. 2482 Before the House Comm. on Irrigation and Reclamation*, 78th Cong., 1st Sess. (1943) (*H.R. 1679 Hearings*); S. Rep. No. 152, 78th Cong., 1st Sess. (1943); H.R. Rep. No. 375, 78th Cong., 1st Sess. (1943); 89 Cong. Rec. 3549-3551 (1943) (Senate passage); *id.* at 4534-4536 (House passage); *id.* at 4907 (Presidential approval).

efficient utilization of the waters within the Basin is for beneficial consumptive use"; and (6) "to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods." Add. 2a.

Article II clarifies the meaning of relevant terms. It defines the "Basin" as "all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River and its tributaries, to its junction with the Smoky Hill River in Kansas," and incorporates by reference a map showing the Basin. Add. 3a. Article II defines the "Virgin Water Supply" to be "the water supply within the Basin undepleted by the activities of man." *Ibid.* And it correspondingly defines "Beneficial Consumptive Use" to be "that use by which the water supply of the Basin is consumed through the activities of man." *Ibid.*

Article III next specifies the "computed average annual virgin water supply" of a series of specific drainage areas within the Basin, which in aggregate amount to a total estimated water supply of 478,900 acre-feet per year. Add. 4a. Those computed averages, expressed in acre-feet of water, represent the historic virgin water supply originating above "the lowest crossing of the [Republican River] at the Nebraska-Kansas state line." *Ibid.* The Compact relies on those historic water supply averages as the basis for allocating future supplies among the States. Article III recognizes, however, that year-to-year flows may vary, and it accordingly states that "[s]hould the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased" proportionately. *Ibid.*

Article IV sets out the allocation for use in each State, expressed in acre-feet per year, for each of the drainage areas that Article III identifies. Add. 5a-7a. Article IV allocates the entire estimated virgin water supply set forth in Article III, giving Colorado an aggregate of 54,100 acre-

feet per year (Add. 5a), Kansas an aggregate of 190,300 acre-feet per year (Add. 5a-6a), and Nebraska an aggregate of 234,500 acre-feet per year (Add. 6a-7a). In addition, Article IV recognizes that Kansas is entitled to "the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line." Add. 6a.

Articles V through IX set forth various rights and obligations relating to the allocation. Add. 7a-8a. Article V recognizes the continuing vitality of a prior judgment of this Court, *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498 (1922), which involved a dispute between Colorado and a Nebraska irrigation district over the district's diversion of water in Colorado for use in Nebraska. See Add. 7a. Articles VI through VIII allow a downstream State (or its citizens) to construct water storage facilities in an upstream State, provided that certain conditions are observed. See Add. 7a-8a. Article IX obligates the States to administer the Compact through appropriate officials and "to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact." Add. 8a. It also provides that those officials "may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact," and it directs the United States Geological Survey to assist state officials in the collection and correlation of data. Add. 8a.

Articles X and XI address issues of federal authority that had prompted the President's veto of the previous compact proposal. Add. 9a-10a. Article X states that nothing in the Compact shall (a) impair federal rights, power, or jurisdiction over waters of the Basin; (b) subject the United States to state taxes or require the United States to reimburse the States for lost tax revenues resulting from federal water development projects; or (c) subject any property of the United States to state law that would not apply in the absence of the Compact. Add. 9a. Article XI

provides, in essence, that (a) any beneficial consumptive use by the United States within a State shall be charged against the State's compact allocation; (b) when exercising its paramount powers, the United States shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use is of paramount importance to the development of the Basin; and (c) the United States will respect valid, pre-existing beneficial consumptive uses. Add. 9a-10a.

D. Post-Compact Development

After approving the Compact, Congress authorized a system of federal water development and management projects as part of the Missouri River Basin Development Program. See Flood Control Act of 1944, ch. 665, § 9, 58 Stat. 891. This Program, also known as the Pick-Sloan Plan, authorizes the Army Corps of Engineers and the Bureau of Reclamation to construct and operate a coordinated system of reservoirs for multiple purposes, including irrigation, flood control, power development, fish and wildlife protection, and recreation. See S. Doc. No. 247, 78th Cong., 2d Sess. (1944).

Between 1945 and 1964, the United States constructed nine federal reservoirs in the Republican River Basin. The Corps of Engineers completed the previously authorized Harlan County Reservoir in Nebraska (see page 3, *supra*) and the Milford Reservoir in Kansas. The Bureau of Reclamation established four water resource development divisions, which include seven reservoirs in Kansas and Nebraska. The Bureau's projects, operated in conjunction with the Corps' Harlan County facilities, provide water to six irrigation districts and service 136,528 acres of farmland in the Republican River Basin. Those projects and the Corps' Harlan County and Milford projects also support a variety of other purposes, including flood control, recreation, and fish and wildlife needs. See *Resource Management Assessment: Republican River Basin, supra*, at 4-5, 13-23.

