No. 137, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

Before the Honorable Barton H. Thompson, Jr.
Special Master

MONTANA'S RESPONSE TO MOTION TO STRIKE THE REPORT AND EXCLUDE THE TESTIMONY OF DOUGLAS R. LITTLEFIELD PH.D.

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July 9, 2013

The State of Montana hereby responds to Wyoming's Motion to Strike the Report and Exclude the Testimony of Douglas R. Littlefield, Ph.D. ("Motion"). Dr. Littlefield's report and testimony constitute admissible expert evidence regarding the historical record of the negotiation and approval of the Compact. This evidence comprises historical facts regarding the negotiation of the Compact as they reflect on the development of Article V(A), and thus will assist the Special Master in resolving issues in this case.

BACKGROUND

1. Negotiations on the Yellowstone River Compact were first authorized by Congress in 1932. See First Interim Report of the Special Master ("FIR") 6 (2010). The negotiations ultimately spanned nearly two decades, giving rise to three unsuccessful drafts before the States agreed to the final Compact in 1950. *Id.*, at 6-9. Subsequently, each of the States ratified the final Compact by legislative enactment, and Congress granted its consent to the Compact in 1951. *Id.*, at 9.

2. As indicated in his vita, attached as Appendix A to the Rebuttal Report on Article V(A) of the 1950 Yellowstone River Compact (May 31, 2013) ("Littlefield Report"),[1] Douglas R. Littlefield, Ph.D., is a research historian with nearly thirty years of experience as a historical consultant on environmental matters, particularly those involving water rights, river navigability and land uses. He has extensive historical research experience in numerous archives throughout the United States, including the U.S. National Archives and many of its regional branches, the Library of Congress, many States' official archives (including those of Montana, North Dakota, and Wyoming), numerous universities' special collections, and a wide variety of local and regional historical societies. He has testified in a number of court proceedings as an expert

[1] The Littlefield Report was not included with Wyoming's Motion. It was subsequently provided to the Special Master as Exhibit A to Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements, filed July 3, 2013.

witness on historical issues, including before Supreme Court Special Master Arthur L. Littleworth in *Kansas v. Colorado*, No. 105 Orig.

3. Dr. Littlefield was retained as an expert by Montana to provide a report and associated testimony in rebuttal to the opinions of Wyoming expert Bern Hinckley, as set forth in Mr. Hinckley's report entitled "Review of Expert Reports Submitted by Montana" ("Hinckley Report") (submitted April 2, 2013). The Hinckley Report advances analyses and opinions that are premised on a fundamental assumption that the Compact requires Montana to administer its water rights and uses in a particular manner (following Wyoming law and practices of administration) before Wyoming is required to deliver Article V(A) water to Montana. This view is evident in recent positions taken by Wyoming in this litigation. See Montana's Motion for Summary Judgment on The Compact's Lack of Specific Intrastate Administration Requirements 5-7 (filed July 3, 2013) ("Montana's Motion for Summary Judgment").

4. Dr. Littlefield has done extensive research in both archival and published primary sources on the history of the Compact. This research was conducted to determine what the historical record reflects regarding the discussions during the drafting and approval of the Compact with respect to how each State was to regulate the pre-1950 rights within its borders. The results of this historical research are detailed in the Littlefield Report.

5. With respect to archival sources, Dr. Littlefield reviewed all available files of the negotiators of the 1950 Yellowstone River Compact, as well as similar files for each draft of the Compact dating back to the 1930s. This research was conducted at the following locations:

a. The Montana Governors' files at the Montana Historical Society (the equivalent of a State archives) in Helena, Montana;

b. The records of the Montana Department of Natural Resources and Conservation in Helena;

c. The Wyoming State Engineer's files at the Wyoming State Archives in Cheyenne, Wyoming;

d. The Wyoming Water Resources Division files at the Wyoming State Archives in Cheyenne;

e. The Wyoming Governors' files at the Wyoming State Archives in Cheyenne;

f. The North Dakota Water Commission files in Bismarck, North Dakota;

g. The North Dakota Governors' files at the University of North Dakota in Grand Forks;

h. The files of the U.S. Bureau of Reclamation at the U.S. National Archives branch in Denver, Colorado; and

i. The records of the Department of the Interior at the U.S. National Archives branch in College Park, Maryland.

Also as part of the archival research, Dr. Littlefield reviewed records, including unpublished reports and papers, regarding the Compact as understood by Harry Truman (President of the United States in 1950) and federal executive branch agencies, held by the Truman Presidential Library in Independence, Missouri. Littlefield Report 6-7.

6. With regard to published materials, Dr. Littlefield conducted a complete examination of all actions by Congress relating to the Compact and its history as shown in the *Congressional Record*, Congressional reports, and in published and unpublished Congressional hearings. Also examined were published reports and studies by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers, as well as over four hundred historical newspaper articles

covering the Compact negotiations, including interviews and other comments of the negotiators. *Id.*, at 7.

7. Dr. Littlefield's research encompassed all known, publicly available documents comprising the historical record of the negotiations and approval of the Compact.

8. Pending before the Special Master is Montana's Motion for Summary Judgment, which argues that the Compact does not impose particular requirements on Montana's intrastate water administration as a prerequisite to Montana's enjoyment of its rights under the Compact. Montana relied on the Littlefield Report in connection with its Motion for Summary Judgment as protective evidence in case the Special Master determines that the language of the Compact is ambiguous on whether the Compact imposes such intrastate administration requirements.

ARGUMENT

Wyoming contends that Dr. Littlefield's report consists of legal opinions that will not assist the Special Master. Wyoming misunderstands Dr. Littlefield's report. That report consists not of legal opinions, but of historical context that is of great value to understanding the negotiation and approval of the Compact. Historical research and gathering records from across the United States piece by piece to ascertain the historical context of the Compact and what was and was not considered by the drafters is precisely the type of research best conducted and presented by an expert historian. Moreover, to strike Dr. Littlefield's entire report at this point would at least be premature. Wyoming will have a full opportunity at trial to cross-examine Dr. Littlefield on the basis of his opinions, and the Special Master may give whatever weight to those opinions he deems appropriate.

I. Legal Standard for Admission of Expert Testimony

The Court's original jurisdiction is sui generis, and, though it may take guidance from the standards developed in cases originating in the federal district courts, the Court is not bound by those standards in the original jurisdiction. See, *e.g.*, *Texas v. New Mexico*, 482 U.S. 124, 134 (1987). Supreme Court Rule 17.2 expressly provides that in actions in the Court's original jurisdiction, the Federal Rules of Evidence "may be taken as guides."

Federal Rule of Evidence 702 governs the admission of expert testimony in federal district court. Such testimony must satisfy the following standard:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

The Supreme Court has stated that the trial court has a "gatekeeping role" of ensuring that an expert's testimony is both reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). Thus, preliminary questions regarding the admissibility of expert testimony are determined by the Court.

In applying Rule 702, courts undertake a three-step analysis: (1) the witness must be qualified as an expert by knowledge, skill, experience, training, or education; (2) the expert's reasoning or methodology must be scientifically reliable; and (3) the testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592-93. Whether an expert will assist the factfinder is a question the trial court has "wide discretion" to decide. *Mercado v. Austin Police Dep't,* 754 F.2d 1266, 1269 (5th

Cir.1985). This is particularly true "when the court sits as the trier of fact, for [it] is then in the best position to know whether expert testimony would help [it] understand the case." *Ibid.*

Wyoming does not challenge Dr. Littlefield's qualifications as a historian, nor does Wyoming contend that his methodology in reviewing the historical record of the Compact's negotiations is unreliable. Only the third test is at issue.

II. The Issues Addressed By Dr. Littlefield's Report Have Not Been Decided

Wyoming first takes issue with the substance of Dr. Littlefield's opinions, arguing that the Littlefield Report should be excluded because the issue whether each State is to administer the waters within its own borders according to its own state laws and practices has already been decided. In support of this argument, Wyoming quotes a passage from page 39 of the First Interim Report discussing the meaning of the phrase "the laws governing the acquisition and use of water under the doctrine of appropriation" in Article V(A). Motion at 3. The discussion directly following the quoted material indicate that the Master did not ***decide*** anything, but rather determined that there was no disagreement between Wyoming and Montana law that would require a decision:

> "Thankfully, the laws of Montana and Wyoming do not appear to directly disagree on the issues raised by Wyoming's Motion to Dismiss, although the law of one or the other state is sometimes clearer on relevant points. The laws of Montana and Wyoming on key issues also appear to be compatible with the general principles of appropriation law applied in other western states." FIR at 39.

The passage cited by Wyoming is purely dicta. It was not necessary for the Special Master to decide, and he did not decide, the question to which Dr. Littlefield's report was addressed, namely, whether the drafters of the Compact intended to impose specific requirements on a State's post-Compact administration of waters within its borders as a prerequisite to that State's enjoyment of its Compact rights. That issue remains for resolution in this proceeding, and

as discussed below, Dr. Littlefield's Report and testimony will assist the Special Master by providing the relevant historical context for that decision. *See* Fed. R. Evid. 704 (expert testimony is not objectionable just because it embraces an ultimate issue).

