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**Colorado** – Letter to Special Master re unresolved issues

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**Colorado** – Response to Kansas’ letter of 3/21/05

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Order Modifying Time Schedule for Expert Discussions

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Order for Status Conference [September 30, 2005]

Kansas – letter attaching Rules of Arbitration

Kansas – Letter reporting results of meeting between Chief Engineer of Kansas and State Engineer of Colorado on September 22 and 23, 2005
The Honorable Arthur L. Littleworth
Special Master
Best Best & Krieger
400 Mission Square
3750 University Avenue, 3rd Floor
Riverside, California 92501

Re:  Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

In accordance with your September 16, 2005 Order for Status Conference, this letter is provided to report the results of the meeting in Denver between the Chief Engineer of Kansas and the State Engineer of Colorado on September 22 and 23, 2005. That meeting, and related meetings of the respective staffs and consultants, resolved a number of issues. In particular, the Chief and State Engineers reached agreement on measurement and crediting for releases from the Offset Account at the Stateline, evaporation loss from the Offset Account, return flow obligations and related issues (see ¶¶(b)14, (b)15 of the March 11, 2005 Schedule). They also agreed to modifications to the Amended Measurement Rules based on Phase II of the U.S.G.S. study (¶ (b)(1)); issues related to the Sisson-Stubbs Ditch (¶(b)13(d)); monitoring and documentation of dry-up acreage (¶(b)13(c)(3)), as well as a number of data issues.

A summary of the status of the issues identified in the March 11, 2005 Schedule is attached hereto. At this time, it appears that there are four issues with respect to which the States are still in disagreement and will therefore need to be set for arbitration or resolution by you if they are not resolved by September 30. Those issues, as identified in part (b) of the March 11, 2005 Schedule, are as follows:

1. Mr. Schroeder's proposed model change on the calculation of model demand;
12(d) Whether any changes should be made to the observed diversion records used for calibration of the model;

13(f) Colorado’s proposal on the representation of Graham alternate points of diversion; and

17 Limitation on accumulation of credits.

Recalibration of the H-I model and model documentation must await the resolution of the disputed issues. The States believe that the remainder of the issues to be resolved before entry of the decree, as shown on the attached schedule, are either agreed to and reduced to writing, or agreed to and will shortly be reduced to writing.

Sincerely yours,

John B. Draper

JBD:dlo

cc:
David W. Robbins, Esq.
Dennis M. Montgomery, Esq.
Leland E. Rolfs, Esq.
David Davies, Esq.
Status of Issues on the March 11, 2005 Schedule, Part (b)
As of September 27, 2005

Not Agreed

11 Schroeder’s proposed model change on the calculation of model demand.

12(d) Whether any change should be made to the observed diversion records used for calibration of the Model

13(f) Representation of the Graham alternate points of diversion.

17 Limitation on accumulation of credits.

Agreed, With Agreement Documented

1 Phase II of the USGS Study

12(b) Lamar/Manvel and X/Y acreages

12(c) Unit response functions for Fort Lyon, Fort Lyon Storage and Holbrook

13(d) Sisson-Stubbs

Agreed, But Agreement Not Yet Documented

2-4 Irrigated Acreage 2000-2004

10 Proper representation in the Model of the various replacement plan water sources

12(a) Use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir

13(a) Rocky Ford conversion and exchange

13(c)(1) Replacement credits 1997-2004

13(c)(2) Special waters 2000-2004

13(c)(3) Monitoring and documentation of dry-up

13(e) Winter water bookovers
14 Credits for Offset Account deliveries to the stateline, evaporation loss from the Offset Account after the evaporation is charged to Kansas and return flow obligations

15 Representation in the model, or other accounting, of releases of stateline return flows associated with LAWMA Section II transfers to the Offset Account and associated transit losses.

Issues 5-9 and 13(b), by agreement of the States, will not be addressed before entry of the decree.
September 23, 2005

By Email and U.S. Mail

The Honorable Arthur L. Littleworth
Special Master
Best Best & Krieger
400 Mission Square
3750 University Avenue, 3rd Floor
Riverside, California 92501

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

I am attaching hereto Rules of Arbitration, which have been agreed to by Colorado and Kansas, subject to your approval. The Rules were selected and developed from the American Arbitration Association (AAA)’s Commercial Rules and Procedures. The Rule designations are those of the AAA and were retained to make it easier to review to the corresponding AAA Rule in the event there is a need to do so. The Arbitration Schedule referred to in the Rules will be finalized and provided to you for your review by next Wednesday, September 28.

We want to point out particularly the rules that refer to the Special Master. These are Rules R-5, R-7, R-11, R-16(a), R-17(c), R-28, R-31(d), R-36, R-38, R-41, R-45 and R-51(b).

You will note that Rule R-45 provides that the original of each final decision of the arbitrator(s) and the original transcript, exhibits and other submittals shall be provided to you once the final decision has been made. Colorado agreed to this provision subject to confirming with you that you actually want those materials deposed with you. Colorado believes that it is unnecessary to include the original transcript, exhibits and other submittals related to arbitration with the records of the proceedings in this case, but has no objection to doing so if you feel that should be done. Kansas believes that the original materials from the arbitration proceedings
should be deposited with you so that they can be retained with the other records of the proceedings in this case.

Best regards -

Sincerely yours,

John B. Draper

JBD:dlo
enclosure

cc: (w/encl.)
    David W. Robbins, Esq.
    Leland E. Rolfs, Esq.
    David Davies, Esq.
Kansas v. Colorado,
No. 105, Original, U.S. Supreme Court

RULES OF ARBITRATION
September 20, 2005

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RULES OF ARBITRATION

R-1. Agreement of the States

(a) The States of Kansas and Colorado hereby agree to use these Rules of Arbitration to resolve the remaining issues included in the March 11, 2005 Schedule adopted in the case of Kansas v. Colorado, No. 105, Original, U.S. Supreme Court. The States, by written agreement, may vary the procedures set forth in these Rules. After appointment of the arbitrator(s), such modifications shall also require the consent of the arbitrator(s).

R-5. Initiation of arbitration

In accordance with the attached Arbitration Schedule, the States shall submit to the Special Master a list of the issues from the States’ Jointly Proposed Schedule to Resolve Issues that Remain After the Supreme Court’s Opinion that have not been resolved that the States will arbitrate. It shall contain a statement of the nature of each issue and the position of each State.

R-7. Jurisdiction

The arbitrator(s) shall have the power to rule on any issues not resolved by the Special Master relating to the interpretation of these Rules or the scope of the arbitration.

R-10. Location of Hearing

For each issue to be arbitrated, the States shall agree, if possible, on a location where the arbitration is to be held. If the States cannot agree on a location in accordance with the attached Arbitration Schedule, the arbitrator(s) shall set the hearing at a neutral location in the United States (a location where no counsel or witnesses live or work).

R-11. Appointment of Arbitrators

An arbitrator must have appropriate qualifications for the issue(s) to be decided by that arbitrator. If an arbitrator does not have the technical expertise necessary to adequately decide an issue, the arbitrator may employ an expert with such expertise. This expert shall also be of demonstrable impartiality and independence. The States should agree on whether the hiring of an expert to assist the arbitrator(s) is necessary at the time the arbitrator(s) is selected. The States will attempt to hire a single arbitrator who can decide as many issues as possible, but in any event, will select an arbitrator(s) for each issue.
If the States have not agreed on the selection of one arbitrator for each issue in accordance with the attached Arbitration Schedule, the arbitrator panel shall be appointed in the following manner: Each State shall select one arbitrator in accordance with the attached Arbitration Schedule. Those two arbitrators shall select a third arbitrator in accordance with the attached Arbitration Schedule. If the two arbitrators do not agree on a third arbitrator in accordance with the attached Arbitration Schedule, the Special Master shall select the third arbitrator.

R-16. Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the Special Master and the States any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the States or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-17. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law.

(b) If there are grounds disclosed or alleged which could disqualify an arbitrator, the States, after reviewing any possible objections to their qualifications or fitness, may mutually agree in writing to allow them to be appointed or to continue as an arbitrator.

(c) Upon objection of a State to the continued service of an arbitrator, the Special Master shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the States of his decision, which decision shall be conclusive.

R-18. Communication with Arbitrator

No State and no one acting on behalf of any State shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration.

R-19. Vacancies
(a) If for any reason an arbitrator is unable to perform the duties of the office, the vacancy shall be filled in the same manner as the original arbitrator was selected in accordance with these rules.

(b) In the event of the appointment of a substitute arbitrator, the substitute arbitrator or the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

L-3. Prehearing Conference

A prehearing conference shall be held among the States and/or their attorneys or other representatives and the arbitrator(s) in accordance with the attached Arbitration Schedule. Unless the States agree otherwise, the pre-hearing conference will be conducted by telephone conference call rather than in person. At the pre-hearing conference the matters to be considered shall include:

(a) identification of the factual and legal issues to be arbitrated;

(b) exchange of preliminary witness lists;

(c) the extent to which discovery shall be conducted;

(d) whether, and the extent to which, any sworn Statements and/or depositions may be introduced;

(e) a determination as to which State will proceed first on each issue;

(f) location of hearing;

(g) the prehearing and hearing schedule; and

(h) other matters necessary to resolve these issues.

The arbitrator(s) shall issue a Scheduling and Procedure Order setting forth the results of the pre-hearing conference.

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of the issues.

(b) States shall cooperate in the exchange of documents, exhibits and information within such State's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of the issues.
(c) The States may conduct such discovery as set forth below; however, the arbitrator(s) may place limitations consistent with these rules on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the States cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) In accordance with the attached Arbitration Schedule, the States shall exchange final lists of proposed witnesses. Each State shall be limited to three witnesses on each issue; however, for good cause shown, the arbitrator(s) may allow additional witnesses. The States shall also exchange at the same time: (1) a detailed description of the unresolved issues; (2) a statement of agreed-upon facts related to each issue and a statement of facts in dispute, (3) opinions and the basis for the opinions, and (4) all proposed exhibits, including expert reports on each unresolved issue, and the backup for the exhibits.

(e) A State may provide responsive exhibits, witness lists, and summaries of testimony in accordance with the attached Arbitration Schedule.

(f) Any proposed witness who has never testified before in this case or whose summary of testimony contains facts or opinions not disclosed during the discussions of experts may be deposed. Depositions, which may include a subpoena duces tecum shall be limited to the areas and documents not disclosed during the expert discussions and to the background, and qualifications of those witnesses who have never testified before in this case. For good cause shown and in accordance with these rules, the arbitrator(s) may order additional depositions.

(g) The arbitrator(s) is authorized to resolve any disputes concerning the exchange of information.

(h) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

(i) Each State shall present evidence to support its position. The other State shall then present evidence to support its position. Witnesses for each State shall also submit to questions from the arbitrator(s) and the adverse State. The arbitrator(s) has the discretion to vary this procedure provided that the States are treated with equality and that each State has the right to be heard and is given a fair opportunity to present its case.

(j) The arbitrator(s), exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the States to focus their presentations on issues the decision of which could dispose of all or part of the case.

(k) The States may agree to waive oral hearings.

R-22. Date and Time of Hearing
The arbitrator(s) shall set the date and time for each hearing, in accordance with the attached Arbitration Schedule. The States shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule.

R-25. Oaths

Before proceeding with the first hearing, each arbitrator(s) may take an oath of office and, if required by law, shall do so. Witnesses shall testify under oath.

R-26. Stenographic Record

A stenographic record shall be made of all substantive hearings and shall be the official record of the proceeding. A copy of the transcript shall be provided to the arbitrator(s) and each of the States.

R-28. Postponements

The arbitrator(s) may postpone any hearing upon agreement of the States, upon request of a State for good cause shown, or upon the arbitrator(s)'s own initiative, but in any case the arbitration hearings shall be completed no later than the date specified in the attached Arbitration Schedule, unless extended with the permission of the Special Master.

R-31. Evidence

(a) The States may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator(s) may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all the arbitrator(s) and both States, unless otherwise agreed to by both States.

(b) The arbitrator(s) shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator(s) to be cumulative or irrelevant.

(c) The arbitrator(s) shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) The arbitrator(s) may request the Special Master to subpoena witnesses or documents upon the request of any State, if necessary.

R-32. Post-hearing Filing of Documents or Other Evidence

(a) If the States agree or the arbitrator(s) directs that documents or other evidence be submitted to the arbitrator(s) after the hearing, the documents or other evidence shall be
filed with the arbitrator(s). Both States shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-35. Closing of Hearing

The arbitrator(s) shall specifically inquire of both States whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator(s) shall declare the hearing closed. If post-hearing briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator(s) for the receipt of briefs. If documents are to be filed as provided in Section R-32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator(s) is required to make the decision shall commence, in the absence of other agreements by the States, upon the closing of the hearing.

R-36. Reopening of Hearing

The hearing may be reopened on the arbitrator(s)'s initiative, or upon application of a State, at any time before the decision is made. If reopening the hearing would prevent the making of the final decision of the arbitrator in accordance with the attached Arbitration Schedule, the matter may not be reopened unless the Special Master approves.

R-37. Waiver of Rules

A State that proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in a timely manner shall be deemed to have waived the right to object.

R-38. Extensions of Time

The States may modify any period of time by mutual agreement, provided that the modification will not prevent the final decision of the arbitrator(s) from being made in accordance with the attached Arbitration Schedule, unless the Special Master approves. The arbitrator(s) may for good cause extend any period of time established by these rules, except as otherwise provided herein.

R-39. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of arbitration under these rules shall be served on counsel of record for each State in the same manner as service has been accomplished in Kansas v. Colorado, No. 105, Original.

(b) Any documents submitted by either State to the arbitrator(s) shall simultaneously be provided to the other State.

R-40. Majority Decision
When the panel consists of more than one arbitrator, a majority of the arbitrators shall make all decisions.

R-41. Time of Final Decision

The final decision shall be made by the arbitrator in accordance with the attached Arbitration Schedule unless extended with the approval of the Special Master.

R-42. Form of the final decision

(a) The final decision as to each issue shall be in writing and signed by a majority of the arbitrators.
(b) The arbitrator(s) shall explain the reasons for each final decision.

R-43. Scope of Final Decision

The arbitrator(s) shall make a final decision as to each issue within the scope of these Rules consistent with the applicable law and facts.

R-45. Delivery of Final Decision

The arbitrator(s) shall provide the original of each final decision to the Special Master, with copies to the counsel of record for each State. The arbitrator(s) shall provide the original transcript, exhibits and other submittals on each issue to the Special Master at the same time or shortly thereafter.

R-46. Modification of Decision

Within five working days after the service of the States, excluding Saturdays, Sundays, and legal holidays specified by name in F.R.C.P. 6(a), any State may request the arbitrator(s) to correct any clerical, typographical, or computational errors in the decision. The arbitrator(s) is not empowered to re-determine the merits of any decision made. The other State shall be given five working days to respond to the request. The arbitrator(s) shall dispose of the request within 5 working days after transmittal to the arbitrator(s) of the request and any response thereto. For purposes of this rule, F.R.C.P. 6 (a) and (e) shall apply to the computation of time.

R-48. Applications to Court and Exclusion of Liability

(a) No arbitrator in this proceeding is a necessary or proper party in judicial proceedings relating to the arbitration and cannot be called as a party or witness in *Kansas v. Colorado*, No. 105, Original.

(b) The parties to an arbitration under these rules shall be deemed to have consented that the decision of the arbitrator(s) is binding on all issues except the Sisson-Stubbs credit,
the Graham Alternate Points of Diversion, and the Offset Account Credits (including evaporation and return flow issues) in the case of *Kansas v. Colorado*, No. 105, Original.

(c) The States shall be deemed to have consented that no arbitrator shall be liable to any State in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these Rules.

R-50. Expenses

The States shall bear their own expenses, including attorneys’ fees.

All other expenses of the arbitration, including the arbitrator’s reasonable fees, fees of any expert hired to assist an arbitrator, travel and subsistence expenses, telephone and mailing costs, facility rental costs, copying, and printing, shall be borne equally by the States.

R-51. Arbitrator’s Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator’s agreed rate of compensation.

(b) Any disagreement concerning compensation of an arbitrator shall be resolved by the Special Master.
IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,
Plaintiff, No. 105 Original

v.

STATE OF COLORADO,
Defendant,

UNITED STATES OF AMERICA,
Intervenor.

ORDER FOR STATUS CONFERENCE

It is hereby Ordered:

1. That a status conference be held on September 30, 2005 at 9:30 a.m. in the office of the Special Master at 3750 University Avenue, 4th Floor, Riverside, California.

2. That the States report in writing as soon as possible the results of the meeting between the Chief Engineer of Kansas and the State Engineer of Colorado, presently scheduled for September 22 and 23.
3. That Counsel be prepared to discuss at the Settlement Conference any issues that remain unresolved from my April 19, 2005 Order, including arbitration arrangements.

4. That Counsel also be prepared to discuss the Judgment and Decree, with particular attention to the provisions for the termination of continuing jurisdiction.

Dated: September 16, 2005.

ARTHUR L. LITTLEWORTH
Arthur L. Littleworth
Special Master
PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Best Best & Krieger LLP, 3750 University Avenue, P.O. Box 1028, Riverside, California 92502. I am readily familiar with this firm’s practice for collection and processing of correspondence for mailing with the United States Postal Service. On September 16, 2005, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

ORDER FOR STATUS CONFERENCE
in a sealed envelope, postage fully paid, addressed as follows:

John Draper, Esq. 
Montgomery & Andrews 
325 Paseo de Peralta 
Santa Fe, New Mexico  87504

David Robbins, Esq. 
Hill & Robbins 
100 Blake Street Building 
1441 Eighteenth Street 
Denver, Colorado  80202

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 16, 2005, at Riverside, California.

Kay J. Bliss
Since the Progress Report dated August 17, 2005, the State Engineer of Colorado, Mr. Simpson, and the Chief Engineer of Kansas, Mr. Pope (the “State and Chief Engineers”), together with their staffs and various experts, have met in Denver on August 15 through 17 and in Topeka on August 31 through September 2 to address issues that have not been resolved through discussions of the States’ experts. These face-to-face meetings were followed up with extensive telephonic meetings on September 7 through 9. In addition, certain of the States’ experts have met separately in person or by telephone. The State and Chief Engineers focused first on issues related to determining credits for Offset Account deliveries, then addressed the remaining issues. They appear to be close to an agreement on the Offset Account and most of the remaining issues. A further meeting of the State and Chief Engineers is scheduled in Denver for September 22 and 23 if agreement is not achieved on all issues before then. Counsel have been in contact during the preceding month to discuss remaining issues as well. The specific status of each of the issues in the March 11 Schedule is as follows:

(a) Calculation of Damages

As previously reported, the calculation and payment of damages and prejudgment interest has been resolved. Confidential settlement negotiations on the issue of costs have been resumed.

(b) Potential Issues Outlined in the Fourth Report (pp. 122-23) and any New Issues

1. Phase 2 of the USGS Study
As previously reported, the U.S. Geological Survey published its final report on the Phase 2 study on May 3. The Colorado State Engineer determined that a modification to the Amended Measurement Rules is necessary, and Colorado notified Kansas by letter received July 5 of the Colorado State Engineer’s determination in accordance with the jointly proposed schedule. Further information was provided by Colorado on July 11 in response to Kansas’ request. The State and Chief Engineers discussed this issue in their meetings, and Kansas has agreed to the modification, provided the Colorado State Engineer agreed to revoke the policy for approval of variances for complex wells. The Colorado State Engineer has agreed not to grant variances from Rule 3.6 of the Amended Measurement Rules to allow owners or users of wells to use the lowest of the two PCC measurements. Therefore, this issue has been resolved. The proposed modification to the Amended Measurement Rules is to reduce the period for re-testing PCCs from four years to two years. This will require amendment of the Measurement Rules, and the Colorado State Engineer will now file the proposed amendment in accordance with Colorado law.

2. **Results of Colorado’s completed verification program on wells and irrigated acreage.**

   This issue is addressed in the following section.

3. **Commencement of the five-year cycle for updating Colorado’s irrigated acreage study.**

   As previously reported, Kansas’ experts have reviewed Colorado’s 2003 classification and mapping, which Colorado finalized on July 14. The Colorado experts provided preliminary files on Colorado’s proposed classification of 2002 images on July 29. On August 22, the Kansas experts provided recommendations
for final quantifications for 2003 and 2004. The Colorado experts reviewed the Kansas recommendations and provided their responses on September 14. On September 7, the Colorado experts provided a summary table for the 2002 irrigated area classification and the classification of irrigated area by source of water (surface water, mixed surface and groundwater, or sole source) as necessary for model data input. Colorado has not provided the 2002 satellite images relied upon for the classifications, but will do so on September 15. The Kansas experts are in the process of completing their analysis and review. Because of the intensive negotiations of the State and Chief Engineers during the past month, in which Mr. Tyner for Colorado and Mr. Book for Kansas were both involved, it has not been possible to complete the review and discussions on irrigated acreage. Mr. Tyner and Mr. Book believe that these issues can be resolved with additional time; however, in light of the Special Master’s admonition that the parties could not assume that more time will be given to complete the review, the States have agreed to binding arbitration on any irrigated acreage issues that cannot be resolved by the experts and this matter will be scheduled for arbitration. The States have fully appreciated the Special Master’s admonition, but as indicated in the previous progress report, the experts’ inability to complete this issue within the time scheduled was due to the significant amount of work involved rather than disagreements among the experts. The 2003 reclassification of irrigated acreage involved a substantial review and improvement in the drawing of field boundaries using digital orthophoto quarter quads provided by the U.S. Geological Survey. Because of significant changes in irrigated acreage due to drought conditions,
Colorado elected to purchase and analyze additional satellite imagery to classify irrigated acreage and crops for 2002. The Kansas experts acquired 2004 aerial photographs to help identify previously fallowed fields that were irrigated in 2004.

4. **Proposed changes in the satellite imagery system used by Colorado.**

This issue is covered under paragraph 3 above.

Issues 5.-9.

The States agreed that Issues 5-9 will not be addressed before entry of the Decree.

10. **Proper representation in the model of the various Replacement Plan water sources.**

The States’ experts have achieved agreement in principle on these issues. Model code changes that will be needed to represent the use of winter water stored in Pueblo Reservoir, the new account for the CWPDA in Pueblo Reservoir, transfers of Article II water into other Article II Accounts, and the Keesee Ditch operations have been identified and are being developed by the experts from both States. Agreement on the coding changes without arbitration is expected.

11. **Mr. Schroeder’s proposed model change on the calculation of model demand.**

As previously reported, Colorado limited its proposal to changing the groundwater acreage previously used for calibration of the model, and on August 11, Colorado’s experts provided their specific proposal regarding the number of acres of sole source pumping and the number of acre-feet of sole source groundwater pumping for the years 1950-1994. Colorado’s explanation of the basis for these estimates and other backup was provided on August 16. The Kansas experts responded to the Colorado information in a meeting on September
9, and the experts from both States discussed the model code changes that would be required and reached agreement on some issues. The Colorado experts are preparing the necessary code changes. Because some of the issues remain unresolved at this time, the States are scheduling these issues for arbitration.

12. Various model calibration issues:

a. Use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir for use in the model and whether recalibration is required.

As previously reported, Colorado made a confidential settlement offer to resolve this issue. Kansas and its experts reviewed the offer and made a counteroffer to Colorado on August 16, which Colorado rejected. Colorado requested that the Kansas experts provide a written response to the Colorado proposal and that the experts meet prior to September 12. The Kansas experts provided a written response to the Colorado proposal on August 19, and the experts met by telephone on September 9 and appear to have resolved some of the issues. The State and Chief Engineers also discussed this issue, but the States have not agreed on most issues, including whether Colorado may seek changes in upstream PET values. The States have traded lists of arbitrators and expect to agree on an arbitrator. If the States cannot agree on whether upstream PET issues may be raised, they will promptly submit that question to the Special Master for resolution.
b. Correcting the irrigated acreages of the Lamar/Manvel and X-Y ditches and whether recalibration of the model is required.

This issue has been resolved.

c. Whether the unit response functions for the Fort Lyon Canal, the Fort Lyon Storage Canal, and the Holbrook Canal should be revised.

This issue has been resolved.

d. Whether any changes should be made to the observed diversion records used for calibration of the model.

The Kansas experts met with Colorado experts in Pueblo on July 27 and reviewed backup data for the proposed Colorado changes to the observed diversion records. Colorado’s experts provided a proposal for the handling of outliers for calibration purposes on August 11. The State and Chief Engineers discussed these issues during their meetings in the past month. The States have agreed to handle outliers as they have been in the past and, in addition, have agreed to document the criteria for identifying outliers. The Kansas experts were not able to complete their review of the proposed Colorado changes to the observed diversion records due to the intensive negotiations between the State and Chief Engineers. Kansas has also raised a legal question of whether monthly diversion records published by ARCA and admitted into evidence in this case can be
changed. Except to the extent that the Special Master chooses to resolve the legal question, these issues will be scheduled for arbitration.

e. Other issues that might affect calibration of the model.

As previously reported, the Colorado experts delivered their recommendation on constraints for determining want factors for two ditches during the calibration process on August 11. The Kansas experts reviewed the recommendation, and the State and Chief Engineers discussed this issue during their meetings. The State and Chief Engineers reached an agreement on how the Sisson-Stubbs want factors should be calibrated, but did not agree on determining want factors for the X-Y/Graham ditch. This issue will be arbitrated, as further discussed in paragraph 13.f below.

13. Other Issues

a. Treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water.

The experts resolved this issue, although they are still working on the coding changes to the model needed to implement the changes that have been agreed to. The coding changes have not been completed because Mr. Straw was involved in the meetings between the State and the Chief
Engineers, but the experts consider this a technical task that can be completed in the near future without disagreement.

b. The States’ experts are reviewing whether a change should be made to the way the Lamar power plant deliveries are represented in the model.

The States agreed that this issue will not be addressed before entry of the Decree.

c. Replacement credit issues for 1997-1999, 2000-2004 and in the future:

1. The States’ experts are discussing replacement credit issues that may not be resolved by pending Water court proceedings, such as certain Highland Canal and Fountain Creek issues.

   The Kansas experts completed their review of dry-up and provided their results for 2000-2004 to the Colorado experts on June 3. Colorado provided its response on August 21 regarding 2000-2003. The Colorado experts reviewed the 2004 Kansas results and provided their response on September 14. Backup on Fountain Creek credits were provided by Colorado to the Kansas experts on July 27 at the meeting in Pueblo. Most issues have been resolved except a few dry-up and special water claims that are still being reviewed. Any remaining issues will be arbitrated.

2. Quantification of special waters, including monitoring, verification and reporting.
As previously reported, the experts met and discussed these issues on July 22. The Kansas experts provided a list of replacement operations for which they requested additional description and documentation. The Colorado experts reviewed the records of replacement operations for which additional description and documentation were requested to provide further information or make revisions to the proposed credits being claimed. As of this time, most of the questions have been resolved, and the remainder are still under discussion. Any remaining issues will be arbitrated.

3. The States' experts are meeting to discuss improvements in monitoring and documentation of dry-up and feedback from Kansas, as well as terms and conditions for monitoring subirrigation.

As previously reported, a joint dry-up tour of experts from both states was conducted June 21-23. The experts then met on June 24 to discuss these issues, and the Kansas experts provided feedback and recommendations for improvements in monitoring and documentation of dry-up at the meeting and by memo on July 8. The States' experts then traded information regarding terms and conditions for monitoring subirrigation. Colorado agreed to most of the Kansas experts' recommendations for improvements in monitoring and documentation of dryup. The State and Chief Engineers then discussed the remaining issues during their meetings and agreed on procedures for monitoring and documentation, which Colorado agreed to put in writing. Kansas
agreed to the procedures, subject to review of the written
document. The written document was provided to Kansas on
September 9. The Kansas experts are reviewing the document.

d. The States’ experts are reviewing the acreage and want factors for the
Sisson-Stubbs credit dry-up.
The State Engineer and the Chief Engineer resolved these issues during
their meetings. The agreement will be reduced to writing shortly. The H-I
Model inputs are being adjusted accordingly.

e. Representation of winter water bookovers in the model

This issue has been resolved.

f. Colorado will provide Kansas a proposal on the representation of
Graham alternate points of diversion.
The State and Chief Engineers discussed this issue during their meetings,
but were unable to resolve this issue. This issue will be arbitrated unless
the State and Chief Engineers are able to resolve this issue in their final
meeting on September 22 and 23. Counsel have traded lists of arbitrators
for this issue and have agreed to procedures for the selection of an
arbitrator or arbitrators.

14. Credits for Offset Account deliveries to the Stateline, evaporation loss from
the Offset Account after the evaporation is charged to Kansas, and return
flow obligations.
Because efforts by the experts to resolve these issues were not successful, the experts concluded that these issues needed to be taken up directly by the State and Chief Engineers, who met in Denver on August 15-17 and in Topeka on August 31 through September 2 in an effort to resolve these issues. These face-to-face meetings were followed up by telephonic meetings on September 7-9, and their staffs have held separate telephonic meetings in an effort to resolve these issues. These efforts included considerable analysis of previous releases from the Kansas Section II account in John Martin Reservoir in an effort to develop a method to calculate the antecedent flow during releases from the Offset Account and a method to determine the credit that Colorado would receive at the Stateline for releases, as well as how the water released from the Offset Account but not credited as a delivery would be treated. During the meetings on September 7-9 the State and Chief Engineers reached tentative agreement on these issues. Their staffs and counsel are working to refine the final agreement. These issues will be scheduled for arbitration, although the States are hopeful that a final agreement on these issues will be reached that will make arbitration unnecessary.

15. **The States’ experts are considering how releases of Stateline return flows associated with LAWMA’s Section II transfers to the Offset Account and transit losses on such return flows should be represented in the model or, in the alternative, how they should be accounted for outside the model.**

These issues were discussed by the State and Chief Engineers during their August and September meetings. The State and Chief Engineers reached tentative agreement on these issues, which are included in the tentative agreement discussed in paragraph 14. These issues will be scheduled for arbitration, but the comments regarding paragraph 14 also apply to these issues.
16. Model Documentation

The Kansas experts provided an initial draft of model documentation to Colorado’s experts on July 15. Colorado’s experts provided their initial comments at the end of August and additional comments on September 9. The States are continuing to work on this issue. By its nature, it cannot be completed until all other modeling issues have been completed.

17. Limitation on Accumulation of Credits

As previously reported, Kansas provided Colorado with a proposal on limitations on accumulation of credits for review on June 14. Colorado requested the backup analysis for the proposal at the June 24 meeting, which was provided by the Kansas experts at the initial meeting on this issue on July 8, and the experts discussed the basis of the proposal at that time. Colorado reviewed the backup analysis and provided a response on August 26. The State and Chief Engineers discussed this issue during their September meetings. A policy has been drafted by Colorado and is being reviewed by Kansas.

(c) Status of Colorado Water Court Proceedings

As previously reported, Colorado obtained and provided Kansas with draft proposed decrees and engineering reports for LAWMA’s and AGUA’s changes of water rights. Both the LAWMA application and the AGUA application have been re-referred to the Water Judge. Trial in the LAWMA matter has been set for April 10-28, 2006. Trial, in the AGUA matter is set for May, 2007. Kansas submitted its initial comments on the LAWMA and AGUA applications to Colorado on July 15. Counsel for Colorado has discussed the comments with LAWMA’s counsel and will provide a response to counsel
for Kansas by October 19, 2005, setting forth Colorado's responses based on those discussions. Counsel for Colorado will also discuss Kansas' comments on the AGUA application and provide a response to counsel for Kansas during October. LAWMA's counsel expects to provide a revised proposed decree by October 24 that will address Kansas' comments to the extent LAWMA agrees with those comments. The Colorado State Engineer has agreed to work with the applicants to have Kansas' concerns addressed to the extent Colorado agrees with the Kansas position.

(d) Status of the H-I Model, Taking Into Account Recommendations In the Fourth Report, to Which Exceptions Were Not Taken

Because the negotiations between the State and Chief Engineers have not resolved all issues necessary to recalibrate and run the H-I model for the years 1997-2004, there is nothing to report in addition to what is reported above.

(e) N/A

(f) Arbitration procedures

Counsel have developed procedures for arbitration and have traded lists of arbitrators. Counsel have agreed that the arbitration rules of the American Arbitration Association for commercial disputes will generally be the basis for the procedural rules used for arbitration of remaining issues, but agree that those rules require some modification to fit the arbitration. On September 13, counsel for Kansas provided a draft of rules of arbitration, and counsel will work together to develop the rules. Counsel expect to finalize the procedural rules for arbitration and develop a detailed schedule for arbitration prior to the September 30 meeting with the Special Master.
(g) Decree

Kansas provided an initial draft of the Decree to the Special Master and Colorado on July 29. Colorado provided its comments on September 12.
September 12, 2005

Dear Mr. Littleworth:

In accordance with paragraph 3 of your Order Following Status Conference of February 4, 2005, counsel have developed procedures for arbitration of remaining issues and have traded lists of experts for each of the remaining issues. Counsel have agreed that a single arbitrator is preferred for each issue to be arbitrated, but have agreed that either State has the option to require three arbitrators for any issue. A panel of three arbitrators will be selected if the States cannot agree upon a single arbitrator or a State has required three arbitrators. We have also agreed on arbitrator qualifications, a process for selecting arbitrators, compensation of the arbitrator(s), the location of the arbitration, witnesses, and costs.

