The Republican River Dispute: An Analysis of the Parties' Compact Interpretation and Final Settlement Stipulation

Aaron M. Popelka
University of Nebraska College of Law, aaron@kla.org

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Aaron M. Popelka, B.S. 2001, Kansas State University (major in Agricultural Economics, minor in Agronomy); J.D. 2004, University of Nebraska College of Law (Nebraska Law Review, Executive Editor, 2003) (concentrated Program of Study in Agricultural Law). The author is currently an associate attorney with the law firm of Leininger, Smith, Johnson, Baack, Placzek, Steele and Allen in Grand Island, Nebraska and a member of the Kansas and Nebraska bars. The author would like to thank Professor Sandra Zellmer for asking him to submit this piece to the Symposium. The author would also like to thank the University of Nebraska College of Law and its excellent faculty, as well as the members of the Nebraska Law Review for their diligent work on this Note and on the Symposium.
I. INTRODUCTION

Water is one of the most abundant resources on the planet. It is a necessity of life. Most of the Earth's surface is covered with water, but declaring that the planet contains vast amounts of water does not mean that water is always in ample supply. Unfortunately for most land-dwelling plants and animals, the only water that can be utilized is fresh water. Fresh water, unlike most of the water encompassing the globe, is in limited supply.¹

In addition, these limited freshwater supplies and their sources are often concentrated in finite locations. As settlements moved west in the nineteenth century, it became necessary to develop a system to allocate this limited resource and to ensure that such a system would provide the most beneficial use of every drop of available water. Before the beginning of the twentieth century, laws concerning the allocation of water dealt primarily with the allocation of surface water found in streams and naturally occurring lakes.² At this point in history, most wells were shallow hand-dug wells that were used only for domestic purposes.³ Water used for agricultural and industrial purposes were primarily surface waters, because they were easily accessible and could be diverted in larger quantities.

With the arrival of the twentieth century, technology allowed surface waters to be utilized in greater quantities, and be used farther away from the water's source.⁴ In addition, public works undertaken in the wake of the great depression in the 1930s allowed states to impound vast quantities of water.⁵ It became apparent that, with the increased consumption and impounding of water, interstate allocations of shared surface water would have to be regulated. One of the prevalent means of accomplishing this daunting task was the creation of interstate compacts.

⁴ See id. at 26.
⁵ See id. at 20.
States began negotiating these water compacts among themselves to set forth specific allocations and methods for settling disputes in interstate water basins. This framework ensured that downstream states would receive necessary supplies of water. The interstate compacts also typically allowed mechanisms to resolve disputes when downstream states were denied access to appropriated water.

One such agreement between Colorado, Kansas, and Nebraska was called the Republican River Compact ("Compact"). Negotiations of the Compact were concluded in December 1942 and it was ratified by the respective states in 1943. It specifically allocated water supplies of the Republican River and provided for an administrative body, the Republican River Compact Administration. This administrative body was charged with ensuring that the provisions of the Compact would continue to be followed and it provided a mechanism to address emerging issues.

Immediately following ratification of the Compact, all seemed well. The Compact was functioning and the respective states had ample supplies of water. By the 1980s, however, tension between the states began to mount. Available water supplies in the Republican River basin were dwindling as surface water unallocated at the time the Compact was entered, began to diminish due to appropriation within the respective states. In addition, groundwater wells within the basin had grown at exponential rates, further depleting water within the basin.

Due to inadequacies of the Compact and state laws relating to the Compact, a dispute arose between Kansas and the upstream states of Colorado and Nebraska. The dispute culminated in 1998 when Kansas filed suit in the United States Supreme Court to enforce the provisions of the Republican River Compact. The suit was finally settled in 2003 when the Supreme Court approved the Final Settlement Stipulation.

This Note will analyze the terms of the Final Settlement Stipulation and whether those terms adhere to the terms of the Republican River Compact. It will show that the Republican River Compact did contemplate regulation of all components of the water supply in the Republican River basin, including groundwater. In addition, it will show that the Final Settlement Stipulation was a substantial im-

7. RP Compact, supra note 6, art. IV.
8. See infra notes 19–20, 28–29 and accompanying text.
THE REPUBLICAN RIVER DISPUTE

improvement upon the existing vague and general guidance of the original compact. It will also demonstrate that while the settlement was a needed improvement, future disputes may be on the horizon if the states fail to make good faith efforts to comply with the terms and goals of the Compact and Final Settlement Stipulation.

Section II will explain the relevant facts and circumstances leading up to the Kansas suit and eventually the final settlement. Section III.A will explain the purpose of the original Republican River Compact and its relevant provisions. Next, section III.B will explain the divergent water appropriation laws of Kansas and Nebraska that ultimately laid the ground for the ensuing dispute. Section IV of this Note will demonstrate that groundwater was considered as part of the water supply regulated by the Compact, that the settlement agreement was a significant improvement in the ability of the states to appropriately apportion water resources, and why certain weaknesses may still lead to future disputes.

II. FACTUAL BACKGROUND

A. Laying the Groundwork for a Dispute

The Republican River basin lies within the three states of Colorado, Kansas, and Nebraska. The mainstem of the Republican River begins in eastern Colorado and flows east-southeast through Nebraska and Kansas. Smaller tributaries that originate in northwest Kansas and southwest Nebraska also feed the basin. Implicated sources of the basin's water include surface water within the Republican River, its tributaries, and its reservoirs; water in alluvial aquifers along the river and its tributaries; and waters contained within the Ogallala Aquifer.11

The entire drainage area contained within the Republican River basin is approximately 24,900 square miles.12 Approximately 7,700 square miles are within Colorado, 9,700 square miles are within Nebraska, and 7,500 square miles are within Kansas.13 In addition to the Republican River and its tributaries, the basin includes a network of federal projects, including nine reservoirs and six irrigation districts operated by the Bureau of Reclamation and the Army Corps of

12. Id. at 1.
13. Id.
Engineers. Of the nine reservoirs located in the basin, five are located in Nebraska.

Prior to 1943, the year the Republican River Compact was ratified, much of the Republican River basin's various water resources were undeveloped. Available surface water within the basin was not fully appropriated upon ratification of the Compact. At the same time, groundwater wells within the Republican River basin numbered only in the hundreds. In addition, the reservoirs that currently enable the capture and storage of a great deal of the surface waters within the basin were not completed until after 1950. Thus, in 1949, the total irrigated acres in Nebraska and within the Republican River basin totaled only 90,352, and there were only several hundred groundwater wells.

Development of the basin's water supply began to change following the floods and droughts of the 1930s. Federally funded reservoirs and irrigation projects were undertaken during the 1940s and continued throughout the 1950s. These public works enabled flood control within the basin and the ability to store large quantities of water. This development allowed retention of waters during times when available water was in excess of consumptive needs and allowed for the distribution of stored water during times when water was in short supply. Bureau of Reclamation projects in 1985 served 88,877 acres within Nebraska alone.

In 1939, with plans to construct reservoirs and irrigation projects along the entire stretch of the Republican River basin pending, the states of Colorado, Kansas, and Nebraska entered negotiations to devise an agreement to allocate waters within the basin between the respective states. The Compact initially allocated 54,100 acre-feet of water to Colorado, 190,300 acre-feet to Kansas, and 234,500 acre-feet.

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15. Id. at 22–23.
16. Reply Brief for the State of Kansas Opposing the Exceptions of Nebraska & Colorado at 12, Kansas v. Nebraska & Colorado (U.S. June 1, 2000) (No. 126, Orig.) (noting the parties' stipulation that the basin was not fully appropriated).
17. See Bureau of Reclamation, 1985 Special Report supra note 11, at 34–43.
18. See generally Cristi V. Hansen, United States Geological Survey, Major Components of Flow in the Republican River During Drought Conditions from Near Hardy, Nebraska to Concordia, Kansas (March 1997).
20. See Bureau of Reclamation, 1985 Special Report supra note 11, at 34–43.
21. See id.
22. See Bureau of Reclamation, 1985 Special Report supra note 11, at 34–43.
23. One acre-foot is the amount of water that would be needed to cover one acre at a depth of one foot and is the equivalent of 43,560 cubic feet. RP Compact, supra note 6, art. IV.
to Nebraska, but allowed for future proportional adjustments. In 1943, the three states and Congress ratified the Republican River Compact. Following ratification of the Compact, both Kansas and Colorado took legislative steps to regulate groundwater. Nebraska, however, did not impose any statewide restrictions on groundwater and instead allowed local natural resource districts (NRDs) to implement restrictions as they felt necessary.

As time passed, each state's unused water allocations under the Compact became appropriated. Kansas and Colorado, by imposing state and local regulatory regimes, were able to contain water use within the basin to quantities dictated by the Compact. Nebraska, however, did not impose any state regulatory scheme to curtail hydraulically connected groundwater use until 1996. Pursuant to its loose regulatory scheme, registered groundwater wells in the Nebraska portion of the Republican River basin had risen to over 10,000 in 1995. Accordingly, total irrigated acres in the Nebraska portion of the Basin grew from 90,352 acres in 1949, to 1,045,354 acres in 1992.

As a result of the unregulated groundwater development, Nebraska began to approach the maximum limits of its allocation under the Compact. It was during the drought years of 1988 through 1992 that Nebraska's overappropriation became apparent. During the drought period, Nebraska twice, in 1990 and 1991, exceeded its allocations under the Compact.

A report published by the United States Geological Survey chronicled the impact of Nebraska's overappropriation on the Republican River's streamflow from Hardy, Nebraska to Concordia, Kansas. During the 1988–1992 drought, streamflow reached the lowest levels on record. The report notes that upstream flow during the period was the greatest contributor to instream flow and that between

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24. RP Compact, supra note 6, art. III, IV.
32. See Hansen, supra note 18.
33. Id. at 4 tbl.1.
1990–1992 upstream flow was at sixteen percent of the 1952–1995 average.\textsuperscript{34}

Although part of the decreased streamflow during the 1988–1992 period may be attributable to the Bostwick Irrigation Districts, whose diversion was not in full operation until 1958,\textsuperscript{35} the Republican River Compact Administration would have accounted for these changes in streamflow in its accounting procedures.\textsuperscript{36} When this evidence is compared to statistics compiled by the State of Nebraska showing that at no time from 1963 through 1994 did Kansas ever use its entire allocation of water under the Compact, it creates compelling evidence that overappropriation by upstream states was to blame.\textsuperscript{37}

In 1984, the Republican River Compact Administration’s Engineering Committee recommended that future groundwater development in alluvial aquifers should be discouraged or stopped.\textsuperscript{38} Following that report and up until the time it filed suit, Kansas attempted to convince Nebraska to regulate groundwater development through the Compact Administration and separate negotiations. In 1985 and 1986, Kansas expressed its concern that hydraulically connected groundwater and surface water in the basin should be regulated.\textsuperscript{39} In 1989, at Nebraska’s request, Kansas submitted a proposal to address groundwater usage in the basin.\textsuperscript{40} Nebraska, however, rejected the proposal.\textsuperscript{41}

Beginning in 1990, Nebraska adopted the view at Compact Administration meetings that groundwater use was not implicated in the Compact.\textsuperscript{42} In accordance with this view, Nebraska rejected a second Kansas proposal on regulation of groundwater in 1995.\textsuperscript{43} Then, in 1995, Kansas and Nebraska entered mediated negotiations to resolve the dispute.\textsuperscript{44} Negotiations were terminated, however, on March 6, 1997, when, after public hearings, it became clear that Nebraska

\textsuperscript{34} Id. at 5.
\textsuperscript{35} Id. at 2.
\textsuperscript{36} See RP Compact, supra note 6, art. III (giving authority to the Republican River Compact Administration to proportionately adjust allocations when water supplies within the basin fluctuate).
\textsuperscript{37} Brief of the State of Nebraska & Request for Oral Argument in Opposition to Kansas’s Motion for Leave to File Bill of Complaint at A-7, Kansas v. Nebraska & Colorado (U.S. Oct. Term, 1997) (No. 126, Orig.).
\textsuperscript{38} REPUBLICAN RIVER COMPACT, 25TH ANN. REP. 10 (1985).
\textsuperscript{39} Id. at 8 (1986); REPUBLICAN RIVER COMPACT ADMIN., 27TH ANN. REP. 11 (1987).
\textsuperscript{40} REPUBLICAN RIVER COMPACT ADMIN., 29TH ANN. REP. 12–13 (1989) [hereinafter RRCA, 29TH ANN. REP.].
\textsuperscript{41} RRCA, 30TH ANN. REP., supra note 31, at 1–15.
\textsuperscript{42} Id. at 13.
\textsuperscript{43} REPUBLICAN RIVER COMPACT ADMIN., 35TH ANN. REP. 19–23 (1995).
\textsuperscript{44} Brief of the State of Kansas in Support of Motion for Leave to File Bill of Complaint at 10, Kansas v. Nebraska & Colorado (U.S. Oct. Term, 1997) (No. 126, Orig.).
could not engender sufficient public support for a preliminary settlement option.\(^{45}\)

The view Nebraska advocated to the Compact Administration was not the view Nebraska was taking within its own state. In 1985, while Nebraska was simultaneously refusing to work with other Compact states regarding hydraulically connected groundwater and surface water, the Nebraska Natural Resources Commission published its own report acknowledging groundwater and surface water interaction.\(^{46}\) The report recommended that regulatory steps be taken immediately due to the "time lag between groundwater pumping and streamflow depletions."\(^{47}\) The Commission also acknowledged that, in 1985, certain segments of the Republican River should be classified as a losing stream.\(^{48}\)

In regard to groundwater and surface water interaction, the report stated, "Reduction in streamflow [by groundwater pumping] sometimes reduces the amount of water available to surface-water irrigators, many of whom have rights that pre-date the wells reducing the streamflow."\(^{49}\) The report then described specific examples in the areas of Enders Reservoir and Rock Creek, both areas within the Republican River basin, where reduced streamflow had been recorded that coincided with extensive groundwater development upstream.\(^{50}\)

In 1996, Nebraska again acted contrary to its contentions within Compact Administration meetings as the Nebraska Legislature adopted Legislative Bill 108 ("LB 108").\(^{51}\) This bill expressed the legislature's finding that "[h]ydrologically connected groundwater and surface water may need to be managed differently from unconnected groundwater and surface water in order to permit equity among water users and to optimize the beneficial use of interrelated groundwater and surface water supplies."\(^{52}\) Shortly after the passage of LB 108, all three of the natural resource districts in the Republican River basin wrote to the Director of the Nebraska Department of Water Resources acknowledging the hydrological connection between groundwater and surface water.\(^{53}\) The letters also sought the director's assistance in

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45. Id.
47. Id. at iii.
48. Id. at 2–34. A losing stream occurs when the water level in an adjacent aquifer falls below the water level in the stream and water from the streamflows into the aquifer. *GLENNON, supra* note 3, at 43.
49. *DIR. OF NATURAL RES., supra* note 46, at 4-2.
50. *DIR. OF NATURAL RES., supra* note 46, at 4-4 to 4-5.
52. *NEB. REV. STAT.* § 46-656.05(2) (Reissue 2003).
53. Letter from Gayle Haag, Chairman, Middle Republican Natural Res. Dist., to J. Michael Jess, Dir., Neb. Dept’ of Water Res. (July 15, 1996) (stating that the dis-
establishing studies to devise an integrated management plan.\textsuperscript{54} The official position of the NRDs soon changed, at the request of Nebraska's Attorney General, when Kansas filed suit in the United States Supreme Court.\textsuperscript{55}

\section*{B. Procedural Synopsis}

In May of 1998, after the failure of mediated negotiations, Kansas filed a Motion for Leave to File a Bill of Complaint with the United States Supreme Court.\textsuperscript{56} On January 19, 1999 the request was granted.\textsuperscript{57} Kansas filed its Bill of Complaint alleging that Nebraska had breached its obligation under the Republican River Compact "by allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries, by the failure to protect surface flows from unauthorized appropriation by Nebraska users, and by other acts and omissions."\textsuperscript{58} The complaint went on to allege that Nebraska had previously failed to deliver water allocated to Kansas under the Compact, and that, due to unregulated groundwater development Nebraska would continue to violate the Compact "believe[es] the ground water and surface water within the Republican River Basin are hydrologically connected affecting administration of the Republican River Compact and that it would be in the public interest to establish an integrated management area to manage these waters"); Letter from Dean Large, Chairman, Upper Republican Natural Res. Dist., to J. Michael Jess, Dir., Neb. Dep't of Water Res. (July 18, 1996) (stating that the district "believe[es] the ground water and surface water within the Republican River Basin are hydrologically connected affecting administration of the Republican River Compact and that it would be in the public interest to establish an integrated management area to manage these waters"); Letter from Jay Ziegler, Chairman, Lower Republican Natural Res. Dist., to J. Michael Jess, Dir., Neb. Dep't of Water Res. (July 26, 1996).

\begin{itemize}
  \item \textsuperscript{54} See supra note 53.
  \item \textsuperscript{55} Letter from David Eigenberg, General Manager, Lower Republican Natural Res. Dist., to Roger Patterson, Dir., Neb. Dep't of Water Res. (July 21, 1999) (responding to the request of the Nebraska Attorney General to suspend LB 108 studies, as they may be in conflict with the suit filed by Kansas); Letter from Gayle Haag, Chairman, Middle Republican Natural Res. Dist., to Roger Patterson, Dir., Neb. Dep't of Water Res. (June 21, 1999) (responding to the request of the Nebraska Attorney General to suspend LB 108 studies, as they may be in conflict with the suit filed by Kansas); Letter from Virgil Norton, Manager, Upper Republican Natural Res. Dist., to Roger Patterson, Dir., Neb. Dep't of Water Res. (June 10, 1999) (responding to the request of the Nebraska Attorney General to suspend LB 108 studies).
  \item \textsuperscript{56} Brief of the State of Kansas in Support of Motion for Leave to File Bill of Complaint, Kansas v. Nebraska & Colorado (U.S. Oct. Term, 1997) (No. 126, Orig.). The United States Supreme Court has jurisdiction over suits between two states under Article III, Section 2, Clause 2 of the United States Constitution.
  \item \textsuperscript{57} Kansas v. Nebraska & Colorado, 525 U.S. 1101 (1999).
  \item \textsuperscript{58} Bill of Complaint at 5, Kansas v. Nebraska & Colorado (U.S. Oct. Term, 1997) (No. 126, Orig.).
\end{itemize}
Finally, the complaint sought damages for Nebraska's "past and continuing violations" of the Compact, and a "decrec commanding the State of Nebraska in the future to deliver the waters of the Republican River in accordance with the provisions of the Republican River Compact."  

Nebraska replied by filing an answer and counterclaim. In its answer, Nebraska denied Kansas's assertion that groundwater was considered as part of the basin's water supply under the Compact. It also asserted sixteen affirmative defenses. The affirmative defenses included assertions that groundwater was not apportioned under the Compact; that Kansas's claims were barred by the doctrines of estoppel and waiver; and that Nebraska was excused from performing under the Compact due to Kansas's prior breach of the Compact by overconsumption in areas upstream of Nebraska and for withholding Compact data. In its counterclaim, Nebraska sought damages for Kansas's overconsumption of water in the part of the basin upstream from Nebraska in northwest Kansas and for Kansas's withholding of data from the Compact Administration in 1995, 1996, and 1997.

On June 21, 1999, the Supreme Court granted Nebraska's motion asking for leave to file a motion under Federal Rule of Civil Procedure 12(b)(6), which was limited to whether the Compact restricts groundwater consumption. Nebraska filed its motion, and Kansas, the United States, and Colorado opposed it. Colorado, however, filed a brief asserting that the groundwater implicated by the Compact was only alluvial groundwater and not water contained within the Ogallala Aquifer.

The Court then appointed a Special Master to preside over the case. After oral arguments were heard, the Special Master recommended in his First Report on January 28, 2000 that Nebraska's
12(b)(6) motion be denied. The denial was based on the Compact’s restriction of groundwater consumption from both the Ogallala and alluvial aquifers. The First Report was received and filed by the Court and exceptions were allowed. Nebraska and Colorado filed exceptions and, thereafter, Kansas filed a reply. On June 29, 2000, the Court denied Nebraska and Colorado’s exceptions and remitted the case to the Special Master.

After the case was remitted to the Special Master, the Special Master issued a series of memorandum decisions ruling on various issues for early resolution. These decisions set the stage for the Final Settlement Stipulation that was received by the Court and ordered filed on October 20, 2003. In the first memorandum decision, the Special Master found that the Compact Administration’s unanimous acceptance of water supply and use computations from 1959 through 1994 were binding and prevented Compact states from recovery for excess water consumption when adopted computations demonstrated Compact compliance. The Special Master also found that Compact states were not allowed “to consume any water allocated to another State that the latter does not put to beneficial consumptive use,” and that “[a] complaining State need not show injury to obtain prospective relief.” Then, in a later memorandum decision, the Special Master effectively eliminated Nebraska’s affirmative defenses against Kansas applicable to the period of time between 1959 and 1994. This decision was primarily predicated on the Special Master’s findings in his first memorandum decision.

With the issuance of the Special Master’s memorandum decisions, the groundwork was laid for a settlement agreement between the three states. Before entering an analysis of the Final Settlement Stipulation, however, it is necessary to explain the original 1943 Compact

68. First Report of the Special Master (Subject: Nebraska’s Motion to Dismiss), Kansas v. Nebraska & Colorado (U.S. Jan. 28, 2000) (No. 126, Orig.).
69. See infra section IV.A.
71. Reply Brief for the State of Kansas Opposing the Exceptions of Nebraska & Colorado, Kansas v. Nebraska & Colorado (U.S. June 1, 2000) (No. 126, Orig.).
75. Id.
agreement and the conflicting state statutory schemes that positioned
the states for an eventual dispute.

III. LEGAL BACKGROUND

A. The 1943 Republican River Compact

In 1943, after having been ratified by the legislatures of Colorado, Kansas, and Nebraska, the United States Congress, and President Roosevelt, the Republican River Compact became effective. The Compact was necessary after Congress approved funds to build Harlan County Lake and study the development of other reservoirs and irrigation districts in the basin. The Compact allowed the states to form a consensual agreement without the judicial interjections of the Supreme Court, which at the time of the Compact, was viewed by western states as failing to grasp water issues affecting the western United States.

The Compact begins by setting out five major purposes of the Compact. The stated purposes are:

[to] provide for the most efficient use of the waters of the Republican River Basin . . . for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present, and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

The Compact continues by setting forth definitions relevant to determining water allocations to the states. In its definitions of relevant terms, the Compact speaks in broad general terms and it is important to note that the Compact does not refer specifically to either surface water or groundwater. Instead, the “Basin” is defined as “the area . . . naturally drained by the Republican River, and its tributaries.” In addition, the term “Virgin Water Supply,” which is the ultimate starting point in determining the available supply of water, is referred to as “the water supply within the Basin undepleted by the activities of

77. Interstate compacts must be approved by Congress under Article I, Section 10 of the United States Constitution. In addition, some authorities believe that interstate compacts are legitimate exercise of limited state sovereignty reserved to the states under the Tenth Amendment. DANIEL TYLER, SILVER FOX OF THE ROCKIES, DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS 19-20 (2003) (explaining Delphus Carpenter’s view regarding interstate compacts). Interstate compacts were given judicial confirmation in Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). The Court upheld the La Plata River Compact, finding interstate compacts were “binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.” Id. at 106.

78. TYLER, supra note 77, at 105-08.

79. RP Compact, supra note 6, art. I.

80. Id. art. II.
Finally, "Beneficial Consumptive Use," which dictates Compact allocations, is defined generally as the "use by which the water supply of the Basin is consumed through the activities of man."82

In Article III, the Compact sets forth the calculated virgin water supply of the basin and its point of origin. In addition, it includes a clause necessary to provide flexibility needed for the future viability of the Compact. The clause allows allocations originating from a specific source to be adjusted proportionally should the virgin water supply of that "source vary more than (10) percent from the virgin water supply set forth" in the Compact.83

Article IV makes specific allocations to the participating states. The allocations are made in terms of beneficial use and the Compact provides a total allocation as well as an itemized list that sets forth the amount of the total that is to be attributed to a specific source. Under Article IV, in 1943, Colorado was to receive a total of 54,100 acre-feet of water, Kansas was to receive a total of 190,300 acre-feet of water, and Nebraska was to receive a total of 234,500 acre-feet of water. Kansas also had the right to use any excess water that flowed past the furthest downstream crossing of the Republican River at the Kansas–Nebraska border, and Kansas was allowed to divert its entire allocation at Guide Rock, Nebraska.84 This is important because it is the present location of the Superior–Courtland Diversion Dam that supplies the Bostwick Irrigation Districts and Lovewell Reservoir.