III. Dr. Littlefield's Evidence Does Not Involve Pure Questions of Law

As set forth in the Littlefield Report, Dr. Littlefield was retained by Montana to conduct historical research and answer the following two questions relating to Article V(A) of the Compact: (1) Did the negotiators of the Yellowstone River Compact discuss imposing on either Wyoming or Montana a requirement for a particular type of water administration as a prerequisite for that State's enjoyment of its Article V(A) rights to water under the Compact?; and (2) What historical sources support the answer to the first question? See Littlefield Report at 1. Based on his extensive research, Dr. Littlefield determined that the historical record did not reflect an understanding on the part of the negotiators that the Compact would impose on either State a requirement for a particular type of water administration as a prerequisite to that State's enjoyment of its Article V(A) rights. With respect to the second question, the Littlefield Report sets forth in detail the historical sources that support his determination on the first question.

As the basis for its Motion, Wyoming incorrectly asserts that Dr. Littlefield was "retained by Montana to render opinions on the *meaning* of the Yellowstone River Compact," Motion at 2 (emphasis in original), citing an incomplete statement from the Littlefield Report. However, as demonstrated above, Dr. Littlefield was retained not to render opinions on the meaning of the Compact, but rather to research the historical record of the Compact's negotiations and to render opinions as to what that record reflects with respect to the particular questions outlined. This is a permissible subject of historian expert testimony. See, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (testimony of expert historians relied on for determination of legislative intent);

Travelers Cas. & Sur. Co. of Am. v. United States, 75 Fed. Cl. 696, 703 (Fed. Cl. 2007) (noting that "interpretation of language, conduct and parties' intent, *i.e.,* the question of what meaning should be given by a court to the words of the contract, may sometimes involve questions of material fact and not present a pure question of law").

In support of its claim that Dr. Littlefield was retained to render impermissible legal opinions on the meaning of the Compact, Wyoming represents that Dr. Littlefield

> "opines that the compacting states 'meant for pre-compact water rights in use as of January 1, 1950, to be defined, administered, and managed by each state in accordance with its laws an practices, and the Compact was not meant to impose any particular form of administration of pre-Compact rights as a prerequisite for a state to enjoy its Compact Rights.'" *Ibid.* (citing Littlefield Report at 5).

The quoted material from the Littlefield Report is taken out of context, and omits the critical opening phrase that changes its meaning entirely. The full passage reads as follows:

> "In sum, in my opinion, ***the historical record reflects*** that the states meant for pre-Compact water rights in use as of January 1, 1950, to be defined, administered, and managed by each state in accordance with its laws an practices, and the Compact was not meant to impose any particular form of administration of pre-Compact rights as a prerequisite for a state to enjoy its Compact Rights." Littlefield Report at 5 (emphasis added).

This statement is properly read not as an opinion on the meaning of the Compact, but rather an opinion on what the historical record reflects as it bears on the understanding of the signatory States.

Moreover, Wyoming points only to this one sentence out of the entire thirty-six page report, and does not identify any other statement that it contends amounts to an impermissible legal opinion. To the extent the Special Master determines that a particular statement in the Littlefield Report constitutes an impermissible opinion on a question of law, the proper approach is to strike the particular statement, not to exclude the entire Report. *See, e.g.*, Report of Special

Master Arthur L. Littleworth, Vol I., at 73, *Kansas v. Colorado*, No. 105, Orig. (July 1994) ("Special Master Littleworth Report").

When viewed as a whole, Dr. Littlefield's Report does not invade the province of the Special Master as the expert on legal matters, but rather presents the Master with facts regarding the statements and understandings of the drafters of the Compact as they appear in historical documents, as well as facts relating to the representations they subsequently made to Congress in securing approval of the Compact. Testimony by historical experts on such factual issues is permissible. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. at 229 (finding that evidence of legislative intent including several historical studies and the testimony of two expert historians demonstrated conclusively that a provision of the Alabama constitution was enacted with the intent of disenfranchising blacks).

