

No. 126, Original

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF KANSAS,

Plaintiff,

vs.

STATE OF NEBRASKA and STATE OF COLORADO,

Defendants.

**COLGRADO'S RESPONSE TO NEBRASKA'S
MOTION TO DISMISS**

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INTRODUCTION

This is an action by the State of Kansas against the State of Nebraska and the State of Colorado. Kansas alleges that Nebraska's unregulated pumping of ground water in the Republican River basin violates the Republican River Compact ("Compact"). Upon an order from this Court, Nebraska filed a motion to dismiss on the grounds that the Compact does not apportion or allocate ground water in the Republican River basin. The question presented to this Court is: "Does the Republican River Compact restrict a State's consumption of ground water?" (Court's Order, June 21, 1999.)

As Nebraska's brief recognizes, there are two types of ground water within the geographic boundaries of the Republican River basin: alluvial ground water and Ogallala Aquifer ground water. Nebraska's Brief in Support of

Motion to Dismiss ("Nebraska Brief") at 18-19. Nebraska argues that Ogallala ground water was not included in the Compact, but virtually concedes that alluvial ground water was. *Id.* Colorado concurs, believing that those who drafted and ratified the Compact intended to include alluvial, but not Ogallala, ground water.

STATEMENT OF FACTS

Colorado, Kansas, and Nebraska determined that a compact was necessary to equitably allocate the waters of the Republican River and designated commissioners for the purpose of drafting a compact. The commissioners (M.C. Hinderlider for Colorado, George S. Knapp for Kansas, and A.C. Tilley and later Wardner G. Scott for Nebraska) met eight times between May 26, 1940 and March 19, 1941. The first Republican River Compact was signed by each of the participating states and consented to by Congress in 1941, but vetoed by President Roosevelt because of the lack of federal representation in the negotiations.

After the veto, Glenn Parker, Chief Hydrologist U.S. Geological Survey, was appointed to the commission as the federal representative. The second draft compact, with provisions intended to correlate federal and state interests without impairing the underlying federal jurisdiction, was signed by the commissioners on December 31, 1942, and subsequently ratified by the compacting states. Congress consented to the Compact and President Roosevelt approved it on May 26, 1943. Pub. Law 60, 78th Congress, 57 Stat. 86. The major change between the two compacts was language addressing rights of the federal government. The allocations of water and much of the original language were unchanged between the 1941 and the 1943 versions.

SUMMARY OF ARGUMENT

Nebraska argues that, as a matter of law, the Compact does not restrict ground water consumption for three reasons:

(1) the Compact, by its plain and unambiguous terms, does not apportion or allocate consumption of any ground water; (2) this Court and the Compact states have previously interpreted the Compact as an agreement regarding rights to only surface water as distinguished from ground water; and (3) the parties did not intend to apportion any ground water under the Compact.

Nebraska Brief at 5-6. Nebraska is wrong on each count.

First, the water supply allocated by the Compact is not clearly limited to surface water and does not specifically exclude ground water. Thus, the Compact is ambiguous and the Court must look at the extrinsic evidence contained in the historical documents surrounding the formation of the Compact to determine the states' intent.

As to the second and third points, the historical documents show that the Compact commissioners intended to apportion alluvial ground water and the states have consistently administered the Compact to include the beneficial consumptive use of alluvial ground water in each state's allocation. This Court has not contradicted the states' interpretation.

While the Republican River Compact allocates the surface water and alluvial ground water of the Republican River Basin, it does not allocate or address water in the enormous, multi-state Ogallala Aquifer. The Compact sets forth the precise geographical boundaries of the Republican River basin. The Ogallala Aquifer boundaries extend far beyond the area covered by the Compact. The Compact specifically defines the full amount of water allocated, yet the Ogallala Aquifer contains vastly more water than the amount allocated by the Compact. Finally, Ogallala water has been

specifically excluded from the computations used to administer the Compact.

