

Approved: 1-19-95  
Date

MINUTES OF THE SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES.

The meeting was called to order by Chairperson Don Sallee at 8:00 a.m. on January 12, 1995 in Room 423-S of the Capitol.

All members were present except: Phil Martin, Excused

Committee staff present: Raney Gilliland, Legislative Research Department  
Dennis Hodgins, Legislative Research Department  
Mike Corrigan, Revisor of Statutes  
Clarene Wilms, Committee Secretary

Conferees appearing before the committee:  
David L. Pope, Chief Engineer-Director, Division of Water Resources, Kansas State Department of Agriculture

Others attending: See attached list

The meeting was called to order by Chairperson Sallee at 8:05 a.m.

There were no requests for introduction of bills.

David L. Pope, