MEMORANDUM

TO: Mike Jess

FROM: Don Blankenau, Assistant Director/Legal Counsel (written by Sag)

RE: Ultra Vires Compact Action

DATE: June 7, 1995

FACTS

The negotiation of the Republican River Compact began when Congress granted its consent to the negotiations. See Act of August 4, 1942, 56 Stat. 736. The authorizing legislation provided that the Compact should not be effective "until the same shall have been ratified by the legislature of each of the said States and approved by the Congress of the United States." Congressional consent to the Compact was granted in the Act of May 26, 1943, 57 Stat. 86, after having been ratified by the legislatures of Kansas, Nebraska, and Colorado.[1] The terms of the Compact were therefore the result of negotiation among the parties, ratification by state legislatures, and congressional approval.

Articles III and IV set forth the bases for the apportionment. Article III provides that "[t]he specific allocations in acre-feet . . . made to each State are derived from the computed average annual virgin water supply originating in . . . designated drainage basins . . .." Article IV then establishes the allocations to the

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[1] A previous effort to negotiate a compact, signed on March 19, 1941, was vetoed by President Roosevelt on April 2, 1942, when it purportedly sought to "withdraw the jurisdiction of the United States over the waters of the Republican Basin for purposes of navigation and to restrict the authority of the United States to construct irrigation works and to appropriate water for irrigation purposes . . .."

three states "subject to such quantities being physically available." Colorado is allocated 54,100 acre-feet of water. Kansas is allocated 190,300 acre-feet of water.[2] Nebraska is allocated 234,500 acre-feet of water. However, the allocations derived from the computed average annual virgin water supply are altered, pursuant to Art. III, as follows:

> Should the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportion that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

The administrative history of the Republican River Compact is important in two respects. First, it displays an ongoing debate over the scope of certain provisions. (No resolution has been achieved with respect to the inclusion of groundwater or virgin water supply.) Second, the record reflects that Kansas wishes to effectively change provisions of the Compact by rules and regulations despite having negotiated the terms, and despite the practice accorded them by the Compact Administration.

The Republican River Compact Administration has been addressing issues related to the apportionment, and to the accounting and administrative process of the Compact Administration, since at least 1979. In 1980, Kansas questioned whether groundwater use should be utilized in computing virgin water supply.

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[2] Kansas' allocation from the mainstem is 138,000 acre-feet. The 52,300 difference is allocated to Kansas from tributaries within Kansas.

A change, however, was not recommended at that time. A formal motion by Commissioner Pope that the Engineering Committee review methods of computing virgin water supply and consumptive use with attention to groundwater depletions was passed on July 11, 1985.

At the July 21, 1989, meeting, Kansas presented a list of seven alternatives for more effective administration. Commissioner Pope stated that Kansas was trying to come into compliance by closing alluvial valleys in Republican Basins to further appropriation. (Kansas claims that this process has been underway since 1984). Kansas also objected to "after the fact" administration.

At the June 10, 1994, meeting an amended resolution proposed by Commissioner Pope was passed. It reads:

> Based on the language in the Republican River Compact and a review of all available historical documents relating to the negotiation and interpretation of the meaning of the Compact, the Legal Committee shall report on the inclusion of groundwater in the computation of "virgin water supply" and [s] to the computation of allocations and consumptive use." If there is no agreement, each representative should submit their own memo.

Kansas Resolution A has been submitted for consideration at the June 8, 1995 meeting. Its principal provisions state:

> 14. The annual beneficial consumptive use in each of the states in each drainage basin shall be limited to the original allocations provided in Article IV of the RRC until such time as the RRC Administration unanimously agrees to adjust those allocations pursuant to Article III of the RRC.
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> 15. The annual beneficial consumptive use in each drainage basin shall be calculated using the formulae adopted by the RRC Administration as revised by the RRC

> Administration in June, 1990, until further amended by the RRC Administration. These values shall be reported to the RRC Administration each year by the Engineering Committee.

These provisions conflict with the concluding paragraph of Art. III of the Republican River Compact:

> Should the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportion that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

DISCUSSION OF COMPACT AMENDMENTS

The Constitution authorizes states to enter into compacts when congressional consent has been obtained. See U.S. Const. art. I, § 10, cl. 3. The standard interpretation of the requirement for congressional consent stems from the case of Virginia v. Tennessee, 148 U.S. 503 (1893), in which Justice Field distinguished between interstate "agreements" and "compacts" and applied the requirement of congressional approval to compacts which increased the power of the states:

> Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.

148 U.S. at 519; see also New Hampshire v. Maine, 426 U.S. 363 (1976); U.S. Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452 (1978).

The requirement of congressional consent was expanded in Cuyler v. Adams, 449 U.S. 433 (1981). The Court held: "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the State's agreement into federal law . . .." 449 U.S. 440. Accordingly:

> The Court's ruling in Cuyler revolutionized Compact Clause jurisprudence in two ways. First, the Court expanded the traditional definition of a pact that requires congressional consent and thus becomes a compact subject to the Compact Clause. Although formerly only those pacts that encroached on federal supremacy were deemed to require consent, the Court added that any pact to which Congress consented also would be characterized as a compact. Second, the Court announced that a compact is federal law.

See L. Eichorn, Cuyler v. Adams and the Characterization of Compact Law, 77 Va. L. Rev. 1387, 1389 (1991).