ARGUMENT

I. THE REPUBLICAN RIVER COMPACT ALLOCATES GROUND WATER

A. The language of the Compact is ambiguous.

A compact approved by Congress becomes a law of the United States, but is, after all, a contract, and remains a legal document that must be construed and applied in accordance with its terms. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Ambiguity exists where the terms of the contract are reasonably susceptible to more than one interpretation. *Papago Tribal Utility Authority v. Federal Energy Regulatory Comm.*, 723 F.2d 950 (D.C. 1983) *cert. denied*, 467 U.S. 1241 (1984). The United States Supreme Court has the final power to pass upon the meaning and validity of compacts. U.S.C. Const. art. 1, § 10, cl. 3., *State ex rel. Dyer et al. v. Sims*, 341 U.S. 22, 28 (1951). This Court has previously determined the meaning of ambiguous words in interstate compacts. In *Oklahoma v. New Mexico*, 501 U.S. 221, 232-236 (1991), the Court found the word “originating” ambiguous. The Court determined the meaning of the word by reviewing numerous historical documents concerning the formation of the compact and the intent of the states. *Id.* at 234.

The plain language of the Compact neither specifically excludes nor includes ground water. The Compact allocates the “Virgin Water Supply,” defined as “the water supply within the Basin undepleted by the activities of man.” Art. II. The Compact states, “[t]he specific allocations in acre-feet hereinafter made to each

State are derived from the computed average annual Virgin Water Supply originating in the following designated drainage basins or parts thereof in the amounts shown." Art. III. The Compact then lists specific acre-feet amounts for specific drainage basins, rather than specific surface streams.

Article IV contains the specific allocations of beneficial consumptive use for each state, in acre-feet amounts, "derived from the sources . . . specified." The Compact's definition of "Beneficial Consumptive Use" refers to "the water supply of the basin," again without distinguishing between surface water and ground water. Art. II.

Nebraska's argument implies that "water supply" has universally been understood to mean **only** surface water, which is simply not supportable. As early as 1907, this Court recognized:

If the bed of a stream is not solid rock, but earth, through which water will percolate, . . . undoubtedly water will be found many feet below the surface, and the lighter the soil the more easily will it find its way downward and the more water will be discoverable by wells or other modes of exploring the subsurface.

Kansas v. Colorado, 206 U.S. 46, 114 (1907). Contrary to Nebraska's assertion that the Compact's failure to use the term ground water does not create an ambiguity, the language of the Compact is ambiguous, and further information is necessary to interpret it.

B. The commissioners intended to include alluvial ground water in the original allocation of the waters of the Republican River basin.

When the meaning of a term within a Compact is ambiguous, it is appropriate to look to extrinsic evidence of the negotiation history in order to interpret the term. *See, e.g., Oklahoma, v. New Mexico*, 501 U.S. 221, 232-36 (1991).

The Republican River Compact does not explicitly include or exclude ground water in determining the virgin water supply of the basin or each state's allocation of the water supply based on beneficial consumptive use. The historical evidence shows that alluvial ground water was included in both of these determinations. Three documents conclusively demonstrate that such ground water was included in the Compact: (1) the Explanatory Statement and Report to the Thirty-fourth General Assembly by M.C. Hinderlider, the Republican River Compact Commissioner for Colorado, signed December 31, 1942; (2) the March 20, 1941 transmittal letter from M.C. Hinderlider, accompanying the transmission of the first compact to the governor of Colorado; and (3) the January 9, 1943 transmittal letter from M.C. Hinderlider to Governor Carr of Colorado, accompanying the transmission of the second compact (appendix A-1, A-11, and A-14).

In Commissioner Hinderlider's report to Colorado's general assembly in support of ratification of the Compact, he stated:

It is believed that this Compact equitably apportions the total available average annual virgin water supplies of the Basin, **both surface and underground**, among the three signatory States, in such manner and in such

amounts as will not only protect all existing uses within the Basin, but will insure, insofar as possible that the available water supplies when regulated by storage works, will adequately meet future requirements for domestic, irrigation, industrial and recreational purposes, and that it affords ample opportunity for multiple use development and flood control.

Explanatory Statement and Report to the Thirty-fourth General Assembly, Colorado, by M.C. Hinderlider, (1942) (appendix A-1) (emphasis added). Hinderlider sent his report to both commissioners and Glenn Parker, the federal representative, and requested observations or criticisms on his explanatory statement. Letter from M.C. Hinderlider to Glenn L. Parker, Chief Engineer, USGS (February 5, 1943) (appendix A-18). The commissioners would have objected to the inclusion of ground water had that been contrary to their intent.

