

# KANSAS V. NEBRASKA & COLORADO: KEEPING EQUITY AFLOAT IN THE REPUBLICAN RIVER DISPUTE

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## I. INTRODUCTION

The trouble that sovereigns experience in apportioning scarce resources among themselves has led to many disputes throughout history.<sup>1</sup> The Supreme Court has addressed this problem between the States via its power to hear cases of original jurisdiction.<sup>2</sup> Here, the States may petition the Court directly,<sup>3</sup> as the Court alone may provide a remedy in cases involving disputes between them.<sup>4</sup> In *Kansas v. Nebraska & Colorado*,<sup>5</sup> the Court will consider a dispute between Kansas, Nebraska, and Colorado concerning the apportionment of a scarce resource: the water from the Republican River Basin.<sup>6</sup>

The Court appointed a Special Master to make recommendations in *Kansas v. Nebraska & Colorado*.<sup>7</sup> The Special Master found that Nebraska used more than its share of water, but a mutual mistake in the three states' accounting procedures overstated some of Nebraska's use.<sup>8</sup> Additionally, the Special Master found that Kansas

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1. Charles M. Courtney, Casenote, *Nebraska v. Wyoming and Colorado Allocating Water Rights to Interstate Rivers: Equitable Principles and the Role of Substantial Injury*, 3 DICK. J. ENVTL. L. & POL'Y 89, 89 (1994).

2. See U.S. CONST. art. III, § 2, cl. 1. ("The judicial Power shall extend . . . to Controversies between two or more States.").

3. See, e.g., *Kansas v. Nebraska*, 131 S. Ct. 1847, 1847 (2011).

4. See 28 U.S.C.A. § 1251 (West 2014) (providing the Supreme Court with exclusive jurisdiction over cases between sovereign states).

5. *Kansas v. Nebraska*, No. 126, Original (U.S. argued Oct. 14, 2014).

6. Report of the Special Master at 1, *Kansas v. Nebraska*, No. 126, Original (U.S. Jan. 13, 2014) [hereinafter *Fourth Report*].

7. *Kansas v. Nebraska*, 131 S. Ct. at 1847.

8. *Fourth Report*, *supra* note 6, at 187.

should receive monetary relief in the form of compensatory damages and disgorgement, but not injunctive relief.<sup>9</sup> The parties disputed some of the Special Master’s recommendations and submitted their exceptions to the Supreme Court. While Nebraska admitted to its excess consumption of water,<sup>10</sup> a question remains for the Court regarding the exact amount of overuse and which remedy is appropriate. The Court may decide to approve the Special Master’s recommendations in full, it may adopt the exceptions argued by Kansas, Nebraska, or Colorado, or it may fashion its own remedy.

Ultimately, the Court seeks a “fair and equitable solution” in cases of original jurisdiction.<sup>11</sup> Thus, the Court should approve the recommendations of the Special Master who found that the accounting procedure contained a mutual mistake and that monetary damages, but not injunctive relief, are warranted. While the monetary damages should include disgorgement, the Court should take a second look at how to calculate disgorgement.

This comment will provide the factual and legal background leading up to *Kansas v. Nebraska & Colorado* and will analyze the case’s key issues.

## II. FACTUAL BACKGROUND

### A. *Factual History*

The Republican River Basin is a watershed that incorporates parts of Colorado, Nebraska, and Kansas.<sup>12</sup> The Republican River originates in Colorado, briefly passes through Kansas and then runs into Nebraska.<sup>13</sup> Finally, the river winds back into Kansas, eventually becoming part of the Kansas River.<sup>14</sup> In 1942, Kansas, Nebraska, and Colorado entered negotiations with the goal of reaching a compact concerning apportionment of the Republican River water between the three states.<sup>15</sup> Compacts of this sort became common, as new

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9. *Id.* at 179.

10. Nebraska’s Exceptions & Brief in Support at 2, *Kansas v. Nebraska*, No. 126, Original (U.S. Feb. 27, 2014).

11. *See Texas v. New Mexico*, 482 U.S. 124, 134 (1987) (stating that the Court has come up with what it believes to be a “fair and equitable solution”).

12. Brief of the United States as Amicus Curiae in Support of Overruling the Parties’ Exceptions to the Report of the Special Master at 3, *Kansas v. Nebraska*, No. 126, Original (U.S. Apr. 7, 2014) [hereinafter *Brief of the United States*].

13. *Id.*

14. *Id.*

15. *Id.* at 4.

technologies developed which allowed upriver states to use immense amounts of water to the detriment of downriver states.<sup>16</sup>

In light of these technological developments' effect on water use, Kansas, Nebraska, and Colorado ratified the Republican River Compact (the Compact) in 1943,<sup>17</sup> and Congress enacted it that same year.<sup>18</sup> The Compact allocates the rights to use the Republican River Basin's water supply between the three states.<sup>19</sup> Going even further, "[t]he Compact quantifies the Republican River Basin's 'Virgin Water Supply,' which is defined as 'the water supply within the Basin undepleted by the activities of man.'"<sup>20</sup> Specifically, the Compact allocates 54,100 acre-feet per year to Colorado; 234,500 acre-feet per year to Nebraska; and 190,300 acre-feet per year to Kansas, plus any water originating entirely within Kansas after the river's last intersection with Nebraska.<sup>21</sup> Finally, pursuant to the Compact, the states created the Republican River Compact Administration (RRCA), which is charged with computing each state's usage at yearend.<sup>22</sup>

Trouble arose in the 1980s and 1990s.<sup>23</sup> Nebraska increased its groundwater pumping, which had the effect of depleting water in the river basin.<sup>24</sup> Kansas alleged that groundwater pumping constituted part of each state's water share under the Compact.<sup>25</sup> Nebraska disagreed.<sup>26</sup> The states resolved this issue at the start of the current litigation by adopting Kansas's stance in the Final Settlement Stipulation (FSS).<sup>27</sup>

The FSS, agreed to by Kansas, Nebraska, and Colorado, expressly states that it did "not intend[] to . . . change the States' respective rights and obligations under the Compact,"<sup>28</sup> but rather addressed

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16. Aaron M. Popelka, *The Republican River Dispute: An Analysis of the Parties' Compact Interpretation and Final Settlement Stipulation*, 83 NEB. L. REV. 596, 597–98 (2004).