E. The Current Controversy

The Republican River Compact imposes limitations on the quantity of water that Colorado and Nebraska may divert from the Republican River and its tributaries, based on an apportionment of the "virgin water supply." In accordance with Article IX of the Compact, the States have designated officials to administer the Compact's allocation limits. Beginning in 1959, the States each appointed a representative to a three-member administrative body, designated the Republican River Compact Administration (RRCA), to compute the Basin's annual virgin water supply, which would in turn allow the States to determine, retrospectively, whether each State has stayed within its annual allocation. See RRCA, *First Annual Report for the Year 1960* (Apr. 4, 1961).⁴ The RRCA has since published and updated formulas for computing the virgin water supply and consumptive use. See RRCA, *Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use, August 19, 1982* (rev. June 1990) (*Formulas*).⁵

Since 1959, the States have debated the extent to which groundwater usage should be included in determining whether a State has exceeded its allocation. Kansas has asserted that groundwater usage should be included to the extent that it reduces the amount of water that would be available for diversion from the sources identified in the Compact, either by intercepting groundwater contributions to the surface flow of the Republican River and its tributaries, or by siphoning water from those sources. As part of its

⁴ The Compact itself does not establish the RRCA. The three States created the RRCA to carry out the powers conferred upon them by Article IX to administer the Compact through an appropriate official in each State.

⁵ Relevant excerpts of the RRCA's First Annual Report and the current formulas for calculating the virgin water supply are reproduced in Addenda C and D. See Add. 81a-102a, 103a-114a.

First Annual Report, the RRCA elected to include in its calculations groundwater that is pumped "from the alluvium along the stream channels." Committee on Procedure & Computation of Annual Virgin Water Supply, *Formulas for the Computation of Annual Virgin Water Supply* 3 (Apr. 4, 1961) (Add. 97a). The RRCA decided, however, not to include at that time pumping from upland areas known as "table-lands." *Ibid.* It concluded that "[t]he determination of the effect of pumping by 'table-land' wells on the flows of the streams in the Republican River Basin must await considerably more research and data regarding the character of the ground-water aquifers and the behavior of ground-water flow before even approximate information is available as to the monthly or annual effects on stream flows." *Ibid.*

Since publishing its First Annual Report, the RRCA has been unable to make further progress on the appropriate treatment of groundwater under the Compact. In recent years, Kansas and Nebraska have strongly disagreed on the issue. Because the three-member RRCA can adopt regulations only through "unanimous action," Compact Art. IX (Add. 8a), the RRCA has not resolved the dispute. Instead, it has retained, virtually verbatim, the statement on groundwater set forth in the 1961 report. See *Formulas* 7 (Add. 108a). Indeed, apparently as a result of this dispute between Kansas and Nebraska, the RRCA has ceased to calculate the virgin water supply and state compliance with allocation limits. Compare Neb. Br. in Opp. to Compl. 16-17 with Kan. Reply Br. 7-8; Neb. Counterclaims paras. 13, 20-23.

Kansas seeks relief from this Court. It asserts that Nebraska has violated the Compact by "allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries," which has "resulted in the appropriation by the State of Nebraska of more than its allocated equitable share of the waters of the Republican River" and has "deprived the State of Kansas of its full entitlement under the Compact." Compl.

para. 7; see Kan. Br. in Support of Compl. 12-14. Nebraska argues that Kansas's complaint should be dismissed because the Republican River Compact does not restrict a State's consumption of groundwater. Br. in Support of Mot. to Dis. 5-19.

SUMMARY OF ARGUMENT

Nebraska's motion to dismiss presents the core legal question that lies at the heart of this interstate dispute. Nebraska contends that, because the Republican River Compact does not expressly apportion groundwater, it places no restriction on a compacting State's groundwater usage. That contention is wrong.

The Compact apportions the Republican River Basin's virgin water supply by reference to the Basin's stream flows. As this Court's decisions recognize, science has established that stream flows consist of both surface runoff and groundwater discharge. See *Cappaert v. United States*, 426 U.S. 128, 142-143 (1976). That scientific principle was well established at the time that Colorado, Nebraska, and Kansas negotiated the Republican River Compact. Indeed, the minutes of the Compact negotiations show that the principle was specifically known to the state representatives who formulated the Compact.

Kansas is entitled to seek relief under the Compact on the theory that Nebraska must include within its allocation both direct diversions of the apportioned stream flows and also groundwater usage that diminishes those stream flows. That theory is consistent with the text of the Compact, which defines the virgin water supply as the "water supply within the Basin undepleted by the activities of man." Art. II (Add. 3a). It would be inequitable, and harmful to the investment-backed expectations of the downstream States, if an upstream State could augment its apportionment by simply intercepting a component of the allocated stream flows before those flows are measured. The compacting

States have demonstrated an understanding, in the course of administering the Compact, that their apportionments should take into account groundwater consumption that affects the virgin water supply. That construction of the Republican River Compact is consistent with the construction that this Court has given to the Arkansas River Compact in *Kansas v. Colorado*, No. 105, Original, and to the Pecos River Compact in *Texas v. New Mexico*, No. 65, Original.

Nebraska is accordingly mistaken in contending that the Republican River Compact places no limitations on groundwater consumption. Kansas is entitled to relief if it can demonstrate, as a factual matter, that Nebraska's consumption of groundwater has resulted in Nebraska's exceeding its Compact allocation. A Special Master should be appointed to address that factual question as well as the other outstanding issues in this original action.

ARGUMENT

THE REPUBLICAN RIVER COMPACT RESTRICTS A STATE'S CONSUMPTION OF GROUNDWATER THAT CONTRIBUTES TO THE "VIRGIN WATER SUPPLY" OF THE REPUBLICAN RIVER BASIN

Nebraska has moved to dismiss Kansas's complaint based on Nebraska's assertion that the Republican River Compact imposes no limits on a compacting State's consumption of groundwater. Nebraska's motion places before this Court a discrete and controlling question of law that has precipitated this original action. That question of law can be resolved at this preliminary stage of the litigation through the application of familiar principles of compact construction.⁶

⁶ For purposes of this motion, which is in the nature of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Kansas's factual allegations are assumed to be true. See, e.g., *Neizke v. Williams*, 490 U.S. 319, 326-327 (1989). As Nebraska correctly notes (Neb.

The Republican River Compact is a congressionally authorized interstate agreement and is therefore both a contract and a law of the United States. See *New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). As with other interstate compacts, if the text, read in light of its context, is unambiguous, it is conclusive. See, e.g., *New Jersey v. New York*, 523 U.S. at 811; *Kansas v. Colorado*, 514 U.S. 673, 690 (1995); *Texas v. New Mexico*, 462 U.S. 554, 567-568 (1983). If the text is ambiguous, the Court may consider other reliable indicia of the parties' intent, including the minutes of the compact negotiations and materials submitted to Congress in support of congressional approval. See e.g., *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5; *Texas v. New Mexico*, 462 U.S. at 568 n.14; *Arizona v. California*, 292 U.S. 341, 359-360 (1934). The Court may also consider the parties' practical construction and application of the Compact's terms. See, e.g., *Air France v. Saks*, 470 U.S. 392, 396 (1985); *New Jersey v. New York*, 523 U.S. at 830-831 (Scalia, J., dissenting).

Nebraska has correctly recognized that the Court's "first and last order of business" here is interpreting the Republican River Compact. Neb. Br. 6 (quoting *New Jersey v. New York*, 523 U.S. at 811). Nebraska is mistaken, however, in its understanding of the compact's terms. Nebraska argues that the Compact places no restriction on Nebraska's consumption of groundwater because: (1) the Compact does not apportion groundwater among the compacting States (Neb. Br. 5-10); (2) the Court and the parties have manifested an understanding that the Compact allocates surface water (*id.* at 11-15); and (3) the uncontroverted actions of the parties

Br. 5), the Court may also "tak[e] notice of items in the public record." *Papsan v. Allan*, 478 U.S. 265, 268 n.1 (1986). Those items include the official minutes of the Compact negotiations and the annual reports of the RRCA. See Add. 13a-114a.

demonstrate that they did not intend to apportion groundwater (*id.* at 16-19). Those contentions, however, do not answer Kansas's complaint.

Kansas seeks relief on the ground that the Republican River Compact allocates the "virgin water supply" of the Republican River Basin, which the Compact measures in terms of Basin stream flows. See Arts. II-IV (Add. 3a-7a). The United States agrees with Kansas that those stream flows necessarily consist of contributions from surface runoff and groundwater discharge. The Compact accordingly restricts a State's consumption of groundwater that diminishes the virgin water supply, and Kansas can obtain legal relief under the Compact if it can show, as a matter of fact, that Nebraska's groundwater consumption has that effect.

A. The Republican River Compact Apportions The Virgin Water Supply, Which Consists Of Stream Flows Originating From Both Surface Runoff And Groundwater Discharge

The Republican River Compact expressly apportions the "virgin water supply" of the Republican River Basin, which the Compact defines as the "the water supply within the Basin undepleted by the activities of man." Art. II (Add. 3a). There is no dispute among the parties that the Compact measures and allocates the virgin water supply on the basis of historic annual stream flows, measured in acre-feet per year. See Arts. III-IV (Add. 4a-7a). The minutes of the Compact negotiations indicate that the Compact Commissioners calculated the water supply and allocations on the basis of federal and state stream flow data. See Add. 20a, 21a-24a, 30a-31a. In that limited sense, Nebraska is correct that the Compact apportions surface water and does not identify groundwater, *in situ*, as a separately apportioned resource. But Nebraska's claim that the Compact does not apportion groundwater as such does not respond to Kansas's specific complaint.

Kansas's claim for relief is not predicated on the notion that the Compact directly apportions groundwater, as a distinct resource, among the compacting States. Kansas alleges, as the gravamen of its complaint, that Nebraska has taken more than its designated share of the virgin water supply by intercepting groundwater that is hydrologically connected to the flows of the Republican River and its tributaries. See Kan. Compl. paras. 5-9. Kansas's complaint rests on the understanding that stream flows consist of contributions from surface run-off and from groundwater discharge. Kansas essentially complains that the Republican River Basin's stream flows depend on groundwater contributions and that, if Nebraska intercepts those contributions through groundwater pumping and does not account for them as part of its Compact allocation, Nebraska will receive more than its allocated share of the virgin water supply. Kan. Br. in Support of Compl. 4-5, 8, 12-13.

Kansas's complaint is based on well-founded hydrological principles that this Court has previously recognized in adjudicating water-rights disputes. For example, the Court ruled in *Cappaert v. United States*, 426 U.S. 128 (1976), that the petitioners in that case had unlawfully depleted a federally reserved pool of surface water in Devil's Hole National Monument by pumping groundwater that supplied the pool. The Court observed that "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Id.* at 142 (quoting Charles E. Corker, *Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6*, at xxiv (1971)). The Court specifically relied on scientific knowledge establishing that groundwater pumping can diminish surface pools and stream flows. See *id.* at 142-143.