We have also agreed that in general the American Arbitration Association arbitration rules for Commercial Arbitration will be used as the procedural rules for arbitration, although we have recognized that some provisions of those rules are not applicable and should be eliminated, supplemented or modified to make them suitable for this purpose. Due to the intense efforts to resolve remaining issues during the past month, counsel have not completed the revisions to the procedural rules, but there is no disagreement about the need to revise the rules and we anticipate that this can be completed promptly without delaying arbitration. We expect to have this completed by the meeting with you on September 30. Counsel have also agreed that any arbitration that turns out to be necessary will be binding with respect to all issues in the March 11, 2005 schedule, except the Sisson-Stubbs Credit, the Graham Alternate Points of Diversion issue, and the Offset Account Credits (including evaporation and return flow issues).
The Chief Engineer of Kansas and the State Engineer of Colorado have met for all or part of ten business days, in person or by telephone, in the past month, with their staffs and appropriate experts, in an effort to resolve remaining issues, as will be described in more detail in the progress report for this month. The Engineers appear to be close to agreement on most remaining issues, and they are scheduled to meet again in person on September 23 if agreement is not reached before that date on all issues.

Sincerely yours,

[Signature]

for John B. Draper

JBD:dlo

cc: (by telecopy)
David W. Robbins, Esq.
Leland E. Rolfs, Esq.
Honorable Arthur L. Littleworth
Special Master
Best, Best & Krieger
400 Mission Square Building
3750 University Avenue
P. O. Box 1028
Riverside, CA  92502

Re:    Kansas v. Colorado, No. 105, Original

Dear Mr. Littleworth:

Colorado has reviewed the initial draft of the Judgment and Decree submitted by Mr. Draper for consideration by you and Colorado and has the following comments on the initial draft.

JUDGMENT

1. The judgment awarded against the State of Colorado and in favor of the State of Kansas for violations of the Arkansas River Compact should be limited to violations resulting from post-compact well pumping in Colorado. Colorado does not agree that the judgment should be awarded on that claim in the amount of $34,615,146 for “damages and interest.” In your Fourth Report, you recommended that damages be calculated pursuant to Appendix Exhibits 1 and 3, together with appropriate prejudgment interest, and adjustment for inflation as required, Fourth Report at 137, ¶ 2, and the U.S. Supreme Court accepted your recommendation. The States agreed on the amount of the damages and prejudgment interest, and the adjustment for inflation, as of the date Colorado made the payment to Kansas. Therefore, it would be more accurate to state in the judgment that the States agreed that the amount of the damages, together with appropriate prejudgment interest, including the required adjustment for inflation, arising from depletions of usable streamflow of the Arkansas River at the Colorado-Kansas Stateline during the period 1950 through 1996 based on the recommendation in your Fourth Report and the Supreme Court’s decision was $34,615,146 as of the date payment was made by Colorado, and that judgment is therefore awarded for that amount. Colorado recommends that Kansas’ other claims be dismissed in the judgment.
2. There has been no agreement that costs should be awarded to Kansas in a stipulated amount. Confidential settlement negotiations have resumed following a four-month hiatus due to other events in Kansas; but, Colorado does not agree that Kansas should be awarded costs and would expect to be heard on whether costs should be awarded and the amount of the costs, if any, to be awarded if the States cannot reach agreement. We would also point out that if Kansas were awarded costs as the “prevailing party” under F.R.C.P. 54(d), although it prevailed on only one of its three claims, the United States would also be entitled to an award of costs since it was the prevailing party on both of the claims on which it intervened.

DECREE

I. Injunction

A. General Provisions

1. Paragraph A.1: If an injunction is entered, and Colorado does not agree that an injunction is consistent with the recommendations in your Fourth Report, see the comments below, the injunction to comply with Article IV-D of the Arkansas River Compact should be limited to post-compact well pumping, the claim on which Kansas prevailed. Also, we question the inclusion of “citizens” and “representatives” in any injunction. Other decrees have been limited to the State, its officers, attorneys, agents, and employees. E.g., Texas v. New Mexico, 482 U.S. 124, 135-36 (1987); Nebraska v. Wyoming, 325 U.S. 665, 666 (1945); Nebraska v. Wyoming, 534 U.S. 40, 42, 48-49 (2001).

2. Paragraph A.1.a: The reference to 15,000 acre-feet per year should be explained as the amount that pre-compact wells are allowed to pump under the Compact. See First Report at 200.

3. Paragraph A.1.b and c: In general, if such an injunction is to be entered, Colorado suggests that the provisions of the injunction be revised to track more closely the recommendations in your Fourth Report at pages 137-39, particularly recommendations 10 and 11. Colorado is concerned that an injunction that Colorado “enforce” the Colorado Use Rules and the Colorado Measurement Rules suggests that the Use Rules and the Measurement Rules cannot be amended in the future, if that should be necessary, without amending the decree. That does not appear to be consistent with your Fourth Report. See Fourth Report at 108 (“It should be noted, however, that the Use Rules do give the State Engineer the authority to revise these presumptive stream depletions if he determines that to be necessary, ...”); 119 (“Based upon Colorado’s actions in recent years, and upon the testimony of Mr. Simpson, I believe the Court can have confidence in Colorado’s ability and determination to provide Kansas with the water to which it is entitled under the compact. In the event of serious failure in the Use Rules, Mr. Simpson testified that adjustments would be made in consultation with Kansas.”); 120 (“I conclude that . . . Colorado has committed to make future adjustments in the Use Rules, if necessary, in order to achieve full compact compliance.”). At a minimum, Colorado suggests that a provision be added that enforcement of the Colorado Use Rules and the Colorado Measurement Rules does not preclude amendment of such Rules if the amendment will not prevent the State of Colorado from achieving compact compliance. Colorado’s more basic
concern with the injunction is that the draft decree would have the Court retain jurisdiction far beyond the limited period that you recommended in the Fourth Report, Fourth Report at 136, by making future compact compliance a matter of enforcing the decree. *See* Section V of the draft decree.

4. Paragraph A.2: This paragraph should be deleted as inconsistent with the conclusions in your Fourth Report. *See* Fourth Report at 123 (pointing out the kind of matters that require expert agreement or some kind of resolution when compact compliance is dependent upon the results of the H-I model and stating: “And all experts agree that continued improvements need to be made to the model to increase its reliability.”).

**B. Determination of Compact Compliance**

1. Paragraph B.1: The word “annual” at the beginning of the first sentence of paragraph B.1 should be deleted as inconsistent with the conclusions in Section X of your Fourth Report. *See* Fourth Report at 115 (“I find that the H-I model is not sufficiently accurate on a short-term basis to be used to determine compact compliance on a monthly or annual basis.”). Since Appendix A was not provided, we cannot comment on the compact compliance procedures. Colorado disagrees with repayment of any net depletions as specified in Section I.C of the draft decree for the reasons stated in the comments on that paragraph of the draft decree.

2. Paragraph B.2: The experts have not completed documentation of the H-I model; nor is Colorado convinced that documentation is necessary for the decree, although Colorado continues to believe it is useful and Colorado’s experts have provided comments to Kansas’ experts on the draft documentation. The phrase “and the Durbin usable flow method with the Larson coefficients” should be added to the first sentence of paragraph B.2. The procedures for annual calculation of depletions and accretions to Stateline flow were not provided, so we cannot comment on those procedures. There has been no agreement that accumulation of accretions shall be limited, although this issue is being discussed by the Kansas Chief Engineer and the Colorado State Engineer and we are hopeful that an agreement will be reached on this issue. The statement that the Annual Accounting for each of the years 1997-2004, found in Appendix E, is final is inconsistent with paragraph 9 of the recommendations in your Fourth Report. *See* Fourth Report at 138-39, ¶ 9; *see also* Order Following Status Conference of February 4, 2005, at pp. 4-5, ¶ 5 (“Proceedings in this case should not be held up pending final decisions by the Water Court. Rather, assumptions on such credits should be made for purposes of running the H-I model, subject to later modification if the decisions of the Water Court should differ from the assumptions made.”). Colorado agrees that in other respects the model results for those years should be final.

3. Paragraph B.3: The term “Approved Replacement Water Sources” in the first sentence of paragraph B.3 is not defined. The sources of replacement water that are acceptable for use by Colorado, as defined in Appendix G, go far beyond the issues decided in this case. For example, there has been no ruling that post-compact water rights in the Arkansas River Basin or developed water (as defined by Colorado law) cannot be used for replacement. Further, Appendix G is inconsistent with paragraph 9 of the recommendations in your Fourth Report for determining replacement credits. *See* Fourth Report at 138-39, ¶ 9. The statement in Appendix
G that a pre-compact water right shall be recognized only to the extent that it was actually used at the time of the adoption of the Compact is ambiguous and inconsistent with the way replacement credits have been determined using the H-I model. Some pre-compact water rights benefited from the operation of John Martin Reservoir under the compact and the 1980 Operating Plan for the John Martin Reservoir, and the H-I model has been used to determine diversions based on those conditions, not the conditions that existed “at the time of the adoption of the Compact.”

C. Replacement of Shortfalls

1. Paragraph C.1: The “Compact Compliance Accounting Procedures” described in Appendix A were not provided, so we cannot comment on them. The statement that Colorado shall deliver repayment water to Kansas from “Approved Replacement Sources” to make up a shortfall goes beyond the issues decided in this case and is inconsistent with paragraph 9 of the recommendations in your Fourth Report for determining replacement credits.

2. Paragraph C.2: The requirement that repayment to Kansas of a shortfall shall be made by depositing water in the Offset Account if such account exists should be deleted. While Colorado would normally require its well users to do that, other provisions for repayment may be necessary if the Offset Account is full or about to spill.

3. Paragraph C.2: The provision that evaporation of repayment water in the Offset Account shall be borne by Colorado for a period not to exceed two years should be deleted or revised. Colorado agrees that Colorado should bear the evaporation loss for a reasonable period of time, but this provision is not consistent with the provision for evaporation loss in the Offset Account Resolution and could discourage Kansas from releasing water placed in the Offset Account even though there is a reasonable opportunity to deliver the water and the water is usable in Kansas. The Kansas Chief Engineer and the Colorado State Engineer are discussing evaporation loss from the Offset Account, which we hope will be resolved by agreement. The requirement that if the Offset Account should cease to exist, then repayment shall be made from Approved Replacement Water Sources at a time approved by Kansas should be deleted. Colorado objects to the term “Approved Replacement Water Sources” for the reasons stated above. Further, if the Offset Account should cease to exist because it has been terminated by Kansas, Colorado should not be required to repay the water at a time approved by Kansas. The requirement should simply be “at a time when the water is usable in Kansas.” The fourth sentence on how the amount of replacement water credited as delivered to Kansas should be determined should be deleted. The calculation of replacement water is more complicated than indicated in this sentence and has not been specifically determined in this case. For example, replacement water credits for some sources are determined by using the H-I model. The Kansas Chief Engineer and the Colorado State Engineer are discussing a method to determine the credit Colorado will receive from deliveries from the Offset Account. We are hopeful that an agreement will be reached. The determination of antecedent flow as set out in Appendix F was not provided. The determination of antecedent flow presents an issue that has not been addressed in this proceeding, although the Engineers are discussing this issue for Offset Account releases.
II. Dispute Resolution

1. Colorado has no objection to the statement in the first sentence of Section II; however, there is no stipulated dispute resolution process as set forth in Appendix H. There appears to be an inconsistency in paragraph D.1 and paragraph B of the dispute resolution process that will need to be clarified and the dispute resolution procedure has not been approved by the Arkansas River Compact Administration. Some provisions appear to require its approval. E.g., ¶¶ B.1 through B.5. Moreover, this Section, when read together with Section V of the draft decree, goes beyond the recommendation in your Fourth Report, which the U.S. Supreme Court accepted. You recommended that the Court retain jurisdiction for a limited period of time beyond the ten-year startup period (ending in 2006) to see how Colorado’s Use Rules operated under different hydrologic conditions. Fourth Report at 136. If the Use Rules were not administered as Mr. Simpson indicated or if the results of the H-I model were seriously in dispute, you recommended that either State could apply to the Court for appropriate relief; but, you recommended that no application be accepted unless the dispute had first been taken to the Arkansas River Compact Administration. Id. The draft decree makes dispute resolution a decree requirement, then retains jurisdiction for the purposes of modifying or enforcing the decree, but has not provision for termination of jurisdiction, which is inconsistent with your recommendation that the Court retain jurisdiction for a limited period of time beyond the ten-year startup period. See Order Following Status Conference of February 4, 2005, at p.5, ¶ 6 (“The decree should include provisions for continuing jurisdiction, the termination of such jurisdiction, and a dispute resolution process.”) (emphasis added).

III. Definitions

1. Some definitions, such as “Acre-foot,” “Compact,” “Stateline,” and “States,” are unobjectionable, but we question if they are needed in the decree. Colorado objects to the terms “Acceptable Replacement Water Sources” and “Replacement” for reasons stated above. Finally, Colorado has a concern about defining terms such as “Colorado Measurement Rules,” “Colorado Use Rules,” and “Hydrologic-Institutional Model (H-I model)” unless the decree states that such Rules can be amended consistent with the recommendations in your Fourth Report and that the H-I model will continue to be improved, as recognized in your Fourth Report.

IV. Modifications of Appendices to the Decree

1. Until all of the Appendices have been provided, Colorado cannot comment fully on this paragraph. However, by providing that the Appendices may be modified only by one of three methods, including “upon order of the Court,” the draft decree would dramatically extend the retained jurisdiction of the Court beyond the limited period of time that you recommended in your Fourth Report, and Colorado does not support that approach.

V. Retention of Jurisdiction

1. The first sentence of the retained jurisdiction provision is not fully consistent with your recommendation on page 136 of the Fourth Report and does not include the condition that no application for relief under the retained jurisdiction be accepted unless the dispute has first
been taken to the Arkansas River Compact Administration. Fourth Report at 136. The second sentence should be deleted as unnecessary or revised to be consistent with your recommendation for a limited period of retained jurisdiction. See Order Following Status Conference of February 4, 2005, at p.5, ¶ 6. ("The decree should include provisions for continuing jurisdiction [and] the termination of such jurisdiction, . . .").

VI. Appendices to the Special Master's Final Report

1. The only appendices provided were Appendices B, G, and H. Therefore, Colorado's comments are limited to those Appendices. In general, Colorado is concerned about including Appendices for the purpose of specifying procedures that must be used to determine compact compliance, which would be subject to enforcement through a retained jurisdiction provision in the draft decree. This would extend the retained jurisdiction beyond the limited period of time that you recommended, unless there is a provision for termination of such jurisdiction.

2. Appendix B: Colorado suggests changing the requirement that Colorado shall provide to Kansas the updated input files for the H-I model by February 1 of each year to March 15 of each year, and change the date for the exchange of preliminary results to April 30 and the resolution of differences to June 30. Although Colorado anticipates that updated input files and results can normally be exchanged at earlier dates, we are concerned that including earlier dates could result in a violation of the decree during the period of retained jurisdiction. The discussions among the experts during the current effort to resolve remaining disputes have demonstrated that certain data issues often require considerable time for the experts to review and resolve, particular issues involving irrigated acreage or replacement sources.

3. Appendix G: Colorado objects to this Appendix for the reasons stated above.

4. Appendix H: The States have not agreed to these dispute resolution procedures. Moreover, including the dispute resolution procedures as an Appendix to the decree and including a provision for modification of Appendices in the decree (Section IV), together with retained jurisdiction for the purposes of modifying or enforcing the decree (Section V), without a provision for termination of jurisdiction, would change your recommendation for a limited period of retained jurisdiction to permanent retained jurisdiction. Also, Colorado is concerned that the "fast track" dispute resolution process would allow a State, simply by designing the issue as a "fast track" issue, to effectively by-pass an investigation by the Compact Administration.

Thank you for the opportunity to comment on the draft decree submitted by Kansas.

Very truly yours,

Dennis M. Montgomery
for David W. Robbins

DWR/rmm
cc: John B. Draper, Esq.
    Hal D. Simpson, State Engineer
    Jason Dunn, Esq.
    Carol B. Angel, Esq.
August 17, 2005

The Honorable Arthur L. Littleworth
Special Master
Best Best & Krieger
400 Mission Square
3750 University Avenue, 3rd Floor
Riverside, California 92501

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

Please find enclosed this month’s Progress Report.

Very truly yours,

John B. Draper

JBD:dlp
enclosure

cc: (By U.S. Mail and Email)
David W. Robbins, Esq.
Leland R. Rolfs, Esq.
Since the Progress Report dated July 15, 2005, the States’ experts have met three times: on July 22 in Denver, on July 27 in Pueblo, and on July 29 by telephone. In addition, the State Engineer of Colorado, Mr. Simpson, and the Chief Engineer of Kansas, Mr. Pope, are meeting in Denver on August 15, 16, and 17 to address issues that have not been resolved through discussions of the States’ experts. An additional meeting in Topeka has been scheduled for September 1 and 2, with provision for a meeting on September 7 and 8, if necessary. The specific status of each of the issues in the March 11 schedule is as follows:

(a) **Calculation of Damages**

As previously reported, the calculation and payment of damages has been resolved. The Attorneys General of Kansas and Colorado have personally discussed the issue of costs in confidential settlement negotiations, followed by correspondence. Negotiations are being resumed, after a hiatus caused by other events in Kansas, with a responsive letter from the Kansas Attorney General to be delivered within the next few days.

(b) **Potential Issues Outlined in the Fourth Report (pp. 122-23) and any New Issues**

1. **Phase 2 of the USGS Study**

   The U.S. Geological Survey published its final report on the Phase 2 study on May 3. The Colorado State Engineer determined that a modification to the Amended Measurement Rules is necessary, and Colorado notified Kansas by letter received July 5 of the Colorado State Engineer’s determination in accordance with the jointly proposed schedule. Further information was provided
by Colorado on July 11 in response to Kansas’ request. Kansas is reviewing the proposal and will provide its recommendations and comments by no later than September 6, although Kansas expects to respond sooner.

2. **Results of Colorado’s completed verification program on wells and irrigated acreage.**

As previously reported, the experts agreed that it will be most efficient to address this issue once the final results of the irrigated acreage study have been provided.

3. **Commencement of the five-year cycle for updating Colorado’s irrigated acreage study.**

Kansas’ experts are reviewing Colorado’s 2003 classification and mapping, which Colorado finalized on July 14. The Colorado experts provided preliminary files on Colorado’s proposed classification of 2002 images on July 29. Colorado has agreed to provide the 2002 images, a summary table for the 2002 irrigated area classification, and the classification of irrigated area by source of water (surface water, mixed surface and groundwater, or sole source). Once the final files and information are provided, a final review will be conducted by the Kansas experts.

Colorado had earlier provided preliminary acreages for 2000, 2001 and 2004. Colorado experts informed the Kansas experts on July 27 that the 2000 and 2001 classifications are final. The Kansas experts provided the Colorado experts with 2004 aerial photographs for review on August 15. Colorado expects to be able to provide the final 2004 acreage classification, together with all backup data, by the end of August.

As indicated in last month’s progress report, the experts may not be able to complete this issue within the time scheduled due to the significant amount of
work involved rather than disagreements among the experts. It is hoped that any remaining work after September 12 on this subject can be resolved while disputed matters are being addressed through formal arbitration procedures.

4. Proposed changes in the satellite imagery system used by Colorado.

This issue is covered under paragraph 3 above.

Issues 5.-9.

The States have agreed that Issues 5-9 will not be addressed before entry of the Decree.

10. Proper representation in the model of the various Replacement Plan water sources.

The States’ experts met in Denver on July 22 and were able to make significant progress on these issues. Model code changes that will be needed to represent the use of winter water stored in Pueblo Reservoir, the new account for the CWPDA in Pueblo Reservoir, transfers of Article II water into other Article II Accounts, and the Keesee Ditch operations have been identified and are being developed by the experts from both States. Kansas’ experts reviewed backup information in Pueblo on July 27. Colorado has since provided further backup information requested by the Kansas experts. The Kansas experts are now reviewing that information. Resolution of these issues without arbitration is expected.

11. Mr. Schroeder’s proposed model change on the calculation of model demand.

As previously reported, Colorado has limited its proposal to changing the groundwater acreage previously used for calibration of the model, and Mr. Tyner provided a summary of his analysis. On August 11, Colorado provided its specific proposal regarding the number of acres of sole source pumping and the
number of acre-feet of sole source groundwater pumping for the years 1950-1994. Colorado’s explanation of the basis for these estimates and other backup was provided on August 16. The Kansas experts will begin their final review of the Colorado proposal as soon as possible.

12. Various model calibration issues:

a. Use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir for use in the model and whether recalibration is required.

On July 25, Colorado made a confidential settlement offer to resolve this issue. Kansas and its experts reviewed the offer and made a counteroffer to Colorado on August 16. Colorado rejected the Kansas counteroffer on August 16 and requested that the Kansas experts provide a written response to the Colorado proposal and that the experts meet prior to September 12. Accordingly, the Kansas experts will provide a written response to the Colorado proposal, and the experts will meet prior to September 12.

b. Correcting the irrigated acreages of the Lamar/Manvel and X-Y ditches and whether recalibration of the model is required.

Completed.

c. Whether the unit response functions for the Fort Lyon Canal, the Fort Lyon Storage Canal, and the Holbrook Canal should be revised.
As previously reported, the experts agreed that the unit response function for the Fort Lyon Canal should not be revised but the unit response functions for the Fort Lyon Storage Canal and the Holbrook Canal should be revised. The Kansas experts provided specific changes to the unit response functions for the Fort Lyon Storage Canal and the Holbrook Canal on July 15. Colorado’s experts have agreed to the changes provided by the Kansas experts.

d. Whether any changes should be made to the observed diversion records used for calibration of the model.

The Kansas experts met with Colorado experts in Pueblo on July 27 and reviewed backup data for the proposed Colorado changes to the observed diversion records. Colorado’s experts provided a proposal for the handling of outliers for calibration purposes on August 11. The experts are considering the proposals by the other State. It is expected that these issues can be resolved by September 12.

e. Other issues that might affect calibration of the model.

On August 11, the Colorado experts delivered their recommendation on constraints for determining want factors for two ditches during the calibration process. The Kansas experts are reviewing the recommendation.

13. Other Issues
a. Treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water.

The experts have resolved this issue, although they are still working on the coding changes to the model needed to implement the changes they have agreed to. They expect to have the coding changes completed by September 12.

b. The States' experts are reviewing whether a change should be made to the way the Lamar power plant deliveries are represented in the model.

The States have agreed that this issue will not be addressed before entry of the Decree.

c. Replacement credit issues for 1997-1999, 2000-2004 and in the future:

1. The States' experts are discussing replacement credit issues that may not be resolved by pending Water court proceedings, such as certain Highland Canal and Fountain Creek issues.

The Kansas experts completed their review of dry-up and provided their results for 2000-2004 to the Colorado experts on June 3. Colorado was to provide its response to the Kansas analysis of dry-up for 2000-2004 on July 29. Colorado now expects to provide that response by August 19. Backup on Fountain Creek credits were provided by Colorado to the Kansas experts on July 27 at the
meeting in Pueblo. The Kansas experts are reviewing this information.

2. **Quantification of special waters, including monitoring, verification and reporting.**

On July 22, the experts met and discussed these issues. The Kansas experts provided a list of replacement operations for which they requested additional description and documentation. The Colorado experts are reviewing the records of replacement operations for which additional description and documentation were requested to provide further information or make revisions to the proposed credits being claimed. As of this time, most of the questions have been resolved, and the remainder are still under discussion.

3. **The States’ experts are meeting to discuss improvements in monitoring and documentation of dry-up and feedback from Kansas, as well as terms and conditions for monitoring subirrigation.**

As previously reported, a joint dry-up tour of experts from both states was conducted June 21-23. The experts then met on June 24 to discuss these issues. The Kansas experts provided feedback and recommendations for improvements in monitoring and documentation of dry-up at the meeting and by memo on July 8. The States’ experts have traded information regarding terms and conditions for monitoring subirrigation. Colorado has agreed to most of the Kansas experts’ recommendations for improvements in monitoring and documentation of dryup. Final issues are being
discussed, and resolution of these issues is expected by September 12.

d. The States' experts are reviewing the acreage and want factors for the Sisson-Stubbs credit dry-up.

As previously reported, Kansas has made a confidential settlement proposal regarding these issues. Colorado is considering the confidential Kansas settlement proposal and has discussed it with Kansas. The State Engineer and the Chief Engineer are meeting on August 15-17, and Colorado expects them to discuss an issue related to the Kansas proposal. Colorado will submit its comments on the Kansas proposal by August 26.

e. Representation of winter water bookovers in the model

The experts have agreed on how to represent winter water bookovers.

f. Colorado will provide Kansas a proposal on the representation of Graham alternate points of diversion.

On July 29, Colorado finalized its proposal and sent it to the Kansas experts. The Kansas experts are reviewing the proposal.

14. Credits for Offset Account deliveries to the Stateline, evaporation loss from the Offset Account after the evaporation is charged to Kansas, and return flow obligations.

Because efforts to resolve these issues have not been successful, the experts have determined that these issues need to be taken up directly by the State and Chief
15. **The States’ experts are considering how releases of Stateline return flows associated with LAWMA’s Section II transfers to the Offset Account and transit losses on such return flows should be represented in the model or, in the alternative, how they should be accounted for outside the model.**

These issues are included in those being discussed by the State and Chief Engineers during their August 15-17 meeting.

16. **Model Documentation**

The Kansas experts provided an initial draft of model documentation to the Colorado experts on July 15. Colorado expects to provide its initial comments by the end of August.

17. **Limitation on Accumulation of Credits**

On June 14, Kansas provided Colorado with a proposal on limitations on accumulation of credits for review. Colorado requested the backup analysis for the proposal at the June 24 meeting, which was provided by the Kansas experts at the initial meeting on this issue on July 8, and the experts discussed the basis of the proposal at that time. The State and Chief Engineers intend to discuss this during their August 15-17 meeting in Denver. Colorado is reviewing the backup analysis and will provide a response by August 26.

(c) **Status of Colorado Water Court Proceedings**

As previously reported, Colorado obtained and provided Kansas with draft proposed decrees and engineering reports for LAWMA’s and AGUA’s changes of water rights. Both the LAWMA application and the AGUA application have been re-referred to the
Water Judge. Trial in the LAWMA matter has been set for April 10-28, 2006. Trial is expected to occur, in the AGUA matter in April or May, 2006. Kansas submitted its initial comments on the LAWMA and AGUA applications to Colorado on July 15.

(d) Status of the H-I Model, Taking Into Account Recommendations In the Fourth Report, to Which Exceptions Were Not Taken

Nothing to report in addition to the foregoing.

(e) N/A

(f) Arbitration procedures

As previously reported, Colorado submitted a draft of arbitration procedures to Kansas for consideration. Kansas provided its response to Colorado on July 1. Colorado responded by letter of August 5. Counsel expect to finalize the procedural rules for arbitration during the month of August.

(g) Decree

Kansas provided an initial draft of the Decree to the Special Master and Colorado on July 29. Colorado is reviewing the initial draft and will provide its comments as promptly as possible.
ORDER MODIFYING TIME SCHEDULE FOR EXPERT DISCUSSIONS

On June 17, 2005, I approved certain extensions to the time schedule for expert discussions that had been established on April 19, 2005. Once again, in their July report, the States have requested extensions for certain individual issues, without changing the overall schedule for completion.

ACCORDINGLY, IT IS HEREBY ORDERED:

The requested modifications and time extensions requested in Progress Report dated July 15, 2002 are approved, but with an observation and an admonition. A large number of issues are now being pushed toward a crowded
finishing line. No one should assume that the effort thus required in September will result in an extension of that deadline. Issues not agreed upon by that time are going to arbitration.

Dated: July 19, 2005.

Arthur L. Littleworth
Special Master
PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Best Best & Krieger LLP, 3750 University Avenue, P.O. Box 1028, Riverside, California 92502. I am readily familiar with this firm’s practice for collection and processing of correspondence for mailing with the United States Postal Service. On July 19, 2005, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

ORDER MODIFYING TIME SCHEDULE FOR EXPERT DISCUSSIONS

in a sealed envelope, postage fully paid, addressed as follows:

John Draper, Esq. David Robbins, Esq.
Montgomery & Andrews Hill & Robbins
325 Paseo de Peralta 100 Blake Street Building
Santa Fe, New Mexico 87504 1441 Eighteenth Street
Denver, Colorado 80202

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 19, 2005, at Riverside, California.

Kay J. Bliss
Since the Progress Report of June 16, 2005, the States' experts met on June 24 in Pueblo following a three-day dry-up tour of the area between Pueblo and the Stateline. A further meeting was held on July 8 in Denver. Because Colorado was concerned that the discussions among the experts were not progressing on several matters, it proposed a meeting of the Kansas Chief Engineer and the Colorado State Engineer to discuss certain issues. Kansas has had similar concerns and believes that two meetings between the Chief and State Engineers should be scheduled, with provision for a third meeting, before September 12. The States are attempting to schedule the dates for the meetings. The status of each of the issues in the March 11 schedule is as follows:

(a) **Calculation of Damages**

As previously reported, the calculation and payment of damages has been resolved. Kansas and Colorado have discussed the issue of costs in confidential settlement negotiations, but no negotiations and no progress has occurred since the last Progress Report due to school finance litigation in Kansas and a related special session of the Kansas Legislature. Kansas has said that it expects to resume the discussions shortly.

(b) **Potential Issues Outlined in the Fourth Report (pp. 122-23) and any New Issues**

1. **Phase 2 of the USGS Study**

The U.S. Geological Survey published its final report on the Phase 2 study on May 3. The Colorado State Engineer has determined that a modification to the Amended Measurement Rules is necessary, and Colorado notified Kansas by
letter dated June 29 of the Colorado State Engineer's determination in accordance with the jointly proposed schedule. If Kansas disagrees with the Colorado State Engineer's determination, Kansas will provide its recommendations and comments within 2 months after the notification by Colorado, although Kansas hopes to respond sooner than that. Kansas requested the specific changes that will be proposed to the Amended Measurement Rules and the analysis that formed the basis of the determination that a change is necessary, which Colorado provided to Kansas on July 11.

2. **Results of Colorado's completed verification program on wells and irrigated acreage.**

As previously reported, the experts agreed that it will be most efficient to address this issue once the final results of the irrigated acreage study have been provided.

3. **Commencement of the five-year cycle for updating Colorado's irrigated acreage study.**

The experts discussed the revisions to Colorado's 2003 classification and mapping on June 24 and July 8. Colorado provided the final 2003 classification in increments between July 8 and July 14, identifying tracts as irrigated vs. non-irrigated, along with the final GIS files for the irrigated fields as requested by the Kansas experts. Classification of 2002 images has not been completed, but is expected to be available soon. Colorado has provided preliminary acreages for 2000, 2001, and 2004, and the Colorado experts will propose revised acreages for 2000, 2001 and 2004. During the June 9 telephonic meeting, the experts discussed procedures to update fallowed acreage annually. The States agreed that additional time to complete this item was needed, and the time to complete this issue was extended by one month, to August 11. Although the experts may not be
able to complete this issue in the time scheduled, this has been due to the significant amount of work involved in the classification and review of the mapping rather than any disagreement among the experts.

4. **Proposed changes in the satellite imagery system used by Colorado.**

This issue is covered under paragraph 3 above.

**Issues 5.-9.**

The States have agreed that Issues 5-9 will not be addressed before entry of the Decree.

10. **Proper representation in the model of the various Replacement Plan water sources.**

As previously reported, the initial meeting has been held, the experts agreed to schedule a separate meeting on replacement issues, and the Kansas experts have been reviewing the 2004 data sets for replacement water sources and the backup information for the replacement sources. A meeting has been scheduled for July 22 to review the backup information for the replacement sources.

11. **Mr. Schroeder’s proposed model change on the calculation of model demand.**

As previously reported, the experts discussed the rationale for Mr. Schroeder’s proposed model change at a meeting held on April 7, and Colorado agreed that the change to the H-I Model proposed by Mr. Schroeder -- to use a different acreage to calculate demand in the model than is used in the water budget -- will not be pursued. And, as previously reported, Colorado has limited its proposal to changing the groundwater acreage previously used for calibration of the model, and Mr. Tyner has provided a summary of his analysis. Colorado will provide the backup data for this analysis to Kansas this week for review and comment.
Colorado has also proposed new acreages for sole source pumping. Colorado will be providing sole source pumping amounts and the methods and backup used to derive them and the acreages for Kansas' review. Given the tasks involved, the States agreed that 5 months was a more realistic time to complete this issue, and the time to complete this issue was extended to 5 months, or August 11. Since the complete proposal has not been finalized, a further extension, to September 12, will be necessary. Therefore, the States request to extend the time to complete this issue to September 12.

12. Various model calibration issues:
   a. Use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir for use in the model and whether recalibration is required.

As previously reported, Colorado provided a report evaluating the new Lamar and Holly electronic weather stations and a proposal regarding the use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir on March 15, and the experts met on April 7 to discuss the proposal. The Kansas experts provided an initial response on July 9 that the Colorado adjustment of PET values based on crop yields was not acceptable and will provide an explanation of the Kansas position by August 11. Because the schedule was to complete this issue by June 11, subject to review of Colorado's proposal, the States have agreed that the time to complete this issue will need to be extended to
6 months, or September 12. Therefore, the States request to extend the
time to complete this issue to September 12.

b. Correcting the irrigated acreages of the Lamar/Manvel and X-Y
ditches and whether recalibration of the model is required.

Completed.

c. Whether the unit response functions for the Fort Lyon Canal, the Fort
Lyon Storage Canal, and the Holbrook Canal should be revised.

As previously reported, the initial meeting had been held, the experts met
on May 12 and agreed that the unit response function for the Fort Lyon
Canal should not be revised but the unit response functions for the Fort
Lyon Storage Canal and the Holbrook Canal should be revised. The
Kansas experts provided specific changes to the unit response functions
proposed by Colorado on July 15. The time to complete this issue was
previously extended to 4 months, or July 11. The States have agreed that
the time to complete this issue should be extended to 5 months, or August
11, to permit Colorado’s experts to review and comment on the specific
changes to the unit response functions provided by the Kansas experts.
The States do not believe this is an issue likely to require arbitration.

Therefore, the States request an extension of time to complete this issue to
5 months, or August 11.
d. Whether any changes should be made to the observed diversion records used for calibration of the model.

As previously reported, Colorado provided Kansas with a list of recommended changes to the observed diversion records, the experts met on April 7 to discuss the recommended changes, and the Kansas experts have been reviewing the recommended changes. The experts discussed this issue on May 12 and agreed that this issue should also include a discussion of whether any changes should be made in the handling of outliers in the statistical comparison of predicted and observed streamflows from the way it has been handled by the Kansas experts. Kansas' engineers have continued their review of the proposed changes to the diversion records and have agreed to provide a response to the recommended changes when they have completed this review. A meeting has been scheduled for July 26 in Pueblo, at which time the Kansas experts will review backup data for the proposed changes. Colorado is reviewing the issue of how to handle outliers for calibration and will provide a proposal. The States agreed that additional time was required to complete the review and discussion of the changes, and the time to complete was extended to 5 months, August 11.

e. Other issues that might affect calibration of the model.

As previously reported, the experts met on April 7 to discuss other issues that might affect recalibration of the model and met again on May 12, at
which time they agreed that canal capacities were not an issue at this time and that the only other issue was whether Colorado wanted to propose any constraints on want factors during the calibration process. Since this is a calibration issue, the States agreed that it should be on the same schedule as calibration, and the time to complete was extended to 6 months, or September 11.

13. Other Issues
   a. Treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water.

As previously reported, the experts met on May 12 and agreed on the methodology for the treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water. Colorado provided additional data needed on July 7, and the Kansas experts are reviewing of that information. As a result, the States have agreed that the time to complete this issue should be extended to 5 months, or August 11. The experts have agreed on the methodology for this issue, and the experts expect to be able to resolve this issue. Therefore, the States request to extend the time to complete this issue to 5 months, or August 11.

b. The States' experts are reviewing whether a change should be made to the way the Lamar power plant deliveries are represented in the model.
The States have agreed that this issue will not be addressed before entry of the Decree.

c. Replacement credit issues for 1997-1999, 2000-2004 and in the future:

1. The States' experts are discussing replacement credit issues that may not be resolved by pending Water court proceedings, such as certain Highland Canal and Fountain Creek issues.

As previously reported, the experts met on April 7 to discuss these issues, and met again on May 12 and agreed to schedule a separate meeting to discuss these issues. The Kansas experts completed their review of dry-up and provided their results for 2000-2004 to the Colorado experts on June 3. The Colorado experts are reviewing the Kansas analysis and will provide their response by July 29. The Kansas experts have continued their review of the data and initial backup for replacement credits. A meeting to review the backup for replacement credits has been scheduled for July 22.

2. Quantification of special waters, including monitoring, verification and reporting.

As previously reported, Colorado has provided backup data, and the experts met on April 7 to discuss these issues, and met again on May 12, at which time they agreed to schedule a separate meeting to discuss these issues. The Kansas experts have continued their review of the backup data. A meeting has been scheduled for July 22.
3. The States’ experts are meeting to discuss improvements in monitoring and documentation of dry-up and feedback from Kansas, as well as terms and conditions for monitoring subirrigation.

A joint dry-up tour of experts from both states was conducted June 21-23. The experts then met on June 24 to discuss these issues. The Kansas experts provided feedback and recommendations for improvements in monitoring and documentation of dry-up at the meeting and by memo on July 8. Colorado’s experts are considering the recommendations by the Kansas experts and reviewing comments by the Kansas experts following the tour.

d. The States’ experts are reviewing the acreage and want factors for the Sisson-Stubbs credit dry-up.

As previously reported, Colorado provided a detailed summary of facts regarding the Sisson and the Stubbs water rights. In lieu of providing comments on Colorado’s summary of facts, Kansas has made a confidential settlement proposal. Colorado is reviewing the proposal. If the proposal is not acceptable, Colorado will notify Kansas promptly, and Kansas will submit comments on the statement of facts, the attorneys will meet, and the experts will attempt to resolve this issue within the remaining time under the schedule.

e. Representation of winter water bookovers in the model is under discussion by the States’ experts.

The experts have agreed on how to represent winter water bookovers.
f. Colorado will provide Kansas a proposal on the representation of Graham alternate points of diversion.

At the July 8 meeting, the Colorado experts discussed with the Kansas experts a conceptual proposal to revise certain aspects of the H-I model, and the Colorado experts have been working to complete their proposal. Adequate time will be necessary for the Kansas experts to review a definite proposal by Colorado.

14. Credits for Offset Account deliveries to the Stateline, evaporation loss from the Offset Account after the evaporation is charged to Kansas, and return flow obligations.

Because efforts to resolve these issues have not been successful, the experts have determined that these issues need to be taken up directly by the State and Chief Engineer. The States are attempting to schedule such a meeting.

15. The States' experts are considering how releases of Stateline return flows associated with LAWMA's Section II transfers to the Offset Account and transit losses on such return flows should be represented in the model or, in the alternative, how they should be accounted for outside the model.

As previously reported, the initial meeting occurred on May 12, and these issues were discussed at the June 9 telephonic meeting. These issues were discussed further at the July 8 meeting. The experts are continuing to discuss these issues, and the States have agreed that an extension of time until September 12 is needed to complete these issues. Therefore, the States request an extension of time to complete these issues to September 12.

16. Model Documentation

The Kansas experts provided an initial draft of model documentation to the
Colorado experts on July 15.

17. **Limitation on Accumulation of Credits**

On June 14, Kansas provided Colorado with a proposal on limitations on accumulation of credits for review. Colorado requested the backup analysis for the proposal at the June 24 meeting, which was provided by the Kansas experts at the initial meeting on this issue on July 8, and the experts discussed the basis of the proposal at that time. Colorado will review the backup analysis and provide a response.

(c) **Status of Colorado Water Court Proceedings**

As previously reported, Colorado obtained and provided Kansas with draft proposed decrees and engineering reports for LAWMA’s and AGUA’s changes of water rights. Both the LAWMA application and the AGUA application have been re-referred to the Water Judge. Trial is expected to occur, if necessary, in April or May, 2006. Kansas submitted its comments on July 15.

(d) **Status of the H-I Model, Taking Into Account Recommendations In the Fourth Report, to Which Exceptions Were Not Taken**

Nothing to report in addition to the foregoing.

(e) **N/A**

(f) **Arbitration procedures**

As previously reported, Colorado submitted a draft of arbitration procedures to Kansas for consideration. Kansas provided its response to Colorado on July 1. Colorado is reviewing Kansas’ response and will provide its comments.
(g) Decree

Kansas expects to have an initial draft of the Decree furnished to the Special Master and Colorado by the end of July 2005.
ORDER MODIFYING TIME SCHEDULE
FOR EXPERT DISCUSSIONS

On April 19, 2005, I issued an Order approving a time schedule for
discussions among experts in an effort to resolve certain outstanding technical
issues. In a joint report filed June 16, 2005, the States have requested certain
modifications to the previously approved time schedule for completing their work
on certain individual issues. The requests do not extend the overall schedule for
completion.
ACCORDINGLY, IT IS HEREBY ORDERED:

The requested modifications and time extensions as set forth in the June 16, 2005 Report of the States are approved.

Dated: June 17, 2005.

Arthur L. Littleworth
Special Master
PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Best Best & Krieger LLP, 3750 University Avenue, P.O. Box 1028, Riverside, California 92502. I am readily familiar with this firm’s practice for collection and processing of correspondence for mailing with the United States Postal Service. On June 17, 2005, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

ORDER MODIFYING TIME SCHEDULE FOR EXPERT DISCUSSIONS

in a sealed envelope, postage fully paid, addressed as follows:

John Draper, Esq.  
Montgomery & Andrews  
325 Paseo de Peralta  
Santa Fe, New Mexico 87504-2307

David Robbins, Esq.  
Hill & Robbins  
100 Blake Street Building  
1441 Eighteenth Street  
Denver, Colorado 80202

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 17, 2005, at Riverside, California.

Kay J. Bliss

ORDER MODIFYING TIME SCHEDULE FOR EXPERT DISCUSSIONS
June 16, 2005

The Honorable Arthur L. Littleworth
Special Master
Best Best & Krieger
400 Mission Square
3750 University Avenue, 3rd Floor
Riverside, California 92501

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

Please find enclosed the Progress Report for June 16, 2005.

The initial discussion among the experts in an effort to resolve the outstanding technical issues have revealed that some adjustments are necessary to the jointly proposed schedule to resolve remaining issues. None of the adjustments will affect the over-all six month schedule for resolving the remaining issues, but the schedule for some individual issues needs to be adjusted and Mr. Robbins and I felt that we should present these changes to you and obtain your approval for the adjustments. The proposed adjustments to the schedule are found in the discussion of items (b)(3)(11), (b)(12)(c,)(d) & (e), (b)(13)(a) & (d) and item (e) of the Progress Report. While we recognize that it is possible that there will need to be other adjustments to the schedule, we note that the experts have agreed that some issues will not be addressed before the entry of the Decree and Colorado has agreed to limit certain proposals.

Mr. Robbins and I have received your March 23, 2005 letter. Each issue raised in your letter is discussed specifically in the appropriate section of the Progress Report.
Very truly yours,

John B. Draper

cc: David W. Robbins, Esq.
    Leland R. Rolfs, Esq.
Since the Progress Report of May 20, 2005, the States’ experts have held a telephonic meeting on June 9, 2005, as a follow-up to their telephonic meeting of May 19, 2005. They will meet again on June 24, in Pueblo following a three-day dry-up tour of the area between Pueblo and the Stateline. A further meeting is scheduled for July 8 in Denver. The status of each of the issues in the March 11 schedule is as follows:

(a) Calculation of Damages

Response to Item 1 of the Special Master’s letter of May 23, 2005: Costs were not included in the Colorado payment of $34,615,146. Kansas and Colorado have discussed this issue in confidential settlement negotiations.

(b) Potential Issues Outlined in the Fourth Report (pp. 122-23) and any New Issues

1. Phase 2 of the USGS Study

The U.S. Geological Survey published its final report on the Phase 2 study on May 3, 2005. The Colorado State Engineer’s staff is reviewing the report to determine whether any modification is necessary to the Amended Measurement Rules. Colorado will notify Kansas by July 3, 2005, of the Colorado State Engineer’s determination in accordance with the jointly proposed schedule.

2. Results of Colorado’s completed verification program on wells and irrigated acreage.

As stated in the previous Progress Report, Colorado provided backup information, the initial meeting occurred on May 12, 2005, in accordance with the schedule, and the experts held a telephone conference on Thursday, May 19, 2005, for
This issue is covered under paragraph 3 above.

Issues 5.-9.

The States have agreed that Issues 5-9 will not be addressed before entry of the Decree.

10. Proper representation in the model of the various Replacement Plan water sources.

As previously reported, the initial meeting has been held, the experts met on May 12, 2005, and agreed to schedule a separate meeting on replacement issues, and the Kansas experts are reviewing the 2004 data sets for replacement water sources and the backup information for the replacement sources. The meeting will be scheduled when they have completed their review.

11. Mr. Schroeder’s proposed model change on the calculation of model demand.

Response to Special Master’s letter of May 23, 2005, Item 2: see paragraph 3 above. As previously reported, the experts discussed the rationale for Mr. Schroeder’s proposed model change at a meeting held on April 7, 2005, Colorado has agreed that the change to the H-I Model proposed by Mr. Schroeder, to use a different acreage to calculate demand in the model than is used in the water budget (described at Fourth Report 89), will not be pursued, and Colorado has limited its proposal to changing the groundwater acreage previously used for calibration of the model. And, as previously reported, Mr. Tyner has provided a summary of his analysis. Colorado will provide the backup data for this analysis for review and comment by Kansas. Colorado has also proposed new acreages for sole source pumping. Colorado will be providing revised sole source pumping amounts and the methods and backup used to derive them and the acreages for
Kansas' review. The experts held a telephone conference on Thursday, May 19, 2005, to discuss this issue. Given the tasks involved, the States have agreed that 5 months is a more realistic time to complete this issue. The states propose to change the time to complete to 5 months, August 11, 2005.

12. Various model calibration issues:
   a. Use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir for use in the model and whether recalibration is required.

   As previously reported, Colorado provided a report evaluating the new Lamar and Holly electronic weather stations and a proposal regarding the use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir on March 15, 2005, and the experts met on April 7, 2005, to discuss the proposal. The Kansas experts are continuing their review of the proposal and will provide comments in writing and a determination on the schedule needed for this issue when they have completed their review.

   b. Correcting the irrigated acreages of the Lamar/Manvel and X-Y ditches and whether recalibration of the model is required.

   Completed.

   c. Whether the unit response functions for the Fort Lyon Canal, the Fort Lyon Storage Canal, and the Holbrook Canal should be revised.
As previously reported, the initial meeting had already been held, the experts met on May 12, 2005, and agreed that the unit response function for the Fort Lyon Canal should not be revised, but the unit response functions for the Fort Lyon Storage Canal and the Holbrook Canal should be revised, and the Kansas experts have agreed in concept that a change is warranted, but are continuing their review of the specific changes to the unit response functions proposed by Colorado. The States have agreed that additional time is required to complete review and discussion of the proposed changes. **The States propose to change the time to complete to 4 months, July 11, 2005.**

d. **Whether any changes should be made to the observed diversion records used for calibration of the model.**

As previously reported, Colorado has provided Kansas with a list of recommended changes to the observed diversion records, the experts met on April 7, 2005, to discuss the recommended changes, and the Kansas experts are reviewing the recommended changes. The experts discussed this issue on May 12, 2005, and agreed that this issue should also include a discussion of whether any changes should be made in the handling of outliers in the statistical comparison of predicted and observed streamflows from the way it has been handled by the Kansas experts. Kansas’ engineers are continuing their review of the proposed changes to diversion records and will provide a response when they have completed this review. Colorado is reviewing the issue of how to handle outliers for...
calibration and will provide a response. The States have agreed that additional time is required to complete the review and discussion of the changes. The States propose to change the time to complete to 5 months, August 11, 2005.

e. Other issues that might affect calibration of the model.

As previously reported, the experts met on April 7, 2005, to discuss other issues that might affect recalibration of the model, and met again on May 12, 2005, and agreed that canal capacities were not an issue at this time and that the only other issue was whether Colorado wishes to propose any constraints on want factors during the calibration process. Since this is a calibration issue, the States have agreed that it should be on the same schedule as calibration.

The States propose to change the time to complete to 6 months, September 11, 2005.

13. Other Issues

a. Treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water.

As previously reported, the experts met on May 12, 2005, and agreed on the methodology for the treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water. Colorado agreed to provide the additional data needed to complete this issue, but it will take additional time to obtain the
information and for the Kansas experts to review that information. The States have agreed that additional time is required to complete this issue. The states propose to change the time to complete to 4 months, July 11, 2005.

b. The States’ experts are reviewing whether a change should be made to the way the Lamar power plant deliveries are represented in the model.

The States have agreed that this issue will not be addressed before entry of the Decree.

c. Replacement credit issues for 1997-1999, 2000-2004 and in the future:

1. The States’ experts are discussing replacement credit issues that may not be resolved by pending Water court proceedings, such as certain Highland Canal and Fountain Creek issues.

As previously reported, the experts met on April 7, 2005, to discuss these issues, and met again on May 12, 2005, and agreed to schedule a separate meeting to discuss these issues. Colorado has provided data and initial backup for replacement credits, except for the 2004 dry-up acreage, which is expected soon. The Kansas experts are reviewing the data and initial backup for replacement credits. The meeting will be scheduled when the Kansas experts have completed their review.

2. Quantification of special waters, including monitoring, verification and reporting.
As previously reported, Colorado has provided backup data, and the experts met on April 7, 2005, to discuss these issues, and met again on May 12, 2005, and agreed to schedule a separate meeting to discuss these issues. The Kansas experts are reviewing the backup data. The meeting will be scheduled when the Kansas experts have completed their review.

3. The States’ experts are meeting to discuss improvements in monitoring and documentation of dry-up and feedback from Kansas, as well as terms and conditions for monitoring subirrigation.

As previously reported, the experts met on May 12, 2005, and agreed to schedule the initial meeting to coincide with the dry-up tour that has been scheduled for June 21-23. At the June 9 telephonic meeting, the experts scheduled the meeting for June 24.

d. The States’ experts are reviewing the acreage and want factors for the Sisson-Stubbs credit dry-up.

As previously reported, Colorado provided a detailed summary of facts regarding the Sisson and the Stubbs water rights. After reviewing the summary, the Kansas experts said they wanted to submit comments on Colorado’s summary of facts. As a result, it was agreed that it would be premature to hold the initial meeting of the attorneys re legal issues in two months. Instead, the States concluded that it would be better to allow the experts to try to agree upon or clarify the facts first, then hold the initial meeting of the attorney to discuss the legal issues. The states propose to
change the initial meeting of attorneys re legal issues to 4 months, July 11, 2005, and the time to complete to 5 months, August 11, 2005.

e. Representation of winter water bookovers in the model is under discussion by the States’ experts.

The experts have agreed on how to represent winter water bookovers.

f. Colorado will provide Kansas a proposal on the representation of Graham alternate points of diversion.

As previously reported, Colorado provided Kansas with a proposal for representation of the Graham water right in the H-I model on April 12, 2005, and the initial meeting of the experts occurred on May 12, 2005, in accordance with the jointly proposed schedule. During the meeting, the Colorado experts acknowledged that it would be necessary to revise certain aspects of the H-I model in conjunction with the proposal and agreed to provide those changes as soon as possible.

14. Credits for Offset Account deliveries to the Stateline, evaporation loss from the Offset Account after the evaporation is charged to Kansas, and return flow obligations.

As previously reported, the initial meeting occurred on May 12, 2005, in accordance with the jointly proposed schedule. On June 9, 2005, Kansas has provided a written proposal on the issue of credits for Offset Account deliveries to the Stateline, which was discussed at the June 9 telephonic meeting. The quantification of consumptive use and return flows from deliveries of Section II storage water to the Offset Account was also discussed at the June 9 telephonic
meeting. Kansas is preparing a proposal for quantifying the consumptive use and return flows from deliveries of Section II storage water to the Offset Account. Colorado will review the Kansas proposals and has agreed to provide a proposal for determining credits for the evaporation that is charged to Kansas.

15. The States’ experts are considering how releases of Stateline return flows associated with LAWMA’s Section II transfers to the Offset Account and transit losses on such return flows should be represented in the model or, in the alternative, how they should be accounted for outside the model.

As previously reported, the initial meeting occurred on May 12, 2005, in accordance with the jointly proposed schedule. This issue was discussed at the June 9 telephonic meeting.

16. Model Documentation

In response to Item No. 3 of the Special Master’s letter of May 23, 2005, Kansas has been working on model documentation and expects to have an initial draft to Colorado in early July.

17. Limitation on Accumulation of Credits

On June 14, 2005, Kansas provided Colorado with a proposal on limitations on accumulation of credits for review.

(c) Status of Colorado Water Court Proceedings

As previously reported, Colorado obtained and provided Kansas with draft proposed decrees and engineering reports for LAWMA’s and AGUA’s changes of water rights. The LAWMA application is currently before the Water Referee. AGUA has re-referred its application to the Water Judge. LAWMA and AGUA’s respective counsel have reported that they are meeting with objectors in an effort to try to resolve objections to
the proposed decrees. LAWMA’s counsel has said that if LAWMA does not reach agreement in the near future, he expects LAWMA to re-refer the application to the Water Judge and set the case for trial. Kansas requests a one-month extension to submit its comments, to July 11. Colorado does not object to this request.

(d) Status of the H-I Model, Taking Into Account Recommendations In the Fourth Report, to Which Exceptions Were Not Taken

As previously reported, Colorado provided the 2004 input data files. Colorado will provide revised irrigated acreage and dry-up acreage data files as soon as possible. The initial meeting occurred on May 12, 2005. The Kansas experts are reviewing the 2004 data sets. A meeting will be scheduled when the revised data sets have been provided by Colorado and the Kansas experts have completed their review.

(e) N/A

(f) Arbitration procedures

Response to Item No. 4 of the Special Master’s letter of May 23, 2005: Colorado has submitted a draft of arbitration procedures to Kansas for consideration. Kansas is reviewing them and expects to respond to Colorado by July 1, 2005.

(g) Decree

Response to Item No. 3 of the Special Master’s letter of May 23, 2005: Kansas expects to have an initial draft of the Decree furnished to the Special Master and Colorado by the end of July 2005.
May 20, 2005

Mr. Arthur L. Littleworth  
Best, Best & Krieger  
400 Mission Square Building  
3750 University Avenue  
P. O. Box 1028  
Riverside, CA 92502

Re:  *Kansas v. Colorado*, No. 105 Original

Dear Mr. Littleworth:

In accordance with your Order Following Status Conference of February 4, 2005, enclosed please find the first monthly progress report, which was prepared jointly by counsel. Because of the extension of time requested to submit this first progress report, it includes progress through May 19, 2005.

Very truly yours,

David W. Robbins

DWR/rmm
Enclosure

cc:  John B. Draper, Esq.  
Leland Rolfs, Esq.  
Jason Dunn, Esq.  
Carol Angel, Esq.  
Hal D. Simpson  
Dale Straw  
Bill Tyner
Progress Report
May 20, 2005

(a) Calculation of Damages

Mr. Robbins contacted Cynthia Rapp, Deputy Clerk of the U.S. Supreme Court, about the procedure for payment of damages and prejudgment interest. Ms. Rapp advised that the Court did not want the damages and prejudgment interest paid into the registry of the Court and said the States should arrange for the payment between themselves. On April 29, 2005, Colorado wire transferred $34,615,146 to the State of Kansas in payment of the damages and prejudgment interest owed to the State of Kansas for depletions to usable Stateline flows from 1950 through 1996. Colorado and Kansas had discussed the damages calculations in 2005 dollars and a proposed method for updating the amounts to a specific date in 2005, but had not reached final agreement on the exact amount. However, because the Colorado General Assembly had appropriated monies to pay the damages and prejudgment interest, Colorado wire transferred an amount based on Colorado’s calculation of the amount of damages and prejudgment interest due as of that date. Kansas agrees that the amount of the payment was correct.

(b) Potential Issues Outlined in the Fourth Report (pp. 122-23) and any New Issues

1. Phase 2 of the USGS Study

The U.S. Geological Survey published its final report on the Phase 2 study on May 3, 2005. The Colorado State Engineer’s staff is reviewing the report to determine whether any modification is necessary to the Amended Measurement Rules. Colorado will notify Kansas within two months after the final report was
issued of the Colorado State Engineer's determination in accordance with the
jointly proposed schedule.

2. **Results of Colorado's completed verification program on wells and irrigated acreage.**

Colorado provided backup information, and the initial meeting occurred on May 12, 2005, in accordance with the schedule. The experts held a telephone conference on Thursday, May 19, 2005, for further discussion on this issue. The experts also agreed to schedule another meeting or telephone conference on June 9, 2005.

3. **Commencement of the five-year cycle for updating Colorado's irrigated acreage study.**

**Colorado Statement:**

Colorado provided a memo on the update of irrigated acreage for 2003 utilizing satellite imagery and information obtained through the acreage verification program and the ongoing cycle of interviews with farm unit operators on April 15, 2003. This was a slight delay in the jointly proposed schedule, but the experts discussed the update to irrigated acreage at a meeting on April 7, 2005, and Colorado has provided GIS files for the irrigated acreage update and has responded to requests from Kansas for backup files. The report also contains model input sets for 2003 irrigated acreage and recommendations on revisions to 1950-94 acreages to be used for calibration of the H-I model to identify acreages irrigated by sole source and supplemental wells. Colorado also obtained satellite imagery for 2002. The classification of the 2002 imagery is nearly complete and will be provided to Kansas as soon as it has been completed. The initial meeting occurred on May 12, 2004, in accordance with the schedule. The experts held a
telephone conference on Thursday, May 19, 2005, for further discussion of this issue. The experts also agreed to schedule another meeting or telephone conference on June 9, 2005.

**Kansas Statement:**

The irrigated acreage results summarized in the April 15 memo from Colorado are preliminary results for 2003. An updated classification is being completed by Colorado consultants, although Colorado does not expect that the updated classification will result in significant differences. Colorado is providing backup data pursuant to requests from Kansas. Kansas has started review of preliminary files but will need the final classification and derivation of proposed model acreages in order to begin its final review of the proposed 2003 acreages. It is anticipated that Colorado will propose irrigated acreages for the years 2000, 2001, 2002 and 2004, following discussion and comment from the Kansas experts. Once those proposals and related backup are provided by Colorado, the Kansas experts will be able to begin their final review.

4. **Proposed changes in the satellite imagery system used by Colorado.**

   This issue is covered under paragraph 3 above.

**Issues 5.-7.**

The States have agreed that Issues 5-7 will not be addressed before entry of the Decree.

8. **Any improvements in the calculation of ungaged tributary inflow.**
The experts have agreed that Issue 8 will not be addressed before entry of the Decree.

9. **Whether any new studies support adjustments to PET values for salinity management or otherwise.**

   The States agreed that this issue will not be addressed before entry of the Decree.

10. **Proper representation in the model of the various Replacement Plan water sources.**

    As stated in the jointly proposed schedule, the initial meeting has been held. The experts met on May 12, 2005, and agreed to schedule a separate meeting on replacement issues. The Kansas experts are reviewing the 2004 data sets for replacement water sources and the backup information for the replacement sources. The meeting will be scheduled when they have completed their review.

11. **Mr. Schroeder’s proposed model change on the calculation of model demand.**

    The experts discussed the rationale for Mr. Schroeder’s proposed model change at a meeting held on April 7, 2005. Colorado has agreed that the change to the H-I Model proposed by Mr. Schroeder, to use a different acreage to calculate demand in the model than is used in the water budget (described at Fourth Report 89), will not be pursued. Colorado has limited its proposal to changing the groundwater acreage previously used for calibration of the model. Mr. Tyner has provided a summary of his analysis. Colorado will provide the backup data for this analysis for review and comment by Kansas. Colorado has also proposed new acreages for sole source pumping. Colorado will be providing revised sole source pumping amounts and the methods and backup used to derive them and the acreages for Kansas’ review. The experts held a telephone conference on Thursday, May 19, 2005, to discuss this issue.
12. Various model calibration issues:

a. Use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir for use in the model and whether recalibration is required.

Colorado provided a report evaluating the new Lamar and Holly electronic weather stations and a proposal regarding the use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir on March 15, 2005, and the experts met on April 7, 2005, to discuss the proposal. The Kansas experts are reviewing the proposal and agreed that they will provide comments in writing and a determination on the schedule needed for this issue.

b. Correcting the irrigated acreages of the Lamar/Manvel and X-Y ditches and whether recalibration of the model is required.

As stated in the jointly proposed schedule, the initial meeting had already been held. The experts discussed this issue on April 7, 2005, and agreed that the acreages should be corrected and the model recalibrated when all other changes have been implemented.

c. Whether the unit response functions for the Fort Lyon Canal, the Fort Lyon Storage Canal, and the Holbrook Canal should be revised.

As stated in the jointly proposed schedule, the initial meeting had already been held. The experts met on May 12, 2005, and agreed that the unit
response function for the Fort Lyon Canal should not be revised, but the unit response functions for the Fort Lyon Storage Canal and the Holbrook Canal should be revised. The Kansas experts have agreed in concept that a change is warranted, but are reviewing the specific changes to the unit response functions proposed by Colorado.

d. Whether any changes should be made to the observed diversion records used for calibration of the model.

Colorado has provided Kansas with a list of recommended changes to the observed diversion records. The experts met on April 7, 2005, to discuss the recommended changes. The Kansas experts are still reviewing the recommended changes. The experts discussed this issue on May 12, 2005, and agreed that this issue should also include a discussion of whether any changes should be made in the handling of outliers in the statistical comparison of predicted and observed streamflows from the way it has been handled by the Kansas experts.

e. Other issues that might affect calibration of the model.

The experts met on April 7, 2005, to discuss other issues that might affect recalibration of the model. The experts met on May 12, 2005, and agreed that canal capacities were not an issue at this time and that the only other issue was whether Colorado wishes to propose any constraints on want factors during the calibration process.

13. Other Issues
a. Treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water.

The experts met on May 12, 2005, and agreed on the methodology for the treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water. Colorado agreed to provide the additional data needed to complete this issue.

b. The States’ experts are reviewing whether a change should be made to the way the Lamar power plant deliveries are represented in the model.

As stated in the jointly proposed schedule, the initial meeting had already occurred. The experts also discussed this issue at the meetings on April 7, 2005, and May 12, 2005. Colorado agreed that the change proposed by Mr. Schroeder did not appear to accomplish what Mr. Schroeder had intended. Colorado therefore agreed that this change would not be pursued before entry of the Decree.

c. Replacement credit issues for 1997-1999, 2000-2004 and in the future:

1. The States’ experts are discussing replacement credit issues that may not be resolved by pending Water court proceedings, such as certain Highland Canal and Fountain Creek issues.

The experts met on April 7, 2005, to discuss these issues. The experts met again on May 12, 2005, and agreed to schedule a separate meeting to discuss these issues. Colorado has provided data and initial backup for replacement credits, except for the 2004 dry-up acreage, which is expected soon.
2. Quantification of special waters, including monitoring, verification and reporting.

Colorado has provided backup data, and the experts met on April 7, 2005, to discuss these issues. The experts met again on May 12, 2005, and agreed to schedule a separate meeting to discuss these issues.

3. The States’ experts are meeting to discuss improvements in monitoring and documentation of dry-up and feedback from Kansas, as well as terms and conditions for monitoring subirrigation.

The experts met on May 12, 2005, and agreed to schedule the initial meeting to coincide with a dry-up tour that has been scheduled for June 21-23, with the meeting to be held on June 24.

d. The States’ experts are reviewing the acreage and want factors for the Sisson-Stubbs credit dry-up.

Colorado provided a summary of facts related to the Sisson and Stubbs water rights shortly after the April 7, 2005 meeting of the experts. The experts discussed this issue on May 12, 2005. Kansas will provide a response to Colorado’s summary of facts. The initial meeting of the attorneys has not occurred but will be scheduled in the near future.

e. Representation of winter water bookovers in the model is under discussion by the States’ experts.

The initial meeting of the experts occurred on April 7, 2005. The experts met again on May 12, 2005, and agreed on how to represent winter water bookovers.
Colorado will provide Kansas a proposal on the representation of Graham alternate points of diversion.

Colorado provided Kansas with a proposal for representation of the Graham water right in the H-I model on April 12, 2005. The initial meeting of the experts occurred on May 12, 2005, in accordance with the jointly proposed schedule. During the meeting, the Colorado experts acknowledged that it would be necessary to revise certain aspects of the H-I model in conjunction with the proposal and agreed to provide those changes as soon as possible.

14. Credits for Offset Account deliveries to the Stateline, evaporation loss from the Offset Account after the evaporation is charged to Kansas, and return flow obligations.

The initial meeting occurred on May 12, 2005, in accordance with the jointly proposed schedule. The experts agreed that Kansas and Colorado will provide written proposals on these issues by June 11, 2005.

15. The States’ experts are considering how releases of Stateline return flows associated with LAWMA’s Section II transfers to the Offset Account and transit losses on such return flows should be represented in the model or, in the alternative, how they should be accounted for outside the model.

The initial meeting occurred on May 12, 2005, in accordance with the jointly proposed schedule. The experts agreed that Kansas and Colorado will provide written proposals on these issues by June 11, 2005.

16. Model Documentation

This schedule was revised by the Special Master. Kansas is currently working on the proposed model documentation.

17. Limitation on Accumulation of Credits
Kansas is working on its proposal, which is due June 11, 2005.

(c) Status of Colorado Water Court Proceedings

Colorado obtained and provided Kansas with draft proposed decrees and engineering reports for LAWMA’s and AGUA’s changes of water rights. Kansas’ comments are not due until June 11, 2005. Both applications are currently before the Water Referee.

LAWMA and AGUA’s respective counsel have reported that they are meeting with objectors in an effort to try to resolve objections to the proposed decrees, but have said that if they do not reach agreement in the near future, they expect to re-refer the applications to the Water Judge and set the cases for trial.