In his March 20, 1941 transmittal letter to the governor, Commissioner Hinderlider again stated that the Compact allocations included such ground water:

In its deliberations, the Commission gave careful consideration to the report of the Division Engineer, . . . also to a voluminous report of the Bureau of Agricultural Economics of the U.S. Department of Agriculture on the underground water resources of the Republican River basin and their availability for beneficial application to the future development of the basin. . . . **The compact allocates to Colorado, . . . all of the surface and underground water supplies originating in Colorado within the Frenchmen and Red Willow Creek drainage basins; . . .**

Letter from M.C. Hinderlider, to Governor Carr of Colorado (March 20, 1941) (appendix A-11) (emphasis added).

Commissioner Hinderlider's transmittal letter of January 9, 1943, was equally clear, stating, "The Compact allocates for beneficial consumptive use in Colorado, annually, a total of 54,100 acre feet of water **These allocations include not only surface, but also sub-surface, or underground water supplies.**" Letter from M.C. Hinderlider to Governor Carr (January 9, 1943) (appendix A-14) (emphasis added).

Commissioner Hinderlider's explicit statements in these public documents were never contradicted or disputed. These documents demonstrate that the states intended to include ground water in the allocations made by the Compact.

The minutes of the Compact negotiation meetings also show that the commissioners intended to include ground water within the Compact. The commissioners considered ground water an important issue and discussed it extensively. On January 27, 1941, at the fourth meeting of the Republican River compact commission at Topeka, Kansas, the commissioners heard from U.S. Bureau of Agricultural Economics representatives Harry P. Burleigh and Robert M. Barkley. They explained in great detail the scope of the Bureau's work to determine the extent and usability of the underground waters of the Republican River basin:

Mr. Burleigh explained at considerable length the nature of these investigations He also presented the Commission with a tabular statement showing estimated amounts of underground water available in the various basins in the Republican River Basin in the three states and amounts of land to which such water supplies could be applied within the economic limits he had assumed.

Mr. Burleigh advised the Commission that, in view of the fact that numerous applications had been made to his department by land owners thruout (sic) the basin, **he was desirous of obtaining a statement from the Commission as to whether the amounts of underground waters he had determined would be feasibly possible of use, would, in the opinion of the Commission, exceed the allotments of water to each state which the Commission may have agreed upon; that his department did not want to recommend developments of underground water supplies in excess of the allocations of water to each state. . . .**

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 water developments must be considered as reducing to that extent the amount of surface water available for use within the basin.

Minutes of the Fourth Meeting of the Republican River Compact Commission, January 27, 1941, Topeka, Kansas, Brief for the United States in Opposition to the Motion to Dismiss, appendix 27a (emphasis added).

Thus, the commissioners were informed of the amount of alluvial ground water available in the Republican River basin and specifically asked to determine whether the federal estimates were consistent with the proposed Compact allocations. The commissioners complied with the request. Following Mr. Burleigh's report, Commissioner Hinderlider

wrote to Commissioners Scott (Nebraska) and Knapp (Kansas):

It is my understanding that Mr. Knapp will address a letter to Engineer Burleigh of the Bureau of Agricultural Economics, advising him that **the commissioners are in agreement that the estimated amount of ground water which may be developed in each of the tributary basins of the Republican River basin are [sic] within the allocations which the commission has tentatively made.**

Letter from Commissioner Hinderlider to Wardner G. Scott, Republican River Compact Commissioner for Nebraska, and George S. Knapp, Republican River Compact Commissioner for Kansas, (January 31, 1941) (appendix A-20) (emphasis added).

Commissioner Knapp sent an official letter to Mr. Burleigh to the same effect:

We, the Republican River Compact Commissioners on the Republican River, meeting at Topeka on January 28, examined the tables which you submitted to us on the 27th indicating the approximate recommendations for consumptive use of water by basins in the three states, and **find that the total estimated annual consumptive use of water is within the amount of the water supply available in the basin above Hardy, and that the proposed allocations in each of the several states fall within the amounts which the commission may see fit to allocate to each state.**

Letter from George S. Knapp to Harry P. Burleigh, U.S. Bureau of Agricultural Economics (January 30, 1941) (appendix A-23) (emphasis added).

Mr. Burleigh's detailed presentation on alluvial ground water to the commission, followed by the commissioners' correspondence indicating their agreement with the estimates by the Bureau of Agricultural Economics, are compelling evidence that the commissioners intended to include alluvial ground water in the Compact's allocations of the water supply.

Nebraska argues that "[f]urther evidence of the intentional omission of ground water from the Compact" is that the water supply figures contained in the Compact are too small to include Ogallala ground water." Nebraska Brief at 9-10. While this statement is true, its reasoning does not apply to alluvial ground water. To the contrary, alluvial ground water was in fact included in the water supply figures. *See e.g.* First Annual Report, Republican River Compact Administration for the Year 1960, Lincoln, Nebraska, April 4, 1961, Formulas for the Computation of Annual Virgin Water Supply (appendix A-24).

Nebraska also argues that the Compact's failure to expressly mention ground water and its use of different language than several other compacts show that the parties did not intend to include ground water.¹ This argument

¹ Nebraska's argument that ground water was intentionally omitted from the Compact is based, in large part, on the assertion that, prior to 1943, Kansas had engaged in lengthy litigation with Colorado over the Arkansas River that involved an explicit distinction between surface water and ground water. (Nebraska Brief at 9.) Therefore, Nebraska argues, the states would have made such a distinction in the Republican River Compact had they intended to include

sharply contradicts Nebraska's position in another ongoing interstate water dispute.

This is what counsel for Nebraska said about ground water depletions in oral argument before the Special Master in *Nebraska v. Wyoming*, No. 108, Original:

It doesn't make any difference whether the ultimate provision in the Arkansas River compact was against the depletions of usable state line flows. It doesn't make any difference whether the ultimate provision in the Pecos River compact related to a diminution of the 1947 condition. **It really doesn't make any difference what kind of apportionment provision you have.**

If post compact or post decree wells physically take unapportioned water that happens as a result of changed conditions but if they take water destined pursuant to the document that we're talking about, to a downstream state, they are violating that document, pure and simple, as everybody seems to be fond of using that phrase.

Transcript at 70-71 (emphasis added), *Nebraska v. Wyoming*, No. 108, Original (June 4, 1998).

ground water. This disregards the fact that Kansas then entered into a compact with Colorado on the Arkansas River that did not specifically allocate ground water, yet, in the opinion of a special master, confirmed by this Court, has been held to apply to alluvial ground water. First Special Master's Report at 107-08, *Kansas v. Colorado*, 514 U.S. 673 (1995). In any case, Nebraska's argument is based on inferences that are contradicted by the history of the compact negotiations.

In that same case, Nebraska stated in a brief:

As the Court has held, it is impossible to separate surface water from hydrologically connected ground water. In most river systems, surface water and ground water are one in the same, separated only in time. Typically, the surface flow of an interstate river consists of tributary inflow and ground water accretions, with the latter most often providing the most significant contribution. Wyoming's argument that the ground water portion of the North Platte River was not apportioned is, in a word, absurd.

Nebraska's Reply to Wyoming's, Colorado's, and the United States' Responses to Nebraska's Motion for Leave to File an Amended Petition at 8 (footnote omitted), *Nebraska v. Wyoming*, No. 108, Original (May 16, 1994). Nebraska repeated that language as recently as December 1998. Nebraska's Response to State of Wyoming's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56(c) at 51, *Nebraska v. Wyoming*, No. 108, Original (Dec. 5, 1998).

Although the language of the Compact may be ambiguous, the express statements of the original Compact commissioners and the minutes of their meetings show that alluvial ground water was intended to be included in the apportionment of the Republican River basin water supply. As discussed below, this conclusion is reinforced by decades of consistent Compact administration.

**II. THE STATES AND THE COURT
HAVE NOT INTERPRETED THE
COMPACT TO APPLY ONLY TO
SURFACE WATER.**

**A. The states have administered
the Compact to include
alluvial ground water.**

Nebraska concedes that, from 1961 to 1996, the Compact Administration² calculated the annual surface water supply of the basin and the annual consumptive use of each state using formulas that it adopted, which "defined the surface water to include water flowing in the stream as well as water found in the adjacent alluvium." Nebraska Brief at 18-19 (footnote defining "alluvium" omitted).

The Compact has consistently been administered to include alluvial ground water in the allocations of Republican River water to each state. From the first, the

² The three commissioners in their role of administering the Compact are called the "Administration." "The State Engineer of the State of Colorado; the Director of Water Resources of the State of Nebraska; and the Chief Engineer, Division of Water Resources, State Board of Agriculture of the State of Kansas, being the officials in their respective states charged with the duty of administering public water supplies, shall be the official members of and together they shall constitute an administrative body hereby designated, 'The Republican River Compact Administration.'" Rules and Regulations of the Republican River Compact Commission, adopted July 15, 1959, Rule 1 (appendix A-159). "The Republican River Compact, hereinafter referred to as the "Compact", shall be administered by the Republican River Compact Administration, hereinafter referred to as the 'Administration.'" *Id.*, Rule 2.

Administration has included alluvial ground water in computing both annual virgin water supply and annual beneficial consumptive use.

The annual reports of the Compact Administration meetings from 1960 forward show that the Administration has consistently included alluvial ground water. In 1962, the Committee on Procedure for Computation of Annual Virgin Water Supply was formed to compute the virgin flow of the Republican River and its tributaries. The May 3, 1963 Progress Report of that committee reports that the data to be used in the computation included "records of pumping from wells" to be collected from irrigators using "wells pumping from the valley floor" Report of the Third Annual Meeting, May 3, 1963, Exhibit A (appendix A-27). At the fifth annual meeting, the Administration discussed the computed virgin water supply for the previous year and noted that "any errors in assumed factors for return flow or **well diversion** could make a considerable difference in total computed annual virgin water supply." Report of the Fifth Annual Meeting, April 27, 1964 (appendix A-32) (emphasis added). At that meeting, the Administration discussed at some length the consumption of alluvial ground water by wells and inclusion of that information in the virgin water supply computations. Progress Report of the Engineering Committee, April 27, 1964 (appendix A-33).

In 1969, the engineering committee revised the formulas for computing the virgin water supply in the Republican River basin. The subsequent report, dated May 26, 1970,³ stated: "Computations of virgin water supply by

³ The revised formulas were discussed at the May 26, 1970 Compact Administration meeting and unanimously adopted by the Administration. See, Minutes of the Eleventh Annual Meeting, Republican River Compact Administration for the year 1969, Topeka, Kansas May 26, 1970 (appendix A-153).

the formulas are based upon the following factors: 1. The irrigation diversions by canals, stream pumps and **wells** for which recorded diversions are not available shall be computed by each State based upon the best information available" Minutes of the Eleventh Annual Meeting, Republican River Compact Administration, Topeka, Kansas May 26, 1970 (appendix A-153) (emphasis added). The report stated further that "irrigation diversions from ground water shall be limited to those by wells pumping from the alluvium along the stream channels." *Id.*

The yearly reports of the Compact Administration meetings uniformly show that alluvial ground water has been included in Compact allocation determinations. Annual consumptive use has consistently been computed using diversions from both surface and ground water sources and both ground water and surface water diversions have been included in computing the virgin water supply, except where the wells were considered to be upland (Ogallala) wells. *See, e.g.,* Progress Report of the Engineering Committee, June 19, 1967 (appendix A-39); Report of the Engineering Committee, June 3, 1968 (appendix A-45); Report of the Engineering Committee, June 30, 1969 (appendix A-51); Report of the Engineering Committee, May 26, 1970 (appendix A-58); Report of the Engineering Committee, June 4, 1971 (appendix A-64); Report of the Engineering Committee, June 9, 1972 (appendix A-71); Report of the Engineering Committee, June 18, 1973 (appendix A-77); Report of the Engineering Committee, June 13, 1974 (appendix A-84); Report of the Engineering Committee, July 30, 1975 (appendix A-91); Report of the Engineering Committee, July 20, 1976 (appendix A-99); Report of the Engineering Committee, June 30, 1977 (appendix A-106); Report of the Engineering Committee, July 7, 1978 (appendix A-115); Report of the Engineering Committee, 1979 Water Year (appendix A-124); Report of the Engineering Committee, 1980 Water Year (appendix A-129); Report of the Engineering Committee, 1981 Water

Year (appendix A-134); Report of the Engineering Committee, 1987 Water Year (appendix A-138); The Thirty-First Annual Report, for the year 1990, July 19, 1991 (appendix A-142); Report of the Engineering Committee, 1991 Water Year (appendix A-146); Report of the Engineering Committee, 1992 Water Year, exhibit 1 (appendix A-148); Report of the Engineering Committee, 1993 Water Year, exhibit 2 (appendix A-150).⁴

The Administration's consistent inclusion of alluvial ground water in its calculations of the allocations to each State reinforces the conclusion that alluvial ground water was intended to be included in the apportionment of the Republican River basin water supply.