The final sentence of Article IV is one that preserves state sovereignty in regard to determining how a state may appropriate its Compact allocation amongst its citizens. The clause, however, is one that contributed to the eventual dispute between Kansas and Nebraska. It states that "[t]he use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made."85 It is important to note that this clause does not allow a Compact state to adopt regulations that infringe on the terms of this agreement. It merely allows a state to govern appropriation of the state's allocation as the state sees fit.86

The final article necessary for the analysis here is Article IX. First, this article authorizes the creation of the Republican River Compact Administration ("RRCA"). Article IX provides: "It shall be the duty of the three States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of

81. Id.
82. Id.
83. Id. art. III.
84. Id. art. IV.
85. Id.
86. See id.
administering the public water supplies." The three-member committee was to be responsible for collecting data necessary for administration, and to "adopt rules and regulations consistent with the provisions of [the] compact." Any proposed rules or regulations, however, had to be approved by unanimous consent.

In 1961, the RRCA published formulas for calculating the virgin water supply of the Republican River basin and sub-basins and formulas for determining whether a state had exceeded its allocation during a given year. "[T]he Formulas generally computed consumptive use as the measured water diversion (minus the measured return flow) within that portion of a sub-basin located within a particular State." Data used included: stream discharges, reservoir evaporation, precipitation, reservoir storage, irrigation diversions, and municipal and industrial diversions. Notably, included in irrigation diversions was groundwater pumped from alluvial wells. One acre-foot of water pumped from alluvial wells was treated similarly to surface water diversions and counted against one acre-foot of the state's allocation. From 1961 until 1994, however, the RRCA has not included tableland wells, such as those located on the Ogallala Aquifer, as irrigation diversions. The RRCA, however, did not state that the tablelands were not implicated under the Compact. Instead, since 1961 the RRCA has maintained:

The 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.

The final clause contained in Article IX provides that the United States Geological Survey "shall collaborate with the RRCA in collection, correlation, and publication of water facts necessary for the proper administration of this compact."

87. Id. art. IX
88. Id.
89. Id.
92. RP Compact, supra note 6, art. IX.
B. State Law Governing Water Appropriation

Before undertaking an analysis of the Final Settlement Stipulation, it is also necessary to analyze the various state laws that are relevant to the Republican River Compact. As stated in section III.A supra, the Compact allowed a state to govern appropriations of the state’s Compact allocation according to that state’s laws. An explanation of state law will further demonstrate the origins of the dispute.

1. Kansas Water Law

At the turn of the nineteenth century, Kansas had adopted the English common law riparian doctrine to govern surface water use, and had adopted the English common law absolute ownership doctrine to regulate groundwater use. In 1944, however, Governor Andrew F. Schoeppel appointed a committee to conduct a study and suggest improvements to the current law regulating water use. Concerns of the committee included: the inability of the riparian system to function efficiently after the interjection of proposed federal water projects, the absence of a Kansas constitutional provision addressing water law, changing water uses from navigation and power to irrigation and industry, and the “interrelationship between groundwater and surface water.”

In 1945, the Kansas Legislature adopted the Kansas Water Appropriation Act. The Act combined the groundwater and surface water doctrines into a single statutory scheme called “prior appropriation.” The Act, however, preserved current water user’s rights by establishing their vested rights as having priority over any of the new appropriation rights. Under the prior appropriation doctrine, also referred to as the “first in time, first in right doctrine,” a water user

93. See supra note 78 and accompanying text.
94. Because the primary dispute is between Kansas and Nebraska, an in-depth analysis of Colorado statutory law is not necessary for the purposes of this Note. Kansas did not allege that Colorado had breached the Compact and Colorado only opposed the inclusion of tableland groundwater under the Compact.
95. The rule provides that owners of land bordering on a waterway have equal rights to use the water passing through or by their property. BLACK’S LAW DICTIONARY 1328 (7th ed. 1999).
97. Id.
98. Id. at 739.
99. Id. at 739–41.
102. KAN. STAT. ANN. §§ 82a-701 to -704c (2002).
who holds a permit to divert water can do so in the amount specified by the permit so long as it is for a beneficial use and does not interfere with prior appropriators.\(^\text{103}\) In addition, the Act stated appropriation permits for groundwater and surface water use could only be obtained through the Chief Engineer, who has the authority to grant permits subject to statutory guidelines set forth by the legislature.\(^\text{104}\)

Later amendments to the Act allowed the Chief Engineer even greater ability to regulate water usage. In 1972, the legislature created groundwater management districts ("GMDs") responsible for administration of certain local matters.\(^\text{105}\) GMDs are accountable to the Chief Engineer and confined to the laws and policies of the state, "found primarily in the Water Appropriation Act."\(^\text{106}\) Another amendment allowed GMDs, with the assistance of the Chief Engineer, the ability to create "intensive groundwater use control area[s]."\(^\text{107}\) Areas designated as such could be subject to corrective control provisions set forth in Kansas's statutes. These corrective controls may include well moratoriums.\(^\text{108}\)

Therefore, with the enactment of the Kansas Water Appropriation Act and its subsequent amendments, the legislature created an integrated system that could readily conform to changing circumstances. This can be attributed to the Act's centralized authority and the well-defined principles that apply to groundwater and surface water alike.

2. Nebraska Water Law

Nebraska, like Kansas, began its regulation of surface water using the English common law riparian doctrine and abandoned the doctrine by legislatively adopting the prior appropriation doctrine.\(^\text{109}\) This is where the similarity in state law ends. Groundwater law was primarily undetermined in Nebraska until 1933.\(^\text{110}\) In 1933, the Nebraska Supreme Court adopted the reasonable use with correlative rights doctrine in Olson v. City of Wahoo.\(^\text{111}\) This doctrine, which was later codified by statute,\(^\text{112}\) states that a landowner may appropriate groundwater for his or her reasonable and beneficial use on the land

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103. Id. §§ 82a-701 to -707.
104. Id. §§ 82a-701 to -733; see also Peck, supra note 96, at 742.
105. Id. §§ 82a-1020 to -1035.
106. Id.; see also Peck, supra note 96, at 752.
108. Id.
110. Id. at 71–72.
111. 124 Neb. 802, 248 N.W. 304 (1933).
which he or she owns, but in times where supply is short, all owners are “entitled to a reasonable proportion of the whole.”

Currently, Nebraska has not successfully integrated groundwater and surface water law. Nebraska statutes continue to regulate surface water under a prior appropriation scheme that functions as a vested property right subject only to prior surface water appropriators and forfeiture due to nonbeneficial use. Unlike Kansas law, surface water appropriators in Nebraska are not subject to attack from prior groundwater appropriators.

Groundwater law in Nebraska remains largely governed under the rule announced in Olson. This means that, generally, a landowner need only determine that well spacing requirements have been met, drill a well, file a well registration, and appropriate water for the owner's beneficial use, irrespective of the effects on surface water appropriators. In addition, groundwater appropriators are generally limited only by instances where groundwater is in short supply. In such instances, however, a groundwater appropriator must only reduce his or her use so as to share proportionately with other groundwater appropriators.

The dual system is further frustrated by its method of administration. The Director of Natural Resources, who is guided by statutory guidelines, regulates surface water. Until 1975, groundwater was largely unregulated, and the courts primarily handled disputes. Then, in 1975, the legislature adopted the Groundwater Management Act. The Act put groundwater regulation into the hands of local NRDs, which, until 1996, had little to no legislative guidance.

In 1996, Nebraska made an attempt at an integrated water management system by passing Legislative Bill 108 (“LB 108”). The bill

113. Olson, 124 Neb. at 811, 248 N.W. at 308.
115. Id. § 46-608, 46-651, 61-206.
116. While a groundwater appropriator is required to register any well drilled, this is primarily for informational purposes and the Department of Natural Resources has no authority to deny a registration. See Mossman, supra note 2, at 75–76; see also Neb. Rev. Stat. § 46-601 (Reissue 2002).
119. See Mossman, supra note 2, at 71–72.
121. Id.
was prompted by the election of Governor Ben Nelson, an advocate of natural resource management, but more importantly, by increased threats of litigation from the State of Kansas under the Republican River Compact.\textsuperscript{122} While drafters of LB 108 had the best intentions in mind, the bill was destined never to accomplish its goal due to fundamental flaws.