Kansas's complaint, like this Court's decision in *Cappaert*, relies on hydrological principles that have long been common knowledge among water resource managers. See Thomas C. Winter et al., *Ground Water and Surface Water: A Single*

Resource (1998) (U.S. Geological Survey (USGS) Circular 1139) (copies lodged with the Court).⁷ As the USGS has explained:

Streams interact with ground water in all types of landscapes. The interaction takes place in three basic ways: streams gain water from inflow of ground water through the streambed (gaining stream), they lose water to ground water by outflow through the streambed (losing stream), or they do both, gaining in some reaches and losing in other reaches. For ground water to discharge into a stream channel, the altitude of the water table in the vicinity of the stream must be higher than the altitude of the stream-water surface. Conversely, for surface water to seep to ground water, the altitude of the water table in the vicinity of the stream must be lower than the altitude of the stream-water surface.

Id. at 9 (parenthetical references to illustrations omitted). The USGS notes that "[g]round water contributes to streams in most physiographic and climatic settings." *Id.* at 12. See *id.* at 13, Fig. B-2 (providing ten examples from different geographic regions of the United States); see also *id.* at 38-41 (describing interactions in riverine terrain); *id.* at 57-61 (describing irrigation effects, with special reference to Nebraska).⁸ Numerous scientific and legal sources, including

⁷ The USGS's views are especially significant, because Article IX of the Compact provides that the USGS "shall collaborate with the officials of the States charged with administration of this compact in the execution of the duty of such officials in the collection, correlation, and publication of water facts necessary for the proper administration of the compact." Add.

^{8a.}

For simplicity of discussion, we assume that the streams within the Republican River Basin are "gaining" streams and that groundwater pumping could intercept groundwater discharge to streams. In doing so, we do not mean to preclude the possibility that the Republican River Basin may include "losing" streams and that groundwater pumping could

sources contemporaneous with and pre-dating the Republican River Compact, recognize those basic hydrological axioms. See, e.g., *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.*, 260 U.S. 596, 598 (1923); *Kansas v. Colorado*, 206 U.S. 46, 114-115 (1907).⁹

Indeed, Kansas relies on science that was not only well established at the time the Compact was approved, but was also specifically made known to the state commissioners who negotiated the Compact and calculated the virgin water supply. The minutes of the Compact negotiations record that, on January 27-28, 1941, the commissioners met with Harry P. Burleigh, of the United States Bureau of Agricultural Economics, who was preparing a study "to determine the extent and useability of the underground waters of the basin and the availability of lands which could be reclaimed thereby in tributary basin areas." Add. 28a. The minutes reveal that

[u]pon inquiry, Mr. Burleigh advised the Commission that all of the underground waters of the basin above Scandia, Kansas, are included in the total water supplies of the basin, as reflected in measurements of stream flow at Scandia and other points in the basin, and that any underground developments must be considered as

affect the virgin water supply by increasing the loss of stream flow into a groundwater aquifer.

⁹ See also, e.g., Robert J. Glennon & Thomas Maddock, III, *The Concept of Capture: The Hydrology and Law of Stream Aquifer Interactions*, in *Proceedings of the 43d Annual Rocky Mountain Mineral Law Institute 22-2* to 22-14 (1997); Charles E. Corker, *Groundwater Law, Management and Administration*, *National Water Commission Legal Study No. 6*, at xxiv, 58 (1971); Richard S. Harnsberger, *Nebraska Ground Water Problems*, 42 Neb. L. Rev. 721, 722-726 (1963); Harold E. Thomas, *The Conservation of Ground Water* 136-138 (1951); C.F. Tolman & Amy C. Stupp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 Or. L. Rev. 113, 115-125 (1942); Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 359-363 (1929).

reducing to that extent the amount of surface water available for use within the basin.

Id. at 29a. Thus, the commissioners were aware that the calculated stream flows included a groundwater discharge component and that groundwater pumping could deplete those stream flows.¹⁰

B. The Compact Requires A State To Include Within Its Allocation Of The Virgin Water Supply Groundwater Consumption That Diminishes Basin Stream Flows

Kansas contends that, because the Republican River Compact apportions the virgin water supply by allocating stream flows that include both surface runoff and groundwater discharge components, each State must include within its Compact allocation both direct diversions of the apportioned stream flows and also groundwater usage that diminishes those stream flows. That proposition is sound for three related reasons.

1. The text of the Compact indicates that a State's allocation of the virgin water supply includes groundwater consumption that reduces the Basin stream flows. The Compact defines the virgin water supply as the "water

¹⁰ The minutes also reveal that Mr. Burleigh had stated that "he was desirous of obtaining a statement from the Commission as to whether the amounts of underground waters he had determined would be feasibly possible of use, would, in the opinion of the Commission, exceed the allotment of water to each state which the Commission may have agreed upon." Add. 29a. Three days later, on behalf of the Commission, Commissioner Knapp of Kansas sent a letter to Mr. Burleigh stating that "the total estimated annual consumptive use of water is within the amount of the water supply available in the basin above Hardy" and that "the proposed allocations in each of the several states fall within the amounts which the Commission may see fit to allocate to each state." See Bureau of Agricultural Economics, Dept. of Agriculture, *Water Facilities Area Plan for Upper Republican River Basin in Nebraska, Kansas, and Colorado* 307 (June 1941) (reprinting the letter as Appendix VII of the "Burleigh Report").

supply within the Basin undepleted by the activities of man," and it defines the Basin inclusively as "all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas." Art. II (Add. 3a). Under those definitions, a State depletes the virgin water supply "through the activities of man" if it authorizes pumping of groundwater by its citizens that diminishes Basin stream flows. The State should therefore include such groundwater pumping as part of its Compact allocation.

Contrary to Nebraska's assertions (Neb. Br. 8), the Compact does not need to apportion groundwater directly, or even make specific reference to groundwater consumption, in order to create enforceable restrictions on groundwater consumption. See *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993). The Compact places limits on each State's consumption of the virgin water supply. If the Republican River Basin stream flows that comprise the virgin water supply consist in part of groundwater discharge, and a State allows its citizens to pump groundwater that reduces those stream flows, then the State must include that consumption as part of the State's allocation. Otherwise, the State will receive more than its allocated share of the virgin water supply.

The Compact's express statement of its "major purposes" bolsters that conclusion. Art. I (Add. 2a). Article I states that the Compact is intended "to provide for an equitable division of [the waters of the Republican River Basin]."

Ibid. The States agreed on the Compact allocations on the understanding that the Basin's undeveloped stream flows historically yielded a reliable quantity of water—the virgin water supply—that would be fairly shared among the States. If Congress and the compacting States sought an equitable division of the Basin waters, then they could not have intended that an upstream State would be entitled to augment its allocation by simply taking a portion of the virgin water supply before it reached the stream flow gauges. The

Compact division is not equitable if an upstream State can supplement its allocation at will by simply intercepting a component of the virgin water supply before it can be measured.

Article I also states that the Compact is intended "to remove all causes, present and future, which might lead to controversies" and "to promote interstate comity." Add. 2a. It is improbable that the Compact negotiators—who were aware of the relationship between stream flow and groundwater discharge (see pages 18-19, *supra*)—would have considered the Compact an effective means for avoiding future controversies if the upstream States remained at liberty to circumvent the precisely drawn allocations through the simple expedient of intercepting groundwater contributions. Congress and the States viewed the Compact as providing a comprehensive apportionment of all of the Basin's stream flows so that the federal government, the States, and individual water users could engage in orderly planning and development of irrigation works based on the knowledge of each State's water supply. If an upstream State could increase its allocation, to the detriment of the downstream States, through groundwater pumping, downstream expectations and investments—including congressionally funded flood control and reclamation projects—could be placed at risk.¹¹

¹¹ The legislative history of Congress's approval of the Compact supports that understanding. See, *e.g.*, S. Rep. No. 152, *supra*, at 2 ("The undertaking of irrigation projects in the past, and more so of those projects yet to be undertaken, depends on the soundness and the stability of the rights to the use of water in connection therewith."); S. 649 *Hearing* 13 (Sen. Butler) ("[T]o bring about that stabilization [of the farms in the region], the compact must be approved, permitting a legal division of the waters of the Republican and its tributaries, so that improvements may be encouraged and made possible."); *id.* at 33 (Neb. Compact Comm'r Gardner G. Scott) ("We, in Nebraska, are very anxious that this compact be ratified by the Congress, so that an orderly planning and development

2. The compacting States have confirmed through their practical construction of the Compact that, if a State authorizes groundwater pumping that measurably diminishes stream flow, those depletions should be charged against that State's allocation. The RRCA's formulas for computing the Basin's virgin water supply provide a clear expression of that understanding. As described above, the Compact authorizes the States to administer the Compact through the responsible officers in each State. See pages 8, 10, *supra*. The States formed the RRCA for that purpose in 1959, when water development had proceeded to a stage that required formal oversight of Compact compliance. The RRCA's First Annual Report, issued in 1961, included formulas for computing the virgin water supply. Add. 94a-102a. As Nebraska acknowledges (Neb. Br. 18-19), since the inception of the RRCA, those formulas have taken into account groundwater pumping "from the alluvium along the stream channels." See Add. 97a.

Nebraska suggests (Neb. Br. 18-19) that the RRCA's decision to include only alluvial groundwater (viz., ground-

and utilization of the waters of the basin can be had in the near future."); *id.* at 35 (M.O. Ryan, Executive Secretary, Republican Valley Conservation Association) ("[I]n the meantime, and before construction of projects can properly be undertaken which would draw upon water supplies originating in several States, it will be essential that a legal division of the waters of the streams be made for all time. * * * By this action, you will simplify all post-war developments in that fine agricultural area, and spare the residents limitless litigation and trouble in the years to come."); *H.R. 4617 Hearings* 7 (Rep. Carlson) ("The territory that is drained by this river needs the use of this water and these States thought, by getting together and working out this compact, they could reach an agreement on the use of this water so that there would be no conflict as to the construction of the various reclamation projects with any other uses it might be put to."); 87 Cong. Rec. at 9610 (Sen. Norris) ("This agreement, if put into effect, would permit the residents of each of the States in question to go ahead, with notice as to just how much water may be taken from every one of the streams.");

water pumped from the alluvium in the valley floor) reflects the States' understanding that the Compact, as a matter of law, excludes consideration of groundwater pumping from non-alluvial sources that nevertheless affect stream flows in the Basin. That suggestion is unsound. The RRCA's First Annual Report demonstrates that the RRCA was aware that groundwater pumping from non-alluvial sources could deplete Republican River Basin stream flows. See Add. 87a-88a, 90a-91a. The RRCA decided to include only alluvial groundwater pumping in its virgin water supply formulas because the RRCA did not have sufficient data, at that time, to estimate the effects of non-alluvial groundwater pumping. See *id.*; see also Add. 97a-98a.¹²

¹² The RRCA's First Annual Report explains that the RRCA appointed a Committee on Procedure and Computation of Annual Virgin Water Supply to develop formulas for computing the virgin water supply. See Add. 83a-84a. That Committee recognized in its first progress report that, as a general matter, groundwater use could deplete the virgin water supply. Add. 90a-91a. It nevertheless recommended that "only the wells in the valley floor of the main Republican River and of its tributaries be considered as depleting the water supply of the Republican River, for present use in the Virgin Flow Formula." *Ibid.* The Committee reasoned: Apparently the determination of the effect of pumping by "table-land" wells on the flow of the streams in the Republican River Basin must await considerably more research and data regarding the character of the groundwater aquifer and the behavior of groundwater flow before even approximate information is available as to the monthly or annual effects on stream flow. * * *

Add. 91a; see also Add. 93a ("Any accurate determination of the virgin water supply in the Republican River Basin is dependent upon a considerable improvement in obtaining data for diversions by stream pumps and by pumping of groundwater from wells."). The Committee ultimately determined that its formulas should take account of only groundwater pumping "from the alluvium along the stream channels," repeating verbatim its previous observation that the effects of groundwater pumping from other sources requires "more research and data." Add. 97a. See page 11, *supra*.

The RRCA plainly understood that the Compact's apportionment of the virgin water supply could place limitations on a State's consumption of hydraulically connected groundwater. Since 1961, the RRCA has included in its calculation of the virgin water supply alluvial groundwater pumping that depletes Basin stream flows. See Add. 108a (*Formulas*). The RRCA's failure to revise its formulas to include groundwater pumping from other sources does not reflect a retreat from the general principle that the RRCA recognized at its inception, nor does it reflect a consensus that non-alluvial groundwater pumping has no effect on stream flows. See Kan. Br. in Support of Compl. 8-9. Rather, the RRCA has retained the 1961 methodology because the RRCA can act only through the unanimous action of the state representatives, and Nebraska has steadfastly refused to agree to revise the formulas to take into account the effects of non-alluvial groundwater pumping. See *ibid*.

3. Finally, there is nothing novel in recognizing that an interstate compact that apportions stream flows can limit a compacting State's groundwater usage. This Court has twice faced that question. In *Kansas v. Colorado*, No. 105, Original, the Court adopted the Special Master's untested recommendation that the Court find that Colorado had violated the Arkansas River Compact, ch. 155, 63 Stat. 145, through excessive groundwater pumping. 514 U.S. 673 (1995). And in *Texas v. New Mexico*, No. 65, Original, the Court issued a series of rulings respecting the Pecos River Compact, ch. 184, 63 Stat. 159, which reflected the understanding that the Compact limited New Mexico's right to consume groundwater. See 446 U.S. 540 (1980); 462 U.S. 554 (1983); 482 U.S. 124 (1987). In each of those original actions, the Compact in question did not expressly apportion groundwater.

This Court's decision in *Kansas v. Colorado* is most directly on point. The Arkansas River Compact, like the Republican River Compact, does not explicitly address

groundwater. Rather, the relevant Compact provision, Article IV-D, recites that States may engage in future water resource development, provided that the waters of the Arkansas River "shall not be materially depleted in usable quantity or availability" for water users in the compacting States. See 63 Stat. 147. The Master recognized the hydrological relationship between stream flow and groundwater, see 1 Report of Special Master, No. 105, Original, at 37 (July 1994), and he concluded that the Arkansas River Compact is intended to prevent "material depletion caused by any increased consumptive use, including the construction of new wells or increased levels of pumping from precompact wells." *Id.* at 108; see also 2 *id.* at 194. The Master accordingly recommended that the Court find Colorado liable for pumping groundwater that materially depleted the usable flow. *Id.* at 263. Although Colorado filed a number of exceptions to the Master's recommendations, it did not challenge the Master's conclusion that the Arkansas River Compact restricts groundwater consumption that materially depletes the stream flow. See 514 U.S. at 680-681. The Court expressly agreed with the Master's conclusion that "new wells, the replacement of centrifugal with turbine pumps, and increased pumping from [pre-Compact] wells all come within [Article IV-D]." 514 U.S. at 691.