17. *Brief of the United States*, *supra* note 12, at 4 (citing Colo. Rev. Stat. Ann. §§ 37-67-101 *et seq.* (West 2010); Kan. Stat. Ann. § 82a-518 (West 1997); Neb. Rev. Stat. app. § 1-106 (2008)).

18. *Id.* (citing Act of May 26, 1943, ch. 104, 57 Stat. 86).

19. *Id.*

20. *Id.* (citing Art. II, 57 Stat. 87).

21. *Id.* at 5 (citing Art. II, 57 Stat. 88).

22. *Id.*

23. *Id.* at 6.

24. *Id.*

25. *Fourth Report*, *supra* note 6, at 5.

26. *Id.*

27. *Fourth Report*, *supra* note 6, at 6.

28. Final Settlement Stipulation vol. 1 at 2, *Kansas v. Nebraska*, No. 126, Original (U.S. Apr. 16, 2003).

accounting procedures for determining compliance.<sup>29</sup> In a dry year, such as 2006, the accounting procedures determine whether a state used more than its water allocation by averaging the state's use for that year and the prior one.<sup>30</sup> Nebraska used more water than allocated in both 2005 and 2006, and therefore breached the Compact in 2006.<sup>31</sup> The accounting procedures as written, however, do not distinguish between imported water, which originates outside the Republican River Basin, and virgin water, which originates inside the basin.<sup>32</sup> This treatment has the effect of over-calculating a state's water usage when it imports more water relative to its fellow states.

### B. Procedural History

The present action commenced on January 19, 1999 when the Supreme Court, under its original jurisdiction, granted Kansas's motion for leave to file a bill of complaint.<sup>33</sup> The Court ordered the appointment of the Honorable Vincent L. McKusick as Special Master.<sup>34</sup> Pursuant to this appointment, the Court gave Mr. McKusick the authority to direct further proceedings and generate reports.<sup>35</sup>

The Court received and filed Mr. McKusick's first report in 2000.<sup>36</sup> This first report sided with Kansas, finding that the Compact encompassed groundwater pumping.<sup>37</sup> The Court then invited all parties to file "Exceptions to the Report."<sup>38</sup> Subsequently, the Court sent the case back to Mr. McKusick for additional proceedings.<sup>39</sup> The parties then discussed settlement, ultimately coming to agreeable

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29. See Final Report of the Special Master with Certificate of Adoption of RRCA Groundwater Model at 1, *Kansas v. Nebraska*, No. 126, Original (U.S. Sept. 23, 2003) ("The FSS laid out the parameters for RRCA Groundwater Model which would, for use in the accounting formulas for administering the Republican River Compact, determine . . . stream flow depletions.") [hereinafter *Third Report*].

30. *Fourth Report*, *supra* note 6, at 17.

31. *Id.*

32. *Id.* at 15.

33. *Kansas v. Nebraska*, 525 U.S. 1101, 1101 (1999).

34. *Kansas v. Nebraska*, 528 U.S. 1001, 1001 (1999).

35. See *id.* (granting the Special Master "the authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced . . . [and] to submit such reports as he may deem appropriate").

36. *Kansas v. Nebraska*, 528 U.S. 1151, 1151 (2000).

37. First Report of the Special Master at 23, *Kansas v. Nebraska*, No. 126, Original (U.S. Feb. 22, 2000) [hereinafter *First Report*].

38. *Kansas v. Nebraska*, 528 U.S. at 1151.

39. *Kansas v. Nebraska*, 530 U.S. 1272, 1272 (2000).

terms through execution of the FSS.<sup>40</sup> In the interim, the Court received and filed Mr. McKusick's second report and approved the executed FSS.<sup>41</sup> Thereafter, in 2003, the Court filed a third report approving the RRCA Groundwater Model,<sup>42</sup> and discharged Mr. McKusick from his duties as Special Master.

Unfortunately the states' amicable relations did not last, and the dispute rematerialized. Kansas contended that Nebraska overused its share of water in the period since the FSS, leading to a breach of the Compact in 2006.<sup>43</sup> Kansas exhausted its non-litigious commitments by submitting the issues before the RRCA and to non-binding arbitration, but to no avail.<sup>44</sup> Thereafter, the Court granted Kansas's motion for leave to file a petition in April 2011.<sup>45</sup> The Court appointed Mr. William J. Kayatta (now Judge Kayatta) as the new Special Master to direct further proceedings and generate reports.<sup>46</sup> Accordingly, the Special Master conducted proceedings, during the course of which Nebraska contended that its breach was not as severe as Kansas had indicated. Nebraska argued that the RRCA's accounting erred by including "imported water" from other river basins and, instead, should have only included "virgin water" from within the Republican River Basin.<sup>47</sup> Thus, Nebraska sought an alteration to the accounting procedures based on a mutual mistake in its execution.<sup>48</sup>

After hearing both sides' arguments, the Special Master produced a report (the Fourth Report).<sup>49</sup> The Court received and filed the Fourth Report in January 2014, and again invited the parties to submit briefs regarding their exceptions to the report.<sup>50</sup> Subsequently, the Court set oral arguments to hear each party's exceptions,<sup>51</sup> and to

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40. *Fourth Report*, *supra* note 6, at 6.

41. *Kansas v. Nebraska*, 538 U.S. 720, 720 (2003).

42. *Kansas v. Nebraska*, 540 U.S. 964, 964 (2003); *see id.* (ordering the Special Master to file another report that "certif[ies] adoption of the RRCA Groundwater Model.").

43. *Fourth Report*, *supra* note 6, at 9.