⁴ Alluvial ground water has been included in the computations since administration began; however, this does not mean the issue is without its disputes. As Administration meeting reports show, in the last decade, disputes have arisen concerning ground water pumping and its effects on surface water. The Minutes of the Thirty-Second Annual Meeting, July 19, 1991, notes that the Administration had asked the Bureau of Reclamation to explore the role of ground water in the Compact. Further, each state computed consumptive use of alluvial ground water differently. Colorado and Kansas included wells constructed into and diverting water from the alluvium of the streams in the basins. Nebraska initially included wells in a band within a mile from either side of a stream, but, in 1990, was in the process of revising its procedure to also include only wells constructed in the alluvium. Minutes of the Thirty-Second Annual Meeting, July 19, 1991 (appendix A-156).

B. The *Sporhase* decision is consistent with the Compact's inclusion of alluvial ground water.

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982), did not consider whether the Republican River Compact includes alluvial ground water. Nebraska misrepresents *Sporhase* by saying that "[t]his Court found the Compact addressed only surface water" and "this court concluded the Compact was limited to surface water" Nebraska Brief at 11. This Court did no such thing. *Sporhase* was a Commerce Clause challenge to a Nebraska statute that restricted the export of ground water to another state. Nebraska pointed to 37 federal statutes and 23 interstate water compacts, including the Republican River Compact and the South Platte River Compact, to demonstrate Congress' deference to state water law. This Court held that Congress' historical deference to state water law and its willingness to let states settle their differences over water through compacts did not constitute persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. 458 U.S. at 959. In that context, the Court explained that "[t]he interstate compacts to which appellee refers are agreements among States regarding rights to surface water." 458 U.S. 959. That statement can hardly be taken as a specific determination that all interstate compacts, or any particular interstate compact, apply only to surface water.

Moreover, *Sporhase* involved Ogallala ground water, not alluvial ground water. Nebraska Brief at 4. To the extent that *Sporhase* recognized that the Ogallala ground water at issue was not included in any interstate compact, the decision supports Colorado's contention that the Republican River Compact does not include Ogallala ground water.

Nebraska also mischaracterizes *Pioneer Irrigation Districts v. Danielson*, 658 P.2d 842 (Colo. 1983), in stating that "the Colorado Supreme Court concluded that the Compact regulates surface water only and does not affect the actions of Colorado's Ground Water Commission in the Basin." Nebraska Brief at 15. The Pioneer Irrigation Districts are surface water appropriators on the North Fork of the Republican River that alleged that ground water pumping by wells located within the Northern High Plains Designated Ground Water Basin⁵ was affecting Republican River surface flows and interfering with their water right. The districts filed a complaint in the water court seeking to require the State Engineer to curtail the wells. The sole question was one of jurisdiction. The Colorado Ground Water Commission has jurisdiction over designated ground water, while the water courts have jurisdiction over surface water rights and other ground water, which is part of the "waters of the state." The water court dismissed the complaint and the Colorado Supreme Court affirmed on the narrow ground that the Ground Water Commission is the forum having initial jurisdiction to make a determination of whether a ground water matter involves designated ground water. The Colorado Supreme Court stated:

The primary issue is whether the wells which Pioneer seeks to curtail are pumping "designated ground water" or "waters of the state." The Ground Water Commission must make that initial factual determination. **If the Commission finds that the ground water is not designated ground water, then the**

⁵ The Northern High Plains Designated Ground Water Basin includes the entire drainage of the North Fork of the Republican River and encompasses the ground water found in the Ogallala Aquifer. 658 P.2d at 844.

matter must be transferred to the water court.

658 P.2d at 846 (emphasis added) (footnote omitted). Thus, the Colorado Supreme Court (1) did not even consider whether the Republican River Compact includes any ground water and (2) concluded that if the Ground Water Commission were to find that wells were pumping waters of the state, rather than designated ground water, the water court would have jurisdiction. If any inference concerning the Compact can be drawn from *Pioneer*, it is that ground water that is classified as "waters of the state" (as opposed to designated Ogallala ground water) would be accounted for under the Compact.

The states have consistently interpreted the Compact to include alluvial ground water and the courts have not held otherwise.