This is not the first time that Dr. Littlefield has provided expert testimony regarding the history of a compact in an interstate compact dispute before this Court, nor is it the first time such testimony has been the subject of a motion to strike contending it presents impermissible legal opinions regarding the meaning of a compact. In *Kansas v. Colorado*, No. 105, Orig., Dr. Littlefield appeared as an expert witness for the State of Kansas and offered testimony regarding the historical record leading to the approval and ratification of the Arkansas River Compact. See Special Master Littleworth Report at 71-73. Colorado objected to the admission of Dr. Littlefield's testimony on the ground that it contained inadmissible legal conclusions concerning the meaning of the Arkansas River Compact and the intent of the negotiators. Special Master Arthur L. Littleworth took Colorado's objections to Dr. Littlefield's testimony under submission and permitted Dr. Littlefield to testify at trial, before ruling on Colorado's motion to strike. See Order of Nov. 16, 1993, *Kansas v. Colorado*, 105 Orig. ("Littleworth Order"), attached hereto as

Exhibit A. Ultimately, while Special Master Littleworth struck certain isolated statements as legal conclusions, he admitted almost all of Dr. Littlefield's testimony, which included a 462 page, 2 volume report and 12 days on the witness stand at trial. See Special Master Littleworth Report, Vol. I, at 73. Special Master Littleworth noted in his Report to the Court "the accuracy and thoroughness of [Dr. Littlefield's] historical presentation generally hold up well," *ibid*, and proceeded to rely on Dr. Littleworth's report in that case as the main source for two entire sections of his report – one on the background of the Arkansas River Compact and one on the negotiations of that compact. *Id.*, at 73-106.

Like his report in Kansas v. Colorado, Dr. Littlefield's Report is based on comprehensive historical research, and offers useful insight into the negotiating history of the Compact.

III. Dr. Littlefield's Testimony Will Assist the Trier of Fact

This case involves questions regarding the meaning of the Compact, particularly with respect to the operation of Article V(A). The Special Master, and ultimately the Court, is tasked with interpreting the Compact. In conducting this task, the first resort must be to the plain language of the Compact, and Montana would agree that if the meaning of the Compact can be discerned from the plain language, Dr. Littlefield's testimony would not be necessary. However, to the extent the Compact is determined to be ambiguous, evaluation of extrinsic sources that reveal the intent of the parties will be necessary. Just as Special Master Littleworth found Dr. Littlefield's testimony regarding the history of the Arkansas River Compact helpful in resolving the questions presented in *Kansas v. Colorado*, Dr. Littlefield's factual testimony in this proceeding regarding the negotiating history of the Compact will assist the Special Master in understanding how the drafters viewed the Compact.

Given that more than half a century has elapsed since the Compact was negotiated and drafted, there are unlikely to be witnesses with direct knowledge and experience bearing on the Compact's negotiations. Thus, the Special Master "must necessarily rely on the testimonial narratives of other people." *United States v. Newmont USA Ltd.*, 2007 WL 4856859, *3 (E.D. Wash. Nov. 16, 2007); *see also Walden v. City of Chicago*, 755 F. Supp. at 950-51 ("This case deals with events that occurred over half a century ago; finding a witness whose experience or knowledge is precisely the subject of [expert's] proposed testimony . . . is unlikely given the amount of time that has passed and that all of the individual defendants in this case are believed to be deceased."). Compiling such narratives from the historical record is precisely what historians like Dr. Littlefield are trained to do. As one district court aptly explained:

> "Historians are trained to recover 'facts' and, through selecting certain facts from the universe of available facts, construct narratives that explain a historical issue. Through the application of his expertise as a historian [the witness] may be able to assist the court as a "summary" or "aggregating" witness 1) by testifying as to what evidence, in his opinion, exists in the record showing the relative roles of the parties; and 2) by providing historical context to the evidence." *United States v. Newmont USA Ltd.*, 2007 WL 4856859 at *3.

See also *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 950 (N.D. Ill. 2010) (expert historian had "the background to find, evaluate, and synthesize historical documents pertinent to the issue of Chicago Police Department policies and practices in 1952").

Dr. Littlefield's report reflects the application of his expertise as a historian in order to assist the Special Master in understanding the negotiating history of the Compact, particularly with respect to Article V(A). Dr. Littlefield identified and located all the relevant archival and published records from multiple locations throughout the United States. He then culled and reviewed these materials in order to piece together a narrative history that traces the evolution of Article V(A). This history is presented in a comprehensive report, complete with all referenced

sources. As both the trier of fact and the legal expert in this proceeding, the Special Master is eminently qualified to receive Dr. Littlefield's opinions, and give those opinions whatever weight he deems appropriate in evaluating and deciding the matters at issue.