44. *Brief of the United States*, *supra* note 12, at 8–9.

45. *Kansas v. Nebraska*, 131 S. Ct. 1847, 1847 (2011).

46. *See id.* (granting the Special Master the "authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and take such evidence as may be introduced . . . [and] to submit Reports as he may deem appropriate.").

47. *Fourth Report*, *supra* note 6, at 15.

48. *Id.*

49. *See Fourth Report*, *supra* note 6.

50. *Kansas v. Nebraska*, 134 S. Ct. 981, 981 (2014).

51. *Kansas v. Nebraska*, 134 S. Ct. 2744, 2744 (2014).

determine whether there was a mutual mistake in the FSS's execution and which remedies Kansas should be afforded for Nebraska's breach.

### III. LEGAL BACKGROUND

Article III of the United States Constitution grants the Supreme Court “judicial power” over “controversies between two or more States.”<sup>52</sup> The States, by ratifying the Constitution, gave the Court the power to resolve disputes arising between them.<sup>53</sup> In fact, the Supreme Court maintains “original and exclusive jurisdiction of all controversies between two or more States.”<sup>54</sup> In cases of original jurisdiction, the Supreme Court alone may provide remedies, which are generally “equitable in nature.”<sup>55</sup>

In cases of original jurisdiction, it is common for the Court to appoint a Special Master to coordinate the proceedings.<sup>56</sup> Once a Special Master has been appointed, the Court affords “the Master’s findings . . . respect and a tacit presumption of correctness.”<sup>57</sup> The Court, however, must review the record and reports of any Special Master they appoint<sup>58</sup> and make the ultimate decision.<sup>59</sup>

Through appointment of Special Masters, the Court has previously addressed disputes between states<sup>60</sup> and, specifically, disputes in which states had agreed upon a compact concerning water rights.<sup>61</sup> The Court has declared that “a compact when approved by Congress becomes a law of the United States.”<sup>62</sup> Nevertheless, the compact at its heart remains a contract.<sup>63</sup>

52. U.S. CONST. art. III, § 2, cl. 1.

53. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (citing *Rhode Island v. Massachusetts*, 37 U.S. 657, 672 (1838)).

54. 28 U.S.C.A. § 1251 (West 2014).

55. *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973) (citing *Rhode Island v. Massachusetts*, 39 U.S. 210 (1840)).

56. *Maryland v. Louisiana*, 451 U.S. 725, 734 (1981).

57. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984).

58. *See United States v. Maine*, 469 U.S. 504, 506 (1985).

59. *Colorado v. New Mexico*, 467 U.S. at 317.

60. *See, e.g., New Hampshire v. Maine*, 426 U.S. 363, 364 (1976); *Vermont v. New York*, 417 U.S. 270, 270 (1974); *Ohio v. Kentucky*, 410 U.S. at 643; *Wisconsin v. Michigan*, 295 U.S. 455, 457, 460 (1935).

61. *See, e.g., Kansas v. Colorado*, 543 U.S. 86, 90–91 (2004); *Texas v. New Mexico*, 482 U.S. 124, 126–27 (1987).

62. *Texas v. New Mexico*, 482 U.S. at 128 (citing *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

63. *Id.* (quoting *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)).

While the Court may provide equitable remedies,<sup>64</sup> it does so within the confines of contract law.<sup>65</sup> Thus, the compact “must be construed and applied in accordance with its terms.”<sup>66</sup> Where a contract’s terms indicate that one party has breached, and the contract itself specifies the appropriate remedy, then the Court should afford that remedy.<sup>67</sup> Conversely, the Court will go as far as to “reform a written contract, where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties.”<sup>68</sup> In cases of original jurisdiction, the Court can fashion any remedy, including reformation, to reach a “fair and equitable solution.”<sup>69</sup> The party seeking relief, however, must show “proof of mutual mistake . . . ‘of the clearest and most satisfactory character.’”<sup>70</sup>

The Court can provide a wide variety of remedies to reach an equitable solution, especially because it has never directly spoken about which damages are most appropriate in cases concerning water-use compacts. For example, the Court can order monetary damages,<sup>71</sup> as it has done in previous cases concerning compacts between states.<sup>72</sup> The Eleventh Amendment of the United States Constitution, which normally bars suits against states without their consent,<sup>73</sup> does not bar the Court from providing a remedy for one state’s suit against another.<sup>74</sup> In fact, the Court may enter money judgments against states despite not having the authority to enforce such judgments.<sup>75</sup> Regardless, states will “almost invariably” comply.<sup>76</sup>

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64. *Ohio v. Kentucky*, 410 U.S. at 648 (citing *Rhode Island v. Massachusetts*, 39 U.S. 210 (1840)).

65. See *Texas v. New Mexico*, 482 U.S. at 129.

66. *Id.* at 128 (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)).

67. *Id.* at 129 (citing RESTATEMENT (SECOND) OF CONTRACTS § 33(2) cmt. b (1981)).

68. *Philippine Sugar Estates Dev. Co. v. Philippine Islands*, 247 U.S. 385, 389 (1918).

69. See *Texas v. New Mexico*, 482 U.S. at 134 (supplying an additional enforcement mechanism in order to enforce a compact).

70. *Philippine Sugar*, 247 U.S. at 391 (quoting *Snell v. Ins. Co.*, 98 U.S. 85, 89–90 (1878)).

71. *Texas v. New Mexico*, 482 U.S. at 130 (citing *South Dakota v. North Carolina*, 192 U.S. 286 (1904)).

72. See, e.g., *id.* at 132 (1987); *Virginia v. West Virginia*, 246 U.S. 565, 589 (1918).

73. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

74. *Texas v. New Mexico*, 482 U.S. at 130 (citing *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981)).

75. *Id.* at 130–31.

76. *Id.* at 131 (citing *Virginia v. West Virginia*, 246 U.S. at 592).