In *Texas v. New Mexico*, Texas asserted that New Mexico had violated Article III of the Pecos River Compact, which states that "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." 63 Stat. 161. See 462 U.S. at 559-560. Although the parties joined issue on the meaning of the "1947 condition," see 446 U.S. at 541, and the proper means for measuring depletions, see 462 U.S. at 571-574, the parties did not question that New Mexico's groundwater consumption could "deplete by man's activities the flow of the Pecos River at

the New Mexico-Texas state line," 63 Stat. 161; see 462 U.S. at 557 & n.2, 559, and the methodology that the Court approved for making that determination took into account groundwater consumption, see 467 U.S. 1238 (1984); 482 U.S. at 127-128.¹³

Nebraska suggests (Neb. Br. 10) that this Court's decisions in *Kansas v. Colorado* and *Texas v. New Mexico* have little relevance because neither Colorado nor New Mexico challenged the various Masters' implicit and explicit determinations that the Compacts at issue restricted groundwater consumption. Those States, however, apparently declined to challenge those determinations because the challenges would be of no avail: The Compacts at issue in those cases

¹³ The Court approved use of a corrected version of the "inflow-outflow methodology," which relies on a water balance of inflows to and outflows from the Pecos River, to calculate Texas's entitlement. 482 U.S. at 127; 462 U.S. at 571-574. That methodology includes consideration of groundwater discharge into the Pecos River and groundwater pumping that depletes the stream flow. See, e.g., 462 U.S. at 558-559 & n.5; Engineering Advisory Comm'n, Pecos River Compact Comm'n, *Manual of Inflow-Outflow Methods of Measuring Changes in Stream-Flow Depletion*, reprinted in S. Doc. No. 109, 81st Cong., 1st Sess. 149 (1949) ("Everything that happens in the basin between the index inflow gaging stations and the outflow station which changes the amount of water depletion occurring in the basin between those points is measured by the inflow-outflow method."); *id.* at 159 ("change in the inflow-outflow relation can be used as a measure of additional depletion of groundwater"). The Masters' reports in No. 65, Original, reveal that the parties recognized that the groundwater component of the stream flow was a central issue in the case. See, e.g., Report of Special Master on Obligation of New Mexico to Texas under the Pecos River Compact 44 (Sept. 7, 1979) ("the heart of this controversy is the pumping of ground water in New Mexico"); Report and Recommendations 6 (Sept. 10, 1982) (citing a 1942 report noting that the Pecos River receives water from "spring and other ground waters"); Report and Recommendations E-10 to E-15 (Jan. 16, 1984) (consideration of specific groundwater inflows); Report 35 (July 1986) (noting that "New Mexico has other means of meeting a delivery obligation than curtailment of pumpage").

obviously do place limits groundwater consumption.¹⁴ The same is true here. Nebraska has simply taken a position in this litigation that is inconsistent with the physical realities of stream-groundwater interactions.¹⁵

C. **Kansas Is Entitled to Relief Under The Compact If It Can Demonstrate That Nebraska's Consumption Of Groundwater Has Resulted In Nebraska's Exceeding Its Compact Allocation**

As the foregoing analysis establishes, Nebraska's basic legal challenge to Kansas's complaint is unsound. Nebraska's objection that the Republican River Compact does not apportion groundwater as such (Neb. Br. 6-10) is of no moment. The Compact *does* apportion the virgin water supply, and Kansas is entitled to seek legal relief if Nebraska has taken more than its allocated share of that supply, whether through direct diversion or through groundwater pumping that diminishes stream flows. Nebraska's objection

¹⁴ For example, in the case of the Arkansas River Compact, one commentator had noted, as early as 1951, that "the flow of the Arkansas River from Colorado into Kansas is modified substantially by ground-water development. Although the Arkansas River Compact of 1949 does not mention ground water, its effective operation depends upon an adequate knowledge of the ground-water hydrology of the watershed in Colorado." Thomas, *supra*, at 156. Similarly, in the case of the Pecos River Compact, the apportionment methodology necessarily requires consideration of groundwater effects on stream flows. See note 13, *supra*.

¹⁵ Nebraska's position is also inconsistent with the position that it has taken in *Nebraska v. Wyoming*, No. 108, Original. In that case, Nebraska has sued Wyoming, arguing, *inter alia*, that this Court's North Platte Decree, 325 U.S. 665 (1945), which apportions the flow of the North Platte River but makes no mention of groundwater consumption, nevertheless restricts Wyoming's groundwater usage. See 515 U.S. 1, 14 (1995). Nebraska has taken one view of stream-groundwater interactions when it is a downstream plaintiff, and a different view when it is an upstream defendant. Wyoming, for its part, has conceded that "groundwater pumping in Wyoming can and does in fact deplete surface water flows in the North Platte River." *Ibid.*

that the Court and the parties have made reference to the Compact as an agreement respecting surface water (Neb. Br. 11-15) is likewise immaterial. There is nothing inconsistent between Kansas's claim for relief and, for example, this Court's observation in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982), that the Republican River Compact is an "agreement among States regarding rights to surface water," because Kansas claims that Nebraska has depleted surface stream flows through excessive groundwater consumption. Nebraska's assertion (Neb. Br. 16-19) that the States could not have intended to apportion groundwater is also irrelevant, because Kansas's complaint does not depend on whether the Compact apportioned groundwater in situ.¹⁶

¹⁶ We note, in particular, that there is no merit to Nebraska's assertion (Neb. Br. 16) that the compacting States could not have intended to regulate groundwater consumption because the States, at the time of the Compact, had not yet subjected their citizens to integrated regulation of stream flows and groundwater consumption. The Compact negotiators expressly stated that their deliberations were "guided by [this Court's decision in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938)], establishing the rights of states to make an equitable division of the waters of an interstate stream, regardless of its effect upon the presumably vested interests in either of the signatory states." Add. 23a. See also *Nebraska v. Wyoming*, 515 U.S. at 22. Kansas and Colorado have each enacted legislation providing for integrated regulation. See Kan. Ann. Stat. § 82a-703 (1989); Colo. Rev. Stat. §§ 37-90-101 *et seq.* (West Supp. 1996). By contrast, commentators have noted that Nebraska has been slow to adopt an integrated management regime. See Glennon & Maddock, *supra*, at 22-19 to 22-21; Stephen D. Mossman, "Whiskey is for Drinkin' But Water is for Fightin' About": A First-Hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108, 30 Creighton L. Rev. 67 (1996); Hansberger, *supra*, at 741-744. Nebraska's resistance to adoption of integrated regulation within its borders should not excuse it from complying with an interstate compact premised on hydrological principles underlying such regulation—particularly where Nebraska has previously sued a neigh-