IV. It Would Be At Least Premature To Strike Dr. Littlefield's Report

At the very least, it would be premature to strike the Littlefield Report. Such a ruling should await trial, presentation of the evidence and cross-examination. At that point, Wyoming can renew its motion, stating with particularity those statements that it finds objectionable. In this regard, Special Master Littleworth's approach in *Kansas v. Colorado*, as discussed previously, is instructive. There, Special Master Littleworth reserved a ruling on Colorado's motion to strike, permitted Dr. Littlefield to testify, and then had Colorado identify the specific statements it contended to be impermissible legal conclusions. See Littleworth Order at 1-2. See also, *e.g.*, Draft Report of the Special Master, *Kansas v. Nebraska & Colorado*, No. 126 Orig., at 9 (Jan. 9, 2013),[2] (regarding pre-trial objections to expert reports and testimony, Special Master Kayatta stated "simply put, it made the most sense to hear the expert testimony and to determine whether or not it was relevant and persuasive, thereby mooting any need to make the more refined determination of whether it was so inadequate as to be inadmissible").

CONCLUSION

For the foregoing reasons, the entire Littlefield Report should be admitted and Dr. Littlefield should be permitted to testify at trial regarding the negotiating history of the Compact. Alternatively, Wyoming's Motion should be denied without prejudice, for possible renewal by Wyoming after trial.

[2] Special Master Kayatta's Draft Report is available at http://www.pierceatwood.com/KansasversusNebraskaandColorado126Original

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STATE OF MONTANA,

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Defendants.

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Before the Honorable Barton H. Thompson, Jr.
Special Master

♦

CERTIFICATE OF SERVICE

I certify that a copy of Montana's Response to Motion to Strike the Report and Exclude the Testimony of Douglas R. Littlefield, Ph.D. was served electronically, and by placing the same in the U.S. mail on July 9, 2013, to the following:

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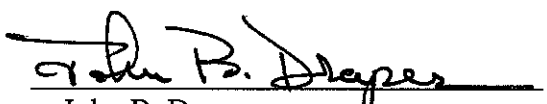
I further certify that all parties required to be served have been served.



John B. Draper

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant, UNITED STATES OF AMERICA, Intervenor.	)	No. 105 Original October Term, 1985

FILED

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SPECIAL MASTER
U.S. SUPREME COURT

O R D E R

On September 18, 1990, Kansas offered Kan. Exh. 129 into evidence. RT Vol. 2 at 53. Colorado objected to the admission of Kan. Exh. 129 on the grounds that it contained inadmissible legal conclusions concerning the meaning of the Arkansas River Compact and the intent of the negotiators. RT Vol. 2 at 63-64, 68-69. Colorado also objected to such legal conclusions offered by Dr. Douglas R. Littlefield during his testimony. RT Vol. 2 at 63-64, 78-79. I reserved a ruling on Kan. Exh. 129 and took Colorado's objections to Dr. Littlefield's testimony under submission. RT Vol. 2 at 80. Dr. Littlefield was permitted to testify subject to Colorado's motion to strike portions of his testimony. RT Vol. 6 at 12; see also RT Vol. 5 at 113-125, 135-36.

On September 28, 1990, Kansas renewed its offer of Kan. Exh. 129, RT Vol. 9 at 84, and I again reserved a ruling. Id.

On January 14, 1991, I made a tentative ruling that (1) Kan. Exh. 129 should be admitted into evidence; (2) that Colorado's motion to strike should be granted with respect to the opinions of Dr. Littlefield, whether they were his own or reflected his understanding of the intent of the Compact negotiators, where they concerned the meaning of specific Compact provisions or language; and (3) that this limited ruling would apply to both Kan. Exh. 129 and Dr. Littlefield's testimony at trial. RT Vol. 39 at 26, 30. However, I deferred entering a final ruling to consider further argument and to determine the need to identify specific conclusions to be stricken. RT Vol. 45 at 21-25.

Based on my tentative ruling, Colorado has identified specific opinions of Dr. Littlefield to be stricken as legal conclusions. Kansas agrees that most of the specific opinions sought to be stricken by Colorado correspond to the standard set out in my tentative ruling, but it argues that certain portions should be admissible.

Accordingly, IT IS HEREBY ORDERED that Kan. Exh. 129 is admitted; however, the following opinions are stricken from Kan. Exh. 129:

1. Volume I at pages 7-8:

Thus, existing stream flows that had existed in 1943 as well as stored floodwaters were to be protected by the proviso clause in Article IV (D).