The Court may also award non-monetary relief.<sup>77</sup> For instance, the Court has considered awarding damages in the form of actual water.<sup>78</sup> Alternatively, the Court can award injunctive relief, which it has done in the form of a decree,<sup>79</sup> and by appointing a “River Master,” who acts as a mediator between the states.<sup>80</sup> An injunction, however, is typically meant to serve a deterrent function.<sup>81</sup> An injunction does not issue by default;<sup>82</sup> before providing injunctive relief the Court should find that intervention is necessary to protect rights from an irremediable threat.<sup>83</sup>

#### IV. REPORT OF THE SPECIAL MASTER

Mr. Kayatta, as Special Master, made a myriad of recommendations in the Fourth Report. Many of those recommendations relate to one of two issues: (1) whether a mutual mistake persists within the RRCA Accounting Procedures as to the treatment of imported water, so that the Court may reform its language; and (2) which remedy should be afforded to Kansas.<sup>84</sup> Because Nebraska concedes it failed to comply with the FSS “and thereby breached its obligations under the Compact in 2006,”<sup>85</sup> all parties agree that some remedy is justified. As a result, the second issue only concerns which remedy is appropriate.

##### A. Reformation

The Special Master agreed with Nebraska and Colorado’s contentions that the accounting procedures’ treatment of imported water consumption diverged from “the parties’ shared intent in agreeing to the Accounting Procedures, and to the Compact,” and therefore constituted a mutual mistake.<sup>86</sup> Imported water consumption is not distinguished from virgin water consumption in

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77. *See id.* at 129–30 (discussing option to award damages in the form of actual water).

78. *Id.*

79. *Id.* at 133.

80. *Kansas v. Colorado*, 543 U.S. 86, 92 (2004) (citing *Texas v. New Mexico*, 482 U.S. at 134–35; *New Jersey v. New York*, 347 U.S. 995, 1002–04 (1954)).

81. *Hecht v. Bowles*, 321 U.S. 321, 329 (1944).

82. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–38 (1933)).

83. *Id.* at 312 (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)).

84. *Fourth Report*, *supra* note 6, at 14.

85. *Id.* at 87.

86. *Id.* at 22–23.



the RRCA Accounting Procedures.<sup>87</sup> This accounting applied to roughly 8,000 acre-feet of water in 2006,<sup>88</sup> which distorted water-use calculations because a riverbed may have no virgin water in it, but may yet run flush with imported water.<sup>89</sup>

The Special Master cited multiple sources indicating that the original intent of the parties was to exclude imported water as part of the calculations of water consumption. First, the Special Master noted that the Compact declares that it concerns water “‘originating in’ the Republican River Basin.”<sup>90</sup> Additionally, the Compact goes on to declare that “allocations . . . are derived from the computed average annual virgin water supply originating in” the Republican River Basin.<sup>91</sup> Further, the Special Master pointed to language in the FSS declaring that “Beneficial Consumptive Use of Imported Water Supply shall not count as Computed Beneficial Consumptive Use or Virgin Water Supply.”<sup>92</sup> Lastly, the Special Master cited language from an earlier report, finding that the FSS “resolves this issue by providing that beneficial consumptive use of imported water will not count as computed beneficial consumptive use or as virgin water supply.”<sup>93</sup> Notably, Kansas indirectly benefits from the current accounting procedure, as the procedure does not distinguish Nebraska’s use of imported water, which instead counts towards its virgin-water share.<sup>94</sup>

Despite the plain language cited above, Kansas argues that the burden of proving a mutual mistake falls on Nebraska,<sup>95</sup> and that Nebraska has not met its burden.<sup>96</sup> While the Special Master credited Kansas’s statement of the law, he believes that enough evidence exists to prove that the parties did not intend to treat imported water the same as virgin water.<sup>97</sup> The Special Master acknowledged that the

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87. *Id.* at 15.

88. *Id.*

89. *Id.* at 34.

90. *Id.* at 23 (quoting Appendices to Report of the Special Master at B4–B5, *Kansas v. Nebraska*, No. 126, Original (U.S. Nov. 15, 2013)).

91. Appendices to Report of the Special Master at B4, *Kansas v. Nebraska*, No. 126, Original (U.S. Nov. 15, 2013) [hereinafter *Appendices to the Report*].

92. *Fourth Report*, *supra* note 6, at 24 (quoting Final Settlement Stipulation vol. 1, *supra* note 28, at 25).

93. *Id.* at 25 (quoting Second Report of the Special Master at 64, *Kansas v. Nebraska*, No. 126, Original (U.S. Apr. 16, 2003)).

94. *Id.* at 35.

95. *Id.* at 27.

96. *Id.*

97. *Id.*

Court has never reformed a compact.<sup>98</sup> He noted, however, that the accounting procedures fall within the FSS, which is unlike a compact and more like a contract because it does not require approval by Congress.<sup>99</sup> Only agreements between states that alter their respective rights require congressional approval, whereas the FSS does not alter any of the parties' rights: it merely provides means to calculate and remedy a breach.<sup>100</sup> The Special Master pointed to a similar scenario from *Wisconsin v. Michigan*.<sup>101</sup> In that case, the Court passed a decree, including certain agreed-upon language defining the boundary between two states.<sup>102</sup> The language, however, contained certain mutual mistakes.<sup>103</sup> As a result, the Court declared that the language should be altered.<sup>104</sup>

### B. Remedy

The Special Master noted that the Compact does not indicate the proper remedy for breach.<sup>105</sup> Thus, the Court may impose any remedy that it considers a “fair and equitable solution.”<sup>106</sup> The Court is free to assess damages in the form of money rather than water.<sup>107</sup> All three states have indicated a preference for monetary damages.<sup>108</sup>

#### 1. Disgorgement

In addition to compensatory damages, Kansas seeks damages that take into account its loss and Nebraska's gain from the latter's overuse of water.<sup>109</sup> The Special Master justified awarding these types of damages on two bases. First, the Compact outlines each state's water rights.<sup>110</sup> Water rights mirror property rights, which may be subjected to disgorgement damages where those rights are infringed.<sup>111</sup> Following this reasoning, “one might fairly say that

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98. *Id.* at 38.