First, the bill never integrated water law doctrines. Surface water remained under the prior appropriation doctrine, while groundwater remained under the reasonable use with correlative rights doctrine.\textsuperscript{123} Second, groundwater controls generally remained localized.\textsuperscript{124} Although the Director of Natural Resources was given the authority to declare integrated management areas, this authority was limited. Under LB 108, the Director can only declare an integrated management area if certain conditions are met. The required conditions include the following: surface waters in the area must be subject to an interstate compact, quantities of water in the area must be in short supply, the short supplies must be caused by the use of hydrologically connected water resources, continued use would lead to a breach of the interstate compact, a proposed joint action plan would mitigate the dispute over the interstate compact, and the joint action plan would be in the public interest.\textsuperscript{125} The NRDs, however, still retained primary authority to designate groundwater controls. The Director can only designate groundwater controls if, after twelve months, the NRD in an area subject to a compact has not constructed a joint action plan approved by the Director and the Interrelated Water Review Committee of the Nebraska Natural Resources Commission agrees that a joint action plan is needed and authority should vest in the Director.\textsuperscript{126} If the area is not governed by an interstate compact, all authority to declare a joint action plan remains with the NRD. Therefore, the ability of the Director to force an NRD to adopt a plan is time-consuming and strewn with checks and balances instituted, in essence, to allow NRDs to retain control.\textsuperscript{127}

Finally, because localized NRDs retained substantial control under LB 108, the possibility of realizing an integrated water management system was lost. NRDs have been reluctant to put forth a good faith effort to utilize a system of integrated management. When the bill was being drafted, public support was split, with most of the public

\textsuperscript{122} See Mossman, supra note 2, at 82-83.
\textsuperscript{124} Id.; see also Mossman, supra note 2, at 86, 99.
\textsuperscript{126} Id.
\textsuperscript{127} See generally id.; see also Mossman, supra note 2, at 93-97.
opposition coming from agricultural producers.\(^{128}\) Therefore, utilization of the integrated management framework of LB 108 was put in the hands of the bill's opponents, who controlled local NRDs.

Ultimately, the convoluted Nebraska integrated management scheme was ineffective in achieving one of its major goals—preventing litigation with Kansas. Two years after the statutory scheme was put into effect, only one NRD, the Upper Republican, which had adopted controls prior to LB 108,\(^{129}\) had integrated water management controls in place. After lengthy negotiations that were terminated in 1997,\(^{130}\) Kansas filed suit in May 1998. LB 108 had proven to be too little too late.

IV. ANALYSIS

After four years of litigation, Kansas, Nebraska, and Colorado agreed upon a Final Settlement Stipulation on December 16, 2002.\(^{131}\) On October 20, 2003, the Final Settlement Stipulation was received and ordered filed by the United States Supreme Court.\(^{132}\) The Settlement officially resolved litigation in the pending dispute. The Settlement required a moratorium on groundwater well-drilling in the Republican River basin,\(^{133}\) provided new accounting procedures,\(^{134}\) established a new conservation study,\(^{135}\) and provided a modified framework for future dispute resolution.\(^{136}\) The Settlement resolved many water accounting issues and was an improvement on the original Republican River Compact. While the Settlement was an improvement, it did not expressly state that groundwater was contemplated under the 1943 Compact. The terms of the agreement, however, imply that groundwater was considered by the original agreement, as these terms constitute a key component of the newly adopted water accounting procedures.

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128. See Mossman, supra note 2, at 84–85.
129. See Mossman, supra note 2, at 86.
133. Id. at 18–25.
134. Id. at 30.
135. Id. at 32–37.
A. Groundwater Was Considered a Component of Water Allocations Under the 1943 Compact

Whether or not it was prudent that the Final Settlement Stipulation did not expressly state that groundwater was a component of surface water allocations under the 1943 Republican River Compact remains to be seen. Regardless, the newly adopted water accounting procedures of the Settlement imply what is already contemplated by the 1943 Compact—groundwater is a component of a state's allocation of surface water under the Compact.

1. The Compact Can Be Interpreted, Using the Plain-Meaning Doctrine, to Include Groundwater

The United States Supreme Court has recognized that an interstate compact is both a contract and a federal statute. Therefore, it is necessary to first apply the plain-meaning doctrine in interpreting the Compact's language. The plain-meaning doctrine provides that if a contract or statute can be read in a plain and unambiguous manner it should be given that effect. It should also be noted that 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning' at the time Congress enacted the statute. If, however, a contract or statute is ambiguous on its face, it is proper to consider extrinsic evidence such as legislative history or subsequent administration of the statute.

Relying only on the plain text of the Compact, the language demonstrates that it does restrict groundwater use that depletes surface allocations within the Republican River basin. To begin this analysis, one need only look to the words of the Compact. Nowhere in the Compact do the words "groundwater" or "surface water" appear. Instead, the Compact speaks only of the "water supply within the Basin." Therefore, it is necessary to read the words in context to determine what meaning the drafters intended.

Thus, the first step is to determine what is meant by "water supply." One of the stated purposes of the Compact is to "provide an equitable division of [the Republican River basin] waters." Accordingly,

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141. RP Compact, supra note 6, art. II.
142. Id. art. I.
we must determine what "basin" waters are. In Article II of the Compact "[t]he Basin" is defined as an area "which is naturally drained by the Republican River, and its tributaries."\textsuperscript{143} The word "drained" thus becomes an important key to defining "water supply within the Basin."

Nebraska itself argued that "drain" should be given its plain meaning, because it is not defined in the Compact.\textsuperscript{144} According to the dictionary, drain means "to cause liquid to go out from . . . [or] to draw off the surface water of . . . [or] to discharge surface or excess water."\textsuperscript{145} We can now put meaning to "water supply within the Basin"—it is an area where the river or its tributaries cause water to flow out from the source by discharge of surface waters or excess waters. Using this definition, groundwater can be included in the "water supply within the Basin," because it is water that flows out from the basin due to the river and its tributaries. This is because in a gaining stream system, which characterizes most of the Republican River,\textsuperscript{146} saturated underground aquifers flow into a river or stream and are carried out of the basin as surface water.\textsuperscript{147}

Now that "water supply within the Basin" has been defined, it is necessary to ascertain how water allocations were to be made under the Compact. In Article III of the Compact, "specific allocations . . . made to each State are derived from the computed average annual virgin water supply."\textsuperscript{148} Therefore, a state's allocation is determined by the meaning of "Virgin Water Supply." In Article II, "Virgin Water Supply" is defined as "the water supply within the Basin undepleted by the activities of man."\textsuperscript{149} It has been determined \textit{supra} that groundwater that finds its way into the surface waters of the basin is part of the water supply.\textsuperscript{150} Therefore, allocations of this water supply under the Compact are to be made from supplies present before any uses by humans. Thus, quantities of groundwater that would reach the river absent groundwater pumping should be accounted for in calculating "Virgin Water Supply."

The final step in interpreting the Compact language is to determine whether hydraulically connected groundwater constitutes part

\textsuperscript{143.} \textit{Id.} art. II (emphasis added).
\textsuperscript{144.} Brief of the State of Nebraska in Support of Exceptions to the First Report of the Special Master at 7, Kansas v. Nebraska & Colorado, (U.S. Apr. 6, 2000) (No. 126, Orig.).
\textsuperscript{147.} \textit{Glennon, supra} note 3 at 42-44, (explaining the concept of a gaining stream).
\textsuperscript{148.} RP Compact, \textit{supra} note 6, art. III.
\textsuperscript{149.} RP Compact, \textit{supra} note 6, art. II.
\textsuperscript{150.} \textit{See supra} subsection IV.A.1.
of a state's allocated water supply. Allocations are made for a state's "Beneficial Consumptive Use." This is defined as "the water supply of the Basin [that] is consumed through the activities of man." Therefore, because hydraulically connected groundwater is part of the water supply within the basin, it is counted against a state's allocation to the extent that it is "consumed by activities of man," which includes groundwater pumping.

Nebraska, in its Brief in Support of Exceptions to the First Report of the Special Master, advanced the notion that by regulating groundwater the parties would be apportioning groundwater, a concept not contemplated by the Compact. Nebraska was correct in its statement that groundwater was not apportioned by the Compact. Only the waters that are naturally drained by the Republican River and its tributaries are apportioned. While this may include a certain amount of groundwater that is hydraulically connected to the river, the Compact does not stand to apportion all groundwater contained within the basin area. Therefore, any wells located within the basin, but that do not decrease streamflow, are not restricted or apportioned by the Compact.

Nebraska also criticized the Special Master for giving the word "basin" an over-expansive meaning. Nebraska argued in its brief that "within the Basin" referred only to the river and its tributaries and the water contained therein. This argument fails to take into account the common meaning of "basin," which is reflected in the Compact. The common meaning of "basin" is "a region drained by a single river system." A region encompasses more than just a streambed. Nebraska itself inadvertently acknowledged that the expansive area of the basin incorporates more than just the streambed by utilizing maps showing the Republican River basin as an area expanding beyond the riverbed and its tributaries' streambeds. This is also reflected in the Compact, which explicitly covers "the area . . . naturally drained by the Republican River." Nebraska's definition of "basin" unnecessarily restricts the term by failing to read the words "area drained by" into the meaning of the word "basin," a meaning that is utilized by the Compact.

151. RP Compact, supra note 6, art. II.
152. Id.
154. Id. at 7-9.
157. RP Compact, supra note 6, art. II (emphasis added).
158. Id.
Utilizing a plain-meaning approach, the Compact language indicates that groundwater was included under the Compact to the extent that it depleted the surface waters of the Republican River and its tributaries. Nevertheless, some individuals, especially those living in Nebraska, would argue that the words of the Compact are ambiguous, as they do not specifically reference surface water or groundwater. In addition, they would contend that the meaning of the language used within the Compact in 1943 was contemporaneous with surface water only. Therefore, it is prudent, although not necessary, to analyze the statute in terms of ambiguity. Even when considered with extrinsic evidence, however, groundwater is still contemplated as a portion of water allocations under the 1943 Republican River Compact.

2. Even if the Compact Is Ambiguous, Compact Language Includes Groundwater

When deciding the meaning of an ambiguous contract or statute, it is permissible to consider reliable extrinsic evidence, which, when taken as a whole, will assist in determining the parties' intent. If the compact is ambiguous, such evidence should be used to show what meaning the parties intended for "water supply within the Basin." A determination of intent requires consideration of the information available to the parties regarding water use and interaction in the Republican River basin in 1943, statements of the negotiating parties concerning the Compact, and subsequent administration of the Compact.

The information available to the parties in 1943 did reflect the fact that groundwater in the basin was hydraulically connected to surface water. Nebraska, in its Brief in Support of Exceptions to the First Report of the Special Master, suggested that the meaning of "water supply" in 1943 did not reflect hydraulically connected groundwater. Nebraska implied that recognition of this phenomenon was beyond the reach of scientific thought and technology of the day. Nebraska, however, never provided evidence that the contemporaneous meaning of the "water supply of the Basin" did not contemplate hydraulically connected groundwater. Nebraska's implied contention was unsupported by evidence because the contention is wrong. The

159. See cases cited supra note 139, and accompanying text.
160. RP Compact, supra note 6, art. II.
162. See generally Brief of the State of Nebraska in Support of Exceptions to the First Report of the Special Master at 7-8, Kansas v. Nebraska & Colorado (U.S. Apr. 6, 2000) (No. 126, Orig.).
scientific authority of the day did understand that groundwater and
surface water are connected.

In 1939, immediately prior to ratification of the Republican River
Compact, the United States Geological Survey, in conjunction with the
University of Nebraska, conducted a study of the groundwater within
the Republican River basin.\textsuperscript{163} The purpose was to make available
information concerning the nature of groundwater in the basin\textsuperscript{164}—
information that could be used by private irrigation developers and
the Federal government in constructing reservoirs and irrigation
projects. The report acknowledged that the supply of the groundwater
was indeed affected by surface water flows. The report stated that:

many factors other than the thickness of the water-saturated material greatly
affect the yields of the wells and perennial supplies of water in any locality,
including: . . . ease of recharge of the water-bearing formation from . . . surface
flow, and . . . amount, distribution and nature of . . . surface flow.\textsuperscript{165}

This report of the United States Geological Survey becomes even more
relevant to the issue of the contemporaneous meaning of “water sup-
ply of the Basin” when it is considered together with a clause con-
tained in Article IX of the Compact. Article IX states that the United
States Geological Survey “shall collaborate with the officials of the
States” in collecting water facts necessary to administer the Com-
pact.\textsuperscript{166} Therefore, it is likely that this information concerning the
interaction of surface water and groundwater was available to the
Compact states in 1943.

Statements made by the negotiators of the Republican River Com-
pact also lend support to the notion that the parties intended hydrau-
lically connected groundwater to be included in compact water
allocations. The United States Supreme Court has previously found
that, when interpreting an interstate compact, it may be necessary to
examine records concerning compact negotiations.\textsuperscript{167} The Court
found that this was permissible, as it had “repeatedly . . . looked to
legislative history and other extrinsic material when required to inter-
pret a statute that is ambiguous.”\textsuperscript{168} Therefore, since a compact is a
statute as well as a contract, negotiation history, which parallels the
legislative history of a statute, should be admitted.\textsuperscript{169}

Negotiation history contained within the minutes of the fourth
meeting of the Compact commissioners and the letters between the
commissioners in response to the fourth meeting demonstrate that the

\begin{itemize}
\item \textsuperscript{163} H.A. Waite et al., *Groundwater in the Republican River Basin in Nebraska* (1943).
\item \textsuperscript{164} Id. Part I, at 1–2.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} RP Compact, *supra* note 6, art. IX.
\item \textsuperscript{167} See Oklahoma v. New Mexico, 501 U.S. 221 (1991).
\item \textsuperscript{168} Id. at 235 n.5 (citations omitted).
\item \textsuperscript{169} Id.
\end{itemize}
negotiators of the Republican River Compact did include hydraulically connected groundwater. The minutes of the fourth meeting show that an issue was addressed concerning whether proposed groundwater usage would be in excess of Compact allocations. The issue was presented by Harry P. Burleigh, an official of the Bureau of Agricultural Economics of the United States Department of Agriculture. The minutes from the meeting state:

Mr. Burleigh . . . 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 . . . .

In response to the request of Mr. Burleigh, the Colorado Commissioner, M.C. Hinderlider, sent a letter to the other Compact Commissioners stating:

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 within the allocations which the Commission has tentatively made.

The letter that Mr. Hinderlider was referencing was actually sent the previous day to Mr. Burleigh. The letter indicated that the Commission had considered the issue and found that the proposed groundwater did not exceed Compact allocations. The letter stated:

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.

In addition, further correspondence between the Colorado Commissioner and his state’s branches of government lend continuing support to the idea that the commissioners who negotiated the Compact did consider and include hydraulically connected groundwater in the

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172. Reply Brief for Kansas Opposing the Exceptions of Nebraska & Colorado at 15–16, Kansas v. Nebraska & Colorado (U.S. June 1, 2000) (No. 126, Orig.).

Compact allocations. Mr. Hinderlider's first letter, addressed to Colorado's Governor, states:

The compact allocates to Colorado, its citizens, agencies, associations and corporations all of the surface and underground water supplies originating in Colorado within the [Republican River Basin], which it is believed is the limit of consumptive use which it is practicable to make in Colorado of the waters from these stream basins.174

Next, the Commissioner sent a letter to his state legislature that stated: "It is believed that this Compact equitably apportions the total available annual virgin water supplies of the Basin, both surface and underground, among the three signatory states . . . ."175 The statements of the commissioners, in the absence of legislative history to the contrary, and when considered in light of Compact language, lead to one conclusion: groundwater was considered by the negotiating parties to be an element of the state's water allocations.

Lending additional support to the conclusion that hydraulically connected groundwater is considered in Compact allocations are the subsequent actions taken by the RRCA. Assuming, for the purposes of this Note that the Compact terms are ambiguous, the actions taken by the RRCA should be considered when interpreting the Compact terms. This is because the RRCA can be compared to a federal agency interpreting a statute. Courts have held that when interpreting a federal statute, agencies are generally entitled to deference in their interpretation of statutes.176 In this instance, however, the RRCA should be given even greater deference than an administrative agency, because any action taken by the RRCA had to be unanimously approved by its three-member board that was comprised of one member from each state.177

Since its creation in 1961, the RRCA has continuously included alluvial groundwater pumped from wells in the Republican River basin in its allocation formulas.178 The RRCA also considered the issue of what impact tableland wells had on Compact allocations. The compact stated in 1961 that further research was needed before an exact accounting of the surface water impact from tableland wells could be determined.179 The RRCA continued to maintain that position until litigation was filed. These published findings of the RRCA further

175. M.C. Hinderlider, Explanatory Statement and Report to the 34th General Assembly (1943), reprinted in Reply Brief for Kansas Opposing the Exceptions of Nebraska & Colorado app. M at M-10, Kansas v. Nebraska & Colorado (U.S. June 1, 2000) (No. 126, Orig.) (emphasis added).
177. RP Compact, supra note 6, art. IX.
178. See supra notes 90–92 and accompanying text.
179. Id.
demonstrate that hydraulically connected groundwater should be considered as part of Compact allocations and that all three states acquiesced in this belief through their RRCA representatives.

Finally, subsequent legislative and administrative actions within all three Compact states support the contention that the states understood that hydraulically connected groundwater was intended to be part of Compact allocations. At the time of the Compact, none of the Compact states regulated the use of groundwater. This was reasonable, however, because at that time each state's allocation was not fully appropriated and there was not a need to regulate groundwater use. Following ratification of the Compact, it became more obvious that water consumption would have to be regulated to comply with the terms of the Compact. In 1945, just two years after the Compact was ratified, Kansas introduced legislation that regulated both surface water and groundwater in an integrated system. Then, in 1965, Colorado instituted groundwater controls. In 1996, even Nebraska passed legislation to regulate interrelated groundwater and surface water. In fact, Nebraska's legislature admitted in express statutory language that the Department of Natural Resources should be “given authority to regulate ground water related activities to mitigate or eliminate disputes over interstate compacts.” In addition, the Nebraska Legislature also recognized that “ground water use or surface water use in one natural resources district may have adverse effects on water supplies in another district or in an adjoining state.” While the actions taken by Kansas, Colorado, and eventually Nebraska are not as conclusive as negotiation history would be for purposes of determining the parties' intent, the actions do lend additional support, when considered with all other evidence, to the primary contention that hydraulically connected groundwater should be considered in Compact allocations.

Nebraska, in its Brief in Support of Exceptions to the First Report of the Special Master, asserted that because state law at the time of the Compact did not regulate groundwater or recognize the connection between groundwater and surface water, the Compact could not have included hydraulically connected groundwater in its allocation. This argument is fundamentally flawed for two reasons. First, the Su-

180. See supra notes 23–27 and accompanying text.
181. See supra note 16 and accompanying text.
182. See supra note 98 and accompanying text.
183. See supra note 26 and accompanying text.
184. See supra notes 27 and 119 and accompanying text.
186. Id. § 46-656.06.
preme Court has already stated in *Hinderlider v. La Platta River and Cherry Creek Ditch Co.*,\(^1\) that an interstate compact could limit pre-compact water rights. Therefore, just because the states did not regulate water before a compact does not mean that the states could not regulate water following a compact according to the compact terms.\(^2\)

Second, the absence of immediate adoption of groundwater regulations, does not mean that groundwater was not considered as part of Compact allocations. This is true because, as mentioned *supra*, the allocated water under the Compact was not fully appropriated within the Compact states; thus, there was not an immediate need to institute groundwater regulation.\(^3\) In addition, the Compact does not stand for the proposition that Compact states must regulate groundwater. Instead, the Compact equitably apportions the "water supply within the Basin," which includes hydraulically connected groundwater, and allows the individual states the autonomy to regulate water within their borders so long as the states can deliver downstream allocations in accordance with the Compact.\(^4\) Thus, the timing of groundwater regulation is irrelevant so long as water allocations are available and will continue to be available.

When all the extrinsic facts are considered in their entirety, it becomes apparent that hydraulically connected groundwater was considered in 1943 and continues to be considered as part of the Compact allocations. Therefore, whether one considers the Compact language unambiguous or ambiguous, the conclusion does not change. Ultimately, the Compact states recognized that groundwater was a component of the "water supply within the Basin" and entered the Final Settlement Stipulation to resolve the dispute.

B. The Final Settlement Stipulation: A Substantial Improvement, but It May Contain Fundamental Flaws

The Final Settlement Stipulation provides a significant improvement in Compact administration, as it resolves many issues implicated in the dispute and provides procedures to avoid future disputes. Nevertheless, the Settlement leaves some unresolved issues that may become future problems if the states do not make a good faith effort to comply with the spirit of the settlement agreement.

\(^{188}\) 304 U.S. 92, 106 (1938).
\(^{189}\) Reply Brief for Kansas Opposing the Exceptions of Nebraska and Colorado at 10, *Kansas v. Nebraska & Colorado* (U.S. June 1, 2000) (No. 126, Orig.).
\(^{190}\) See *supra* note 16 and accompanying text.
\(^{191}\) RP Compact, *supra* note 6, art. III.
1. Improvements Made by the Settlement

The first benefit of the Final Settlement was to end the expensive litigation and begin a concerted effort to realize a solution to the problem. Upon signing the agreement, the Compact states agreed to forever waive all claims arising before December 15, 2002. In addition, the three states agreed to be bound by the agreement and undertake its obligations. The agreement acknowledged that these obligations did not change the states’ obligations or rights under the Republican River Compact.

The agreement made an immediate improvement by instituting a well-drilling moratorium within the Republican River basin. This was a necessary step that had previously been taken by Kansas and Colorado, but one that Nebraska had been reluctant to impose on its citizens, except in the Upper Republican NRD. By agreeing to the terms of the Final Settlement Stipulation, Nebraska has bound its citizens and NRDs to comply with its terms. Therefore, Nebraska has now bound its citizens to the terms of the moratorium under the Final Settlement Stipulation. This is a substantial improvement, because before entering the Settlement, Nebraska’s NRDs were only bound to regulate groundwater according to Nebraska statutes that gave them substantial power to avoid imposition of a moratorium.

The next significant section of the Final Settlement Stipulation establishes accounting procedures for determining the “Virgin Water Supply” and “Computed Beneficial Consumptive Use.” The fact that accounting procedures were adopted is not the most notable change, as there had been previous agreements concerning accounting procedures by the RRCA prior to the dispute. What is significant is that the Settlement has foreclosed the issue of whether groundwater is considered a component of streamflow. The Stipulation provides that “stream flow depletions caused by Well pumping for Beneficial Consumptive use will be included in the determination of Virgin Water Supply, Computed Water Supply, Allocations and Computed Beneficial Consumptive Use.” These depletions will be determined...

193. Id.
194. Id.
195. Id. at 11.
196. See Mossman, supra note 2, at 86.
197. See Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 92, 106 (1938) (holding that interstate compacts are binding on its citizens).
198. This is not to say that the 1943 Compact did not bind the NRDs, however, due to the Compact’s structure, no mandatory regulatory imposition was put on the states. See generally RP Compact, supra note 6.
199. See generally Final Settlement Stipulation, supra note 131, at 18–25, Kansas v. Nebraska & Colorado (U.S. June 1, 2000) (No. 126, Orig.).
200. Id. at 18.
using a Groundwater Model that was constructed by representatives of all three states. The model takes into account both alluvial and tableland wells to the extent that the wells deplete streamflow. The accounting is also to be conducted on a five-year running average with flood flows removed.

Incorporating the clause that mandates well-pumping as a component of the water accounting procedures effectively puts to rest the dispute about whether groundwater is a component of the “water supply within the Basin” in the 1943 Compact. Although the Final Settlement Stipulation never expressly stated that groundwater was considered a component of the basin’s water supply, this conclusion can be implied. The implication is made by reading the well-pumping provision mentioned supra, together with the provision stating that the Final Settlement Stipulation did not change any of the states’ rights or obligations under the Compact. A reading of the two provisions together demonstrates that the Compact states agree that groundwater was included under the original Compact. If groundwater was not included under the Compact, the provision requiring well-pumping to be included in accounting procedures would be in conflict with the provision of the Settlement stating that the states rights were not changed under the Final Settlement Stipulation.

The Final Settlement Stipulation also establishes water shortage indicators, agreed upon by the Compact states, that trigger a system of remedial procedures to prevent Compact allocation shortfalls. The indicators are an important dispute avoidance mechanism, because they allow the states to look to specific measurements, based on the water quantity in Harlan County Lake, to determine when conservation measures should be taken when it appears that a water shortage that may cause Compact violations is likely. Prior to the Final Settlement Stipulation, no indicators or conservatory procedures were expressed under the Compact. The states were relegated to individually deciding if water supplies were short enough to merit taking remedial measures. The Final Settlement Stipulation resolves prior speculation by affirmatively establishing: (1) when water is in short supply and listing suggested remedial measures; (2) a February 26, 1948 priority date for the Superior Courtland Diversion Dam; (3) a time table for Nebraska to present its planned remedial measures and those measures’ predicted yield; and (4) that the running average used

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201. Id. at 19.
202. Final Settlement Stipulation, supra note 131, Accounting Procedures and Reporting Requirements, app. C at C-13, Kansas v. Nebraska & Colorado (U.S. June 1, 2000) (No. 126, Orig.).
203. Final Settlement Stipulation, supra note 131, at 24.
204. Id. at 4–5.
205. Id. at 25–30.
in the accounting procedures changes from a five-year running average to a two-year running average. Nevertheless, while it generates some certainty in Compact accounting and remedial procedures, the Final Settlement Stipulation relies a great deal on Nebraska’s good faith efforts to comply with the Settlement.