2. Volume I at page 8:

> In short, the only depletions that were to be allowed under Article IV (D) were those that did not affect usable flows of any kind, whether these were usable flows that existed in 1943 -- the status quo -- or usable floodwaters stored at John Martin Reservoir. In addition, Article IV (D)'s limitation on future activities covered all future developments -- whether anticipated or not -- and it even extended to operations affecting alluvial groundwaters because groundwater pumping and recharge potentially could have depleting effects on usable surface flows and usable stored floodwaters. The key word here is "usable." Under Article IV (D), depletions of non-usable waters (such as floodwaters that would spill from John Martin Reservoir, that would be beyond the ability of downstream ditches to divert, that would be more than could be used in groundwater recharge, and that would pass Garden City, Kansas, without being utilized) could be depleted without violating the compact.
>
> Where Article IV (D) protected usable flows from future developments in order to maintain the status quo,...

3. Volume II at pages 296-97:

> Finally, the debates over Article IV (D) consistently indicated that the purpose of that article's proviso clause as it reads today ("Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction") was to restrain any development in both states that would have an adverse impact on the water supply available to maintain the status quo in relation to existing diversions and irrigated lands. The clause was not meant to stop all developments, just those which would interfere with the

quantities of water then being used for irrigation or reaching John Martin Reservoir for storage if those developments would adversely affect either of those supplies. This was a mutual restriction aimed at protecting the status quo, and it was central to the conviction that the commissioners were laying the interstate apportionment issue to rest for all time.

4. Volume II at pages 349-50:

The use of the phrase "shall not be materially depleted in usable quantity" also carried another connotation of importance. Because the compact commissioners recognized that some stream flows reaching John Martin Reservoir were not "usable" (for example, flood flows that would spill from the reservoir that would be greater than the capacity of downstream ditches to use and that would be in excess of flows needed for groundwater recharge), a depletion of these waters would not be material. Similarly, natural stream flows that were insufficient to be put to use on lands served by ditches below and that contributed nothing to groundwater recharge also were not "usable." Hence, depletions of these waters also was not material. Both of these points reaffirmed the status quo.

5. Volume II at page 360:

The net result of this change was to emphasize that all future developments, no matter how small, were included in the restriction that they could not be developed if they interfered with usable Arkansas River flows in any manner whatsoever.

6. Volume II at pages 360-61:

Thus, by the time the Arkansas River Compact Commission met with the Bureau of Reclamation in the afternoon of July 2, 1948, the June 2, 1948, version of Article IV (F) had been changed to make it certain that all future undertakings -- federal, state, and private -- were included in the clause's limitations, not just "comprehensive and coordinated" projects. Furthermore, the

article had been clarified to note that its provisions did not apply to imported waters, but that the restrictions did relate to all usable native waters in the entire Arkansas Basin, including hydrologically connected groundwaters. Finally, Article IV (F) was now understood to include limitations on future developments that affected normal stream flows as well as waters that would be stored for later release at John Martin Reservoir. There was no latitude provided in the clause by the use of such words as "materially" or by the inclusion of a phrase allowing depletions if compensation were provided.

7. Volume II at page 380:

...not to permit any future development that would upset the status quo....

8. Volume II at page 381:

...but the meaning remained that no further developments should be allowed in the Arkansas Basin if they would alter the status quo.

9. Volume II at page 387:

First and foremost, the article continued to create a mechanism for maintaining the status quo while allowing future developments that did not upset this equilibrium....[T]he restriction on future developments also applied to lands below John Martin Reservoir in both Colorado and Kansas if such development would have an adverse impact on usable flows available to either state. Second, the deliberations behind Article IV (D) made it clear that the compact was meant to cover all water naturally occurring in the Arkansas Basin, including surface flows, return flows, and hydrologically connected groundwaters. A corollary to this concept was that the compact was not planned to regulate waters imported from the Colorado Basin on their return flows.

10. Volume II at page 388:

With Article IV (D) planned to insure that future developments would not upset the

interstate relationship with respect to then-existing diversions,...

11. Volume II at page 392:

... -- guaranteeing the perpetuation of the status quo by preventing future developments that would deplete usable Arkansas River waters --

12. Volume II at page 439:

...a statement of the fundamental principle expressed in Article IV (D) that usable Arkansas River waters were not to be depleted by future developments.

13. Volume II at page 440:

...and they also established that usable flows at the state line included extra water to compensate for transit losses to Kansas' ditches. Thus, usable state line flows were, in fact, divertible flows at ditch heads with extra quantities added for seepage and evaporation in the river's bed. This was an integral part of maintaining the status quo while creating an equitable interstate apportionment.