99. *Id.* at 41.

100. *Id.* at 41–42.

101. *Id.*; *Wisconsin v. Michigan*, 295 U.S. 455 (1935).

102. *Wisconsin v. Michigan*, 295 U.S. at 458, 460.

103. *Id.* at 460.

104. *Id.* at 462.

105. *Fourth Report*, *supra* note 6, at 127.

106. *Texas v. New Mexico*, 482 U.S. 124, 134 (1987).

107. *Id.* at 130.

108. *Fourth Report*, *supra* note 6, at 129.

109. *Id.* at 18.

110. *Id.* at 131.

111. *Id.*

Nebraska took Kansas' water."<sup>112</sup> Thus, the Special Master argued that Nebraska's taking should be subject to disgorgement damages.

Second, the Special Master found that the Compact is ultimately an act of Congress, and thus a law of the United States.<sup>113</sup> Where United States law is broken, damages may be "aimed at divesting the wrongdoer of any gains derived from the statutory violation."<sup>114</sup> Under this reasoning disgorgement may also be appropriate. Ultimately, while the Special Master acknowledged that contract law affords some policy reasons for promoting efficient breach,<sup>115</sup> he finds that Nebraska's gain from breach of the Compact far exceeded Kansas's loss.<sup>116</sup> Therefore, the Special Master supported an award of some disgorgement damages.<sup>117</sup>

The Special Master recommended a disgorgement award despite declaring that Nebraska did not deliberately breach the terms of the Compact.<sup>118</sup> Ultimately, the Special Master set the total damages owed by Nebraska to Kansas at \$5.5 million.<sup>119</sup> This amount constitutes \$3.7 million for compensatory damages<sup>120</sup> and \$1.8 million for disgorgement damages.<sup>121</sup>

## 2. Injunctive Relief

Kansas also seeks injunctive relief in addition to monetary damages.<sup>122</sup> The Special Master recognized that an injunction is necessary only "in order 'to prevent future violations,'"<sup>123</sup> particularly because injunctions are meant to serve a deterrent function.<sup>124</sup> While Kansas remains skeptical of Nebraska's willingness to comply with the Compact going forward,<sup>125</sup> the Special Master recognized that Nebraska's latest Implementation Management Programs have reduced its groundwater pumping by 25 percent from when the

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112. *Id.* at 132.

113. *Id.*

114. *Id.*

115. *Id.* at 132–33.

116. *Id.* at 178.

117. *Id.* at 179.

118. *Id.* at 111.

119. *Id.* at 179.

120. *Id.* at 170.

121. *Id.* at 179.

122. *Id.* at 180.

123. *Id.* at 180–81 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

124. *Id.* at 181 (citing *Hecht v. Bowles*, 321 U.S. 321, 329 (1944)).

125. *Id.* at 183.

settlement was reached.<sup>126</sup> Thus, Nebraska has fallen below its consumption allocation by an average of approximately 64,000 acre-feet per year in the five years following the 2006 breach.<sup>127</sup> Because of Nebraska's turnaround, the Special Master rejected Kansas's request for an injunction or appointment of a River Master.<sup>128</sup> Concerning the latter request, the Special Master noted the Court has only resorted to appointment of a River Master twice: where cooperation among the states was unlikely and where the River Master filled a ministerial role.<sup>129</sup> Here, however, the Special Master found future disputes, if any, would "require discretionary, policy-oriented decisionmaking"<sup>130</sup> and appointment of a River Master would be inappropriate.<sup>131</sup>

## V. ARGUMENTS

### A. *Kansas's Arguments*

Kansas takes exception to many of the Special Master's recommendations. Kansas maintains that there was no mutual mistake that justifies reformation of the accounting procedures.<sup>132</sup> Kansas also contests the Special Master's denial of injunctive relief, as well as his endorsement of only \$1.8 million in disgorgement damages.<sup>133</sup>

Kansas counters the Special Master's finding that the FSS contained a mutual mistake, pointing to the fact that the FSS was "an extensive and technically detailed compromise."<sup>134</sup> As Kansas puts it, "the parties got what they bargained for in 2002; there was no mutual mistake."<sup>135</sup> In fact, Kansas contends that the parties "made a deliberate choice" not to separate imported water as part of the accounting procedures.<sup>136</sup> Kansas specifically emphasizes that one of Colorado's experts explicitly recognized the non-linearity of the

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126. *Id.* at 114.

127. *Id.* at 116.

128. *Id.* at 184.

129. *Id.* (citing *Texas v. New Mexico*, 482 U.S. 124, 134 (1987)).

130. *Id.* at 186 (quoting *Kansas v. Colorado*, 543 U.S. 86, 92 (2004)).

131. *Id.*

132. Exceptions by Plaintiff State of Kansas to the Report of the Special Master and Brief in Support of Exceptions at i, *Kansas v. Nebraska*, No. 126, Original (U.S. Feb. 27, 2014) [hereinafter *Plaintiff's Brief in Support of Exceptions*].

133. *Id.*

134. *Id.* at 6.

135. *Id.* at 17.