2. Viability of the Settlement Rests in the Hands of Nebraska

The Final Settlement Stipulation is susceptible to failure if Nebraska does not make a good faith effort to deliver Kansas’s water allocations under the guidelines of the Settlement. While the Settlement is valuable because it sets definite boundaries concerning the water supply, the Settlement is also weak because it does not mandate any remedial efforts except a well-drilling moratorium. Even the well-drilling moratorium will have little effect if Nebraska does not appropriately regulate water use in water-short years.

The well-drilling moratorium was necessary and useful, because it precluded further exploitation of the basin’s water supply by new wells. This does not, however, preclude exploitation by already established wells. It is clear that in 1990 and 1991 the waters of the basin were overappropriated, because Kansas did not receive its water allocations in those years. From 1992 until the signing of the agreement in 2002, wells in the Middle and Lower Republican River NRDs continued to proliferate. Therefore, it is safe to infer that Nebraska will be at risk of violating the Compact and Final Settlement Stipulation if it does not choose to regulate existing wells in water-short years. Moreover, with the addition of more wells between 1992 and 2002, it is likely that water-short years will now occur with more frequency.

The Final Settlement Stipulation does not mandate remedial measures by Nebraska in water-short years. Instead, it only suggests six remedial measures that Nebraska may utilize. The only mandate is that Nebraska must report to the other Compact states on which measures it has chosen and those measures’ potential yields. Therefore, the burden of compliance rests on Nebraska’s ability to regulate its water use. This is not encouraging, given Nebraska’s com-

206. Id.
207. RRCA, 31ST ANN. REP., supra note 31, at 12–13; RRCA, 30TH ANN. REP., supra note 31, at 18–19.
208. See Republican River Settlement, Nebraska Connects: Troubled Waters (Nebraska Public Radio (NPRN) broadcast, May 15, 2003), available at http://nprn.org/nprn_news/npr051503.html (stating that well-drilling had significantly increased immediately prior to the moratorium imposed by the settlement agreement); see generally Mossman, supra note 2, at 78 (noting that only the Upper Republican NRD had instituted groundwater restrictions prior to 1996).
209. Final Settlement Stipulation, supra note 131, at 27.
210. Id. at 28.
plex regulatory scheme that confers a great deal of power to local NRDs.\textsuperscript{211}

It is important to note that Nebraska has taken a good faith step toward complying with the Settlement terms. In 2004, the Nebraska Legislature amended the state’s water management laws.\textsuperscript{212} Legislative Bill 962 ("LB 962") instituted mandatory yearly evaluations of Nebraska’s river basins, which are to be conducted by the Director of the Department of Natural Resources.\textsuperscript{213} The evaluations will assess the appropriation level of each basin. If, after the preliminary evaluation, the Director finds the basin fully appropriated, all new surface water permits and well-drilling permits in areas hydrologically connected to surface water shall be temporarily discontinued.\textsuperscript{214} The temporary stay will continue until a final determination can be made. At that time, the stay will either become permanent or be lifted.\textsuperscript{215} This complies with the Settlement’s conditions that require well moratoriums in the entire Republican River basin.\textsuperscript{216} When a basin is fully appropriated, LB 962 requires the Director and the NRD affected to jointly develop an integrated water management plan.\textsuperscript{217} This allows the Director to indirectly force the creation of an integrated water management plan. Like LB 108, however, LB 962 states that the Director can only develop the surface water controls and the NRD must develop the groundwater controls.\textsuperscript{218} If a joint agreement regarding the integrated water management plan cannot be reached because of conflicting goals, inability to agree on the geographic area affected, or incompatible surface water and groundwater controls, an individual board called the Interrelated Water Review Board will settle the dispute.\textsuperscript{219}

While the legislation is a step in the right direction, it is still flawed. The bill still allows NRDs to promulgate their own portion of the plan. Although the Interrelated Water Review Board will settle any dispute, it must decide the structure of the plan by considering the views presented by both the Director and the NRD.\textsuperscript{220} The process is time consuming and fails to allow decisive action to be taken by one government agency. In addition, the bill leaves enforcement of

\begin{itemize}
\item \textsuperscript{211} See supra subsection III.B.2.
\item \textsuperscript{212} L.B. 962, 98th Leg., 2d Sess., 2004 Neb. Laws (codified as amended in scattered sections of chapters 2 and 46 of Neb. Rev. Stat.).
\item \textsuperscript{213} Id. § 53.
\item \textsuperscript{214} Id. § 54.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} See supra notes 192–95 and accompanying text.
\item \textsuperscript{217} L.B. 962 § 55, 98th Leg., 2d Sess., 2004 Neb. Laws (codified as amended in scattered sections of chapters 2 and 46 of Neb. Rev. Stat.).
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id. §§ 58–59.
\item \textsuperscript{220} Id. § 59.
\end{itemize}
groundwater management in the hands of the local NRDs, the same local entities that fought integrated management under LB 108. Therefore, the bill still fails to give regulation and enforcement authority to a centralized agency equipped to gather and evaluate all necessary facts impacting an integrated water management issue.

LB 962 also liberalizes appropriation transfers.\textsuperscript{221} It allows transfers between not only locations, but also appropriation types.\textsuperscript{222} While this may provide more flexible use of the water, it is only a temporary fix. Appropriation transfers do not reduce the quantity of water used. Instead, the transfers merely shift where and when the water is used. This may reduce demand during peak usage periods, but, in the long run, no reduction in beneficial use is accomplished. This is especially relevant, because the Compact terms are decided on total amounts of water delivered within a year.\textsuperscript{223} Therefore, adjusting when already-present water is available will not address noncompliance issues for not delivering sufficient water quantities under the Compact.

The transfers may even increase water use if hydrologically connected groundwater wells are not regulated. This could occur where appropriation transfers shift usage to nonpeak periods. Then, when the peak periods arrive, unregulated groundwater appropriators consume any extra water made available from the transfer. Therefore, water will not be available to reach the Kansas border and the purpose of the transfer—to relax demand during peak periods—will be defeated.

LB 962 is not the best solution to this problem. The best solution would be completely integrated water management laws that are enforced by a centralized agency. This solution, however, may be impossible, because Nebraska's bifurcated system has been in place for too long. Therefore, whether the integrated water management problem can be remedied sufficiently to allow compliance with the Compact remains to be seen. Nevertheless, LB 962 is encouraging, as it indicates that Nebraska is serious about complying with the Settlement's terms.

Although the new legislation is not ideal, Nebraska has a strong incentive to make the new legislative scheme work. This incentive is the threat of future litigation under the Final Settlement Stipulation terms. By ratifying the Settlement terms, Nebraska bound itself to adhere to the express formulas of the Settlement that can be easily interpreted and enforced should the need arise for Kansas to seek intervention through the Court. Therefore, while it is still uncertain whether Nebraska will make a good faith effort to comply with the

\textsuperscript{221} Id. § 16.
\textsuperscript{222} Id.
\textsuperscript{223} See supra notes 81–84 and accompanying text.
Settlement, the threat of litigation in accordance with the unambiguous terms of the Settlement creates an increased likelihood that Nebraska will comply with the Settlement terms.

V. CONCLUSION

Adopting the Final Settlement Stipulation was a step in the right direction for the states of the Republican River Compact. The Settlement correctly interpreted the 1943 Compact to include hydraulically connected groundwater in the “water supply within the Basin” by providing that groundwater pumping is part of the state’s allocated water to the extent that it depletes streamflow. The Settlement also established tangible thresholds of when water supplies within the Republican River basin may jeopardize water allocations under the Compact. The Settlement, however, falls short of requiring remedial efforts. Instead, it delegates authority to Nebraska and allows it to choose suggested remedial efforts to use during water-short years. Whether Nebraska will be able to utilize these remedial measures remains to be seen, given the state’s complex statutory regulation of water. It may be enough that settlement provisions, readily enforceable through litigation, will make the political forces in Nebraska take notice; but only time will tell if harmony within the Republican River basin will be restored.

Aaron M. Popelka