(d) Status of the H-I Model, Taking Into Account Recommendations In the Fourth Report, to Which Exceptions Were Not Taken

Colorado provided the 2004 input data files in a memorandum dated March 23, 2005. The initial meeting occurred on May 12, 2005. The Kansas experts said they need additional time to review the 2004 data sets. A meeting will be scheduled when the Kansas experts have completed their review.
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

ORDER FOLLOWING STATUS CONFERENCE
OF FEBRUARY 4, 2005

On December 7, 2004, the Supreme Court issued its Opinion on the exceptions filed by Kansas to my Fourth Report. Neither Colorado or the United States filed exceptions. The Supreme Court overruled all of Kansas’ exceptions, and adopted all of the recommendations in that Fourth Report. The case was remanded for preparation of a decree consistent with the Court’s Opinion.

On February 4, 2005, a status conference was held, with the agreement of counsel, in the United States District Court in Santa Fe, New Mexico. The conference was reported in Volume 271 of the Reporter’s Transcript. Prior to the status conference, counsel submitted a joint letter setting forth the issues that still remained in the case. The status conference identified more specifically the issues that needed to be resolved in order to enter a decree, and the way in which such
issues would be addressed. It was agreed generally that the respective experts for the States would engage in a series of meetings in efforts to determine the technical issues, and that any disagreements would be subject to arbitration. On the issue of damages, counsel stated that they expected to reach agreement on the calculation of damages, and that by March 31, 2005, Kansas would submit a proposal to Colorado on costs. They stated that no claim would be made for attorney fees. At the conclusion of the status conference, it was agreed that the States would present a joint time schedule for resolving the remaining issues, and this was done by letter dated March 11, 2005.

The joint scheduling letter outlines approximately 25 issues that remain to be decided, including the final calculation of damages and costs. The majority of the matters relate to technical modeling issues. An initial meeting date for the experts, and a time for completion, was given for each separate issue. The completion times range generally between one and six months, and presuppose that agreements will be reached. The completion times do not include any additional time required for arbitration. Counsel reported that there were also three legal issues on which they had some disagreement: the scope of the decree, model documentation, and the model results for 1997-2004. These matters were then briefed by the States in letters dated March 21 and March 30.

Later, Kansas recommended that the discussions between and among experts and counsel should be considered as compromise discussions under Federal Rule 408, and therefore not admissible in any later arbitration or other proceeding. Kansas expressed the belief that treating the efforts among experts as settlement discussions would facilitate the resolution of the outstanding issues. Colorado disagreed, arguing that the contemplated discussions among experts were not
"compromise negotiations" under Rule 408, but rather Court-ordered efforts to try to reach agreement on certain remaining issues. It was the Colorado view that we need to establish a "new process" that places greater responsibility upon the experts to discuss and resolve issues.

All of these issues were further discussed with counsel in a lengthy telephone conference on April 12, 2005.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The program for discussions among experts in an effort to resolve the outstanding technical issues, and the scheduling therefor, are hereby approved, subject to the overriding condition that all such issues will be resolved by agreement by September 12, 2005, or submitted for arbitration. This Order includes all changes in the H-I model that were approved in my Fourth Report; all issues identified in the March 11, 2005 letter that are necessary to update the H-I model; data input for the years 1997 through 2004; and calibration of the model.

2. Discussions among experts in an effort to reach agreement on the outstanding issues should not be considered as compromise negotiations, pursuant to Federal Rule 408. The goal of these discussions is to arrive at the best professional and technical answers, not simply at compromises. Both States have an interest in developing the H-I model so as to achieve the most reliable results possible. The experts need to approach these discussions as advocates of the highest professional standards, and not simply as spokesmen for the interests of either State. If good faith discussions do not produce agreements, then the remaining issues will be decided by arbitration. This is not to say that true offers
of compromise cannot be made in this process. If such offers are made, they need to be clearly identified as offers of compromise, and they will then be treated with the protection allowed by the law.

3. Counsel are hereby directed to develop appropriate procedures for such arbitration, and if possible, to develop a panel of experts that may be called upon as arbitrators. This task is also to be completed by September 12, 2005. If there are disagreements about the arbitration procedures, such issues should be submitted to me for decision prior to September 12, 2005.

4. Phase 2 of the USGS Study is scheduled for release at the end of April, 2005. The March 11 schedule calls for the report to be submitted to the Colorado State Engineer to determine whether any modification to Colorado’s Amended Measurement Rules may be necessary. Kansas will then be advised of the State Engineer’s determination, and if Kansas disagrees, Kansas will have an opportunity to provide its recommendations and comments. If agreement between the States is not reached on measuring groundwater pumping, the Phase 2 USGS Study, and the comments of both States should be submitted to me for decision.

5. In my Fourth Report, I deferred to the decision of the Colorado Water Court on certain of the consumptive use credits included in the Replacement Plans approved by Colorado. Two applications are currently pending before the Water Court concerning consumptive use credits to be allowed in Replacement Plans. These are the amended application filed by LAWMA and the application of AGUA. No decisions by the Water Court have yet been made, and final decisions may not be made prior to the entry of the decree herein. Proceedings in this case should not be held up pending final decisions by the Water Court. Rather,
assumptions on such credits should be made for purposes of running the H-I model, subject to later modification if the decisions of the Water Could should differ from the assumptions made.

6. The goal is to enter a decree before the end of this calendar year. Counsel are directed to begin to work on a proposed decree, with Kansas having the responsibility of producing the first draft. It may well be that portions of the decree relating to the H-I model, and to the results thereof, cannot be drafted until September, or after any arbitration proceedings have been completed. Nonetheless, counsel should complete a draft of those portions of the decree that can be done now, and submit those to me as early as practicable. The decree should include provisions for continuing jurisdiction, the termination of such jurisdiction, and a dispute resolution process. One of the issues discussed has been the amount of documentation of the H-I model to be included in the decree. Both States agree that documentation can be useful, but there has been disagreement over whether a meaningful amount of documentation can be produced within the period of time now available. The H-I model is unique, and is not based upon a model such as MODFLOW for which the USGS has published documentation of the assumptions and mathematical equations used, and the way in which the model operates. Nonetheless, Kansas states that it can produce useful documentation within two months, and Kansas is hereby directed to include that effort in the proposed decree. Of course, Colorado’s views on this matter, as well as on all other aspects of the proposed decree, are expected.
7. Counsel shall report progress pursuant to this Order on a monthly basis, beginning May 15, 2005.

Dated: April 19, 2005.

Arthur L. Littleworth
Special Master
PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Best Best & Krieger LLP, 3750 University Avenue, P.O. Box 1028, Riverside, California 92502. I am readily familiar with this firm’s practice for collection and processing of correspondence for mailing with the United States Postal Service. On April 19, 2005, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

ORDER FOLLOWING STATUS CONFERENCE OF FEBRUARY 4, 2005

in a sealed envelope, postage fully paid, addressed as follows:

David Robbins, Esq.                                   John Draper, Esq.
Hill & Robbins                                         Montgomery & Andrews
100 Blake Street Building                               325 Paseo de Peralta
1441 Eighteenth Street                                 Santa Fe, New Mexico 87504-2307
Denver, Colorado 80202                                   

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 19, 2005, at Riverside, California.

Kay J. Bliss
March 30, 2005

Mr. Arthur L. Littleworth
Best, Best & Krieger
400 Mission Square Building
3750 University Avenue
P. O. Box 1028
Riverside, CA 92502

Re:  Kansas v. Colorado, No. 105, Original

Dear Mr. Littleworth:

Mr. Draper requested an opportunity to submit a reply to my letter to you of March 21, 2005, regarding the issues on which the States had differing views, and it was agreed that we would submit replies by March 30, 2005.

Standard of Compliance

Mr. Draper states in his letter it is axiomatic that a decree that requires a defendant to undertake certain conduct must describe that conduct with enough specificity to allow the defendant to know what is required and that, in this case, the standard of compliance that has been developed through the efforts of both States, the Special Master, and the Court will be the version of the H-I model approved in the most recent trial phase by the Special Master, together with the resolution of the outstanding issues specified in the schedule. (p.1)

There is no disagreement that the H-I model will be used to determine Compact compliance as you recommended in your Fourth Report, Fourth Report at 121, 139 ¶ 11, but I detect in Kansas’ insistence that a specific version of the H-I model, with its code, inputs and outputs, together with pre- and post-processing to quantify Compact compliance, be included in the decree (p.4) an unwillingness to accept your recommendation that future modeling disputes
be resolved through expert discussion, negotiation, and if necessary binding arbitration. (See p.3) ("While it is hoped that the remaining issues on the Model can be resolved by agreement, those issues will be resolved as part of finalization of the Decree according to the process proposed in the Schedule.") The schedule agreed upon by the States does not include all remaining issues; nor does it address issues that may arise concerning future updates or improvements that may be proposed by the experts in the future.

It certainly would have been preferable to all if a specific version of the H-I model had been developed during the litigation that all experts agreed could be used as the "standard of compliance"; but, as you pointed out in your Fourth Report, modeling the Arkansas River Basin in Colorado is extraordinarily difficult, Fourth Report at 109, and the model predictions are not sufficiently accurate to be used to determine Compact compliance on a monthly or annual basis. *Id.* at 115. You also said that the issue of how to reasonably assure that Colorado will continue to meet its Compact obligations is complicated by disagreements that have surfaced in each of the trial segments among the experts over updating the model, *id.* at 121, and that all experts agree that continued improvements need to be made to the model to increase its reliability, *id.* at 123. The Supreme Court noted, as you did, that the States have agreed to use the H-I model to measure Colorado's future Compact compliance, but also noted that the model is highly complex and tries to account for almost every Arkansas-River-connected drop of water that arrives in, stays in, or leaves Colorado. Slip op. at 10. The Court said that, not surprisingly, the model's ability to calculate depletions has proved highly controversial, leading to many modifications during this litigation, and affirmed your recommendation to use the model together with a 10-year measurement period to determine compliance. *Id.* at 11-14. The Court noted that practical considerations favored your measurement approach, noting that "[m]odel results over measurement periods of less than 10 years are highly inaccurate." *Id.* at 12. The Court also affirmed your recommendation that it was unnecessary to resolve 15 disputed issues that you had not decided. The Court noted that Kansas had argued that the Court could not leave unanswered important questions "essential" to our "determination of a controversy." *Id.* at 16. (internal quotations and citations omitted.) The Court agreed with you that there were good reasons not to decide those issues immediately and said the passage of time will produce more accurate resolution of certain disputes and the parties will learn more about matters relevant to the H-I model's strengths, weaknesses, and methods of monitoring and measurement, which is why you had recommended that the Court retain jurisdiction of the case. *Id.* at 17. At the same time, the Court also endorsed your recommendations that the two States confer, and supported your expressed hope that expert discussion, negotiation, and if necessary binding arbitration, would lead to resolution of any remaining disputes. *Id.*

While Colorado is committed to carrying out your recommendations regarding Compact compliance, Colorado is concerned that Kansas is simply rearguing positions that were not accepted by you or the Court. For example, in its exceptions to your decision not to decide 15 disputed issues at the conclusion of the last trial segment, Kansas argued that it was necessary to decide those issues "to implement the H-I Model or otherwise determine Compact compliance." Brief in Support of Kansas’ Exceptions to the Fourth Report of the Special Master 47 (Jan. 22, 2004). Kansas also stated: "Without a decision on the 15 disputed issues, it is not possible to implement an ‘approved’ version of the Model or determine Compact compliance." *Id.* You
rejected these arguments, as did the U.S. Supreme Court. Yet, this seems to be the same argument Kansas is now making about the need for the inclusion of a specific version of the H-I model in the decree, with its code, inputs, and outputs. Colorado remains committed to using the H-I model to determine Compact compliance as you recommended; but, Colorado also believes that a process is necessary to resolve issues that will not be resolved prior to entry of a decree and wants to be sure that Kansas will not use the final decree as a reason to ignore your recommendation regarding future disputes. Fourth Report at 136, to or oppose arbitration of such disputes. See Slip op. at 5.

**MODEL DOCUMENTATION**

Mr. Draper states that model documentation is the only way to implement your earlier rulings and the general principle that a standard of conduct needs to be specified in the decree and that this step is logically the final step in resolving model issues for the purposes of the decree. (p.2). My initial reaction is that if Kansas felt that model documentation was necessary for a final decree, it should have produced the documentation prior to the end of the last trial segment. However, I want to be clear that Colorado agrees that model documentation would be useful; Colorado’s disagreement is that our experts did not agree that it could be produced in the two-month schedule proposed by Kansas, and Colorado does not agree that model documentation is necessary to implement your earlier rulings and to enter a final decree. After all, the States have been using the H-I model since the Supreme Court affirmed your First Report in 1995. The disagreements have not related to the lack of documentation, but to changes to the model proposed by one State or the other or the representation or replacement plans. It is my recollection that the Kansas response to Professor Maddock’s criticism of a lack of documentation was that the record of these proceedings constituted that very documentation. If that was true for purposes of the last trial segments, it is probably still true today.

**STATUS OF H-I MODEL RESULTS FOR 1997-2004**

Mr. Draper states that at the status conference, you indicated your preference that the H-I model be updated through 2004, that as a result the States have proposed to resolve a list of issues that would produce quantitative results for the period 1997-2004, that the States are proceeding on as fast a schedule as possible to resolve the 1997-2004 issues in accordance with your directions, and it follows that when the tasks in the schedule are achieved, those results will be the final results for 1997-2004. (p.3) Colorado has pointed out that some issues will not be addressed in the jointly agreed-upon schedule. In addition, the Colorado Water Court may not have acted on the replacement credits for LAWMA’s water rights, including any appeal therefrom, which is required under the ninth recommendation in your Fourth Report. Therefore, while Colorado agrees that the arbitration should be final as to the issues decided, Colorado recognized that decisions on other issues could modify the 1997-2004 results and does not want the arbitration of the agreed-upon issues to undercut expert discussion and agreement as a means of resolving other modeling issues.
CONFIDENTIALITY

Finally, please be aware of a distinction between this case and the Republican River litigation. There the expert discussions were occurring before a trial on the issues with no certainty that a compromise would result. Here we are trying to resolve post trial disputes.

Very truly yours,

David W. Robbins

DWR/rmm
cc: John B. Draper, Esq.
    Attorney General John Suthers
    Jason R. Dunn, Deputy Attorney General
    Carol B. Angel, Assistant Attorney General
    Hal D. Simpson, Colorado State Engineer
Fax Transmittal

Fax Originator's Initials: rmm

To:
Arthur L. Littleworth
Best, Best & Krieger
(951) 686-3083

CC:
John B. Draper
Montgomery & Andrews
(505) 982-4289
Attorney General John Suthers
Office of the Attorney General
(303) 866-4745
Jason Dunn/Carol B. Angel
Office of the Attorney General
(303) 866-3558
Hal D. Simpson
Office of the State Engineer
(303) 866-3589

Date: March 30, 2005
Time: 5:07 PM (MST)
HR Case #: 287

Number of Pages: 5


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Thank you.

Fax Originator's Initials: rmm
March 30, 2005

Mr. Arthur L. Littleworth
Best, Best & Krieger
400 Mission Square Building
3750 University Avenue
P. O. Box 1028
Riverside, CA 92502

Re: Kansas v. Colorado, No. 105, Original

Dear Mr. Littleworth:

Mr. Draper requested an opportunity to submit a reply to my letter to you of March 21, 2005, regarding the issues on which the States had differing views, and it was agreed that we would submit replies by March 30, 2005.

STANDARD OF COMPLIANCE

Mr. Draper states in his letter it is axiomatic that a decree that requires a defendant to undertake certain conduct must describe that conduct with enough specificity to allow the defendant to know what is required and that, in this case, the standard of compliance that has been developed through the efforts of both States, the Special Master, and the Court will be the version of the H-1 model approved in the most recent trial phase by the Special Master, together with the resolution of the outstanding issues specified in the schedule. (p.1)

There is no disagreement that the H-1 model will be used to determine Compact compliance as you recommended in your Fourth Report, Fourth Report at 121, 139 ¶ 11, but I detect in Kansas' insistence that a specific version of the H-1 model, with its code, inputs and outputs, together with pre- and post-processing to quantify Compact compliance, be included in the decree (p.4) an unwillingness to accept your recommendation that future modeling disputes
be resolved through expert discussion, negotiation, and if necessary binding arbitration. (See p.3) ("While it is hoped that the remaining issues on the Model can be resolved by agreement, those issues will be resolved as part of finalization of the Decree according to the process proposed in the Schedule.") The schedule agreed upon by the States does not include all remaining issues; nor does it address issues that may arise concerning future updates or improvements that may be proposed by the experts in the future.

It certainly would have been preferable to all if a specific version of the H-I model had been developed during the litigation that all experts agreed could be used as the "standard of compliance"; but, as you pointed out in your Fourth Report, modeling the Arkansas River Basin in Colorado is extraordinarily difficult, Fourth Report at 109, and the model predictions are not sufficiently accurate to be used to determine Compact compliance on a monthly or annual basis. Id. at 115. You also said that the issue of how to reasonably assure that Colorado will continue to meet its Compact obligations is complicated by disagreements that have surfaced in each of the trial segments among the experts over updating the model, id. at 121, and that all experts agree that continued improvements need to be made to the model to increase its reliability, id. at 123. The Supreme Court noted, as you did, that the States have agreed to use the H-I model to measure Colorado's future Compact compliance, but also noted that the model is highly complex and tries to account for almost every Arkansas-River-connected drop of water that arrives in, stays in, or leaves Colorado. Slip op. at 10. The Court said that, not surprisingly, the model's ability to calculate depletions has proved highly controversial, leading to many modifications during this litigation, and affirmed your recommendation to use the model together with a 10-year measurement period to determine compliance. Id. at 11-14. The Court noted that practical considerations favored your measurement approach, noting that "[m]odel results over measurement periods of less than 10 years are highly inaccurate." Id. at 12. The Court also affirmed your recommendation that it was unnecessary to resolve 15 disputed issues that you had not decided. The Court noted that Kansas had argued that the Court could not leave unanswered important questions "essential" to our "determination of a controversy." Id. at 16. (internal quotations and citations omitted.) The Court agreed with you that there were good reasons not to decide those issues immediately and said the passage of time will produce more accurate resolution of certain disputes and the parties will learn more about matters relevant to the H-I model's strengths, weaknesses, and methods of monitoring and measurement, which is why you had recommended that the Court retain jurisdiction of the case. Id. at 17. At the same time, the Court also endorsed your recommendations that the two States confer, and supported your expressed hope that expert discussion, negotiation, and if necessary binding arbitration, would lead to resolution of any remaining disputes. Id.

While Colorado is committed to carrying out your recommendations regarding Compact compliance, Colorado is concerned that Kansas is simply rearguing positions that were not accepted by you or the Court. For example, in its exceptions to your decision not to decide 15 disputed issues at the conclusion of the last trial segment, Kansas argued that it was necessary to decide those issues "to implement the H-I Model or otherwise determine Compact compliance." Brief in Support of Kansas' Exceptions to the Fourth Report of the Special Master 47 (Jan. 22, 2004). Kansas also stated: "Without a decision on the 15 disputed issues, it is not possible to implement an 'approved' version of the Model or determine Compact compliance." Id. You
rejected these arguments, as did the U.S. Supreme Court. Yet, this seems to be the same argument Kansas is now making about the need for the inclusion of a specific version of the H-I model in the decree, with its code, inputs, and outputs. Colorado remains committed to using the H-I model to determine Compact compliance as you recommended; but, Colorado also believes that a process is necessary to resolve issues that will not be resolved prior to entry of a decree and wants to be sure that Kansas will not use the final decree as a reason to ignore your recommendation regarding future disputes, Fourth Report at 136, to or oppose arbitration of such disputes. See Slip op. at 5.

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Mr. Draper states that model documentation is the only way to implement your earlier rulings and the general principle that a standard of conduct needs to be specified in the decree and that this step is logically the final step in resolving model issues for the purposes of the decree. (p.2). My initial reaction is that if Kansas felt that model documentation was necessary for a final decree, it should have produced the documentation prior to the end of the last trial segment. However, I want to be clear that Colorado agrees that model documentation would be useful; Colorado’s disagreement is that our experts did not agree that it could be produced in the two-month schedule proposed by Kansas, and Colorado does not agree that model documentation is necessary to implement your earlier rulings and to enter a final decree. After all, the States have been using the H-I model since the Supreme Court affirmed your First Report in 1995. The disagreements have not related to the lack of documentation, but to changes to the model proposed by one State or the other or the representation of replacement plans. It is my recollection that the Kansas response to Professor Maddock’s criticism of a lack of documentation was that the record of these proceedings constituted that very documentation. If that was true for purposes of the last trial segments, it is probably still true today.

STATUS OF H-I MODEL RESULTS FOR 1997-2004

Mr. Draper states that at the status conference, you indicated your preference that the H-I model be updated through 2004, that as a result the States have proposed to resolve a list of issues that would produce quantitative results for the period 1997-2004, that the States are proceeding on as fast a schedule as possible to resolve the 1997-2004 issues in accordance with your directions, and it follows that when the tasks in the schedule are achieved, those results will be the final results for 1997-2004. (p.3) Colorado has pointed out that some issues will not be addressed in the jointly agreed-upon schedule. In addition, the Colorado Water Court may not have acted on the replacement credits for LAWMA’s water rights, including any appeal therefrom, which is required under the ninth recommendation in your Fourth Report. Therefore, while Colorado agrees that the arbitration should be final as to the issues decided, Colorado recognized that decisions on other issues could modify the 1997-2004 results and does not want the arbitration of the agreed-upon issues to undercut expert discussion and agreement as a means of resolving other modeling issues.
CONFIDENTIALITY

Finally, please be aware of a distinction between this case and the Republican River litigation. There the expert discussions were occurring before a trial on the issues with no certainty that a compromise would result. Here we are trying to resolve post trial disputes.

Very truly yours,

David W. Robbins

DWR/mm

cc: John B. Draper, Esq.
    Attorney General John Suthers
    Jason R. Dunn, Deputy Attorney General
    Carol B. Angel, Assistant Attorney General
    Hal D. Simpson, Colorado State Engineer
DATE: March 30, 2005  
TIME: 5:07 pm  
NO. PAGES (INCLUDING COVER) 5

TO: Hon. Arthur L. Littleworth  
FAX: (951) 686-3083  
PHONE: 

FROM: JOHN B. DRAPER  
(505) 986-2525

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MESSAGE:

Please see attached letter of today’s date.

cc: David W. Robbins - 303-296-2388  
Lee Rolfs - 785-368-6668

This fax is being sent from (505) 982-4289

CLIENT NAME: CLIENT NUMBER:

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The Honorable Arthur L. Littleworth  
Special Master  
Best Best & Krieger  
400 Mission Square  
3750 University Avenue, 3rd Floor  
Riverside, California 92501  

Re: Kansas v. Colorado, No. 105, Original  
U.S. Supreme Court  

Dear Mr. Littleworth:  

The States have agreed to submit to you simultaneous responses to each other’s letter to you of March 21, 2005, addressing three issues on which your guidance is requested. This letter provides Kansas’ response.  

DECREE DRAFTING  

Kansas requests, along with Colorado, guidance from you as to whether you would like the States to work on a draft decree for your consideration, as the States have proposed, and, if so, what should be included in the draft decree.  

MODEL DOCUMENTATION  

In Kansas’ view, documentation of the H-I Model is not only useful, but essential, for the reasons set forth in our letter of March 21, and those set forth below. Adoption of a specific version of the H-I Model, subject to revision in the future, is critical at this time. As Mr. Simpson testified at trial, whether Colorado is in compliance with the Compact “depends on which version of the H-I Model you use to make that determination.” RT 216 at 109. Both states must be able to determine whether Colorado is in compliance with the Compact in order...
The Honorable Arthur L. Littleworth  
March 30, 2005  
Page 2

to minimize further conflict. That is not possible without knowing what version of the H-I Model will be used to measure Colorado compliance.

You recommended, and the Court approved, Colorado's proposal for Compact compliance accounting. That proposal requires that: (1) the accounting period will begin with calendar year 1997, (2) the model will be updated annually in the spring of the following year, (3) depletions or accretions will be determined annually and carried forward for 10 years, (4) in the 11th year Colorado will make up any depletions accrued at the end of that 10-year period, (5) the process will continue each year on a 10-year moving basis, and (6) the analysis will "be done using the version of the model approved at the conclusion of this trial segment." Fourth Report 116-118. In order to implement the ordered compliance accounting, there must, of course, be a "version of the model approved at the conclusion of this trial segment." Resolving the issues listed in our Schedule of March 11, 2005 will allow an unambiguous determination of that "version of the model."

Moreover, adoption of a specific version of the H-I Model is essential for implementation of the Colorado Use Rules. Rule 3.4, as quoted in Kansas' March 21 letter, requires that the HJM as defined in Rule 2.d "or such other method approved by the Special Master, the United States Supreme Court, or the Arkansas River Compact Administration" be used to determine depletions to usable flows. Thus, the Rules require a definite determination in this proceeding of the specific version of the H-I Model to be utilized.

There are two general levels at which the H-I Model can be documented. The first and imperative level of documentation is to put the H-I Model, with all of its input and output files and related pre- and post-processing programs, on a DVD and include it in the decree, along with a narrative description, as was done in the Republican case. The narrative description would explain, for instance, what is on the DVD, identifying the data for the input files and the sources of that data, and indicating which files are to be updated yearly. The H-I Model embodies legal interpretations of the Compact that have been made during these proceedings and is therefore an essential part of the decree. Based on our experts' experience with the same process on the Republican River, we estimate that one to two months would be required to put this kind of documentation together. This is the level of model documentation recommended by Kansas in this case.

A second general level of documentation would be an operator's manual that would provide instructions for updating and running the model. The parties in the Republican case did not include this level of documentation in the decree, and Kansas is not recommending this level of detail for the decree in this case. Even this level of documentation would not necessarily involve the "mathematical concepts and equations" to which Colorado refers. In any event, an operator's manual can be developed after entry of the decree.
The Honorable Arthur L. Littleworth  
March 30, 2005  
Page 3

Specifying the version of the model adopted by the decree in this case does not preclude changes to improve the model in the future. Just as in the Republican case, post-decree improvements in the model are possible. In fact, a series of changes to the RRCA Groundwater Model was adopted on January 12, 2005, by the Republican River Compact Administration without the need to resort to the available post-decree dispute resolution procedures. The same would be possible here. There is no “short-circuit[ing] of the process of expert discussion and negotiation of future issues and improvements,” as Mr. Robbins alleges. There simply needs to be a starting point for that process.

Under the rubric of “model documentation,” Colorado seeks to introduce its “daily flow model” as the answer to eliminating diversion reduction factors and low want factors. Yet you allowed Colorado every opportunity at trial to eliminate diversion reduction factors and low want factors from the H-I Model, and Mr. Schroeder failed in his efforts to do so. Colorado indicates that you overruled Kansas’ objection to the introduction of the daily flow model. The immediate effect of your ruling, actually, was to exclude the daily flow model from being presented at that time. You also indicated an intention, however, to reassess the situation when Colorado had completed presentation of its evidence. See Order re Colorado Daily Flow Model (May 13, 2002). However, Colorado later indicated that it would not be presenting the daily flow model. RT Vol. 256 at 97, lines 21-23. And, indeed, it was not presented. At the conclusion of trial, Colorado rested without qualification. RT Vol. 270 at 164. Thus, the daily flow model was not presented and is not a part of this case. If Colorado decides to put forward the daily flow model in the future, that would be an issue to be decided under the procedures adopted to decide such post-decree issues. In any event, the daily flow model proposal would need to be reformulated by Colorado to include its effect on the 10-year accounting procedure adopted by the Court. Any improvement in modeling worth considering would be expected to shorten the 10-year accounting period.

As stated in our March 21 letter, the decree should contain a detailed and precise procedure for adopting improvements to the model. But after nearly 15 years of litigation, you and the Court have decided that a version of the H-I Model will be approved at the end of this trial segment. That version of the H-I Model is the best tool we have to determine whether Colorado is in compliance with the Compact. Failure to approve a specific version of the H-I Model would be contrary to your ruling and the decision of the Supreme Court. Further, the resulting uncertainty would undoubtedly make it easier to continue this litigation.

In sum, Colorado proposed, you recommended to the Supreme Court, and the Supreme Court approved, that “the analysis [of whether Colorado is in compliance with the Compact] would be done using the version of the model approved at the conclusion of this trial segment.” It is essential that the approved version of the H-I Model be documented in the decree in order to have a definite standard for measuring Compact compliance.
The Honorable Arthur L. Littleworth  
March 30, 2005  
Page 4

FINALITY OF H-I MODEL RESULTS FOR 1997-2004

Colorado opposes “locking in” model results for 1997-2004. It is not surprising that the defendant State opposes being “locked in” to a standard of compliance and to definite, final results for the years 1997-2004, but Colorado’s position must be rejected. There needs to be a definite version of the model and definite results for 1997-2004.

For the reasons set forth in our letter of March 21, 2005, Kansas believes that these results should be finalized and not subject to future changes. There is no motivation for either state to work hard to resolve the listed issues if it is going to result in indefinite H-I Model results for 1997 through 2004. Finalizing the results for 1997 through 2004 will not decrease motivation for the experts to continue discussions to resolve future issues and use those improvements prospectively. As noted above, the use of the 10-year accounting procedure based on the H-I Model has been settled. Your approval of Colorado’s 10-year running total test addressed any deficiencies the H-I Model might have if it is run for a period of less than 10 years. If H-I Model accuracy improves in the future, the 10-year test will need to be simultaneously revisited because the two issues are directly linked. There will always be the need for better data, improvements to the model and the accounting procedures, and that should be done in accordance with the procedures set forth in the decree, as it is done in the Republican River case.

CONCLUSION

For the reasons set forth above, and in our letter of March 21, 2005, Kansas requests that you direct the States to work together to prepare a final decree, and that the decree include a DVD containing the H-I Model, with all of its inputs and outputs through 2004, together with a description of what is on the DVD and identifying data and data sources for the model similar to that included in the Republican decree by Colorado, Kansas and Nebraska. Further, Kansas asks that you confirm that the results to be obtained for 1997-2004 through the process outlined in the Schedule will be final and not subject to later revision.

Respectfully submitted,

John B. Draper

JBD:dlo

cc: David W. Robbins, Esq. (by telecopy and U.S. Mail)  
Lee Rolfs, Esq.
Dear Mr. Littleworth:

The States have agreed to submit to you simultaneous responses to each other’s letter to you of March 21, 2005, addressing three issues on which your guidance is requested. This letter provides Kansas’ response.

**DECREE DRAFTING**

Kansas requests, along with Colorado, guidance from you as to whether you would like the States to work on a draft decree for your consideration, as the States have proposed, and, if so, what should be included in the draft decree.

**MODEL DOCUMENTATION**

In Kansas’ view, documentation of the H-I Model is not only useful, but essential, for the reasons set forth in our letter of March 21, and those set forth below. Adoption of a specific version of the H-I Model, subject to revision in the future, is critical at this time. As Mr. Simpson testified at trial, whether Colorado is in compliance with the Compact “depends on which version of the H-I Model you use to make that determination.” RT 216 at 109. Both states must be able to determine whether Colorado is in compliance with the Compact in order...
to minimize further conflict. That is not possible without knowing what version of the H-I Model
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accounting. That proposal requires that: (1) the accounting period will begin with calendar year
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will continue each year on a 10-year moving basis, and (6) the analysis will “be done using the
version of the model approved at the conclusion of this trial segment.” Fourth Report 116-118.
In order to implement the ordered compliance accounting, there must, of course, be a “version
of the model approved at the conclusion of this trial segment.” Resolving the issues listed in our
Schedule of March 11, 2005 will allow an unambiguous determination of that “version of the
model.”

Moreover, adoption of a specific version of the H-I Model is essential for implementation
of the Colorado Use Rules. Rule 3.4, as quoted in Kansas’ March 21 letter, requires that the
HIM as defined in Rule 2.d “or such other method approved by the Special Master, the United
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imperative level of documentation is to put the H-I Model, with all of its input and output files
and related pre- and post-processing programs, on a DVD and include it in the decree, along with
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explain, for instance, what is on the DVD, identifying the data for the input files and the sources
of that data, and indicating which files are to be updated yearly. The H-I Model embodies legal
interpretations of the Compact that have been made during these proceedings and is therefore an
essential part of the decree. Based on our experts’ experience with the same process on the
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documentation together. This is the level of model documentation recommended by Kansas in
this case.

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not include this level of documentation in the decree, and Kansas is not recommending this level
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As stated in our March 21 letter, the decree should contain a detailed and precise procedure for adopting improvements to the model. But after nearly 15 years of litigation, you and the Court have decided that a version of the H-I Model will be approved at the end of this trial segment. That version of the H-I Model is the best tool we have to determine whether Colorado is in compliance with the Compact. Failure to approve a specific version of the H-I Model would be contrary to your ruling and the decision of the Supreme Court. Further, the resulting uncertainty would undoubtedly make it easier to continue this litigation.