136. *Id.* at 8.

accounting system during negotiations.<sup>137</sup>

Kansas further argues that Nebraska has not met the immense burden of proving mutual mistake.<sup>138</sup> Kansas stresses that “[t]he mistake must be common and mutual to both parties”<sup>139</sup> and proven by “clear and convincing evidence.”<sup>140</sup> Additionally, Kansas notes that reforming a contract based on mutual mistake constitutes an “extraordinary equitable remedy.”<sup>141</sup>

Kansas also questions the Special Master’s conclusion regarding whether FSS’s accounting procedures were the “*best possible method* for addressing groundwater consumption based on present-day understandings.”<sup>142</sup> Kansas alleges that the Special Master found mutual mistake by the mere existence of a better accounting system.<sup>143</sup> Kansas argues that the existence of a more efficient system does not necessarily mean the parties made a mistake in their particular choice of which system to use,<sup>144</sup> and that Nebraska has failed to put forth evidence to prove otherwise.<sup>145</sup> Kansas further contends that Nebraska, to prove mutual mistake, has to show what the parties intended to agreed upon.<sup>146</sup> Otherwise, as here, alteration may do more than fix inadvertent error, and may instead change the entire method by which states address their apportionment of water.<sup>147</sup>

Kansas further disputes the Special Master’s recommended remedies. Kansas contends that injunctive relief is appropriate. Particularly, Kansas emphasizes that “the Court may order ‘such appropriate decree as the facts might be found to justify.’”<sup>148</sup> Kansas posits that the balance of equities warrants injunctive relief because Nebraska has consistently breached the Compact.<sup>149</sup> Kansas claims that it suffers irreparable harm when Nebraska breaches,<sup>150</sup> and a

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137. *Id.* at 27.

138. *Id.* at 19.

139. *Id.* (quoting *Hearne v. Marine Ins. Co.*, 87 U.S. 488, 490–91 (1874)).

140. *Id.* at 29. (citing *Nash Finch Co. v. Rubloff Hastings, LLC*, 341 F.3d 846, 850 (8th Cir. 2003)).

141. *Id.* at 19 (quoting *Mark Andy, Inc. v. Hartford Ins. Co.*, 229 F.3d 710, 716 (8th Cir. 2000)).

142. *Id.* at 22.

143. *Id.* at 23.

144. *Id.* at 22–23.

145. *Id.* at 29.

146. *Id.* at 29–30 (citing *Loewenson v. London Mkt. Cos.*, 351 F.3d 58, 61 (2d Cir. 2003)).

147. *Id.* at 32.

148. *Id.* at 35 (quoting *Kansas v. Colorado*, 185 U.S. 125, 145 (1902)).

149. *Id.* at 37.

150. *Id.* at 38.

compliance order will not impede Nebraska as long as it complies.<sup>151</sup> Kansas also expresses concern that future breaches on Nebraska's part will require return trips to the Supreme Court.<sup>152</sup>

Finally, Kansas takes exception to the Special Master's award of \$1.8 million in disgorgement damages, arguing that it is too small. Kansas points to the Special Master's admission that Nebraska gained upwards of \$25 million for its overuse.<sup>153</sup> Kansas argues that an award of merely \$1.8 million in disgorgement will fail in its deterrent function,<sup>154</sup> as a disgorgement of only \$1.8 million, compared to Nebraska's \$25 million gain, may incentivize future breach.

### *B. Nebraska's Arguments*

Nebraska principally takes exception to the \$1.8 million disgorgement award. First, Nebraska notes that the Special Master admitted that a disgorgement award in this context is "unprecedented."<sup>155</sup> Nebraska emphasizes a "Compact is, after all, a contract."<sup>156</sup> As a result, it argues that no damages are available beyond what is generally awarded in contract law: compensation damages.<sup>157</sup>

Nebraska further contests the Special Master's basis in property rights for awarding disgorgement. Nebraska highlights that it only infringed Kansas's water rights temporarily, not in perpetuity.<sup>158</sup> Consequently, Nebraska claims any disgorgement is warranted only to the extent required to return Kansas to the position it otherwise would have occupied.<sup>159</sup> Further, Nebraska contends that disgorgement would not serve a deterrent function, because, as the Special Master admitted, "Nebraska's Integrated Management Plans . . . and actions to be taken thereunder alleviate any concerns about future violations."<sup>160</sup>

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151. *Id.* at 39.

152. *Id.* at 43.

153. *Id.* at 55.

154. *Id.* at 53.

155. Nebraska's Exceptions and Brief in Support, *supra* note 10, at 9.

156. *Id.* at 10 (quoting *Petty v. Tenn.-Mo. Bridge Comm'n.*, 359 U.S. 275, 285 (1959)).

157. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 344, cmt. e).

158. *Id.* at 13.

159. *Id.*

160. *Id.* at 14 (citing *Fourth Report*, *supra* note 6, at 116–27).

Nebraska also asserts that disgorgement requires “*intentional* interference with legal entitlements,”<sup>161</sup> so disgorgement is not warranted here where interference was not intentional. Nebraska remarks that the Republican River Basin experienced “an *unprecedented* drought” in the years in which it consumed above its allocation,<sup>162</sup> leading to its greater reliance on the basin’s water. Further, Nebraska contends that it began its Implementation Management Programs to reduce groundwater pumping as early as 2004.<sup>163</sup> These actions resulted in roughly a 36 percent reduction in groundwater pumping between 2002 and 2006.<sup>164</sup> Because of the drought and Nebraska’s mitigation efforts, Nebraska argues that it “did not ‘knowingly’ violate the Compact” and thus disgorgement is inappropriate.<sup>165</sup>

### C. Colorado’s Arguments

Colorado’s exceptions to the Fourth Report largely echo the exceptions taken by its fellow defendant, Nebraska. Like Nebraska, Colorado argues disgorgement is unwarranted, mirroring Nebraska’s contention that an unprecedented drought impeded Nebraska’s otherwise “sincere efforts to reduce its allocation.”<sup>166</sup>

To aid its argument, Colorado points to another case in which the Special Master denied Kansas’s request for disgorgement because the breach of a compact “was not intentional.”<sup>167</sup> In *Kansas v. Colorado*,<sup>168</sup> Kansas sought disgorgement from Colorado<sup>169</sup> for its overuse of water from the Arkansas River, contrary to the terms of a compact between the states.<sup>170</sup> The Special Master in that case recommended no disgorgement award, based on Colorado’s lack of intent to violate the

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161. Nebraska’s Brief in Reply to Exceptions by Kansas at 32, *Kansas v. Nebraska*, No. 126, Original (U.S. Mar. 31, 2014).