14. Volume II at page 446:

This restriction applied to both states, and it covered all future activities -- whether anticipated or not -- and it even applied to groundwater pumping to the extent it would have an impact on usable stream flows or stored floodwaters.

15. Volume II at pages 459-460:

Ultimately, with the advice and recommendations of many federal agencies, the Arkansas River Compact Commission developed Article IV (D) to limit depletions that would affect the status quo, to apportion stored floodwater benefits to existing irrigated acreage, and still to allow certain future developments to take place. Such developments, however, were

only to be acceptable so long as they did not interfere with existing usable flows at ditch diversions -- thus preserving the status quo -- and so long as they did not interfere with usable floodwaters destined for regulation by John Martin Reservoir. In other words, under Article IV (D), any future development that diminished usable flows or floodwaters destined for storage at John Martin Reservoir would cause a "material" depletion of waters apportioned under the compact -- a depletion that mattered and that would be prohibited by the compact. Depletions of waters that were not usable -- such as major floods that were incapable of storage at John Martin Reservoir, that could not be diverted by existing ditches, and that did not contribute to groundwater recharge -- were not material and did not matter. Such flows could be depleted, and these flows could be used in future developments without violating the compact.

16. Volume II at page 460:

The prohibitions in Article IV (D) were to be construed as broadly as possible in relation to future developments. The compact commissioners meant for all future developments within the control of man -- whether anticipated or not -- to be covered by the article's restrictions....[A]nd the commissioners wanted the limiting provisions of Article IV (D) to apply to impacts to these waters as well as to surface flows. Hence, if pumping groundwaters in one part of the Arkansas Valley resulted in a greater demand for usable flows from the river or in greater call for waters stored in the conservation pool at John Martin Reservoir -- even if the increased calls happened at some later point in time long after pumping had ceased -- then such pumping was to be a violation of Article IV (D). Similarly, if activities in either state resulted in changes in the Arkansas River's bed which in turn led to greater calls for usable flows or water from storage, those activities were also prohibited under the compact.

IT IS FURTHER ORDERED that the following opinions expressed by Dr. Littlefield during his testimony are hereby stricken:

1. RT Vol. 7 at page 58, lines 14-20:

> ...AND, THEREFORE, THE COMMISSIONERS WERE NOT DEALING WITH NATURAL WATERS, BECAUSE NATURAL WATERS WOULD IMPLY JUST THE WATERS THAT CAME DOWN IN THE FORM OF RAIN AND NOT THE RETURN FLOWS. IT IS ALSO A RECOGNITION THAT THEY ARE NOT DEALING WITH VIRGIN WATERS AS THE COMMISSIONERS BELIEVED THAT TERM HAD BEEN USED IN THE REPUBLICAN RIVER COMPACT.

2. RT Vol. 7 at page 59, lines 4-8:

> ...AND ALSO, I THINK THAT THE REFERENCE HERE CONTINUES TO SUPPORT THE IDEA THAT THE COMMISSIONERS BELIEVED THERE WAS A DE FACTO STATUS QUO THAT THE SUPREME COURT HAD ESTABLISHED IN ITS RULING IN 1943.

3. RT Vol. 7 at page 125, lines 16-20:

> AND IN FACT, WHAT THEY DID IS THEY SIMPLY STATED THAT IF THERE WERE ANY FUTURE DEVELOPMENTS AFTER THE DATE OF THE COMPACT THAT IN ANY WAY DEPLETED USABLE QUANTITY OR AVAILABILITY FOR USE, THOSE WERE TO BE PROHIBITED UNDER THE COMPACT.

4. RT Vol. 7 at page 148, lines 17-26:

> ...BUT IN RELATION TO CLARIFYING THAT IT DID NOT RELATE TO IMPORTED WATERS, THEY HAD MADE IT ABUNDANTLY CLEAR, IN MY VIEW, THAT THE RESTRICTIONS IN ARTICLE IV-F DID RELATE TO ALL USABLE WATER IN THE ENTIRE ARKANSAS BASIN. AND THE USABLE WATERS INCLUDED NATIVE WATERS -- WELL, WERE DEFINED AS NATIVE WATERS WHICH REPRESENTED PRECIPITATION AND RETURN FLOWS OF THE -- OF WATER ORIGINATING IN THE ARKANSAS BASIN. AND IT ALSO INCLUDED, IN MY VIEW, HYDROLOGICALLY CONNECTED GROUND WATERS.