In sum, Colorado proposed, you recommended to the Supreme Court, and the Supreme Court approved, that "the analysis [of whether Colorado is in compliance with the Compact] would be done using the version of the model approved at the conclusion of this trial segment." It is essential that the approved version of the H-I Model be documented in the decree in order to have a definite standard for measuring Compact compliance.
The Honorable Arthur L. Littleworth  
March 30, 2005  
Page 4

FINALITY OF H-I MODEL RESULTS FOR 1997-2004

Colorado opposes “locking in” model results for 1997-2004. It is not surprising that the defendant State opposes being “locked in” to a standard of compliance and to definite, final results for the years 1997-2004, but Colorado’s position must be rejected. There needs to be a definite version of the model and definite results for 1997-2004.

For the reasons set forth in our letter of March 21, 2005, Kansas believes that these results should be finalized and not subject to future changes. There is no motivation for either state to work hard to resolve the listed issues if it is going to result in indefinite H-I Model results for 1997 through 2004. Finalizing the results for 1997 through 2004 will not decrease motivation for the experts to continue discussions to resolve future issues and use those improvements prospectively. As noted above, the use of the 10-year accounting procedure based on the H-I Model has been settled. Your approval of Colorado’s 10-year running total test addressed any deficiencies the H-I Model might have if it is run for a period of less than 10 years. If H-I Model accuracy improves in the future, the 10-year test will need to be simultaneously revisited because the two issues are directly linked. There will always be the need for better data, improvements to the model and the accounting procedures, and that should be done in accordance with the procedures set forth in the decree, as it is done in the Republican River case.

CONCLUSION

For the reasons set forth above, and in our letter of March 21, 2005, Kansas requests that you direct the States to work together to prepare a final decree, and that the decree include a DVD containing the H-I Model, with all of its inputs and outputs through 2004, together with a description of what is on the DVD and identifying data and data sources for the model similar to that included in the Republican decree by Colorado, Kansas and Nebraska. Further, Kansas asks that you confirm that the results to be obtained for 1997-2004 through the process outlined in the Schedule will be final and not subject to later revision.

Respectfully submitted,

John B. Draper

JBD:dlo

cc:  David W. Robbins, Esq. (by telecopy and U.S. Mail)  
Lee Rolfs, Esq.
March 28, 2005

Mr. Arthur L. Littleworth
Best, Best & Krieger
400 Mission Square Building
3750 University Avenue
P. O. Box 1028
Riverside, CA 92502

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

During the discussions on the schedule to resolve issues that remain after the Supreme Court’s opinion, there was a fourth issue on which the States had differing views, and we agreed to submit letters to you by March 28, 2005, on this issue and seek your guidance.

Kansas believes that the discussions between and among the experts and counsel in an effort to resolve the disputed technical issues should be considered settlement negotiations and that evidence of conduct and statements made in such negotiations should not be admissible in arbitration or proceedings before you or the Court under Federal Rule of Evidence 408.

In Colorado’s view, the discussions between and among the experts are not “compromise negotiations” under F.R.E. 408, but are court-ordered discussions between the experts in an effort to determine if agreement can be reached on certain remaining issues. Colorado believes strongly that the discussions are not for the purpose of offering to compromise disputed claims and therefore should not be considered “compromise negotiations” under F.R.E. 408. If these discussions are considered to be confidential, the States will not be able to advise you adequately on the progress of the discussions and whether the experts are attempting in good faith to discuss and resolve the issues, which will greatly limit your ability to supervise and encourage resolution of the issues.

Colorado agrees that it is possible during the discussions that a proposal could be made for the purpose of offering to compromise issues and that evidence of such offers should be inadmissible under F.R.E. 408. If that occurs, it should be the subject of a specific, limited
agreement covering only the specific settlement offer. However, to consider all discussions between and among the experts, whether counsel are present or not, as “compromise negotiations,” and therefore that all conduct and statements made in such discussions are not discloseable, would undercut the primary purpose of the expert discussions, which is to get the experts to fully discuss and attempt to resolve the technical issues. In Colorado’s view, the best hope for resolving technical issues is to invest the experts with the responsibility for discussing and trying to resolve the issues. In that respect, I see the meetings as similar to meetings of engineer advisors to certain compact commissions, which are not generally considered to be settlement negotiations and the results are reported to the commissions. While I understand Kansas’ reasons for wanting to consider such meetings “compromise negotiations,” I can also see the potential that making such discussions inadmissible will relieve the experts of any sense of responsibility for fully discussing the issues or trying to resolve them.

Colorado’s goal – and I understood this to be your goal as well – is to try to establish a process by which issues related to the H-I model can be resolved through expert discussions or, if necessary, arbitration. The reason for making offers to compromise a claim inadmissible is to encourage the compromise and settlement of disputes. However, the purpose of the expert discussions in this case is not to encourage compromise and settlement of disputes per se, but to get the experts to fully discuss the issues to determine if they can be resolved without the need for arbitration. In this situation, treating all conduct and statements made during the expert discussions, with or without counsel present, as inadmissible creates the potential that experts for one State or the other will not openly discuss their views on a particular issue and will use the discussions simply as informal discovery of the other State’s positions.

In this case, the experts have had some success resolving technical issues; but, there have also been instances where experts have not disclosed their views for litigation strategy reasons. I understand the reasons for not wanting the experts to fully disclose their views to the other side unless and until they are required to do so; but, I believe we need to establish a new process here, one that will have a strong likelihood of avoiding further litigation before the Court. To that end, I believe the States need to move away from the pre-trial litigation model and toward a process that places greater responsibility on the experts to discuss and try to resolve issues. Therefore, Colorado does not believe that the discussions of the experts should be considered “compromise negotiations” under F.R.E. 408, and Colorado accepts that the conduct and statements of its experts in such discussions will be discloseable to you or in arbitration when and if appropriate.

Very truly yours,

David W. Robbins

DWR/rmm
cc: John B. Draper, Esq.
    Attorney General John Suthers
    Jason R. Dunn, Deputy Attorney General
    Carol B. Angel, Assistant Attorney General
    Hal D. Simpson, Colorado State Engineer
The Honorable Arthur L. Littleworth
Special Master
Best Best & Krieger
400 Mission Square
3750 University Avenue, 3rd Floor
Riverside, California 92501

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

In accordance with our letter to you on March 21, 2005, I am submitting this letter to discuss Kansas’ views on the confidentiality and nonadmissibility of the discussions between and among experts and counsel contemplated by the Schedule submitted to you on March 11, 2005.

Kansas has proposed, and Colorado has objected to, Rule-408-of-Evidence-type confidentiality for expert and other discussions aimed at settling the issues listed on the Schedule.

Rule 17.2 of the Rules of the Supreme Court provides that the Federal Rules of Evidence may be taken as guides in original proceedings. Rule 408 of the Federal Rules of Evidence provides:

Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion
of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 408 was adopted for the primary reasons (1) that the “evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position,” and (2) “promotion of the public policy favoring the compromise and settlement of disputes.” Advisory Committee Notes (1972). See DirecTV, Inc. v. Puccinelli, 224 F.R.D. 677, 685-87 (D. Kansas, 2004); Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980-82 (6th Cir. 2003).

Kansas believes that making confidential and inadmissible the settlement discussions between and among experts and counsel contemplated by the Schedule will facilitate settlement of those issues. In Kansas’ experience, the ability of experts and attorneys to have a free exchange of ideas in a settlement setting increases the likelihood of settlement. This experience is consistent with the wisdom embodied in Rule 408. This procedure worked well during the successful Republican settlement negotiations. There, Colorado and the other parties agreed to confidentiality. Those negotiations involved the same Kansas experts who are involved in this case. Colorado’s position in this case, on the other hand, seems contrary to the purpose behind Rule 408 and to Colorado and Kansas’ successful experience on the Republican.

Kansas requests that the Special Master direct that settlement discussions related to the Schedule issues between and among experts and counsel be held confidential and not admissible in any later arbitration or other proceeding.

Respectfully submitted,

John B. Draper

JBD:dlo

cc: David W. Robbins, Esq. (by telecopy and U.S. Mail)
Lee Rolfs, Esq.
The Honorable Arthur L. Littleworth  
Special Master  
Best Best & Krieger  
400 Mission Square  
3750 University Avenue, 3rd Floor  
Riverside, California 92501  

Re:  Kansas v. Colorado, No. 105, Original  
U.S. Supreme Court  

Dear Mr. Littleworth:

In accordance with our letter to you on March 21, 2005, I am submitting this letter to discuss Kansas’ views on the confidentiality and nonadmissibility of the discussions between and among experts and counsel contemplated by the Schedule submitted to you on March 11, 2005.

Kansas has proposed, and Colorado has objected to, Rule-408-of-Evidence-type confidentiality for expert and other discussions aimed at settling the issues listed on the Schedule.

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The Honorable Arthur L.兰开斯特
March 28, 2005
Page 2

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Kansas believes that making confidential and inadmissible the settlement discussions between and among experts and counsel contemplated by the Schedule will facilitate settlement of those issues. In Kansas’ experience, the ability of experts and attorneys to have a free exchange of ideas in a settlement setting increases the likelihood of settlement. This experience is consistent with the wisdom embodied in Rule 408. This procedure worked well during the successful Republican settlement negotiations. There, Colorado and the other parties agreed to confidentiality. Those negotiations involved the same Kansas experts who are involved in this case. Colorado’s position in this case, on the other hand, seems contrary to the purpose behind Rule 408 and to Colorado and Kansas’ successful experience on the Republican.

Kansas requests that the Special Master direct that settlement discussions related to the Schedule issues between and among experts and counsel be held confidential and not admissible in any later arbitration or other proceeding.

Respectfully submitted,

John B. Draper

cc: David W. Robbins, Esq. (by telecopy and U.S. Mail)
Lee Rolfs, Esq.
The Honorable Arthur L. Littleworth  
Special Master  
Best Best & Krieger  
400 Mission Square  
3750 University Avenue, 3rd Floor  
Riverside, California 92501  

Re: Kansas v. Colorado, No. 105, Original  
U.S. Supreme Court  

Dear Mr. Littleworth:  

In accordance with our proposal to you of March 11, 2005, I am submitting this letter to discuss Kansas’ views on three issues that the States were not able to resolve in preparing the Schedule to Resolve Issues That Remain After the Supreme Court’s Opinion provided to you on March 11, 2005 (“Schedule”).  

MODEL DOCUMENTATION  

This issue is noted on page 6 of the Schedule in paragraph (b)16. Kansas proposes that model documentation be addressed as part of the Decree, allowing two months for completion.  

It is axiomatic that a decree that requires a defendant to undertake certain conduct must describe that conduct with enough specificity to allow the defendant to know what is required. In this case, the conduct to be required is compliance with the Arkansas River Compact with respect to the effects of post-Compact well pumping. The standard of compliance that has been developed through the efforts of both States, the Special Master and Court will be the version of the H-I Model approved in the most recent trial phase by the Special Master, together with the resolution of the outstanding issues specified in the Schedule.  

Article IV-D of the Compact requires that the waters of the Arkansas River not be materially depleted in usable quantity or availability for use. That principle has been translated into a quantifiable Colorado obligation by the H-I Model. The Court now needs to adopt a decree.
that includes an injunction specifying Colorado’s obligations based on the H-1 Model. Certain issues remain to be decided by agreement or by arbitration. Once the scheduled issues are settled, the Model can be recalibrated and the results determined for the years 1997-2004. The H-1 Model needs to be included in the Decree so that there is a clear standard of conduct that constitutes compliance with the Compact. Such a standard will protect not only Kansas, but also Colorado.

Rule 17.2 of the Rules of the Supreme Court provides that the Federal Rules of Civil Procedure may be taken as guides in original proceedings. Rule 65(d) of the Federal Rules of Civil Procedure provides:

“Every order granting an injunction . . . shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .”

The Supreme Court has described the rationale for this rule. Referring to the danger of “a decree too vague to be understood,” the Court stated, “Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.” Gunn v. University Comm. to End the War in Vietnam, 399 U.S. 383, 389 (1970). The H-1 Model should be included in the decree in this case for the same reason and to provide adequate direction as to what is required.


The Supreme Court has approved your Fourth Report in this case, which states, “Both states are bound, at least for now, to use the model to determine whether or not there are compact shortages at the Stateline.” Fourth Report 121. Model documentation is the only way to implement your earlier rulings and the general principle that a standard of conduct needs to be specified in the Decree. This process is logically the final step in resolving model issues for purposes of the Decree. In Kansas v. Nebraska and Colorado, No. 126 Original, concerning the Republican River Compact, the finalization of the model and the documentation of the model took six and a half months altogether. See id., Final Settlement Stipulation, dated December 15, 2002, Vol. 1, § IV.C.7, at 20 (deadline to agree on RRCA groundwater model by July 1, 2003). As exhibited to the Special Master and counsel for Colorado at the status conference of February 4,
2005, the Republican River model was essential to completion of that case and was documented in the Final Report of the Special Master With Certificate of Adoption of RRCA Groundwater Model 6-52, App. A (RRCA Model DVD) and Apps. B-U. See RT Vol. 271 at 108. As in the Republican Decree, the Decree in this case should include procedures by which the documented version of the Model can be updated and improved in the future.

It was suggested by Colorado at the recent status conference that whether the Model is specifically identified in the Decree would be dependent upon whether there is “agreement of the States to include the disk.” RT Vol. 271 at 109. This position cannot be correct. Whether a standard of compliance is included in the Decree is not dependent upon whether Colorado agrees to it. Although the States agreed to include a DVD in the Decree in the Republican case, agreement by the parties to the terms of an injunction is not essential. What is essential is specification of the standard of conduct required by the injunction. While it is hoped that the remaining issues on the Model can be resolved by agreement, those issues will be resolved as part of finalization of the Decree according to the process proposed in the Schedule.

**STATUS OF H-I MODEL RESULTS FOR 1997-2004**

At the status conference, you indicated that your preference was that the H-I Model be updated through 2004. See RT Vol. 271 at 96-97. As a result, the States have proposed to resolve a list of issues in the Schedule that would produce quantitative results for the period 1997-2004. The States are proceeding on as fast a schedule as possible to resolve the 1997-2004 issues, in accordance with your directions. See Rt Vol. 271 at 98. It follows that, when the tasks in the Schedule are achieved, those results will be the final results for 1997-2004.

Colorado apparently does not agree and asserts that the 1997-2004 results should be subject to modification in the future. This would change the procedures that have been followed in this case throughout and would result in a great waste of resources. The States should not pay arbitrators to resolve disputes over the quantification of annual compliance in the years 1997-2004 if the quantification of compliance in those same years can be resubmitted to the same dispute resolution procedure at a later time. In other words, the suggestion by Colorado that the modeling results are only interim would mean that all of the determinations through the process outlined in the Schedule might be for naught. If this is Colorado’s proposal, it brings into question the whole rationale for the schedule, which Colorado has jointly proposed with Kansas.

This is not to say that improvements cannot be made in the Model after the Decree is entered, pursuant to procedures specified in the Decree. However, if improvements are adopted, those improvements should only apply to the time period then in question. It would not be appropriate to go back to 2004 and earlier years and recalculate those results at the request of our State. If this were appropriate, it would have been done in this case every time improvements were made. This has not been done, and it should not be done as we go forward. It would set
SCOPE OF THE DECREE

The States have suggested in the Schedule, at p. 7, ¶(g)3, that, if the Special Master believes it would be helpful, the States might work together to develop a proposed form of decree. Mr. Montgomery suggested that it would be helpful for each State to describe what should be included in a decree.

Kansas believes that the scope of the Decree should be broad enough to cover all issues relating to post-Compact well pumping in Colorado. In particular, the central part of the Decree should be the standard for compact compliance. This should be complemented by sections addressing the determination of Compact compliance, the documentation of the H-I Model code, inputs and outputs, together with pre- and post-processing to quantify Compact compliance. Reporting of data and other matters should be specified with respect to scope and timing. There should be a section on the retention of jurisdiction in accordance with the Special Master’s determination in the Fourth Report. A dispute resolution procedure should be included to minimize the need to come back to the Supreme Court. The Colorado Use Rules and Measurement Rules should be included in appendices, and it should be required that those rules may not be relaxed without agreement of the States or as determined through the dispute resolution mechanisms. The annual schedule for determining Compact compliance should be specified, and procedures for handling delivery shortfalls should be clearly spelled out.

With regard to inclusion of a specific version of the H-I Model, with its code, inputs and outputs, the following points should be noted in addition to what has been said above under Model Documentation. The Supreme Court has agreed with you that the H-I Model is, at least for the time being, the standard for compliance. 125 S.Ct., at 532. The Colorado Use Rules rely on the H-I Model. Rule 3.4 states:

“...The state and division engineers shall use the Kansas Hydrologic-Institutional Model (HIM) and the Durbin usable flow method with the Larson coefficients, or such other method approved by the Special Master, the United States Supreme Court, or the Arkansas River Compact Administration to determine depletions to usable Stateline flow caused by post-compact groundwater diversions for irrigation use.” Kan. Exh. 1123, reprinted in the Fourth Report, at App. 42.

As Colorado has pointed out, this language does not specify which version of the H-I Model is intended. See e.g., RT Vol. 215 at 124-126 (“Special Master: So if you were to run the H.I. Model today, would it show you’re in compliance? [Mr. Simpson]: I think it depends on which...”)
version of the H.I. Model that we would use"). The fact that different versions of the H-I Model give different results is also shown in Colo. Exh. 1411, Table 6c (comparing original H-I Model results for 1950-85 of 328.5 thousand acre-feet with the results of the “Revised Papadopulous/Spronk Model” of 586.4 thousand acre-feet for the same period). Further, specifying the exact version of the H-I Model in the Decree will minimize the chance of future disputes. It is essential that the yearly quantification of H-I Model results contemplated by the Special Master’s 10-year compliance period accounting be capable of unambiguous calculation. Otherwise, there will be initial disputes every year on what the results are, regardless of any changes that might be proposed by one of the States.

Kansas believes that the Decree should include procedures by which the H-I Model can be improved as time goes on. The Republican River settlement includes such procedures, and they have already been used to modify of the RRCA Groundwater Model adopted in the Republican Decree. See RT. 271 at 93.

We believe the foregoing is a general listing of issues that need to be considered in the process of drafting a jointly proposed decree for the Special Master’s consideration. Much detail would need to be added.

CONCLUSION

Kansas respectfully requests that the Special Master direct that model documentation be undertaken as laid out in the Schedule, that the H-I Model results for the years 1997-2004, once determined, be considered final, and that the scope of the Decree be generally as proposed above.

As to one further matter, counsel for Kansas and Colorado have agreed that we need your determination with respect to the confidentiality and nonadmissibility of the discussions between and among experts and counsel in an effort to resolve the disputed issues by negotiation. In order to present this issue for your consideration, we propose that we address it in letters to you one week hence, on March 28, 2005.

Respectfully submitted,

[Signature]

John B. Draper

JBD:dlo

cc: David W. Robbins, Esq. (by telecopy and U.S. Mail)
    Lee Rolfs, Esq.
March 21, 2005

Mr. Arthur L. Littleworth
Best, Best & Krieger
400 Mission Square Building
3750 University Avenue
P. O. Box 1028
Riverside, CA 92502

Re: Kansas v. Colorado, No. 105 Original

Dear Mr. Littleworth:

After lengthy discussions, Kansas and Colorado reached agreement on a schedule to resolve certain issues that remain after the Supreme Court’s opinion. Although I would have preferred a shorter schedule, I was ultimately convinced that the experts would need six months to review back-up documentation, meet to try to resolve issues, re-calibrate the model, and address new issues for the 2000-2004 update to the model. However, there were four issues on which the States had differing views, and it was agreed that we would submit letters to you within 10 days on our respective views to seek your direction as to three of the issues, and that we would address the fourth issue by next Monday, the 28th.

1. Proposed Decree. Kansas suggested that while the experts are working to resolve the remaining issues specified in the schedule, the attorneys would work on drafting a proposed judgment/decree. I was not certain that you wanted the States to prepare a proposed judgment/decree and thought it was better to seek your guidance on this issue. Moreover, from the discussions, it was apparent that Kansas and Colorado have different views on what a proposed decree should contain. Therefore, it was agreed to seek your direction on whether you want the States to try to draft a proposed decree, and if so, to seek your thoughts on what should be covered in the draft decree. The disagreement regarding the final decree concerns the H-I model and model documentation. Mr. Draper believes – as he stated at the status conference – that the decree should specify a particular version of the H-I model that will be used as the standard for Compact compliance, which can be attached to the decree in a CD, and that the decree should include detailed model documentation, similar to what was done in the Republican River litigation. Colorado believes that this case is different, in part because it is not based on a settlement, but also because you have written several reports that address the model and many
modeling issues. Therefore, I was not convinced that you would find it helpful for the States to submit a draft decree, particularly a decree containing detailed model documentation. If, however, you would like the States to try to agree on a proposed decree, it would be helpful if you provided direction on what the decree should contain. This issue is further discussed below.

2. Model documentation. Kansas proposed that the schedule include development of model documentation (see paragraph (b) 16 on page 6 of the schedule), to be completed three months after the schedule for resolving the other listed issues but prior to entry of the final decree in this case. Colorado agrees that development of model documentation would be useful, but did not agree that model documentation could be completed within the schedule proposed by Kansas or that it was necessary to include model documentation in the final decree.

While Colorado agrees that model documentation would be useful, I find it somewhat surprising that Kansas, having failed to produce model documentation during the pendency of this case, now thinks it can be produced in a few months. As noted in your Fourth Report, one Colorado expert in hydrologic modeling (Dr. Thomas Maddock) testified to the lack of documentation of the assumptions used in the model and the difficulty for an outsider to run the model on the basis of the model code. Fourth Report at 128. He recommended that documentation be developed so that other experts could understand and run the model, particularly if anything were to happen to the existing experts who are currently operating the model. However, Colorado’s experts estimate that development of model documentation would take 10-12 months, assuming they were not engaged full-time in trying to resolve the other remaining issues.

The difference in opinion on the time required to document the model may in part reflect a difference in what documentation is required. Dr. Maddock recommended documentation of the assumptions in the model code, which, as you may recall, consists of thousands of lines of computer code that goes on for many pages and that only a computer modeling expert can decipher. The model documentation in the Republican River litigation, at least as I understand it, simply described the ground water model used (i.e., MODFLOW), the modules used, the calibration targets, and a description of the inputs to the model and how they are to be determined. Independent documentation of MODFLOW or the modules was unnecessary because the U.S. Geologic Survey has published documentation for MODFLOW and the various modules that can be used with the main MODFLOW program. Thus, there already existed documentation of the assumptions that are used in MODFLOW, the mathematical concepts and equations used in the program, and the operation of the model. It is this basic documentation that is what is lacking with the H-I model. The H-I model is not based upon a vigorously documented, peer reviewed model. Mr. Schroeder did develop documentation for updating the H-I model, describing the data sets that are used to update the H-I model, such as irrigated acreage and pumping files. Colo. Exh. 1065. But that is not documentation for the computer code used in the model or the assumptions used to simulate streamflow, the priority system, reservoir storage and releases, consumption of surface and ground water, etc. I felt strongly that model documentation should not delay the expert efforts to resolve the remaining issues listed in the schedule, particularly given your statement that three months ought to be adequate for the experts to resolve the remaining issues.
Mr. Draper believes, as he stated at the February 4 status conference, that the decree in this case should specify a specific version of the H-I model as the “standard” for model compliance, to be attached to the decree in a CD, and that the decree should contain model documentation similar to the decree in the Republican River litigation. Colorado does not see the need to specify a specific version of the H-I model as the “standard” for Compact compliance in the final decree, since the model will in all likelihood continue to be improved in the future. Nor does Colorado see the need for model documentation in the final decree, since the documentation is also likely to change as improvements are made. During the course of this litigation, a specific version of the model was not determined to be the “standard” for Compact compliance. Instead, you found that implementation of Colorado’s Use Rules, and replacement water provided thereunder, brought Colorado into compliance with the Compact for the period 1997-99 based on the results of the latest Kansas version of the model, Fourth Report, Section III, and page 137, ¶ 4, and that it was unnecessary to resolve the remaining issues to make that finding. Id. at 24-32, 121-23. You also noted that all experts agreed that continued improvements need to be made to the model to increase its reliability, id. at 123, and you recommended that the States try to resolve remaining and future issues through expert negotiation and, if necessary, binding arbitration. Id. at 136. You also recommended that the Court retain continuing jurisdiction in this case for a limited period. Id. at 135-36. The U.S. Supreme Court accepted all of your recommendations and strongly endorsed your approach to bring an end to the litigation. While Colorado supports the goal of developing a model that all experts agree is appropriate and reliable, we have not reached that point yet, as you noted in the Fourth Report. Id. at 121-23. Recognizing your expressed desire to bring this matter to a conclusion, Colorado agreed that certain issues were not appropriate for resolution in the time frame you suggested and we are concerned that Kansas is attempting to short-circuit the process of expert discussion and negotiation of future issues and improvements by trying to establish that the latest version of the model as the “standard” for Compact compliance.

Colorado agrees that the experts should work together to try to resolve the remaining issues. But Colorado’s experts have also criticized the use of diversion reduction factors and low WANT factors to calibrate the model. In the last trial segment, Colorado proposed to introduce a new version of the H-I model (the Colorado Daily Flow Model) that was calibrated without using diversion reduction factors or low WANT factors. Kansas objected to the introduction of the model as rebuttal evidence, and you overruled that objection; but Kansas also insisted that it would need at least six months to review the model and prepare to respond. See Order re Colorado Daily Flow Model (May 13, 2002). To avoid significant delay in completing the trial, Colorado agreed not to present the Colorado Daily Flow Model during the last trial segment. And, because of your desire to resolve the issues that remained from the last trial segment within a relatively short period of time, Colorado agreed that the Colorado Daily Flow Model was not an issue that should be addressed in the schedule leading to the final decree. However, Colorado continues to want a model that its experts agree is appropriately calibrated and wants to be sure that there is a process for resolving future issues regarding improvements to the model. Colorado has expressed its willingness to agree to binding arbitration of future disputes, and you have recommended that the Court retain jurisdiction for a limited period if there are issues that cannot be resolved. In Colorado’s view, your Fourth Report contains clear direction on how Compact compliance should be determined and how disputes regarding the model should be
resolved. As a result, Colorado does not see the need to attach a copy of the model to the decree or a need for model documentation prior to the entry of the final decree.

3. **Model Results for 1997-2004.** Kansas believes that one purpose for the schedule is to determine final modeling results for the period 1997-2004, regardless of the outcome of any other issues that will not be resolved by the schedule. I recognize the benefit of having a final determination of modeling results for 1997-2004, as we did for 1995-1996. But Colorado agreed not to include some issues in the schedule so that the States could resolve the remaining issues in the six-month schedule. Although Colorado’s experts have consistently criticized the use of diversion reduction factors and low WANT factors to calibrate the model, Colorado is willing to proceed in a step-by-step process to address modeling issues, provided Kansas will agree to a process to address the remaining concerns of Colorado’s experts, which is what Colorado understood you had recommended and the Supreme Court had strongly endorsed. Colorado’s concern is that Kansas’ proposal will undercut expert discussion and agreement as a means of resolving modeling issues by “locking in” model results for 1997-2004 and specifying that version of the model as the “standard” for Compact compliance. In Colorado’s view, the experts need to be given both the opportunity and responsibility for trying to resolve technical modeling issues. Locking in specific modeling results for the period 1997-2004 and specifying that version of the model is to be the version that will be used for the initial ten-year period and the future could encourage Kansas to refuse to discuss Colorado’s other issues, which is contrary to the goal of creating a process to resolve modeling issues by a means other than litigation. To create such a process, Colorado believes that it is important that the States agree to invest the experts with responsibility for resolving modeling issues and establishing an arbitration process in the event they cannot reach agreement.

4. **Nature of Expert Negotiations.** We have agreed with Mr. Draper to separately address the nature or characterization of the expert negotiations on March 28th.

In conclusion, while the States reached agreement on the schedule to resolve certain issues that remain, we were not in agreement on whether you wanted the States to prepare a proposed decree or what the decree should contain. Rather than continue to debate these issues, it was agreed that we would submit our respective views and obtain your direction.

Thank you for your consideration.

Very truly yours,

David W. Robbins

DWR/rmm

cc: Attorney General John Suthers
Jason Dunn/Carol B. Angel
Hal D. Simpson
John B. Draper, Esq.
March 11, 2005

Re: Kansas v. Colorado, No. 105, Original U.S. Supreme Court

Dear Mr. Littleworth:

Please find enclosed the States’ Jointly Proposed Schedule to Resolve Issues that Remain After the Supreme Court’s Opinion. The States have agreed on all but three points, model documentation (see (b), p. 6), whether one result of the scheduled process will be to determine final, or just interim, H-I Model results for the period 1997-2004 (see (e), p. 6) and the scope of the decree (see (g), p. 7). The States propose to submit letters to you within ten days addressing their respective positions.

In summary, the enclosed schedule proposes a period of six months within which to complete recalibration of the H-I Model and quantification of H-I Model results for 1997-2004. Several other matters are scheduled to follow shortly thereafter, depending on your determinations and approval.

Sincerely yours,

John B. Draper

cc: (by telecopy and U.S. Mail)
David W. Robbins, Esq.
Lee Rolfs, Esq.
MESSAGE:

Please see attached letter of today's date.

cc: David W. Robbins - 303-296-2388
    Lee Rolfs - 785-368-6668
March 7, 2005

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

On behalf of Colorado and Kansas I would like to request that we be allowed an extra week to provide the schedule for resolution of pending issues. We have been conferring, and we would expect to have a proposal ready by this Friday, March 11.

Thank you very much for your consideration.

Sincerely yours,

John B. Draper

cc: (by telecopy and U.S. Mail)
David W. Robbins, Esq.
Lee Rolfs, Esq.
The Honorable Arthur L. Littleworth  
Special Master  
Best Best & Krieger  
400 Mission Square  
3750 University Avenue, 3rd Floor  
Riverside, California 92501

Re:   Kansas v. Colorado, No. 105, Original  
U.S. Supreme Court

Dear Mr. Littleworth:

Please find enclosed the States’ Jointly Proposed Schedule to Resolve Issues that Remain After the Supreme Court’s Opinion. The States have agreed on all but three points, model documentation (see (b), p. 6), whether one result of the scheduled process will be to determine final, or just interim, H-I Model results for the period 1997-2004 (see (e), p. 6) and the scope of the decree (see (g), p. 7). The States propose to submit letters to you within ten days addressing their respective positions.

In summary, the enclosed schedule proposes a period of six months within which to complete recalibration of the H-I Model and quantification of H-I Model results for 1997-2004. Several other matters are scheduled to follow shortly thereafter, depending on your determinations and approval.

Sincerely yours,

John B. Draper

JBD:dlo

cc:  (by telecopy and U.S. Mail)  
David W. Robbins, Esq.  
Lee Rolfs, Esq.
Jointly Proposed
Schedule to Resolve Issues That Remain After the Supreme Court’s Opinion
As of March 11, 2005
All time periods run from March 11, 2005, except as noted.

(a) Calculation of Damages

1. Colorado will report by the end of April on whether there is agreement on the damages calculation in 2005 dollars and the proposed method for updating the amounts and how Colorado intends to pay damages.

(b) Potential Issues Outlined in the Fourth Report (pp. 122-23) and any New Issues

1. Phase 2 of the USGS study.
   a. The USGS is expected to issue a final report in April. At that time the Colorado State Engineer will determine whether any modification is necessary to the Amended Measurement Rules based on the final report. Colorado will notify Kansas within 2 months after the final report is issued of the Colorado State Engineer’s determination. If Kansas disagrees with the Colorado State Engineer’s determination, Kansas will provide its recommendation and comments within 2 months after the notification by Colorado. The Colorado State Engineer and the Kansas Chief Engineer shall then meet to discuss the differences within 1 month after receipt of the recommendation and comments by Kansas.
   b. Time to complete: 1 month after meeting of the Engineers.

2. Results of Colorado’s completed verification program on wells and irrigated acreage.
   a. Initial contact has occurred. Colorado is providing backup information.
   b. Initial meeting: 2 months.
   c. Time to complete: 4 months.

3. Commencement of the five-year cycle for updating Colorado’s irrigated acreage study.
   a. Colorado will provide a memo, data and model input sets to Kansas by March 31.
4. Proposed changes in the satellite imagery system used by Colorado.
   a. Colorado will provide a memo, data and model input sets to Kansas by March 31.
   b. Initial meeting: 2 months.
   c. Time to complete: 4 months.

5. Kansas' claim that more data need to be collected on the distribution of surface water.
   a. The States agree that this issue will not be addressed before entry of the Decree.

6. Further investigation of the amount of return flow intercepted by the Amity Canal from the Fort Lyon service area.
   a. The States agree that this issue will not be addressed before entry of the Decree.

7. Further investigation of the amount of return flow intercepted by the Buffalo Canal from the Amity service area.
   a. The States agree that this issue will not be addressed before entry of the Decree.

8. Any improvements in the calculation of ungaged tributary inflow.
   a. Colorado will provide comparative H-I Model calibration runs and other backup: 1 month.
   b. Initial meeting: 2 months.
   c. Time to complete: 5 months.

9. Whether any new studies support adjustments to PET values for salinity management or otherwise.
   a. The States agree that this issue will not be addressed before entry of the Decree.
10. Proper representation in the model of the various Replacement Plan water sources.
   a. Initial meeting: Already held.
   b. Time to complete: 6 months.