III. THE COMPACT DOES NOT RESTRICT A STATE'S CONSUMPTION OF OGALLALA AQUIFER GROUND WATER.

In its brief, Nebraska fails to distinguish between alluvial ground water and ground water in the Ogallala Aquifer. The Ogallala Aquifer is a huge multi-state aquifer that lies beneath an area known as the High Plains Region. Pub. L. 99-662, Title X, § 1121, Nov. 17, 1986 100 Stat. 4239. The Ogallala is a physically distinct underground structure of the high plains containing billions of acre feet of ground water.⁶ The High Plains Region spreads across eight

⁶ *A Summary of Results of The Ogallala Aquifer Regional Study, with Recommendations to the Secretary of Commerce and Congress*, High Plains Study Council, December 13, 1982, at 3.

states: Colorado, Wyoming, South Dakota, Nebraska, Kansas, Texas, Oklahoma, and New Mexico.⁷ Only three of these states are parties to the Republican River Compact.⁸

The same factors that show that alluvial ground water was allocated by the Compact also show that Ogallala ground water was **not** allocated: the language of the Compact, the history of Compact negotiations, and the states' subsequent administration of the Compact over the past decades.

The Compact applies solely to the Republican River Basin, *see* Arts. I, II, III, IV, and specifically provides that: "The Basin is 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. The Compact allocates a total of less than 500,000 acre feet of water. A compact of expressly limited geographic scope and precisely defined amounts of water cannot be read to allocate an interstate aquifer that covers 180,000 square miles and contains over 3 billion acre-feet of water. *See* Nebraska Brief, Appendix A.

Historical documents confirm the limited geographical area and the limited amounts of water addressed by the Compact. In his March 29, 1943, Report and Recommendation, Glenn Parker, the United States Representative to the Republican River Compact negotiations, stated:

⁷ Lukey, Gutentag and Weeks, Hydrologic Investigations Atlas HA-652 (sheet 1 of 2), U.S.G.S. 1981.

⁸ This Court has previously refused to interpret a compact in such a manner that the compact would include water arising in a state not party to that compact and foreclose claims by the state to such water. *Oklahoma v. New Mexico*, 501 U.S. 221, 232 (1991).

The drainage basin involved in the proposed compact comprises an area of 24,960 square miles in northeastern Colorado, northwestern Kansas, and southwestern Nebraska, which is naturally drained by the Republican River, and tributaries, above Junction City, Kansas.

George W. Norris, the U.S. Senator from the State of Nebraska, stated:

[T]hese experts . . . were men who were able to go into all the technicalities of the stream for irrigation and reclamation. They had used 500,000 acre-feet not as being anything necessarily definite but as covering the entire amount of water that was going to be controlled.

The Republican River Compact, 1941: Hearings on H.R. 4647 and H.R. 5945 Before the Comm. on Irrigation and Reclamation, 77th Cong. (1941) (Statement of Hon. George W. Norris, U.S. Senator from Nebraska).

In addition, the States have consistently administered and interpreted the Compact to exclude Ogallala Aquifer ground water. *See, e.g.*, Progress Report of the Engineering Committee April, 27, 1964 (appendix A-38), (ground water diversions in Colorado assumed to be table land [Ogallala] diversions and considered to have no effect on flow of streams); Progress Report of the Engineering Committee, June 19, 1967 (appendix A-39) (including both ground water and surface water diversions in computation of virgin water supply, except where wells were considered to be up-land [Ogallala] wells); *See also*, Reports of Engineering Committee, cited above, 1967-1991.

In their *amici* brief in *Sporhase*, Colorado and Kansas stated that there was only a “*de facto* equitable apportionment” of Ogallala ground water, that “each state overlying the aquifer allocates for beneficial use only that

quantity of ground water which can be diverted within the state,” and that this Court’s decision could force the states to seek a formal equitable apportionment of the Ogallala through compact or decree. Nebraska Brief, at 12-13. These statements are inconsistent with the notion that the Republican River Compact had already apportioned any part of the Ogallala.

It does not make technical, legal, or common sense to interpret the Compact to include the Ogallala Aquifer, in whole or in part. The Compact was intended “to remove all causes, present and future, which might lead to controversies [and] to promote interstate comity . . .” Art. I. It follows that, almost sixty years ago, states compacting to remove causes of controversy did not intend to include a poorly understood, separate aquifer in the Compact, subjecting water users to decades of uncertainty.

By its terms, the Compact allocates rights in the interstate waters of the Republican River drainage basin to the three compacting states. Water from the Ogallala aquifer was never meant to be included in, and was not allocated under, the Compact.

CONCLUSION

Colorado respectfully requests the Court to find, as a matter of law, that the Republican River Compact allocates alluvial ground water to each of the three compacting states and that the Compact does not include Ogallala Aquifer ground water.

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