Although Kansas's complaint is properly founded on the legal theory that the Republican River Compact can restrict a compacting State's consumption of groundwater, Kansas will be entitled to relief only if it can establish the factual elements of its claim. In particular, Kansas bears the burden of showing that Nebraska has in fact diminished the virgin water supply through groundwater pumping. To make that showing, Kansas must demonstrate the hydrological connection between Basin stream flows and groundwater pumping, and Kansas must establish the net stream flow losses resulting from groundwater consumption. Those factual issues, as well as the other outstanding issues in this original action, should be addressed, in the first instance, by a Special Master.¹⁷

boring State to impose those principles in another interstate apportionment. See *Nebraska v. Wyoming*, 515 U.S. at 14. See note 15, *supra*.

¹⁷ We note that original actions involving interstate water disputes have frequently proceeded at a slow pace. See *Texas v. New Mexico*, No. 65, Original (motion to file complaint granted in 1975 (421 U.S. 927)), decree entered in 1987 (482 U.S. 124); *Kansas v. Colorado*, No. 105, Original (motion to file complaint granted in 1986 (475 U.S. 1079)), remanded for trial on remedy in 1995 (514 U.S. at 694); *Nebraska v. Wyoming*, No. 108, Original (motion to file petition granted in 1987 (479 U.S. 1051)), motions to amend pleadings granted in part in 1995 (515 U.S. at 4). The slow progress may be due, to some degree, to the scope and complexity of the cases. But inordinate delays have also resulted from the parties' failure to define precisely, at the outset of the litigation, the specific issues in controversy.

The pleadings can play an important role in identifying the issues. To ensure that the Court maintains control over the scope of the litigation, the Court should require that a party obtain leave of the Court before filing counterclaims. See *Nebraska v. Wyoming*, 515 U.S. at 8-9; see also 481 U.S. 1011 (1987) (granting Wyoming leave to file a counterclaim). The Court may, of course, direct the Master to make a recommendation whether proposed counterclaims present appropriate matters for the exercise of original jurisdiction. See *United States v. Alaska*, 445 U.S. 914 (1980). The Court may also direct the Master to recommend rulings on affirmative defenses that are amenable to disposition through traditional

CONCLUSION

The motion to dismiss should be denied.
Respectfully submitted.

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pre-trial mechanisms, compare Fed. R. Civ. P. 12, 56, as a means of resolving the dispute or narrowing the issues for trial. See generally *Nebraska v. Wyoming*, 515 U.S. at 5-6; 507 U.S. 584 (1993); see also *United States v. Alaska*, 503 U.S. 569 (1992) (resolving dispute through summary judgment on a stipulated record).

The Master should insist that the parties confer at the outset to reach agreement on a statement of the precise issues that are in dispute. See, e.g., Report of the Special Master in *United States v. Alaska*, No. 84, Original, at 7 & App. A (1996) (describing the parties' submission of a "Joint Statement of Questions Presented and Contentions of the Parties"). That statement can then guide the course of the litigation (including the scope of discovery) and provide the basis for continuing negotiations aimed at resolving the controversy. The Court has repeatedly "counseled States engaged in litigation with one another before this Court that their dispute 'is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court, however constituted.'" *Texas v. New Mexico*, 462 U.S. at 575. The Master should accordingly be receptive to mechanisms, such as consensual mediation, that may aid the States in reaching a negotiated solution.

ADDENDUM A

Act of May 26, 1943, ch. 104, 57 Stat. 86

AN ACT

To grant the consent of Congress to a compact entered into by the States of Colorado, Kansas, and Nebraska relating to the waters of the Republican River Basin, to make provisions concerning the exercise of Federal jurisdiction as to those waters, to promote flood control in the Basin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the compact authorized by the Act entitled "An Act granting the consent of Congress to the States of Colorado, Kansas, and Nebraska to negotiate and enter into a compact for the division of the waters of the Republican River", approved August 4, 1942. (Public Law 696, Seventy-seventh Congress; 56 Stat. 736), signed by the commissioners for the States of Colorado, Kansas, and Nebraska at Lincoln, Nebraska, on December 31, 1942, and thereafter ratified by the Legislatures of the States of Colorado, Kansas, and Nebraska, which compact reads as follows:

"REPUBLICAN RIVER COMPACT

"The States of Colorado, Kansas, and Nebraska, parties signatory to this compact (hereinafter referred to as Colorado, Kansas, and Nebraska, respectively, or individually as a State, or collectively as the States), having resolved to conclude a compact with respect to the waters of the Republican River Basin, and being duly authorized therefor by the Act of the Congress of the United States of America, approved August 4, 1942, (Public No. 696, 77th Congress, Chapter 545, 2nd Session) and pursuant to Acts of