11. Mr. Schroeder’s proposed model change on the calculation of model demand.
   a. Initial meeting: Already held.
   b. Time to complete: 3 months.

12. Various model calibration issues:
   a. Use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir for use in the model and whether recalibration is required.
      1. Colorado to provide proposal within 2 weeks.
      2. Initial meeting: 1 month.
      3. Time to complete: 3 months, subject to review of Colorado’s proposal.
   b. Correcting the irrigated acreages of the Lamar/Manvel and X-Y ditches and whether recalibration of the model is required.
      1. Initial meeting: Already held.
      2. Time to complete: 1 month.
   c. Whether the unit response functions for the Fort Lyon Canal, the Fort Lyon Storage Canal, and the Holbrook Canal should be revised.
      1. Initial meeting: Already held.
      2. Time to complete: 2 months.
   d. Whether any changes should be made to the observed diversion records used for calibration of the model.
      1. Initial meeting: 1 month.
      2. Time to complete: 3 months.
e. Other issues that might affect calibration of the model.

1. Initial meeting on calibration methodology: 1 month.
2. Time to complete: 2 months.
3. Time to complete recalibration: 6 months.

13. Other Issues

a. Treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water.

1. Initial meeting: Already held.
2. Time to complete: 2 months.

b. The States’ experts are reviewing whether a change should be made to the way the Lamar power plant deliveries are represented in the model.

1. Initial meeting: Already completed.
2. Time to complete: 2 months.

c. Replacement credit issues for 1997-1999, 2000-2004 and in the future:

1. The States’ experts are discussing replacement credit issues that may not be resolved by pending Water Court proceedings, such as certain Highland Canal and Fountain Creek issues.

   a. Initial meeting: 1 month.
   b. Time to complete: 6 months.

2. Quantification of special waters, including monitoring, verification and reporting.

   a. Colorado to provide backup data: 2 weeks.
   b. Initial meeting: 1 month.
   c. Time to complete: 6 months.

3. The States’ experts are meeting to discuss improvements in monitoring and documentation of dry-up and feedback from
Kansas, as well as terms and conditions for monitoring subirrigation.

a. Initial meeting: 3 months.

b. Time to complete: 6 months.

d. The States' experts are reviewing the acreage and want factors for the Sisson-Stubbs credit dry-up

1. Experts to summarize facts: 1 month.

2. Initial meeting of attorneys re legal issues: 2 months.

3. Time to complete: 3 months.

e. Representation of winter water bookovers in the model is under discussion by the States' experts.

1. Initial meeting: 1 month.

2. Time to complete: 2 months.

f. Colorado will provide Kansas a proposal on the representation of Graham alternate points of diversion.

1. Colorado to provide proposal to Kansas: 1 month.

2. Initial meeting: 2 months.

3. Time to complete: 5 months, subject to review of Colorado's proposal.

14. Credits for Offset Account deliveries to the Stateline, evaporation loss from the Offset Account after the evaporation is charged to Kansas, and return flow obligations.

a. Initial meeting: 2 months.

b. Time to complete: 4 months.

15. The States' experts are considering how releases of Stateline return flows associated with LAWMA's Section II transfers to the Offset Account and transit losses on such return flows should be represented in the model or, in the alternative, how they should be accounted for outside the model.

a. Initial meeting: 2 months.
b. Time to complete: 4 months.

16. Model Documentation [Colorado proposes to delete this from the schedule.]
   a. Initial meeting: 7 months.
   b. Time to complete: 9 months.
   c. The States will submit letters to the Special Master on their respective views on this point within ten days.

17. Limitation on Accumulation of Credits
   a. Kansas to provide Colorado with proposal: 3 months
   b. Initial meeting: 4 months.
   c. Time to complete: 6 months, subject to review of Kansas’ proposal.

(c) Status of Colorado Water Court Proceedings
   1. Kansas to provide comments to Colorado: 3 months, subject to review of the applicants’ engineering reports and proposed decrees.

(d) Status of the H-I Model, Taking Into Account Recommendations In the Fourth Report, to Which Exceptions Were Not Taken
   1. Colorado to provide 2004 data input files: 2 weeks.
   2. Initial meeting: 2 months.
   3. Time to complete: 6 months.

(e) The Current Results of the 10-Year Accounting Procedure Approved By the Court
   Kansas believes that one purpose of the foregoing schedule is to determine final modeling results for the period 1997-2004. Colorado believes that the goal of this schedule is to determine the current results of the HI model for the period 1997-2004, subject to the issues that will not be resolved by this schedule. The States will submit letters to the Special Master on their respective views on this point within ten days.

(f) How Issues Should Be Addressed
   1. The States’ experts will do their best to resolve the foregoing issues within the schedule provided.
2. Any issues which cannot be so resolved shall be submitted to the State/Chief Engineers who will meet in a final attempt to resolve the issues by negotiation.

3. Unresolved issues will go to arbitration. Counsel for the States should discuss the nature of the arbitration (binding or non-binding), the selection of an arbitrator or arbitrators, and the rules to govern arbitration. Issues not appropriate for binding arbitration should be identified.

4. The States will provide the Special Master with monthly progress reports.

(g) Judgment: Timing and preparation

1. Final damages amounts are being reviewed as discussed in (a) above. Kansas is reviewing cost issues and will make a proposal to Colorado by March 31, 2005.

2. Whether a judgment for damages separate from a decree for future compliance should be proposed is being discussed by the States.

3. If the Special Master would find it helpful, while the experts are working to resolve the remaining issues specified in the above schedule, the attorneys will work on drafting the judgment/decree according to the following schedule or as otherwise directed by the Special Master. Kansas will provide an initial draft to Colorado in 3 months. Colorado will review and counsel for the States will meet within 30 days thereafter. Colorado will determine the amount of time required to respond to the Kansas initial draft after receipt of the Kansas draft.

The States may have differing views on what the decree should include. They will address this issue in the letters to be submitted in ten days.

Time to complete: 8 months, or as otherwise determined by the Special Master.
The Honorable Arthur L. Littleworth  
Special Master  
Best Best & Krieger  
400 Mission Square  
3750 University Avenue, 3rd Floor  
Riverside, California 92501

Re:  Kansas v. Colorado, No. 105, Original  
U.S. Supreme Court

Dear Mr. Littleworth:

I was surprised yesterday to see Mr. Robbins’ letter of February 1 because it purports to describe matters that were discussed in a telephone conference that I considered confidential settlement negotiations. It was also surprising because it contains argument beyond the scope of your Order of January 24. This reply to Mr. Robbins’ letter will not discuss Mr. Robbins’ oral statements because to do so would also constitute a violation of the confidentiality of settlement discussions between counsel.

Mr. Robbins has misunderstood the Kansas position and interfered needlessly with the ongoing discussion of the remaining issues between the parties. The Kansas position is that negotiation, mediation, arbitration and Special Master resolution are all potentially available to resolve pending issues.

It is also the Kansas position that a definite version of the H-I Model must be incorporated into the decree. A standard of Compact compliance must be ordered by the Court, for the protection of both States. A standard of compliance has been included in all prior interstate Supreme Court water decrees, and this case is no different. See, e.g., Texas v. New Mexico, 485 U.S. 1201 (1988); Oklahoma v. New Mexico, 510 U.S. 126 (1993). Your 11th Recommendation states as follows:
“That the Court approve my conclusions found in Section X of this Report accepting Colorado’s proposal to use the results of the H-I model over a ten-year period to measure compact compliance, and to make up any depletions as testified to by the Colorado State Engineer.” Fourth Report 139.

In the section of the Report referred to, you state in reference to the application of the ten-year accounting period, “The analysis would be done using the version of the model approved at the conclusion of this trial segment. Id., at 117-118. You also confirmed this later in the Report: “Both states are bound, at least for now, to the use of the model to determine whether or not there are compact shortages at the Stateline.” Id., at 121. Further, in confirming your recommendations, the Court stated: “The Special Master has recommended use of the model together with a ten-year measurement period to determine the amounts of any future depletions.” Kansas v. Colorado, 125 S. Ct. 526, 536 (2004) (emphasis added). Therefore, exactly what “the model” consists of must be set out in the decree.

Colorado also makes several assertions that Kansas rejects because they are largely outside the scope of your Order and because they are incorrect. For instance, they confuse resolution of issues prior to entry of a decree with those that arise after the entry of a decree.

The Colorado assertion that Kansas is providing little or no feedback is unfair. You should know that Colorado has only been providing modeling information since Kansas specifically requested it in November, and some of it is still unavailable. Also, the settlement conference calls between the States were proposed by Kansas.

Going far beyond the scope of your Order, Colorado also claims that water was lost through evaporation because Kansas did not call from the Offset Account during 2003. Colorado cites a specific amount of evaporation, but neglects to mention that even Colorado’s own preliminary calculations show that the unreplaced depletions of usable flow during the four years 2000-2003 are greater than 20,000 acre-feet. Also, Colorado did not specify how much of the alleged Offset Account evaporation occurred after responsibility was transferred to Kansas or how much of such water would have been delivered to the Stateline had it been called for under the drought conditions in 2003. The agreement setting up the Offset Account was motivated and justified in large part by its giving Kansas the ability to call for water whenever it wanted to do so. Kansas water officials call for water when it is of most benefit to Kansas water users. In return, Colorado receives full credit for water delivered to the Stateline, without deductions for usability.

Finally, in order to be clear, any other assertion by Colorado in Mr. Robbins’ letter should be considered opposed by Kansas.
The Honorable Arthur L. Littleworth  
February 3, 2005  
Page 3

Sincerely yours,

John B. Draper

JBD:dlo

cc:  David W. Robbins, Esq. (by telecopy & U.S. Mail)  
Lee Rolfs, Esq.
FAX TRANSMITTAL

DATE: February 3, 2005  TIME: 3:16 pm  NO. PAGES (INCLUDING COVER) 4

TO: Hon. Arthur L. Littleworth  FAX: (951) 686-3083  PHONE: 

FROM: JOHN B. DRAPER  (505) 986-2525

HANDLING INSTRUCTIONS: Urgent
Call when received
Original to be mailed

MESSAGE:

Please see attached letter of today’s date

cc: David W. Robbins - 303-296-2388

This fax is being sent from (505) 982-4289

CLIENT NAME: CLIENT NUMBER:

THE INFORMATION CONTAINED IN THIS FACSIMILE TRANSMITTAL IS INTENDED FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENT. THIS TRANSMITTAL MAY BE CONFIDENTIAL OR PRIVILEGED. IF YOU ARE NOT THE INTENDED RECIPIENT OR AN AGENT RESPONSIBLE FOR DELIVERY TO THE INTENDED RECIPIENT, BE AWARE THAT ANY REVIEW, DISCLOSURE, COPYING OR DISTRIBUTION OF THIS TRANSMITTAL IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS TRANSMITTAL IN ERROR, PLEASE NOTIFY US BY TELEPHONE IMMEDIATELY SO WE CAN ARRANGE FOR RETRIEVAL AT NO COST TO YOU (COLLECT 505/982-3873). THANK YOU.
The Honorable Arthur L. Litleworth  
Special Master  
Best Best & Krieger  
400 Mission Square  
3750 University Avenue, 3 rd Floor  
Riverside, California 92501  

Re: Kansas v. Colorado, No. 105, Original  
U.S. Supreme Court  

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Mr. Robbins has misunderstood the Kansas position and interfered needlessly with the ongoing discussion of the remaining issues between the parties. The Kansas position is that negotiation, mediation, arbitration and Special Master resolution are all potentially available to resolve pending issues.  

It is also the Kansas position that a definite version of the H-I Model must be incorporated into the decree. A standard of Compact compliance must be ordered by the Court, for the protection of both States. A standard of compliance has been included in all prior interstate Supreme Court water decrees, and this case is no different. See, e.g., Texas v. New Mexico, 485 U.S. 1201 (1988); Oklahoma v. New Mexico, 510 U.S. 126 (1993). Your 11 th Recommendation states as follows:
The Honorable Arthur L. Littleworth  
February 3, 2005  
Page 2

"That the Court approve my conclusions found in Section X of this Report accepting Colorado’s proposal to use the results of the H-I model over a ten-year period to measure compact compliance, and to make up any depletions as testified to by the Colorado State Engineer.” Fourth Report 139.

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The Colorado assertion that Kansas is providing little or no feedback is unfair. You should know that Colorado has only been providing modeling information since Kansas specifically requested it in November, and some of it is still unavailable. Also, the settlement conference calls between the States were proposed by Kansas.

Going far beyond the scope of your Order, Colorado also claims that water was lost through evaporation because Kansas did not call from the Offset Account during 2003. Colorado cites a specific amount of evaporation, but neglects to mention that even Colorado’s own preliminary calculations show that the unreplaced depletions of usable flow during the four years 2000-2003 are greater than 20,000 acre-feet. Also, Colorado did not specify how much of the alleged Offset Account evaporation occurred after responsibility was transferred to Kansas or how much of such water would have been delivered to the Stateline had it been called for under the drought conditions in 2003. The agreement setting up the Offset Account was motivated and justified in large part by its giving Kansas the ability to call for water whenever it wanted to do so. Kansas water officials call for water when it is of most benefit to Kansas water users. In return, Colorado receives full credit for water delivered to the Stateline, without deductions for usability.

Finally, in order to be clear, any other assertion by Colorado in Mr. Robbins’ letter should be considered opposed by Kansas.
The Honorable Arthur L. Littleworth
February 3, 2005
Page 3

Sincerely yours,

John B. Draper

JBD:dl0

cc: David W. Robbins, Esq. (by telecopy & U.S. Mail)
Lee Rolfs, Esq.
The Honorable Arthur L. Littleworth
Special Master
Best Best & Krieger
400 Mission Square
3750 University Avenue, 3rd Floor
Riverside, California 92501

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

In accordance with your Order of January 24, 2005, I am submitting the attached Issues
That Remain After the Supreme Court’s Opinion, which has been agreed to by both States.

Best regards –

Sincerely yours,

John B. Draper

JBD:dlo
enclosure

cc: (w/ encl. by telecopy/email/ U.S. Mail)
David W. Robbins, Esq.
Lee Rolfs, Esq.
Issues That Remain After the Supreme Court’s Opinion

(a) Calculation of Damages

1. Kansas has provided spreadsheets updating damages calculations to 2005 dollars and a method for further updating the amounts to any day in 2005.

2. Colorado is reviewing the spreadsheets, backup information, and the proposed method for updating the amounts.

(b) Potential Issues Outlined in the Fourth Report (pp. 122-23) and any New Issues

1. Phase 2 of the USGS study.
   a. The USGS submitted a draft report for review in November 2004. At the request of Kansas, the time for comments was extended to the end of December 2004.
   b. Colorado and Kansas submitted comments on the draft report and have provided each other with their respective comments.

2. Results of Colorado’s completed verification program on wells and irrigated acreage.
   a. Colorado provided a memo with the results of the completed verification program and the verification data for 2000 through 2003. The State’s experts will meet once Kansas has reviewed the results.

3. Commencement of the five-year cycle for updating Colorado’s irrigated acreage study.
   a. Colorado’s memo describes the status of the Irrigated Acreage Update Project using satellite imagery for 2002 and 2003, which is expected to be completed in March 2005.
   b. The 2002 and 2003 input data sets will be updated to reflect any changes to fields based on the update and provided to Kansas.

4. Proposed changes in the satellite imagery system used by Colorado.
   a. Colorado was not able to acquire higher resolution satellite imagery, but was able to obtain imagery from 2002 and 2003. Colorado also obtained digital aerial photo base mapping for the entire study area, which was incorporated into Colorado’s GIS system and used to revise and update field boundaries. The project is expected to be completed in March 2005 and will be provided to Kansas.
5. Kansas' claim that more data need to be collected on the distribution of surface water.
   a. Nothing has been done to investigate Kansas' claim by either State. Kansas will review information submitted by well owners on the number of shares owned and determine whether production or collection of further data is needed.

6. Further investigation of the amount of return flow intercepted by the Amity Canal from the Fort Lyon service area.
   a. No further investigation has been undertaken since trial by either State. This issue will be addressed later as appropriate.

7. Further investigation of the amount of return flow intercepted by the Buffalo Canal from the Amity service area.
   a. No further investigation has been undertaken since trial by either State. This issue will be addressed later as appropriate.

8. Any improvements in the calculation of unaged tributary inflow.
   a. Colorado has requested that Kansas review the proposed changes by Dewayne Schroeder and Jim Slattery and provide their comments.

9. Whether any new studies support adjustments to PET values for salinity management or otherwise.
   a. There is an ongoing study of irrigation practices and salinity by Colorado State University; but, there is no current proposal to adjust PET values for management or salinity.
   b. The Colorado Water Conservation Board has entered into an agreement with Colorado State University to improve the CoAgMet network in the Arkansas River Valley.
   c. The Colorado Water Conservation Board is planning to enter into an agreement with CSU to install precision weighing lysimeters at the Rocky Ford Experiment Station to provide data to determine if adjustments are appropriate to use the Penman-Monteith equation in the Arkansas River Valley in Colorado and to develop crop coefficients for the Arkansas River Valley; however, the results that would support adjustments to PET values will not be available for several years and no adjustments are currently proposed. Kansas requested a copy of the drawings of the lysimeter design and setting. Colorado will provide when the drawings have been finalized. Site inspections by Kansas personnel are permitted and encouraged.
10. Proper representation in the model of the various Replacement Plan water sources.
   a. Colorado has provided Kansas a memo identifying issues regarding the representation of replacement plans, primarily for changes and new replacement sources introduced after 1999, and requested input from Kansas on how these should be represented in the model. These issues are also discussed under model calibration issues.

11. Mr. Schroeder’s proposed model change on the calculation of model demand.
   a. Colorado has requested that the Kansas experts review this change and provide their comments.

12. Various model calibration issues:
   a. Use of new Lamar and Holly electronic weather station data to develop PET values below John Martin Reservoir for use in the model and whether recalibration is required.
      1. Colorado is reviewing the data from the two new electronic weather stations at Lamar and Holly and expects to have the adjustment ratios completed by the end of January. These will be provided to Kansas for review.
   b. Correcting the irrigated acreages of the Lamar/Manvel and X-Y ditches and whether recalibration of the model is required.
      1. The acreages have been corrected; the experts need to determine whether recalibration is necessary.
   c. Whether the unit response functions for the Fort Lyon Canal, the Fort Lyon Storage Canal, and the Holbrook Canal should be revised.
      1. Colorado has requested that the Kansas experts review the changes proposed by Colorado and provide their comments.
   d. Whether any changes should be made to the observed diversion records used for calibration of the model.
      1. Colorado has asked the Kansas experts to review the changes to the observed diversion records for the years 1950-1994 that the Colorado Division of Water Resources has determined should be made and to advise whether they agree that such changes are appropriate and whether they agree with the specific changes recommended.
   e. Other issues that might affect calibration of the model.
1. Experts from both States are reviewing whether any disagreements exist on canal capacities, outliers and calibration period.

13. Other Issues

   a. Treatment of the conversion of shares in the Rocky Ford Canal to municipal use and exchanges of the Rocky Ford Canal water.

      1. Colorado has requested that Kansas review how the States had agreed the conversion of shares in the Rocky Ford Canal to municipal use would be represented in the model and whether the representation for 1997-99 was consistent with the prior agreement, whether additional information is needed to represent the conversion of the shares for 1997-99, and also provide a recommendation how the City of Aurora’s conversion of additional shares since 1999 should be handled.

      b. The States’ experts are reviewing whether a change should be made to the way the Lamar power plant deliveries are represented in the model.

   b. Replacement credit issues for 1997-1999, 2000-2004 and in the future:

      1. The States’ experts are discussing replacement credit issues that may not be resolved by pending Water Court proceedings, such as certain Highland Canal and Fountain Creek issues.

      2. Quantification of special waters, including monitoring, verification and reporting.

      3. The States’ experts are meeting to discuss improvements in monitoring and documentation of dry-up and feedback from Kansas, as well as terms and conditions for monitoring subirrigation.

   d. The States’ experts are reviewing the acreage and want factors for the Sisson-Stubbs credit dry-up.

   e. Representation of winter water bookovers in the model is under discussion by the States’ experts.

   f. Colorado will provide Kansas a proposal on the representation of Graham alternate points of diversion.

14. Credits for Offset Account deliveries to the Stateline and return flow obligations.

   a. Colorado presented a method to measure the spring 2004 Offset Account deliveries to the ARCA Operations Committee at its December 13, 2004
meeting. The Committee directed that both States be prepared to make a report at the April Operations Committee meeting.

15. The States’ experts are considering how releases of Stateline return flows associated with LAWMA’s Section II transfers to the Offset Account and transit losses on such return flows should be represented in the model or, in the alternative, how they should be accounted for outside the model.

(c) **Status of Colorado Water Court Proceedings**

1. LAWMA filed an amended application at the end of June 2004 to include its purchase of one-half of the Keesee water right.

2. A copy of the amended application and a list of the objectors in the case has been provided to Kansas.

3. AGUA has filed applications for approval of appropriative rights of exchange and to change water rights decreed to the Excelsior Ditch. Copies of the applications, engineering report, and list of objectors in the AGUA cases has been provided to Kansas.

(d) **Status of the H-I Model, Taking Into Account Recommendations In the Fourth Report, to Which Exceptions Were Not Taken**

1. Colorado has provided results of preliminary runs of the H-I model for 1997-2003, which include data files for 2000-2003 but do not include all of the changes that the Special Master recommended in his Fourth Report. The work on implementation of the specific recommendations is described above.

2. Data to update the model for 2004 are being collected. Colorado hopes to have this completed by March 15, 2005.

(e) **The Current Results of the 10-Year Accounting Procedure Approved By the Court**

1. Preliminary runs of the H-I Model for 1997-2003 have been made, but further updating of irrigated acreage and other matters described above remain to be done.

(f) **How Issues Should Be Addressed**

1. The States should continue to provide information and responses as outlined above.

2. The experts should meet and confer to try to resolve all remaining issues. Telephone conferences with counsel should be scheduled to monitor progress and discuss issues as necessary. To the extent the experts are unable to resolve the remaining issues, the experts should provide a description of the unresolved issue
and an explanation of their position and why they disagree with the position of the experts of the other State.

3. Counsel from each State, with experts or other officials as appropriate, should meet (in person or by telephone) in an effort to resolve any issue that the experts have been unable to resolve. If such conference does not resolve the issue, each State should identify a method to resolve the issue.

(g) **Judgment**

1. **Timing and preparation of a Judgment**
   
   a. Final damages amounts are being reviewed as discussed in (a) above. Kansas is reviewing cost issues and will make a proposal to Colorado.
   
   b. Whether a judgment for damages separate from a decree for future compliance should be proposed is being discussed by the States. There appears to be a disagreement regarding the scope of decree requirements and whether the H-I Model should be included in the decree provisions.
February 1, 2005

Arthur L. Littleworth
Best, Best & Krieger
400 Mission Square Building
3750 University Avenue, 3rd Floor
Riverside, CA 92501

Re:  Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

In your Order Re Status Conference, you directed that the States each file a brief statement of the issues which it believes now remain after the Supreme Court’s opinion on your Fourth Report, and how such issues should be addressed. To the extent that the States may be in agreement as to issues and how they should be handled, you directed that such agreement should be indicated.

On January 21 and January 26, the States held telephone conferences to discuss the issues that remain and how they should be addressed; a final telephone conference will occur on February 3. While we made progress in developing a list of issues that remain, which Mr. Draper transmitted to you earlier today, there is a fundamental difference between the States regarding how such issues should be handled. Until this disagreement is resolved, I see only limited progress likely in resolving the remaining issues. Therefore, I hope we can discuss this at the February 4 status conference.

During the telephone conference on January 26, Mr. Draper stated that Kansas believes that the final decree should include a version of the H-I model that would be the “definite standard” for Compact compliance and that to establish this “definite standard,” it will be necessary for you to resolve the remaining modeling issues prior to the entry of a final decree. Colorado does not agree that you intended to resolve remaining modeling issues prior to the
entry of a final decree. To the contrary, Colorado understood the final two recommendations in your Fourth Report as recommending that the case be remanded for the preparation of a final decree in accord with the Court’s prior Opinions and the recommendations in your Fourth Report (unless the Court directed otherwise), which decree would contain a retained jurisdiction provision as recommended on page 136 of your Fourth Report. In the meantime, Colorado understood your recommendation to be that the States should try to resolve any remaining issues through expert discussion, negotiation, and arbitration. That certainly appeared to be the Court’s interpretation of your recommendation when it denied Kansas’ exception to your decision not to make recommendations on the 15 disputed issues that Kansas wanted you to decide. As the Court said:

The Special Master also recommended that experts for the two parties confer, e.g., [Fourth Report] at 91-92, and he expressed the hope that expert discussion, negotiation, and if necessary binding arbitration, would lead to resolution of any remaining disputes. Id., at 135-136. We express that hope as well.

Slip op. at 17; see also id. at 4-6 (“Moreover, the need for a River Master is diminished by the fact that the parties may find it possible to resolve future technical disputes through arbitration. . . . The Special Master recommended both binding arbitration and these other less formal methods as alternatives, while opposing appointment of a River Master and observing that such an appointment would ‘simply’ make it ‘easier to continue this litigation.’”)

I would also point out that Kansas did not take an exception to your recommendation that no application to invoke the retained jurisdiction of the Court be accepted unless the dispute has first been taken to the Arkansas River Compact Administration. Fourth Report at 136. I viewed this recommendation as an important qualification to ensure that both States heeded your counsel that they have a greater appreciation for the Court’s admonition that litigation of these cases is a poor alternative to negotiation. Id.

Colorado is prepared to engage in all of the methods you have recommended to resolve remaining modeling issues, including binding arbitration; Kansas, however, has suggested that you should resolve the remaining disputed issues prior to entry of a final decree. In Colorado’s view, this is really just an attempt to reargue its exception to your Fourth Report, see Brief in Support of Kansas’ Exceptions to the Fourth Report of the Special Master 47 (“Without a decision on the 15 disputed issues, it is not possible to implement an ‘approved’ version of the Model or determine Compact compliance.”), which the Court denied. This difference has a very real effect on the conduct of expert discussions and negotiations.

Colorado continues to deliver information to Kansas regarding replacement plans and updates to the model, but has received little or no feedback from Kansas to date on whether it agrees or disagrees with Colorado’s information. Apparently, Kansas believes that resolution of disputed issues should occur by litigating these issues before you, as we have done in the past. Colorado has repeatedly expressed its preference for resolution of such issues by expert discussion, negotiation, and, if necessary, binding arbitration rather than continued litigation of the issues before you and the U.S. Supreme Court; however, so long as Kansas continues to
believe that you will resolve the remaining disputed modeling issues prior to the entry of a final decree, there appears to be limited hope of progress in resolving the issues by other means.

In your Order, you requested a statement of issues which each State believes now remain after the Supreme Court’s opinion on your Fourth Report. Kansas submitted a list of issues that remain after the Supreme Court’s Opinion that both States have agreed to. Colorado adds the following:

(a) Calculation of Damages.

The first recommendation in your Fourth Report was “[t]hat prejudgment interest be calculated as set forth in [your] Order dated December 2, 2002, and the final damage award be included in the decree.” Fourth Report, p. 137 ¶ 1. The States had previously agreed upon the amount of nominal damages for the years 1950-94 and the amount of future damages for 1950-1994 in 1998 dollars. Fourth Report App. 1, 8. Colorado had calculated the damages, including the adjustments for inflation and prejudgment interest, as $28,998,366 in 2002 dollars. Id. at 11-12. There was no disagreement about the calculation, only the meaning of the Supreme Court’s 2001 opinion. In accordance with your recommendation and the Court’s December 7, 2004 opinion, it will be necessary to adjust the nominal damages for 1950-1994 for inflation and prejudgment interest to the date of judgment. Therefore, that issue remains.

Kansas has recently provided spreadsheets to update the 1950-1994 damages and the future damages to 2005 dollars, and a method for further updating the amounts to any day in 2005. Colorado is reviewing the spreadsheets and the backup for the calculations and the method to update the amounts. Colorado believes that it will not be difficult to reach agreement on the amount in 2005 dollars or a method to update the amounts. Colorado therefore recommends that the States continue their efforts to resolve the amount of the final damages award and advise you in a reasonable time if they have reached agreement. If the States are unable to reach agreement, Colorado suggests that the States be ordered to provide statements of the disagreement and sufficient information to allow you to resolve the dispute and to include the final damage award in the decree.

(b) Potential IssuesOutlined in Your Fourth Report.

The discussions during the telephone conferences between the States did not specifically determine that any of the issues outlined in your Fourth Report are moot at this time, although it appears that some issues will not be matters in dispute during the initial 10-year period for Compact compliance because further investigation would require data collection that is unlikely to be completed within that time frame. Colorado believes that the States should be encouraged to make good-faith efforts to resolve remaining issues through expert discussion, negotiation, and if necessary arbitration. Colorado again expresses its willingness to agree to binding arbitration of any modeling disputes.

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LAWMA filed an amended application at the end of June 2004 to include one-half of the Keesee water rights it had purchased. The amended application is currently before the Water Referee. It is my understanding from Mr. David Harrison that an engineering report and draft decree are being finalized. Although no trial date has been set, LAWMA is required to complete the change of certain of its water rights by mid-2006, so I would expect the case to be re-referred to the Water Judge and a trial set for later this year or early next year if LAWMA and the objectors cannot agree to the terms of a proposed decree.


Colorado has provided Kansas with memoranda describing preliminary runs of the H-I model for 1997-2003. The backup files used in the preliminary runs were also provided to Kansas. Because there are additional changes to the model that will need to be implemented before the model is finalized, experts from both States will need to discuss changes to the model after the Kansas experts have reviewed the changes implemented by Colorado based on the recommendations in your Fourth Report.

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The preliminary runs for the H-I model made by Colorado for 1997-2003 showed a seven-year running total of depletions to usable Stateline flows; however, there was a significant amount of fully consumable water remaining in the Offset Account at the end of 2003. During 2003, the Colorado State Engineer determined that LAWMA had delivered 7,260 acre-feet of fully consumable water to the Offset Account but Kansas did not request a release of water from the Offset Account during 2003, which resulted in over 4,800 acre-feet of evaporation loss from the Offset Account during 2003. In March and April 2004, Kansas finally called for the release of all water from the Offset Account, although Kansas had been advised by the Colorado Division Engineer that conditions were unfavorable for the delivery of water at that time. Colorado calculated that over 7,400 acre-feet of fully consumable water was delivered to the Stateline that could be used as a credit against depletions to usable Stateline flows. For a variety of reasons Colorado believes that the preliminary results of the model for 1997-2003 overstate the amount of depletions to usable Stateline flows; however, because of the trend of depletions for the years 2000-2003 in the preliminary runs, Mr. Simpson has advised well users in the Arkansas River Valley in Colorado that deliveries to the Offset Account will have to be increased and/or the presumptive depletion percentages for supplemental wells will have to be increased for wells included in replacement plans approved for the 2005-06 plan year. This action is consistent with Mr. Simpson’s testimony that Colorado would have to make some adjustment in the event the model showed a trend of depletions. See Fourth Report at 118, 120.
We will look forward to our conference this Friday.

Very truly yours,

David W. Robbins

DWR/rmm

cc: John B. Draper, Esq.
    Jeffery Minear, Esq.
    Carol B. Angel, Esq.
FAX TRANSMITTAL

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<tr>
<th>NAME</th>
<th>COMPANY</th>
<th>FAX NUMBER</th>
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<tbody>
<tr>
<td>To:</td>
<td>Arthur L. Littleworth</td>
<td>(951) 686-3083</td>
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<tr>
<td>CC:</td>
<td>John B. Draper</td>
<td>(505) 982-4289</td>
</tr>
<tr>
<td>DATE:</td>
<td>February 1, 2005</td>
<td>TIME: 5:43 p.m. (MST)</td>
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<tr>
<td>FROM:</td>
<td>David W. Robbins, Esq.</td>
<td>HR Case #: 287</td>
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<tr>
<td>MESSAGE:</td>
<td>Transmitting letter re Kansas v. Colorado, No. 105 Original.</td>
<td>NUMBER OF PAGES: 6</td>
</tr>
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Hard Copy □ will ☑ will not follow in the mail.

Please Call 303.296.8100 if you do not receive all pages.

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Thank you.
February 1, 2005

Arthur L. Littleworth
Best, Best & Krieger
400 Mission Square Building
3750 University Avenue, 3rd Floor
Riverside, CA 92501

Re:  Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

In your Order Re Status Conference, you directed that the States each file a brief statement of the issues which it believes now remain after the Supreme Court's opinion on your Fourth Report, and how such issues should be addressed. To the extent that the States may be in agreement as to issues and how they should be handled, you directed that such agreement should be indicated.

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We will look forward to our conference this Friday.

Very truly yours,

David W. Robbins

DWR/rmm

cc: John B. Draper, Esq.
    Jeffery Minear, Esq.
    Carol B. Angel, Esq.
IN THE SUPREME COURT OF THE UNITED STATES

No. 105, Original

STATE OF KANSAS,

Plaintiff

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

BEFORE THE HONORABLE ARTHUR L. LITTLEWORTH
SPECIAL MASTER

ORDER RE STATUS CONFERENCE

It is hereby ordered:

1. That a status conference be held on February 4, 2005, at 9:30 a.m., in the United States District Court, 100 South Federal Place, Santa Fe, New Mexico.