Three principles must be applied when determining the legality of a Compact rule or regulation. First, the interpretation of a compact should be in accordance with the terms of the compact and the rules of federal substantive law. See Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959); Dyer v. Sims, supra. Second, an aid for making this determination is the (administrative practice accorded the compact) by the parties. See Udall v. Tallman, 380 U.S. 1 (1965). Finally, compacts are governed by (contract law.) See State ex rel. Dyer v. Sims, 341 U.S. 22 (1951); Texas v. New Mexico, 482 U.S. 124 (1987). Changes to compact terms cannot be made absent the negotiations contemplated

by Art. I, § 10, and with congressional approval in a manner that is fully consistent with the status of an interstate compact as federal law.

There is no dispute that a compact's administrative body may adopt rules and regulations to implement its purposes. Moreover, Art. IX of the Republican River Compact authorizes the officials of the compacting states "by unanimous action [to] adopt rules and regulations consistent with the provisions of this compact," (emphasis added). The limitation is that the rules and regulations may not be ultra vires, i.e., "acts beyond [an] official's statutory authority, acts taken pursuant to constitutionally void powers, or acts exercised in a constitutionally void manner." See, e.g., Davis v. Reed, 462 F. Supp. 410 (W.D. Okla. 1977). In Texas v. New Mexico, 462 U.S. 554, 564-65 (1983), the Court invalidated the Special Master's recommendation that the United States Commissioner on the Pecos River Compact Commission be granted a tie-breaking vote contrary to Art. V(a). The Court held that as a consequence of the Compact's status as federal law to which Congress has consented "no court may order relief inconsistent with its express terms." The same rationale applies to Kansas Resolution A.

In Paragraph 14 of Kansas Resolution A, Kansas proposes that the beneficial consumptive use allocations set forth in Article IV of the Republican River Compact shall be adhered to "until such

time as the RRC administration unanimously agrees to adjust those allocations pursuant to Article III of the RRC." This proposal directly conflicts with the concluding paragraph of Article III which states that when the future computed virgin water supply varies more than ten percent from the virgin water supply set forth in Article III "the allocations hereinafter made from such source shall be increased or decreased in the relative proportion that the future computed virgin water supply of such source bears to the computed virgin water supply used herein," (emphasis added). This provision is mandatory and provides no basis for being set aside by a rule and regulation. As the Court held in Texas v. New Mexico, 482 U.S. 124, 128 (1987), a compact "remains a legal document that must be construed and applied in accordance with its terms." West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951).

Administrative construction by the states supports the proposition that adjustments must be made as set forth in the final paragraph of Article III. Specifically, it has been the history of the Compact Administration to automatically adjust the allocations when the virgin water supply varied by more than 10 percent. In Udall v. Tallman, supra, the Court held:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question

> arisen in the first instance in judicial proceedings." Unemployment Comm'n v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at the stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the partes work efficiently and smoothly while they are yet untried and new.'" Power Reactor Co. v Electricians, 367 U.S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order ....

380 U.S. at 16.

Moreover, the Republican River Compact is a federal law, the terms of which were negotiated among the parties. See Texas v. New Mexico, 482 U.S. 124, 128 (1987); Petty v. Tennessee-Missouri Bridge Comm'n. 359 U.S. 275, 284 (1959). But an amendment of the compact terms can only be undertaken through negotiation and ratification by the Congress. This has been the precedent where other compacts have been amended. See the amended Costilla Creek Compact, approved by Congress in the Act of December 12, 1963, 77 Stat. 350.[3]

In its Resolution, Nebraska recognizes that the issues raised by the states require renegotiation of compact provisions. Nebraska submits that among the matters appropriate for renegotiation are:

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[3] The preamble to the amended Costilla Creek Compact states that Colorado and New Mexico designated commissioners "pursuant to the acts of their respective legislatures and through their appropriate executive agencies..."

1. Prospective administration;

2. Reallocating or eliminating subbasin allocation;

3. Reorganizing the overlapping responsibilities of the Director of the Department of Water Resources and certain Natural Resource Districts with respect to water administration under Nebraska law;

4. Renegotiation of the "renewable" supply;

5. The establishment of target flows at certain locations along the Republican River and its tributaries;

6. Adoption of accounting procedures that allow for debits and credits of water allocations from year to year; and

7. The establishment of regulatory procedures to ensure that the State of Kansas receives 138,000 acre-feet of water as determined by the Commission's accounting procedures.

8. The exclusion of particular activities of man from the determination of the virgin water supply and of the consumptive use of water. Examples of such activities could include soil conservation practices, such as, reuse pits and terraces, changes in the water regime that causes changes in channel shape and increased growth of phreatophytes, and other such actions.

CONCLUSION

It seems likely that Kansas' Resolution A is beyond the authority of the Compact Commission because it would alter provisions of the Compact. This memorandum is submitted in support of Nebraska's contention that the Compact Commission lacks the authority to amend the terms of the Compact by revised rules and resolutions.

Nebraska, however, should not disagree with the point behind Kansas' Resolution A. The Compact requires restructuring. But the matter cannot be solved by rules and regulations. The Compact requires re-negotiation in a manner that is lawful, that resolves ambiguities and disputes, and that produces a result that is equitable to the three states. Accordingly, the Nebraska Resolution should be adopted.