5. RT Vol. 7 at page 148, line 27, through page 149, line 6:

AND FINALLY, I THINK BY THIS PARTICULAR POINT, ARTICLE IV-F WAS NOW UNDERSTOOD TO INCLUDE LIMITATIONS ON FUTURE DEVELOPMENTS THAT AFFECTED TWO DIFFERENT COMPONENTS OF WATER. THE RESTRICTIONS APPLIED TO THE COMPONENT OF WATER THAT HAD HISTORICALLY BEEN DIVERTED AND ALSO TO THE COMPONENT OF WATER THAT NOW IS GOING TO BE STORED FOR LATER RELEASE IN THE FORM OF FLOOD WATERS.

6. RT Vol. 7 at page 149, lines 16-18:

A DEPLETION OF THOSE WATERS WAS ACCEPTABLE UNDER ARTICLE IV-F.

7. RT Vol. 8 at page 45, lines 1-10:

THE OBJECTIVES WERE ESSENTIALLY THAT NO DEPLETIONS WERE TO BE ALLOWED IN RELATION TO THE WATERS THAT HAD BEEN HISTORICALLY DIVERTED IN THE TWO STATES, NOR WERE DEPLETIONS TO BE ALLOWED IN THE NEWLY USABLE SUPPLIES THAT WERE GOING TO COME FROM THE STORED FLOOD WATERS AT JOHN MARTIN RESERVOIR. NO DEPLETIONS IN EITHER OF THOSE AMOUNTS WERE GOING TO BE ALLOWED, IF THEY IN ANY WAY HAD AN IMPACT ON THE -- IN THE FLOWS AVAILABLE FOR DIVISION BETWEEN THE TWO STATES OR IN THE FLOWS THAT WOULD BE GOING INTO STORAGE OF JOHN MARTIN RESERVOIR.

8. RT Vol. 8 at page 110, line 26, through page 111, line 4:

BUT I THINK, GIVEN THE LONG HISTORY OF THEIR NEGOTIATIONS AND ALL OF THE STATEMENTS LEADING UP TO IT, INCLUDING THE STATEMENTS THAT FOLLOWED THE DECISION TO INSERT THE WORD "MATERIALLY," AMPLY DEMONSTRATED THAT ANY DEPLETION THAT AFFECTED USABLE FLOWS AS BASED ON THE HISTORIC DIVERSIONS OR USABLE FLOWS GOING INTO STORAGE WAS NOT TO BE ALLOWED IF IT AFFECTED THOSE WATERS.

9. RT Vol. 8 at page 115, lines 15-19:

I BELIEVE IT IS INTENDED TO PROTECT THE STATUS QUO WITH REGARD TO THE EXISTING HISTORICAL DIVERSIONS. I ALSO BELIEVE IT IS INTENDED TO PROTECT THE ADDITIONAL USABLE SUPPLIES THAT

WERE TO BE MADE AVAILABLE BY FLOOD WATER STORAGE BY JOHN MARTIN.

10. RT Vol. 8 at page 115, line 24, through page 116, line 1:

IN OTHER WORDS, ARTICLE IV-D IS THE FOUNDATION ON WHICH THE TWO STATES COULD AGREE THAT THEY WERE GOING TO SHARE IN BENEFITS OF FLOOD WATER STORAGE AND THEY WERE ALSO GOING TO KEEP THE EXISTING HISTORIC DIVERSION LEVELS AT THE SAME RATE, BUT IN A BETTER REGULATED MANNER.

11. RT Vol. 8 at page 116, lines 4-6:

IT MERELY SAID THAT THESE THINGS WERE GOING TO TAKE PLACE, THAT NO DEPLETIONS WOULD TAKE PLACE ON THESE TWO COMPONENTS OF WATER.

The motion to strike Kan. Exh. 129 and the testimony of Dr. Littlefield is otherwise denied.

DATED: November 16, 1993.

Arthur L. Littleworth

ARTHUR L. LITTLEWORTH
Special Master

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502.

I am readily familiar with Best, Best & Krieger's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, all correspondence is deposited with the United States Postal Service the same day it is collected and processed in the ordinary course of business.

On November 16, 1993, I served the within **ORDER** re Kansas Exhibit 129 by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

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On November 16, 1993, at the office of Best, Best & Krieger, 3750 University Avenue, 400 Mission Square, Riverside, California 92502, I sealed and placed each envelope for collection and deposit by Best, Best & Krieger in the United States Postal Service, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on November 16, 1993, at Riverside, California.

Sandra L. Simmons

Sandra L. Simmons