2. That the States each file by February 1, 2005, a brief statement of the issues which it believes now remain after the Supreme Court’s opinion on my Fourth Report, and how such issues should be addressed. These statements may be in letter form, and should be filed by fax.
3. To the extent that the States may be in agreement as to issues and how they should be handled, such agreements should be indicated.

Dated: January 24, 2005.

Arthur L. Littleworth
Special Master
PROOF OF SERVICE BY FACSIMILE

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Best Best & Krieger LLP, 3750 University Avenue, P.O. Box 1028, Riverside, California 92502. On January 24, 2005, I served a copy of the within document(s): ORDER RE STATUS CONFERENCE

by telefaxing a copy thereof to the following individual(s) at the following facsimile number(s):

John Draper
Montgomery & Andrews
325 Paseo de Peralta
Santa Fe, New Mexico 87504-2307
Phone: (505) 982-3873
Fax: (505) 982-4289

David Robbins
Hill & Robbins
100 Blake Street Building
1441 Eighteenth Street
Denver, Colorado 80202
Phone: (303) 296-8100
Fax: (303) 296-2388

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 24, 2005, at Riverside, California.

Kay J. Bliss

RVPUBLALT687677.1
TELECOPIER TRANSMISSION

DATE: January 24, 2005

To:

<table>
<thead>
<tr>
<th>NAME</th>
<th>Fax No.</th>
<th>Phone No.</th>
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<tbody>
<tr>
<td>John Draper</td>
<td>(505) 982-4289</td>
<td>(505) 982-3873</td>
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<tr>
<td>David Robbins</td>
<td>(303) 296-2388</td>
<td>(303) 296-8100</td>
</tr>
</tbody>
</table>

FROM: Arthur L. Littleworth
Re: Kansas v. Colorado

FILE No.: 16086.00000 USER No.: 1000 NO. OF PAGES, INCLUDING COVER:

MESSAGE:

See attached Order re Status Conference

CAUTION - CONFIDENTIAL: THE DOCUMENT BEING TELECOPIED TO YOU MAY CONTAIN INFORMATION PROTECTED BY THE ATTORNEY-CLIENT/WORK PRODUCT PRIVILEGE. It is intended only for the person to whom it is addressed. If you are not the intended recipient or an authorized agent, then this is notice to you that dissemination, distribution or copying of this document is prohibited. If this was received in error, please call us at once and destroy the document.

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TELECOPIER TRANSMISSION

DATE: January 24, 2005

To:

Name | Fax No. | Phone No.
---|---|---
John Draper | (505) 982-4289 | (505) 982-3873
David Robbins | (303) 296-2388 | (303) 296-8100

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Mr. Arthur L Littleworth
Special Master
Best, Best & Krieger
3750 University Avenue
Mission Square Bldg., Suite 400
Riverside, CA 92501

Re: Kansas
v. Colorado
No. 105, ORIG.

Dear Mr. Littleworth:

The Court today entered the following order in the above-entitled case:

The motion of Special Master for interim fees and expenses is granted, and the Special Master is awarded a total of $10,060.80 for the period January 26, 2004 through November 16, 2004, to be paid equally by the parties.

Sincerely,

William K. Suter, Clerk

by
January 4, 2005

John B. Draper
Montgomery & Andrews
325 Paseo de Peralta
Santa Fe, NM 87501

Dear Mr. Draper:


I am in receipt of your letter of January 3, 2005, concerning the above-captioned case. I will query Justice Breyer about your suggestions when we prepare the case for publication in the United States Reports preliminary print.

Sincerely,

Frank D. Wagner
Reporter of Decisions

cc: Cynthia Rapp
David W. Robbins
Jeffrey P. Minear
Arthur L. Littleworth
January 12, 2005

VIA FACSIMILE AND U.S. MAIL

Mr. Frank Wagner
Reporter of Decisions
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Wagner:

I received a copy of a January 3, 2005 letter from Mr. John B. Draper, Esq. to you regarding certain “typographical and other formal errors” in the Court’s December 7, 2004 Slip Opinion in the above-referenced case. After conferring with Ms. Cynthia Rapp, I am submitting this response to Mr. Draper’s letter.

Although Mr. Draper has listed 27 suggested corrections, for the most part, the errors pointed out by Mr. Draper are very minor, and Colorado has no objection to the suggested corrections. However, Colorado does not agree with two of the suggested corrections.

19. Page 8, first full paragraph, last line.
   Suggested Correction: Replace “only some” with “none.”

   Colorado does not agree with the suggested change, which would imply that the Special Master did not calculate prejudgment interest on any damages. That is not correct. See first sentence in the same paragraph of the Slip Opinion, noting that “the Special Master, seeking to remain faithful to our determination, calculated prejudgment interest from 1985 onward, and calculated that interest on (post-1985) Late Damages alone, …” If a change is necessary to this sentence, I suggest simply deleting the phrase “then due.” That would eliminate the issue raised by Mr. Draper.
Suggested Correction: Replace “$53 million” with “$39 million.”

Colorado does not agree with the suggested change. There is no disagreement that the figure “$38 million” is in 1998 dollars and the figure “$53 million” is in 2002 dollars, but to replace “$53 million” with “$39 million” in this sentence would create a misleading impression in the context of the paragraph. If a correction is necessary, I suggest the following: “Were we to accept Kansas’ argument (and calculate post-1985 interest on all damages), the total damages awarded to Kansas, including prejudgment interest, would have increased to $39.4 million in 1998 dollars (despite the fact that we overruled Kansas’ exception and sustained Colorado’s exception), and would have grown to $53 million in 2002 dollars.” Thus, if the Court had accepted Kansas’ argument, the amount awarded in 1998 dollars would have increased, not decreased, even though the Court partially granted Colorado’s exception, but because prejudgment interest would have been calculated on all damages after 1985, the increase in prejudgment interest from 1998 to 2002 would grow significantly.

Thank you for considering our comments as well as Mr. Draper’s.

Very truly yours,

[Signature]

David W. Robbins

DWR/rmm

cc: (By Facsimile and U.S. Mail)
John B. Draper, Esq.
Jeffrey P. Minear, Esq.
Hon. Arthur L. Littleworth
Attorney General John Suthers
Cynthia Rapp
January 13, 2005

David W. Robbins
Hill & Robbins, P. C.
100 Blake Street Building
1441 Eighteenth Street
Denver, CO 80202-1256

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Sincerely,

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Reporter of Decisions

cc: Cynthia Rapp
    John B. Draper
    Jeffrey P. Minear
    Arthur L. Littleworth
Mr. Frank Wagner  
Reporter of Decisions  
Supreme Court of the United States  
1 First Street, N.E.  
Washington, D.C. 20543

Re:  *Kansas v. Colorado*, No. 105, Original  
U.S. Supreme Court

Dear Mr. Wagner:

I would like to bring to your attention certain typographical and other formal errors in the Slip Opinion issued December 7, 2004 in this case:

1. **Page 2, first sentence after block indent.** Suggested Correction: Replace “Kansas submitted that Colorado ‘development,’ in particular the drilling of new irrigation wells” with “Kansas submitted that Colorado ‘development,’ in particular increases in groundwater consumption through new and existing irrigation wells.” Reason: The drilling of new irrigation wells per se is not a violation of the Compact. Rather, it is the increased consumption of groundwater that occurred after the date of the Compact that caused the violation determined by the Court. This violation occurred through the use of both new irrigation wells and the improved or prolonged functioning of existing irrigation wells. See *Kansas v. Colorado*, 514 U.S. 673, 679-680, 689-691 (1995).

2. **Page 2, first full paragraph, third line.** Suggested Correction: Replace “overextracted” with “overdepleted.” Reason: As the Special Master recognized at the page cited, Second Report 112, it was the acre-feet of *depletions* that was important for determining Compact compliance. Thus, the 400,000 acre-feet number refers to depletions, not to the amount of water “overextracted” from
wells. The overpumping from wells would be considerably larger than 400,000 acre-feet because part of the water pumped returns to the river. See 2 First Report 233 (1994) (the H-I Model calculates “the amount of water consumed by crop evapotranspiration, and the amount of applied water returned to the river as surface runoff or recharged to the groundwater system”).


4. Page 2, fifth line from the bottom. Suggested Correction: Remove the parenthetical “(the date of the judgment).” Reason: No judgment has been entered in this case. The year 1994 was the latest year for which evidence was available at the time of the trial on the damages reviewed in the Court’s Opinion of June 11, 2001 in this case. See Third Report 1 (2000); Kansas v. Colorado, 533 U.S. 1 (2001).

5. Page 3, line 3. Suggested Correction: Replace “the” with “certain.” Reason: As the opinion acknowledges elsewhere, there are “lingering” issues that the Special Master has yet to decide. This is noted, for instance in the next paragraph of the Slip Opinion.


11. Page 6, last four lines on the page. Suggested Correction: For each period, change “between . . . and . . .” to “from . . . through.” Reason: The first and last years of each period are included within each period.


13. Page 6, second to last line. Suggested Correction: Move the phrase “when Kansas filed its complaint” to the next line, following “1985.” Reason: With the change in the previous line, this phrase needs to be moved to the next line to follow 1985, the year in which the complaint was filed.

14. Page 6, last line and Page 7, first line. Suggested Correction: Replace “when judgment was entered” with “the last year for which evidence was available at the time of the trial on damages.” Reason: Judgment has not yet been entered in this case.

15. Page 7, first full paragraph, line 1. Suggested Correction: Replace “appeal to” with “review by.” Reason: This case is in the original jurisdiction, not the appellate jurisdiction, of the Court.


19. Page 8, first full paragraph, last line. Suggested Correction: Replace “only some” with “none.” Reason: See first sentence in the same paragraph of the Slip Opinion, noting the Special Master’s calculation of prejudgment interest based on “completely exempting both Early Damages and Middle Damages from prejudgment interest.”

21. Page 10, line 4. Suggested Correction: Replace “$53 million” with “$39 million.” Reason: Just as two bank accounts could not be validly compared to determine the degree of their equivalency by comparing the amount in one account in 1998 with the amount in the other account in 2002, it is incorrect to compare damage amounts in 1998 dollars by one method with damages in 2002 dollars by another method to determine the degree of their equivalency. The $53 million figure is in 2002 dollars. It is erroneously compared to the $38 million figure in line 1, which is in 1998 dollars. The correct figure, $39 million, is shown at App. to Fourth Report 4 (2003). A copy of that page of the Fourth Report is attached to this letter and shows the exact number, $39,470,730, which rounds to $39 million.

In his Third Report, the Special Master, after balancing the equities, made a recommendation that would have resulted in Kansas’ receiving damages and interest, expressed in 1998 dollars, for Compact violations occurring prior to 1995, of $38 million. Slip Opinion 7. In 2001 the Court ruled that prejudgment interest would begin to accrue in 1985 rather than 1969. 533 U.S., at 13-16. In the Slip Opinion the Court accepts the Special Master’s interpretation of the Court’s 2001 decision, which results in the damages and interest for violations occurring prior to 1995 being reduced to $22 million, in 1998 dollars, a reduction of $16 million or about 43 percent. See App. to Fourth Report 4, 5, attached (the sum of (1) Colorado’s value for past damages, accepted by the Court, in 1998 dollars, $19,923,433, and (2) the undisputed value of future damages in 1998 dollars, $1,703,384, is $21,626,817 in 1998 dollars, which rounds to $22 million). Colorado’s $29 million figure is in 2002 dollars, as the Special Master makes clear. See id., at 11-12 (attached). Had the Court accepted Kansas’ method of calculating the prejudgment interest, the Special Master’s recommendation in his Third Report of $38 million, in 1998 dollars, would have been adjusted to approximately $39 million, in 1998 dollars, an increase of approximately $1 million or some 4 percent. The $39 million figure becomes $53 million in 2002 dollars.

22. Page 10, line 5. Change “12” to “4, 11-12.” Reason: The Special Master makes clear on the cited pages that the $52,879,927 ($53 million) is in 2002 dollars, whereas the $38 million is in 1998 dollars. Copies of pages 11 and 12 of the Fourth Report are attached with the cited numbers and years circled.

23. Page 10, lines 5-11: The Court may wish to revise or delete its characterization of the comparison of adjustments as “major” or “modest” based on a comparison of dollar figures that has been shown above to be erroneous.


27. Page 16, numbered paragraph 2 in the block indent, line 2. Suggested Correction: Add a first quotation mark for “Sisson-Stubbs credit.” Reason: This opens the quotation ending with “credit.”

Thank you very much for your consideration.

Sincerely yours,

[Signature]

John B. Draper
Counsel of Record
State of Kansas

JBD:dlo
Enclosures

cc: (w/encls.) (By telecopy and U.S. Mail)
David W. Robbins, Esq.
Jeffrey P. Minear, Esq.
Hon. Arthur L. Littleworth
Attorney General Phill Kline
Cynthia Rapp

M:\Attorneys\JBD\Kansas v. Colo\Letters\ltr-Frank Wagner.wpd
### Table D8. Summary of Kansas Damages

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**Note:** Dollar values for 2002 represent a date of January 1, 2002. Settlement after this date will require appropriate adjustment in interest charges.

**App. 4**

a: Values calculated using CPI shown in Table D5.
b: Values calculated using compound factors shown in Table D5.
c: Values calculated using compound factors shown in Table DSA.

NOTE: Dollar values for 2002 represent a date of January 1, 2002. Settlement after this date will require appropriate adjustment in interest charges.
Table F. Colorado’s estimate of money damages due to state line deletions from 1959 through 1984, expressed in both 1998 and 2002 dollars, including adjustments for inflation and prejudgment interest.

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Adjusting the sum of estimated damages to 2002 dollars results in the following estimate of damages: 26,665,048

Including the estimated future damages, also expressed in 2002 dollars, adds the following amount: 2,332,318

The sum of estimated historical and future damages, expressed in 2002 dollars is the following amount: 28,998,366

This table appears in Johnse8.wb2, Page Table D6, Cell BY 120. It was created on July 21, 2002 and is in the may2002 subdirectory.
reasonable people can – and do – disagree. After examining the equities for ourselves, however, a majority of the Court has decided that the later date is the more appropriate.” 533 U.S. 1 at 15.

The Court therefore overruled the states’ objections, except that Colorado’s objection was sustained “insofar as it challenges the award of interest for the years prior to 1985.” 533 U.S. 1 at 16.

ARGUMENTS OF THE STATES

First, it may be helpful to outline the matters on which the states agree. For damages caused by depletions occurring after 1985 when the action was filed, they agree that prejudgment interest is appropriate, at rates reflecting both inflation and lost investment opportunities. Moreover, they agree upon the specific amounts of such damages through 1994. They further acknowledge that under the Supreme Court decision, damages occurring before the action was filed, i.e., for the 1950-85 period, may not bear interest that reflects lost investment opportunities. This is a separate matter from an adjustment for inflation to which Colorado has always agreed. Remaining at issue, however, is the question of how the total amount of damages for the early 1950-85 period (adjusted for inflation) should be treated after 1985, and until entry of Judgment. Kansas maintains that such total, after 1985, should begin to bear full prejudgment interest, at rates including both inflation and lost investment opportunities. Colorado, while acknowledging the need to adjust for inflation, argues that such damages are exempt from any other prejudgment interest. Approximately 24 million dollars is dependent upon this decision. In 2002 dollars, the Kansas approach puts total damages for the 1950-94
Colorado's analysis leads to a total of $28,998,368.

It is Kansas' position that the Supreme Court's decision of June 11, 2001 "left open" the question of whether prejudgment interest should begin to accrue on all damages existing as of 1985, or only on the "additional damages" occurring after filing the suit in 1985. Kansas Brief at 4. Colorado, on the other hand, states that the only issue is whether the Supreme Court "intended to overrule" the Special Master's recommendation, citing from the Third Report:

"I thus recommend that actual damages for the period 1950-68 should be adjusted for inflation, but should not bear compound interest reflecting the loss of use of those monies." Colorado Brief at 2, 5, 9.

Colorado argues that the Supreme Court simply changed the Special Master's 1969 date to 1985. Colorado Brief at 10.

In connection with the argument before the Supreme Court on my Third Report, I directed the states to calculate what the total amount of damages would have been if the Court were to have accepted my recommendations in their entirety. The states were able to agree that the total amount of damages for the period 1950-94, adjusted to 1998 dollars and calculated on the basis of the Third Report, came to approximately 38 million dollars and this information was conveyed to the Court. The states received no direction on how to calculate these damages. The meaning of the Third Report in this respect lay with the two states.
January 7, 2005

The Honorable Arthur L. Littleworth
Special Master
Best Best & Krieger
400 Mission Square
3750 University Avenue, 3rd Floor
Riverside, California 92501

Re: Kansas v. Colorado, No. 105, Original
U.S. Supreme Court

Dear Mr. Littleworth:

Thank you for your letter of December 17, 2004. I have been in touch with Mr. Robbins and Mr. Montgomery regarding our responses, and I have seen David’s letter of this morning. We are in agreement that you, of course, should set the place of the status conference wherever it suits you best. This could range from a conference room at your law firm to the court in Pasadena, to Santa Fe or Denver. I would like to suggest that this might be a unique opportunity to have a status conference in Santa Fe. I know that David will be comfortable with any choice that you make, including Santa Fe.

I would suggest that we have a court reporter in order to have a clear record, and David has no objection. If we were to hold it in Santa Fe, Stephanie would likely be available since she now lives not far from Santa Fe.

As to the date, I would request that we look at Friday, February 4, 2005. My circumstances are such that January would be difficult, and February 4 is acceptable to David. Most important, of course, is that it be convenient for you.
As to the specification of the issues to be addressed, David and I have agreed that it would make most sense for us to confer and provide you, prior to the status conference, with our proposals, which would be joint to the maximum extent possible.

Best wishes for the new year –

Sincerely yours,

John B. Draper

cc: David W. Robbins, Esq. (by telecopy and U.S. Mail)
Re: Your Letter of December 17, 2004

Dear Mr. Littleworth:

In response to your letter, Colorado is amenable to a status conference during the month of January; however, after a conversation with John, I understand that it is John’s preference to have a conference during the first week in February. He suggested February 4th. That is similarly acceptable to us.

Colorado does not believe that a court reporter is necessary, but again I understand that John feels that one would be helpful, which is certainly allright with us as well. With regard to a conference location, we are willing to accommodate you and Mr. Draper. It strikes me that if a court reporter is to be used, it would probably be best to have a conference in California so that you can utilize the same reporting service you would have relied upon in the past, but if you would like to hold a conference in Denver or Santa Fe that would be fine.

I believe that Colorado and Kansas agree that a telephone conference or series of telephone conferences between us concerning the issues to be addressed would probably be helpful and we are prepared to conduct those with Kansas representatives in the coming weeks so that we can provide joint comments if possible. As a result, I will withhold any substantive comments on the matters outlined in your letter until we have had those conversations.
Please accept our best wishes for the coming year. I trust that Mr. Draper will confirm his position on the timing, location and court reporter issues with you by separate communication.

Very truly yours,

David W. Robbins

DWR/rmm

cc: John B. Draper, Esq. (via facsimile)
December 17, 2004

John Draper
Montgomery & Andrews
325 Paseo de Peralta
P. O. Box 2307
Santa Fe, New Mexico 87504-2307

David Robbins
Hill & Robbins
100 Blake Street Building
1441 Eighteenth Street
Denver, Colorado 80202

Re: Kansas v. Colorado, No. 105 Original

Gentlemen:

I would like to arrange for a status conference sometime in January to discuss what needs to be done in light of the Court's recent opinion. I doubt that we can do this over the phone, although we would not necessarily have to meet in the court in Pasadena. I would also like your thoughts on whether the conference needs to be reported. My thought, at the present, is that we would not need a court reporter. Stephanie has moved to New Mexico, but I think will still be available to us as needed.

There are, of course, a number of issues that need to be addressed:

(a) The calculation of damages, including inflation and pre-judgment interest through 1999, and a methodology for updating that amount.

(b) The potential issues outlined in my Fourth Report – whether some are moot as suggested by the Court – and how to handle those that may remain. And, indeed, any new issues that were not included in that forecast.

(c) Status of the Colorado Water Court proceedings.
(d) Status of the H-I model, taking into account the recommendations in my Fourth Report, to which exceptions were not taken.

(e) The current results of the 10 years accounting procedure approved by the Court (recognizing that the initial period has not yet run), and any differences which may exist. I understand that the accounting depends on whether substantial modeling issues still remain.

I expect that you may have other matters of concern, but in all of our discussions I want to consider the potential use of “expert discussion,” mediation and arbitration to address any “lingering issues.”

Finally, we need to talk about the timing and preparation of a judgment in the case.

Let me have your thoughts, and meanwhile enjoy the holidays.

Best regards,

Arthur L. Littleworth
Special Master

ALL:kjb
In response to your letter, Colorado is amenable to a status conference during the month of January; however, after a conversation with John, I understand that it is John’s preference to have a conference during the first week in February. He suggested February 4th. That is similarly acceptable to us.

Colorado does not believe that a court reporter is necessary, but again I understand that John feels that one would be helpful, which is certainly alright with us as well. With regard to a conference location, we are willing to accommodate you and Mr. Draper. It strikes me that if a court reporter is to be used, it would probably be best to have a conference in California so that you can utilize the same reporting service you would have relied upon in the past, but if you would like to hold a conference in Denver or Santa Fe that would be fine.

I believe that Colorado and Kansas agree that a telephone conference or series of telephone conferences between us concerning the issues to be addressed would probably be helpful and we are prepared to conduct those with Kansas representatives in the coming weeks so that we can provide joint comments if possible. As a result, I will withhold any substantive comments on the matters outlined in your letter until we have had those conversations.
Please accept our best wishes for the coming year. I trust that Mr. Draper will confirm his position on the timing, location and court reporter issues with you by separate communication.

Very truly yours,

David W. Robbins

DWR/rmm

cc: John B. Draper, Esq. (via facsimile)
SUPREME COURT OF THE UNITED STATES

Syllabus

KANSAS v. COLORADO

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 105, Orig. Argued October 4, 2004—Decided December 7, 2004

Kansas and Colorado entered into the Arkansas River Compact (Compact) in 1949, but disagreements over the equitable distribution of the river's upper waters persisted. In 1985, Kansas charged that Colorado had violated the Compact by drilling new irrigation wells that, in Compact Art. IV-D's words, "materially depleted" the river water otherwise available "for use" by Kansas' "water users." Accepting the recommendation set forth in the First Report of the Special Master to find that Colorado had unlawfully depleted the river in violation of Art. IV-D, this Court remanded the case for remedies. Kansas v. Colorado, 514 U.S. 673, 694 (Kansas I). In proposing remedies in his Second and Third Reports, the Master said that Colorado's Compact violation had occurred between 1950 and 1994; recommended that Colorado pay Kansas damages; divided the water losses into six categories, calculating damages somewhat differently for each; and urged that Kansas be awarded prejudgment interest on damages for losses incurred from 1969 through 1994 (the judgment's date). The Court subsequently adopted these recommendations with one exception: It held that prejudgment interest would run from 1985 (not 1969). Kansas v. Colorado, 533 U.S. 1, 15–16 (Kansas III). The Master has now filed a Fourth Report setting forth his resolution of the remaining issues. Kansas takes exception to several of his recommendations.

Held:

1. Kansas' request to appoint a River Master to decide various technical disputes related to decree enforcement is denied. This Court has appointed River Masters to help resolve States' water-related disputes only twice before, Texas v. New Mexico, 482 U.S. 124, and New Jersey v. New York, 347 U.S. 995, each time on the Special Master's recommendation, always as a discretionary matter,
and only when convinced that such an appointment would significantly aid resolution of further disputes, see Vermont v. New York, 417 U. S. 270, 275. The Court is not convinced that such an appointment is appropriate here. For one thing, further disputes in this case, while technical, may well require discretionary, policy-oriented decisionmaking directly and importantly related to the underlying legal issues. These potential disputes differ at least in degree from those that the Court has asked River Masters to resolve in past cases. See, e.g., Texas v. New Mexico, 482 U. S., at 134, 135–136. Administration of the present decree will involve the highly complex computer-run Hydrologic-Institutional Model (H-I Model or Model), and resolution of many modeling disputes may well call for highly judgmental determinations of matters that are more importantly related to the parties' basic legal claims. For another thing, the need for a River Master here is diminished by the fact that the parties may be able to resolve future technical disputes through binding arbitration under Compact Art. VII or through less formal dispute-resolution methods like joint consultation with experts, negotiation, and informal mediation. The Special Master recommended all of these alternatives, while opposing appointment of a River Master because it would "simply" make it "easier to continue this litigation." Fourth Report 136. Pp. 3–5.

2. Kansas' exception to the Special Master's prejudgment interest calculation is overruled. The calculation and Kansas' objection grow out of this litigation's special history. The Master initially calculated prejudgment interest on the basis of "considerations of fairness," Third Report 97, dividing the prejudgment period into three temporal subcategories: (1) an Early Period between 1950, when Colorado's unlawful water depletion began, and 1968, when Colorado should first have known about it; (2) a Middle Period between 1969 and 1985, when Kansas filed its complaint; and (3) a Late Period between 1985 and 1994, when judgment was entered, id., at 107. The Master adjusted damages from all three periods for inflation, but he awarded additional prejudgment interest only from 1969 to the judgment date, for a total damages award, including prejudgment interest, of $38 million. Ibid. The Kansas III Court accepted the Master's equitable approach, 533 U. S., at 11, but applied its own "considerations of fairness" in concluding that "prejudgment interest should begin to accrue" as of 1985, id., at 12–13, and n. 5. On remand, the Master therefore calculated prejudgment interest from 1985 onward on Late Damages alone. Kansas' argument that the Master should have calculated prejudgment interest (from 1985) on all damages—i.e., on Early, Middle, and Late Damages—would make good sense in an ordinary case. But the question here is not about the ordinary case,
but rather what Kansas III's prejudgment interest determination meant in that case's special context. For one thing, the Court there did not seek to provide compensation for all of Kansas' lost investment opportunities; rather, it sought to weigh the equities. For another, it was apparent that the Master's earlier determination involved both a decision about when to begin to calculate interest (1969) and what to calculate that interest upon (Middle and Late Damages only). Saying nothing about the Master's total exemption of Early Damages, id., at 14, the Court changed the when (from 1969 to 1985), but not the methodology for calculating the what. In context, the Court's silence fairly implies acceptance, not rejection, of the Master's underlying methodology, which now yields a post-1985 interest calculation based upon Late Damages only. This view is reinforced by the resulting numbers. Were the Court now to accept Kansas' argument, the final damages award would be roughly $53 million, not the $38 million originally calculated by the Master. The Court cannot reconcile that numerical result with its acceptance in Kansas III of the Master's equitable approach and with its own equitable determination, which implied a modest adjustment of the $38 million award in Colorado's favor, not, as Kansas now seeks, a major adjustment of the award in Kansas' favor.

Ibid. Pp. 6-10.

3. Kansas' exception to the Special Master's recommendation that the H-I Model be used with a 10-year measurement period to determine Colorado's future Compact compliance is overruled. Kansas seeks, in place of the 10-year period, a 1-year period. Kansas points to Compact Art. V-E(5), which says that there "shall be no allowance for accumulation of credits or debits for or against either State." Kansas argues that a 10-year period averages out oversupply and undersupply during the interim years, with the likely effect of awarding Colorado a "credit" in dry years for oversupply in wet years. Adding that Art. IV-D forbids Colorado to deplete the river water's "availability for use," Kansas says that the 10-year period effectively frees Colorado from the obligation to compensate Kansas for years (within the 10-year period) when overpumping may have made water "unavailable" for Kansas' use. Kansas also notes that the parties and the Master have heretofore used a 1-year measuring period in calculating past damages. The Court is not persuaded by these arguments. The Compact's literal words are not determinative. Its language essentially forbids offsetting debits with "credits," but it does not define the length of time over which a "credit" is measured. Any measurement period inevitably averages interim period flows just as it overlooks interim period lack of water "availability." At the same time, practical considerations favor the Master's approach. The Master found that Model results over measurement periods less than 10
years are highly inaccurate, but that the Model functioned with acceptable accuracy over longer periods of time. Moreover, Kansas is unlikely to suffer serious harm through use of a 10-year period because Colorado has developed a river water replacement plan to minimize depletions. Assuming, as Kansas argues, that the Compact's framers expected annual measurement with no carryover from year to year, those framers were likely unaware of the modern difficulties of complex computer modeling and, in any event, would have preferred accurate measurement. The fact that both parties earlier agreed to use annual measurement is not determinative here because that stipulation was made before the Master fully examined the model's accuracy. Pp. 10-14.

4. Also overruled is Kansas' exception to the Special Master's recommendation that the final amounts of water replacement plan credits to be applied toward Colorado's compact obligations be determined by the Colorado Water Court and appeals therefrom. Kansas argues that the Water Court is a state court, that Colorado cannot be its own judge in a dispute with a sister State, West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28, and that this Court must pass on every essential question, e.g., Oklahoma v. New Mexico, 501 U.S. 221, 241. Kansas' objection founders, however, upon additional language in the Master's full recommendation—and his attendant analysis—making clear that all replacement credits are subject to Kansas' right to seek relief under this Court's original jurisdiction; that Colorado's replacement plan rules affect the rights, not only of Kansas water users, but also of Colorado senior water users; that both groups have similar litigation incentives; and that permitting the Colorado Water Court initially to consider challenges to credit allocations will help prevent inconsistent determinations. The full recommendation will help avoid potential conflict and adequately preserves Kansas' rights to contest any adverse Water Court determination. Pp. 14-15.

5. Kansas' exception to the Special Master's finding that Colorado complied with the Compact between 1997 and 1999 is overruled. Kansas' objection rests on its claim that the Master cannot use an accounting period longer than one year. This Court has already found against Kansas on that matter. P. 15.

6. Kansas' exception to the Special Master's refusal to make recommendations on 15 disputed issues is overruled. As the Master found, there are good reasons not to decide these issues immediately. The issues in the second category, which involves challenges to the accuracy of the figures used to determine whether Colorado depleted the river between 1997 and 1999, are mostly moot. Moreover, the passage of time will produce more accurate resolution of disputes in the first and third categories (and any future second-category dis-
Syllabus

Kansas' exceptions overruled; Special Master's recommendations accepted; and case recommitted to Special Master.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined and in which STEVENS and THOMAS, JJ., joined except for Part II. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., filed an opinion concurring in part and dissenting in part.
JUSTICE BREYER delivered the opinion of the Court.

We again consider a long-running water dispute between Colorado and Kansas. The water is that of the Arkansas River, once proudly called the "Nile of America." The river originates high in the Rocky Mountains. It runs eastward through Colorado, Kansas, Oklahoma, and Arkansas, before joining the Mississippi near the town of Arkansas Post. For decades, Kansas and Colorado disagreed about the division of its upper waters. See Kansas v. Colorado, 206 U. S. 46 (1907); Colorado v. Kansas, 320 U. S. 383 (1943). In 1949, they entered into an interstate compact. See Arkansas River Compact (Compact), 63 Stat. 145. (agreeing to "[e]quitably divide and apportion" the waters (internal quotation marks omitted)). But the disagreements have persisted.

Present proceedings began in 1985, when Kansas charged that Colorado had violated the Compact. Kansas pointed out that Compact Art. IV–D says:

"This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations
thereof, which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: 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.” Id., at 147 (emphasis added and internal quotation marks omitted).


The Special Master set forth proposed remedies in his Second and Third Reports. He said that Colorado had overextracted more than 400,000 acre-feet of usable river flow between 1950 and 1994. Second Report 112. He recommended that Colorado pay Kansas monetary damages to make up for the depletions. Third Report 119. He divided losses into six categories, calculating damages somewhat differently in each category. See id., at 120. And he recommended that Kansas be awarded prejudgment interest on damages reflecting losses incurred from 1969 through 1994 (the date of the judgment). Id., at 107. We subsequently adopted the Special Master’s recommendations with one exception; we held prejudgment interest would run from 1985 (not 1969). Kansas v. Colorado, 533 U. S. 1, 15–16 (2001) (Kansas III). See infra, at
Opinion of the Court

6–8. And we remanded the case. 533 U. S., at 20.

The Master has now filed a Fourth Report setting forth his resolution of the remaining issues. Kansas takes exception to several of the Fourth Report's recommendations. We overrule Kansas' exceptions and adopt all of the Special Master's recommendations.

I

Kansas asked the Special Master to recommend that we appoint a River Master with authority to decide (within clear error limits) various technical disputes related to decree enforcement. See Texas v. New Mexico, 482 U. S. 124, 134 (1987) (appointing a River Master to "make the calculations provided for in [a] decree" concerning the Pecos River). The Special Master rejected Kansas' request, recommending instead that "the Court retain continuing jurisdiction in this case for a limited period of time" to permit the Special Master himself to resolve any lingering issues (subject, of course, to this Court's review). Fourth Report 135. Kansas here renews its request for appointment of a River Master.

We recognize that this Court has previously appointed a River Master to help resolve water-related disputes among States. Texas v. New Mexico, supra, at 134–135; New Jersey v. New York, 347 U. S. 995, 1002–1004 (1954). But it has done so only twice before, each time on recommendation of the Special Master, always as a discretionary matter, and only because it was convinced that such an appointment would significantly aid resolution of further disputes. See Vermont v. New York, 417 U. S. 270, 275 (1974) (per curiam) ("[I]t is a rare case" where we will install a River Master). We are not convinced that such an appointment is appropriate here.