162. Nebraska’s Exceptions and Brief in Support, *supra* note 10, at 17.

163. *Id.*

164. See *Fourth Report*, *supra* note 6, at 111 (reporting that Nebraska’s ground water pumping fell from more than 1,400,000 acre-feet in 2002 to less than 900,000 acre-feet in 2006).

165. Nebraska’s Exceptions and Brief in Support, *supra* note 10, at 16.

166. Colorado’s Sur-Reply in Support of its Exception at 7, *Kansas v. Nebraska*, No. 126, Original (U.S. Apr. 30, 2014).

167. Colorado’s Exception to the Report of the Special Master and Brief in Support of Exception at 4, *Kansas v. Nebraska*, No. 126, Original (U.S. Feb. 27, 2014) [hereinafter *Colorado’s Exception and Brief in Support*].

168. *Kansas v. Colorado*, 514 U.S. 673 (1999).

169. *Third Report*, *supra* note 29, at 75.

170. *Kansas v. Colorado*, 514 U.S. at 679–80.

compact.<sup>171</sup> Colorado points out that, similar to the Special Master in *Kansas v. Colorado*, the Special Master here has stated that Nebraska did not intend to breach.<sup>172</sup> Instead, Nebraska inadvertently breached after honest attempts to comply.<sup>173</sup> While Colorado concedes that the Court did not directly address the disgorgement issue in *Kansas v. Colorado*, the Court did accept the Special Master's recommendations twice.<sup>174</sup> Colorado contends that the Court should not award disgorgement here.<sup>175</sup>

Additionally, Colorado argues that the Special Master's \$1.8 million disgorgement award "would result in a windfall to Kansas."<sup>176</sup> Colorado emphasizes that while the Court sits with equitable power, its ultimate remedy must not be arbitrary or capricious.<sup>177</sup> Colorado argues the Special Master failed to determine Nebraska's actual gains from its overuse, and \$1.8 million in disgorgement does not relate to Kansas's loss.<sup>178</sup> As a result, Colorado asserts that this \$1.8 million disgorgement would be arbitrary.<sup>179</sup>

Finally, Colorado proclaims its support for the Special Master's denial of injunctive relief to Kansas. Colorado argues against Kansas's justification that any future breach will require return trips to the Supreme Court.<sup>180</sup> Colorado points to the FSS's requirement that the RRCA first hear disputes between the parties,<sup>181</sup> and thereafter the parties must additionally submit to arbitration.<sup>182</sup> Both of these forums may provide redress before the Supreme Court would be bothered.

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171. *Third Report*, *supra* note 29, at 80 (citing *First Report*, *supra* note 37, at 169).

172. *Colorado's Exception and Brief in Support*, *supra* note 167, at 6 (citing *Fourth Report*, *supra* note 6, at 111).

173. *Id.* (citing *Fourth Report*, *supra* note 6, at 130–31).

174. *Id.* at 8 (citing *Kansas v. Colorado*, 533 U.S. 1, 6 (2001), and *Kansas v. Colorado*, 522 U.S. 1073 (1998)).

175. Colorado's Sur-Reply in Support of its Exception at, *supra* note 166, at 7.

176. *Id.* at 9.

177. *Id.*

178. *Id.* at 10.

179. *Id.*

180. Colorado's Reply in Opposition to Kansas's Exceptions at 11, *Kansas v. Nebraska*, No. 126, Original (U.S. Mar. 31, 2014) (citing *Plaintiff's Brief in Support of Exceptions*, *supra* note 132, at 43).

181. *Colorado's Exception and Brief in Support*, *supra* note 167, at 12 (citing Final Settlement Stipulation vol. 1, *supra* note 28, at 34–35).

182. *Id.* (citing Final Settlement Stipulation vol. 1, *supra* note 28, at 39).



#### D. The United States's Position

While the United States is not a party to the case, the Court has invited the United States to express its opinion in an amicus brief.<sup>183</sup> The United States supports approval of the Special Master's Report in its entirety.<sup>184</sup>

### VI. ANALYSIS

The Supreme Court will now have to decide whether to approve the recommendations issued by the Special Master, support any of the state's exceptions, or fashion its own equitable remedy. While the Court has previously set aside some of its Special Masters' recommendations,<sup>185</sup> many prior cases also approve Special Master recommendations,<sup>186</sup> indicating a tendency towards deference. The Court may also be influenced by the opinion of the United States, which fully supports the Special Master's recommendations.<sup>187</sup> Nebraska and Colorado's position in opposition to Kansas's exceptions, echoing the positions of the Special Master and United States, better draw upon the facts and settled law than do Kansas's exceptions. The current accounting system as propagated by the FSS counts imported water towards each state's consumption.<sup>188</sup> Kansas asserts that this treatment was intentional, and therefore the FSS contained no mutual mistake.<sup>189</sup> The plain language of both the Compact and the FSS, however, indicate otherwise. Both documents clearly state that the Republican River allocation considers only virgin water supply.<sup>190</sup> The FSS specifically excludes imported water from calculations.<sup>191</sup>

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183. *Kansas v. Nebraska*, 131 S. Ct. 378, 378 (2010).

184. *Brief of the United States*, *supra* note 12, at 2.

185. *See, e.g.*, *Kansas v. Colorado*, 543 U.S. 86, 96 (2004) (setting aside part of a Special Master's recommendations).

186. *See, e.g., id.* at 91–92, 102–05; *Texas v. New Mexico*, 482 U.S. 124, 127–28 (1987).

187. *Brief of the United States*, *supra* note 12, at 2.

188. *Fourth Report*, *supra* note 6, at 15.

189. *Plaintiff's Brief in Support of Exceptions*, *supra* note 132, at i.

190. *Appendices to the Report*, *supra* note 91, at B4–B5; Final Settlement Stipulation vol. 1, *supra* note 28, at 25.