For one thing, further disputes in this case, while technical, may well require discretionary, policy-oriented decisionmaking directly and importantly related to the
underlying legal issues. In this respect, potential disputes in this case differ at least in degree from those that we have asked River Masters to resolve. Implementation of the Pecos River Decree, for example, involved application of a largely noncontroversial mathematical curve. The curve correlates inflows at various New Mexico River locations with expected outflows so that engineers can estimate, for any given inflow, the amount of water likely available for Texas' use. See Texas v. New Mexico, 462 U.S. 554, 572–573 (1983); see also Texas v. New Mexico, 446 U.S. 540 (1980) (per curiam). Lingering disputes between Texas and New Mexico, we thought, would involve not the curve's shape but whether officials had properly measured the flows. 482 U.S., at 134–135. Although these disputes might call for a "degree of judgment," they would often prove capable of mechanical resolution and would usually involve marginal calculation adjustments. Id., at 134; see id., at 135–136; Fourth Report 128 (The Pecos River Master "does not adjudicate the kinds of disputes" potentially at issue here).

Administration of the decree in this case, by contrast, will involve not a simple curve but a highly complex computer model, the Hydrologic-Institutional Model (H–I Model or Model). The H–I Model seeks to determine just what the precise water flows into Kansas would have been had Colorado not dug new wells after 1949. See 2 First Report 231. Modeling disputes—and there have been many—involves not just measurement inputs, but basic assumptions underlying the model. See, e.g., Kansas I, 514 U.S., at 685–687; 2 First Report 237–240; Fourth Report 123–124. Their resolution may well call for highly judgmental decisionmaking about matters that (compared to the Pecos) are more importantly related to the parties' basic legal claims. See Fourth Report 128.

Moreover, the need for a River Master is diminished by the fact that the parties may find it possible to resolve
future technical disputes through arbitration. The interstate compact itself creates an Arkansas River Compact Administration (Administration) empowered to resolve differences arising under the Compact. Art. VIII, 63 Stat. 149. The Administration consists of three representatives from each State and a representative of the United States acting as chair. Art. VIII–C. Each State has one vote; the United States has no vote. Art. VIII–D. In case of an equally divided vote, the Administration (with the consent of both States) may refer a matter for resolution to the “Representative of the United States or other arbitrator or arbitrators.” Ibid. (internal quotation marks omitted). The arbitrator’s determinations are binding. Ibid.

At oral argument, counsel for Kansas suggested a willingness to use arbitration, noting that “in the one case [he was] aware of, Kansas’ suggestion of doing an arbitration was rejected by Colorado.” Tr. of Oral Arg. 17. Colorado’s counsel responded that Colorado had proposed “that binding arbitration be used and has committed itself to participate in that.” Id., at 26; see also Reply Brief of Colorado Opposing Exceptions 15. These comments suggest that neither party opposes arbitration, and indeed that Colorado would accept it. Nor have the parties expressed any opposition to the use of other less formal means to resolve disputes, such as joint consultation with experts, negotiation, and informal mediation. See, e.g., Kansas v. Nebraska, 538 U. S. 720 (2003) (Kansas, Colorado, and Nebraska resolved Republican River dispute by settlement and stipulation); Fourth Report 134 (discussing ongoing “joint efforts” and “cooperation” among the States to resolve lingering disputes over the waters of the Republican River).

The Special Master recommended both binding arbitration and these other less formal methods as alternatives, while opposing appointment of a River Master and observing that such an appointment would “simply” make it
“easier to continue this litigation.” Id., at 136.

For all of these reasons, we deny Kansas’ River Master request.

II

Kansas takes exception to the Special Master’s prejudgment interest calculation. The calculation and the objection grow out of the special history of this litigation.

After we initially remanded this case for remedial determinations, see Kansas I, supra, the Special Master found that Colorado’s unlawful water depletion had harmed Kansas beginning in 1950 and that Colorado must pay monetary damages reflecting that harm. Kansas asked the Special Master to award prejudgment interest on those damages incurred before entry of the judgment in 1994. Colorado replied that the Compact—like the common law—did not foresee interest payments in respect to unliquidated claims, particularly where, as here, damages were highly speculative. And even with the best of good will, said Colorado, it still could not have known prior to the filing of the complaint (in 1985) how much it owed Kansas. See Third Report 92–94; Kansas III, 533 U. S., at 11–13; Brief for Defendant in Kansas v. Colorado, O. T. 2000, no. 105, orig., pp. 28–32.

The Special Master resolved the argument by deciding to calculate pre-judgment interest on the basis of what he called “‘considerations of fairness.’” Third Report 97 (quoting Board of Comm’rs of Jackson Cty. v. United States, 308 U. S. 343, 352 (1939)). In a kind of Solomonic compromise, he divided the prejudgment period into three temporal subcategories: (1 an Early Period, the period between 1950, when Colorado’s unlawful water depletion began, and 1968, when Colorado should first have known about it; (2 a Middle Period, the period between 1969 and 1985, when Kansas filed its complaint; and (3 a Late Period, the period between 1985 and 1994, when judgment
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was entered. He adjusted damages from all three periods (Early, Middle, and Late) for inflation. But he awarded additional prejudgment interest, reflecting Kansas' loss of use of the money, "only from 1969 to the date of judgment," Third Report 107. Both Kansas and Colorado interpreted his order as awarding interest only on Middle and Late Damages (1969–1994), not on Early Damages (1950–1968). Kansas III, Exceptions and Brief for Plaintiff Kansas 9; App. to Fourth Report 12–13. The resulting total damages award, including prejudgment interest, came to $38 million. Ibid.

On appeal to this Court, Colorado attacked the award of any prejudgment interest, while Kansas called for full prejudgment interest. We accepted the Special Master's equitable approach. We were unable to conclude that Colorado should have known that prejudgment interest would "automatically" be imposed "in order to achieve full compensation." 533 U.S., at 14. But, we added, Colorado did believe (or should have believed) that we would assess "considerations of fairness" in order to achieve a just and equitable remedy. Ibid. Hence "the Special Master acted properly ... in only awarding as much prejudgment interest as was required by a balancing of equities." Ibid.

The Special Master, we found, properly refused to "award prejudgment interest for any years before either party was aware of the excessive pumping in Colorado." Id., at 15. We then applied our own "considerations of fairness" and concluded that "prejudgment interest should begin to accrue," not as of 1969 (the Special Master's date), but as of 1985. Id., at 14–15. We wrote in an accompanying footnote:

"JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE THOMAS would not allow any prejudgment interest. ... JUSTICE KENNEDY and The CHIEF JUSTICE are of the opinion that prejudgment interest should
run from the date of the filing of the complaint [1985].

JUSTICE SOUTER, JUSTICE GINSBURG, JUSTICE BREYER [and JUSTICE STEVENS] ... agree with the Special Master's view that interest should run from the time when Colorado knew or should have known that it was violating the Compact [1969]. In order to produce a majority for a judgment, the four Justices who agree with the Special Master have voted to endorse the position expressed in the text." Id., at 15 n. 5.

On remand, the Special Master, seeking to remain faithful to our determination, calculated prejudgment interest from 1985 onward, and calculated that interest on (post-1985) Late Damages alone, i.e., completely exempting both Early Damages and Middle Damages from prejudgment interest. Kansas now objects to this last-mentioned limitation; it challenges the sum upon which post-1985 interest runs. Kansas says the Special Master should have calculated prejudgment interest (from 1985) on all damages, i.e., on Early Damages, Middle Damages, and Late Damages alike. After all, says Kansas, "[p]rejudgment interest serves to compensate for the loss of use of money due as damages ... thereby achieving full compensation for the injury those damages are intended to redress," West Virginia v. United States, 479 U. S. 305, 310–311, n. 2 (1987) (citing Comment, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192 (1982)). See Exceptions and Brief for Plaintiff Kansas 29. Kansas lost the "use of" all the "money due as damages," i.e. Early and Middle Damages as well (which were "due" at least by 1985). Why then, asks Kansas, calculate post-1985 interest on only some of the damages then due?

Kansas' argument would make good sense in an ordinary case. But the question here is not about the ordinary case, but rather what the Kansas III paragraph we quoted
Opinion of the Court

above means in context. And the Kansas III context is a special one.

For one thing, like the Special Master, we did not seek to provide compensation for all lost investment opportunities; rather, we sought to weigh the equities. For another, it was apparent that the Special Master's earlier determination involved both a decision about when to begin to calculate interest (1969) and what to calculate that interest upon (Middle Damages and Late Damages only). Brief for Plaintiff in Kansas v. Colorado, O. T. 2000, no. 105, orig., pp. 9, 25, n. 8. All damages incurred before his selected date were totally exempt from interest. Kansas contested the when by arguing that we should award interest for the entire period. Kansas also contested the what by arguing that, even accepting the Special Master's preferred date, interest should run on Early Damages as well as Middle and Late Damages. See id., at 25, n. 8 ("Even if a defendant's good-faith ignorance of its breach were a valid reason to deny prejudgment interest, it would not justify the Special Master's recommendation to deny Kansas compensation for its loss of use of money [reflecting Early Damages] after 1968").

In overruling Kansas' exception and sustaining Colorado's exception, we said nothing about the Special Master's total exemption of Early Damages. 533 U. S., at 14. Thus, we changed the when (from 1969 to 1985) in Kansas III, but (despite Kansas' argument) we did not change the methodology for calculating the what. In context, our silence fairly implies acceptance, not rejection, of the Special Master's underlying methodology. Moving the date forward thus meant moving the exemption period forward as well. And that methodology now yields a post-1985 interest calculation based upon Late Damages only.

This view of our prior opinion is reinforced by the resulting numbers. The Special Master's original 1969 date (and methodology) produced a total damages award to
Kansas, including prejudgment interest, of about $38 million. Were we to accept Kansas’ argument (and calculate post-1985 interest on all damages), the final damages award would be roughly $53 million. App. to Fourth Report 12. We cannot reconcile that numerical result with our acceptance in Kansas III of the Special Master’s equitable approach and with our own equitable determination. That determination implied a modest adjustment of the $38 million award in Colorado’s favor, not, as Kansas now seeks, a major adjustment of the award in its own favor. App. to Fourth Report 12.

Consequently, we overrule Kansas’ objection.

III

Kansas and Colorado have agreed to use a computer model, the H–I Model, to measure Colorado’s future Compact compliance. This highly complex set of computer programs determines whether Colorado’s post-1949 wells deplete the river of usable water that the Compact makes available for Kansas. It does so by trying to account for almost every Arkansas-River-connected drop of water that arrives in, stays in, or leaves Colorado, whether by way of rain, snow, high mountain streams, well pumping of underground water, evaporation, canal seepage, transmountain imports, reservoir storage, or otherwise. 2 First Report 233–235. With all “switches” turned on, the model predicts how much river water will leave Colorado for Kansas during a given month. Id., at 234–235. To obtain a figure representing an unlawful depletion (or lawful accretion) under the Compact, the Model subtracts from this figure (the actual flow) a number representing a hypothetical prediction of how much water would have flowed into Kansas had Colorado not dug and operated post-1949 wells. The Model obtains this prediction through a computer rerun with the Model’s “post-1949 well” switch turned off. Ibid. The final figure is then
adjusted to reflect depletions to usable, as opposed to total, flow. App. to Second Report 37.

Not surprisingly, the Model's ability to calculate depletions has proved highly controversial, leading to many model modifications during this litigation. See, e.g., 2 First Report 236-240 (describing Colorado's objections to the original model). The Special Master has recommended use of the model together with a 10-year measurement period to determine the amounts of any future depletions. Fourth Report 139. That is to say, a determination of whether Colorado owes Kansas water in Year 11 will be made by taking the model's total result for Years 1-10, for year 12 by the model's total result for Years 2-11, and so forth. Fourth Report 117; App. to Fourth Report 86, Exh. 14. Kansas takes exception to the 10-year measurement period.

Kansas seeks a measurement period of one year. In support, Kansas points to Compact Art. V-E(5), 79 Stat. 148, which says that there "shall be no allowance or accumulation of credits or debits for or against either State" (internal quotation marks omitted). Kansas argues that a 10-year period averages out oversupply and undersupply during the interim years, with the likely effect of awarding Colorado a "credit" in dry years for oversupply in wet years. Kansas adds that Art. IV-D, 79 Stat. 147 forbids Colorado to deplete the river water's "availability for use." Kansas says that the 10-year measurement period in effect frees Colorado from the obligation to compensate Kansas for years (within the 10-year period) when overpumping may have made water "unavailable[e]" for Kansas' use. Kansas also notes that the parties and the Special Master have used a 1-year measuring period in this litigation for purposes of calculating past damages. See Exceptions and Brief for Plaintiff Kansas 37-40, 43-44.

Like the Special Master, we are not persuaded by Kansas' arguments. The literal words of the Compact are not
determinative. The Compact's language essentially forbids offsetting debits with "credits," but it does not define the length of time over which a "credit" is measured. Any period of measurement inevitably averages interim period flows just as it overlooks interim period lack of water "availability." Thus annual measurement offsets and overlooks seasonal differences; seasonal measurement, monthly differences; monthly measurement, weekly differences, and so forth.

At the same time, practical considerations favor the Special Master's measurement approach. Model results over measurement periods of less than 10 years are highly inaccurate. The Special Master found, for example, that the current iteration of the Model, if used to project river diversions (including well pumping) during a single year, produces figures that overpredict actual diversions in some years and underpredict them in others by as much as 22%. Fourth Report 111. Similar inaccuracies plague the Model's projection of actual river flows. Id., at 112. If projected diversions and flows deviate substantially in this way from actual measured diversions and flows, 1-year estimates of final depletions to usable flow—the figure that determines Kansas' damages—cannot be accurate. Id., at 115 ("I find that the H-I model is not sufficiently accurate on a short-term basis to be used to determine compact compliance on a monthly or annual basis"). But measured over long periods of time, say, the full 540 months between 1950 and 1994, the Model's predicted and observed diversions "matched almost perfectly." Id., at 114. For this reason, the Master concluded that "[o]nly by using longer term averages do the model simulations more closely match historic data." Id., at 115. Thus, the 10-year measurement period is needed to assure model accuracy.

Nor is Kansas likely to suffer serious harm through use of a 10-year measuring period. That is because Colorado
has developed a water replacement program designed to minimize depletions. See Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin (Use Rules), App. to Fourth Report 36, Exh. 6; Fourth Report 8–13. The program protects both Kansas water users and senior Colorado users by insisting that Colorado users with junior rights (and in particular those who obtain water from post-1949 wells) replace the river water that they use. They must either (1) buy replacement water, say, from the Rockies' western slope or (2) buy land irrigated by pre-1949 wells and remove it from cultivation. *Id.*, at 10–13. In practice, junior users belong to one of three associations that conduct these transactions, reporting the details monthly to the Colorado State Engineer's Office, and receiving replacement "credits," which they divide among their members. *Id.*, at 13.

Were the replacement program and the H–I Model both to work perfectly, the Model's net depletion figure, whether determined each month, each year, or each decade, would be zero (that is, there would be no difference between actual flow and what the flow would have been under pre-compact conditions). Of course, perfection is impossible; and Kansas claims certain defects in the Use Rules. See *id.*, at 27. But operation of the Rules should help to diminish the real amount of any depletion, thereby limiting any negative effect that a 10-year measurement period might have upon Kansas. See *id.*, at 119–120; see also *id.*, at 32. The 1997–1999 results, showing essentially no aggregate depletion, suggest the water replacement program will have this effect. *Ibid.*

Kansas argues that the Compact's framers expected annual measurement. And they quote a Colorado Commissioner as recognizing that there would be "'no carry-over from year to year,'" see Exceptions and Brief for Plaintiff Kansas 39 (quoting Joint Exhibit 3, pp. 14–84).
Assuming, *arguendo*, that the framers opposed such carryover, they were likely unaware of the modern difficulties of complex computer modeling. And we believe that those framers, in any event, would have preferred accurate measurement. After all, a "credit" for surplus water that rests upon inaccurate measurement is not really a credit at all.

Kansas also points out that earlier in this litigation both parties agreed to the use of annual measurement for purposes of calculating past damages. The parties made that stipulation, however, before the Special Master fully examined the model's accuracy. In any event, their previous agreements do not govern this determination.

We overrule Kansas' exception.

IV

As we just mentioned, measuring the depletion caused by Colorado's post-1949 wells involves taking account of Colorado's water replacement program, which credits Colorado with non-Arkansas water pumped into the Arkansas and with Arkansas water not used because farmers have removed from cultivation lands previously irrigated by pre-1949 wells. The Special Master has recommended that "the final amounts of Replacement Plan credits to be applied toward Colorado's compact obligations shall be the amounts determined by the Colorado Water Court, and any appeals therefrom." Fourth Report 138, ¶9. Kansas takes exception to this recommendation.

Kansas points out that the Colorado Water Court is a state court. It says that a "'State cannot be its own ultimate judge in a controversy with a sister State,'" Exceptions and Brief for Plaintiff Kansas 45–46 (quoting *West Virginia ex rel. Dyer v. Sims*, 341 U. S. 22, 28 (1951),) and that this Court must "'pass upon every question essential'" to resolving the dispute, Exceptions and Brief for
Opinion of the Court


Kansas objection founders, however, upon additional language in the Master’s full recommendation. The recommendation adds:

“This is not to say, however, that the Colorado Water Courts are empowered to make a final determination on any matter essential to compact compliance at the Stateline, or that Colorado’s reliance on such Water Court actions will necessarily satisfy its compact obligations. ... All replacement credits, no matter how determined, are subject to the right of Kansas to seek relief under the Court’s original jurisdiction [as set forth in] Section VIII.” Fourth Report 138–139, ¶9.

In the cross-referenced Section VIII, the Special Master makes clear that Colorado’s replacement plan rules affect the rights, not only of Kansas water users, but also of Colorado senior water users; that both groups of water users have similar litigation incentives; and that permitting the Colorado Water Court initially to consider challenges to credit allocations will help prevent inconsistent determinations. Id., at 93–95.

In our view, the Special Master’s full recommendation will help to avoid the potential conflict he mentioned. It also adequately preserves Kansas’ rights to contest any adverse Water Court determination. We overrule Kansas’ exception.

V

The Special Master found that Colorado complied with the Compact for the period 1997–1999. Kansas takes exception on the ground that the Special Master used a
measurement period "greater than one year." Exceptions and Brief for Plaintiff Kansas 47. Kansas concedes that its objection rests upon its claim that the Special Master cannot use "an accounting period longer than one year." Ibid. Having found against Kansas on that matter, supra, at 14, we must overrule this exception.

VI

At the end of its brief, Kansas lists 15 disputed issues that the Special Master has not yet decided. It groups them into three categories:

2. "Disputed 1997–1999 Accounting Issues" ("[d]ry-up acreage," Sisson-Stubbs credit," "winter water bookovers" credit);

Kansas takes exception to the Special Master's refusal to make recommendations on these issues now. It points out that we cannot leave unanswered important questions "essential" to our "determination of a controversy" between the States. Id. at 49 (quoting Oklahoma v. New Mexico, supra, at 241). And Kansas asks us to require the Special Master to decide them.

As the Special Master found, however, there are good
Opinion of the Court

reasons not to decide these issues immediately. There is no need to resolve most of the issues in the second category. They involve challenges to the accuracy of the figures used to determine whether Colorado depleted the river between 1997 and 1999. The Special Master concluded that Colorado was in compliance during 1997–1999, in the process relying upon Kansas' own figures. Fourth Report 30–31. As far as we can tell from the briefs, these issues are mostly moot.

The passage of time will produce more accurate resolution of disputes in the first and third categories (and any of those in the second that arise again in the future). The parties will learn more about matters relevant to their resolution, namely, the H–I Model's strengths, weaknesses, and methods of monitoring and measurement. That is why the Special Master recommended that we retain jurisdiction over this case and permit him to take up lingering issues at a future date. *Id.*, at 135–136, 139. We accept that recommendation and overrule Kansas' objection.

The Special Master also recommended that experts for the two parties confer, e.g., *id.*, at 91–92, and he expressed the hope that expert discussion, negotiation, and if necessary binding arbitration, would lead to resolution of any remaining disputes. *Id.*, at 135–136. We express that hope as well.

VII

For these reasons, we overrule all Kansas' exceptions. We accept the Special Master's recommendations and recommit the case to the Special Master for preparation of a decree consistent with this opinion.

*It is so ordered.*
Opinion of THOMAS, J.

SUPREME COURT OF THE UNITED STATES

No. 105 Orig.

STATE OF KANSAS, PLAINTIFF v. STATE OF COLORADO

ON BILL OF COMPLAINT

[December 7, 2004]

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the Court's opinion with the exception of Part II, which concerns whether prejudgment interest should begin accruing in 1985 only on damages thereafter arising (post-1985 damages) or also on damages then owing (pre-1985 damages). As JUSTICE O'CONNOR explained in Kansas v. Colorado, 533 U. S. 1 (2001) (Kansas III), neither the Arkansas River Compact itself nor the common law at the time of the compact's formation allows Kansas to recover any prejudgment interest. See id., at 21–25 (opinion, joined by SCALIA, THOMAS, JJ., dissenting in part). The Court did not adopt that view in Kansas III, but neither did it adopt the now-familiar rule that Kansas should be made whole with an award of prejudgment interest spanning the duration of Colorado's breach, from 1950 to the present. See, e.g., Milwaukee v. Cement Div., National Gypsum Co., 515 U. S. 189, 195–196, and n. 7 (1995); West Virginia v. United States, 479 U. S. 305, 310–311, n. 2 (1987).

The Court instead crafted what it viewed as an equitable compromise, designed to apply sui generis to these States and their particular dispute, in which prejudgment interest would begin to accrue in 1985. See Kansas III, supra, at 14–16. Its compromise left open the door to the present litigation, for saying when prejudgment interest began to accrue did not answer on what the interest was
accruing. The Court therefore must again decide what is too little or too much compensation for Colorado's depletion of the Arkansas. That weighing is as unnecessary now as it was before. Kansas is not entitled to prejudgment interest, and its exception seeks only to compound the windfall it received in *Kansas III*. I therefore agree with the Court that Kansas' second exception to the Special Master's Report should be overruled.
JUSTICE STEVENS, concurring in part and dissenting in part.

With the exception of Part II, I join the Court's opinion. In dissenting from Part II, I adhere to the views that we expressed in Kansas v. Colorado, 533 U. S. 1, 13–16 (2001) (Kansas III). In Kansas III, in a compromise that was required in order to issue a judgment of the Court, we accepted the views of the CHIEF JUSTICE and JUSTICE KENNEDY that prejudgment interest should run from 1985, the date the complaint was filed. Ibid. Like today's majority, I adhere to the judgment reflecting that compromise. Unlike the majority, however, I believe that prejudgment interest should run, starting in 1985, on all damages that accrued after Colorado "knew or should have known that it was violating" its compact with Kansas—i.e. from 1969. Id., at 15, n. 5. Such a result best respects the reasoning behind our conclusion in Kansas III that prejudgment interest is an appropriate component of the award of damages.

In Kansas III, recognizing that a monetary award does not fully compensate for an injury unless it includes an interest component, we affirmed the Special Master's determination that the unliquidated nature of Kansas'
claim did not by itself bar an award of prejudgment interest. *Id.*, at 14. Nevertheless, equitable concerns persuaded a majority of the Court to overrule the Special Master’s determination that prejudgment interest should begin to run in 1969, the date on which Colorado first knew, or should have known, that it was violating the Compact. Although we did not explicitly discuss the point in our opinion, we also agreed with the Special Master’s decision to exclude from the principal amount on which interest would run any damages that had accrued prior to 1969.2

The methodology that led to that conclusion was the Master’s appraisal of the equities—in his judgment, interest should not be imposed on the portion of the damages award that was attributable to relatively innocent conduct that occurred before 1969. See Third Report of the Special Master 106–107 (hereinafter Report) (“The general lack of knowledge in the early years about pumping in Colorado and its impacts along the Arkansas River served to protect Kansas during the liability phase of the case against a claim of laches. The same degree of fairness, I believe, should now relieve Colorado of the obligation to pay full

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2Kansas had objected to the Master’s refusal to award interest on all damages accruing after 1950. See Brief for Plaintiff in *Kansas v. Colorado*, O. T. 2000, No. 105, Orig., p. 25, n. 8. Although we did not discuss Kansas’ exception to the Special Master’s determination regarding the total amount of damages on which interest would run, we overruled the objection and thereby approved the Master’s selection of the period after 1968 as the appropriate measure of damages on which interest should be paid. See *Kansas v. Colorado*, 533 U. S. 1, at 14 (2001); see also Third Report 106–107 (explaining that Colorado’s awareness of its breach was central to the determination that interest should run on post-1968 damages). Today, the Court explains why it would be inequitable to give Kansas the relief that would be the equivalent of sustaining an objection that we overruled three years ago, but does not explain why we should not accept the Special Master’s original determination that all post-1968 damages should bear interest.
interest rates on damages from depletions during 1950-68 period . . ."). But the Master did find that Colorado was required to pay interest on damages that occurred between 1969 and 1985. See ibid.; see also Brief for United States in Opposition to the Exceptions of Kansas and Colorado in Kansas v. Colorado, O. T. 2000, No. 105 Orig., p. 27 ("For the period from 1969 to the date of judgment, the Master recommended that Kansas be awarded prejudgment interest"). Our opinion did not reject that portion of his judgment, and did not contain any suggestion that he had erred in that respect. See 533 U. S., at 12, 14. The happenstance that we selected, as a compromise, the date the complaint was filed as the date on which interest should begin to accrue should have no bearing on the principal amount of damages that gave rise to the interest obligation. Thus, I believe that the Special Master's Fourth Report erred in its conclusion that we meant to limit the principal amount of damages to those that occurred after 1985.

Surely if this were an ordinary tort case involving a single harm-causing event, an award of prejudgment interest would apply to the entire damages recovery, not just to the portion that resulted from events occurring after interest began to accrue. See Funkhouser v. J. B. Preston Co., 290 U. S. 163, 168 (1933). Indeed, were this an ordinary case, we would no doubt have awarded prejudgment interest in the entire amount that Kansas requested in Kansas III. This, however, is a unique case in which unusual equities necessitated a compromise designed to resolve a dispute between two States. Thus, I agree with the Majority that the Special Master was correct in rejecting Kansas' argument that the principal on which interest should run should be "the nominal damages occurring from 1950 through 1984." App. to Fourth Report 15.

However, the fact that Kansas' request represents too
large a measure of damages does not convince me that Kansas is entitled to no interest for damages prior to 1985. Nothing in our \textit{Kansas III} opinion compels such a result. In my view, the proper measure of damages on which Colorado owes Kansas interest is the entire amount attributable to the time that Colorado knew, or should have known, that it was violating the compact. That date is 1969—the date that the Special Master initially chose and that we implicitly accepted as appropriate in \textit{Kansas III}. Choosing 1969 as the initial date for the damages period not only has the benefit of respecting our affirmation of the methodology in the Special Master's Third Report, it also results in a total damages sum that is less than the $38 million the Special Master originally awarded.

Accordingly, I would sustain Kansas' second objection to the Special Master's Report, but only insofar as it applies to post-1968 damages.
IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

UNITED STATES OF AMERICA,

Intervenor.

MOTION OF SPECIAL MASTER
FOR INTERIM FEES AND EXPENSES

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT

The Special Master, Arthur L. Littleworth, hereby moves for an order of the Court approving interim fees for work performed and expenses paid in this case from January 26, 2004, through November 16, 2004.

My Fourth Report was filed with the Court on November 10, 2003. Services for which compensation is sought herein consist of reviewing the exceptions to the Forth Report filed by the State of Kansas, a review of the brief of the United States
filed in opposition to one of the exceptions taken by Kansas; a review of the reply brief filed by the State of Colorado; and a review of the surreply brief filed by the State of Kansas.

Prior to the filing of my Fourth Report the Clerk had requested that I retain in my office all of the pleadings, exhibits and transcripts from the beginning of trial in 1990. There was one exception when certain portions of the record were requested in connection with one of my earlier reports. However, in June, 2004, the Clerk requested that all of the files in the case be transferred to the Court. Accordingly, the following boxes were organized, inventoried by box, and shipped:

(a) On June 11, 2004, there were 28 boxes of exhibits, together with several large containers holding “unique” exhibits.

(b) On June 21, 2004, a portion of the transcript that had been sealed was sent separately.

(c) On July 20, 2004, there were 4 sealed depositions that were sent separately.

(d) On July 20, 2004, there were 7 boxes of reporter’s transcripts, and 8 additional boxes of exhibits relating to the final segment of the trial.
(e) On August 26, 2004, there were 13 boxes of pleadings, containing a docket of 68 pages, reflecting 731 documents.

This motion covers services performed over approximately 11 months. Compensation for which approval is sought includes $3,125.00 for my services as a Special Master, and $4,050.00 for the services of my secretary, Sandy Simmons, who has acted as court clerk during these proceedings. All of her services are related to the organization, indexing, inventorying and shipment of the trial records to the Court. Hourly rates remain the same as those previously approved by the Court, and for my own services, at the same rate as it has been since my appointment in 1987.

This motion also seeks approval of the fees, costs and payments set forth in the attached declaration.


ARTHUR L. LITTLEWORTH
Special Master
IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,                  )  
     Plaintiff,                     ) No. 105 Original

v.                                      )

STATE OF COLORADO,                  )
     Defendant,                     )

UNITED STATES OF AMERICA,             )
     Intervenor.                    )

DECLARATION OF SPECIAL MASTER
ARTHUR L. LITTLEWORTH IN SUPPORT OF
MOTION FOR INTERIM FEES AND EXPENSES

I, ARTHUR L. LITTLEWORTH, declare:

1. I am a senior partner in the law firm of Best, Best & Krieger of
   Riverside, California, and was appointed Special Master by Order of the Court

2. The Special Master’s fees included in this motion have been
   computed at the rate of $250 per hour. This is the same hourly rate established in
   1987 and approved by the Court in its previous orders. The hourly rate charged for
   Sandy Simmons, acting as clerk of the court, in connection with the organization
and transfer of the trial records to the Court is $75 per hour. This rate has also been approved in previous Court orders.

3. To provide for the payment of fees and expenses incurred in this case, a trust account was established to which both states have contributed. Since 1995 when the interests of the United States were determined, and it ceased to participate actively in the later segments of the trial, fees and costs have been shared equally between Kansas and Colorado. As of November 1, 2004, the trust account balance was $74,729.00.

4. This application covers fees and expenses for the period from January 26, 2004, through November 16, 2004. My principal efforts during this period of time have involved reviewing the briefs submitted following the conclusion of the trial, and the preparation of this Fourth Report.

5. The amounts of time expended by me and by my secretary, acting as clerk of the court, are set forth below:

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<th>Attorney/Billing Professional</th>
<th>Rate</th>
<th>Number of Hours</th>
<th>Fee</th>
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<tr>
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<td>$250 per hour</td>
<td>12.5</td>
<td>$3,125.00</td>
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<tr>
<td>Sandra Simmons, Paralegal Assistant</td>
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<td>54</td>
<td>$4,050.00</td>
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<td><strong>$7,175.00</strong></td>
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6. In addition, the following expenses have been incurred in connection with performance of the work described above. All such expenses are submitted for approval, although most have already been paid from the Special Master’s trust account.

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<tr>
<th>Description</th>
<th>Amount</th>
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<td>** Shipping charges</td>
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<td>** Facsimile charges</td>
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<td>** TOTAL EXPENSES DUE: **</td>
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**These expense items have been reimbursed from the trust account.
EXECUTED at Riverside, California, on November 16, 2004.

I declare under penalty of perjury that the foregoing is true and correct.

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 LLC, 3750 University Avenue, 400 Mission Square, Riverside, California 92501.

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, 2004, I served the within MOTION OF SPECIAL MASTER FOR INTERIM FEES AND EXPENSES AND DECLARATION OF SPECIAL MASTER ARTHUR L. LITTLEWORTH IN SUPPORT OF MOTION FOR INTERIM FEES AND EXPENSES by placing a copy of the document in a separate envelope for each addressee named below and addressed to each such addressee as follows:

John B. Draper, Esq.
Montgomery & Andrews
325 Paseo de Peralta
P.O. Box 2307
Santa Fe, New Mexico 87504-2307

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999 18th Street, Suite 945
Denver, Colorado 80202

On November 16, 2004, at the office of Best, Best & Krieger LLC, 3750 University Avenue, 400 Mission Square, Riverside, California 92501, 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, 2004, at Riverside, California.

[Signature]
Kay J. Bliss
June 28, 2004

Mr. Arthur L Littleworth
Special Master
Best, Best & Krieger
3750 University Avenue
Mission Square Bldg., Suite 400
Riverside, CA 92501

Re: Kansas, Plaintiff
   v. Colorado
   No. 105, Original

Dear Mr. Littleworth:

The Court today entered the following order in the above-entitled case:

The motion of the Solicitor General for divided argument is granted.

Sincerely,

William K. Suter, Clerk

By

Cynthia Rapp
Deputy Clerk
June 28, 2004

Mr. Arthur L Littleworth
Special Master
Best, Best & Krieger
3750 University Avenue
Mission Square Bldg., Suite 400
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