191. *See Appendices to the Report*, *supra* note 91, at B4–B5 (“Beneficial Consumptive Use of Imported Water shall not count as Computed Beneficial Consumptive Use or Virgin Water Supply.”).

Because the Compact is an act of Congress,<sup>192</sup> the Court will interpret it by first looking to its language.<sup>193</sup> With such clear language, the Court will not be persuaded by Kansas's contentions that the current accounting treatment was a point of bargain. The intent of the parties is frustrated by the accounting procedure's inadvertent treatment of imported water. The language of the Compact supports that the agreement is limited to virgin water; an accounting treatment that includes imported water must have been a mistake. Therefore, the Court should reform the FSS's accounting procedures to better reflect the parties' intent and remedy the mutual mistake.

The Court would create an injustice for Nebraska by strictly interpreting the accounting procedures as written. The current accounting procedures distort the allocation in its inclusion of imported water<sup>194</sup> by charging Nebraska for virgin water that it does not use. The Court, however, seeks a fair and equitable solution.<sup>195</sup> An equitable solution would not charge Nebraska for water it does not use, particularly when a more accurate system is within reason.<sup>196</sup>

Additionally, the Special Master offered convincing arguments for denying the injunctive relief sought by Kansas. Injunctive relief is meant to serve a deterrent function.<sup>197</sup> To obtain injunctive relief Kansas must convince the Court that its rights are severely threatened.<sup>198</sup> Kansas has not met this burden. While Nebraska concedes its violation in 2006,<sup>199</sup> the Special Master presented ample evidence concerning its compliance in every year since.<sup>200</sup>

Finally, Kansas, echoing the Special Master, presents the most persuasive arguments concerning the feasibility of some disgorgement award. Kansas argues that the disgorgement award should be even greater than the \$1.8 million recommended by the Special Master to

192. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (citing *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

193. *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)).

194. Grant Harse, *Nebraska's Costs of Compliance with the Republican River Compact: An Equitable Solution*, 19 KAN. J. L. & PUB. POL'Y 124, 146 (2009).

195. *Texas v. New Mexico*, 482 U.S. 124, 134 (1987).

196. Harse, *supra* note 194, at 145.

197. *Hecht v. Bowles*, 321 U.S. 321, 329 (1944).

198. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)).

199. *Nebraska's Exceptions and Brief in Support*, *supra* note 10, at 2.

200. *See Fourth Report*, *supra* note 6, at 111 (reporting that Nebraska's ground water pumping fell from more than 1,400,000 acre-feet in 2002 to less than 900,000 acre-feet in 2006).

effectively serve its deterrent function.<sup>201</sup> Nebraska and Colorado oppose the award,<sup>202</sup> arguing that the award is unprecedented.<sup>203</sup> The Court, however, has plenary power to institute a solution that it deems fair and equitable.<sup>204</sup>

Nebraska also tries to argue that disgorgement is not warranted because it did not knowingly breach.<sup>205</sup> While Nebraska may have taken some efforts to avoid breach, its breach was inevitable. Nebraska, while making efforts to reduce its water consumption, overused its allowance from 2003 through 2005, so that vast under-usage would have been required in 2006 for compliance.<sup>206</sup>

Despite the feasibility of some disgorgement award, Colorado argues that the Special Master's specific award of \$1.8 million was arbitrary, and thus not proper.<sup>207</sup> The Court may be persuaded to depart from the Special Master's recommendation on this issue. The Special Master failed to set specific parameters for his calculation, merely citing that the \$1.8 million "represents a disgorgement of the amount by which Nebraska's gain exceeds Kansas's loss."<sup>208</sup> Further, while Kansas claims economic loss from Nebraska's breach, some commentators argue that Kansas in fact suffered no harm.<sup>209</sup> While Kansas's claimed losses remain speculative, Nebraska has already expended many resources in complying with the Compact's requirements.<sup>210</sup> Again, the Court must reach a fair and equitable solution,<sup>211</sup> which does not include a damages award chosen at random. While the Court may find that some disgorgement is not arbitrary, in the interest of fairness and equity it will probably require greater justification for the ultimate award.

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201. *Plaintiff's Brief in Support of Exceptions*, *supra* note 132, at 53.

202. Nebraska's Exceptions and Brief in Support, *supra* note 10, at 10; Colorado's Exception and Brief in Support, *supra* note 167, at 4.

203. Nebraska's Exceptions and Brief in Support, *supra* note 10, at 9.

204. *Texas v. New Mexico*, 482 U.S. 124, 134 (1987).

205. *Colorado's Exception and Brief in Support*, *supra* note 167, at 4.

206. *Brief of the United States*, *supra* note 12, at 8.

207. *Colorado's Exception and Brief in Support*, *supra* note 167, at 9.

208. *Fourth Report*, *supra* note 6, at 179.

209. Harse, *supra* note 194, at 146-47 (citing Editorial, *River Details Preliminary Republican River Decisions Seem to Lean to Nebraska*, Omaha World-Herald, Dec. 18, 2008, at 06B).

210. *Id.* at 147.

211. *Texas v. New Mexico*, 482 U.S. 124, 134 (1987).

## VII. CONCLUSION

Cases of original jurisdiction in the Supreme Court, such as *Kansas v. Nebraska & Colorado*, reach as far back as the Constitution's enactment. In this context, the Court plays a vital role as referee between the sovereign States. Ultimately, the Court's goal is to reach fair and equitable solutions. Here, the Court can achieve this goal by reforming the mutual mistake in the FSS's accounting procedures. Currently, the accounting procedures include imported water as part of the virgin-water calculation, despite the Compact's plain language and clear intent stating otherwise. Additionally, the Court would create injustice by denying reformation, thereby approving a system that charges one state more than it uses. Finally, the Court may include a disgorgement award as part of its equitable relief of a knowing breach. The Court, however, must be careful to impose only damages that it can substantiate; otherwise fairness is not attained. Fair and equitable relief will produce goodwill between the States, which is of paramount concern because they are bound together indefinitely.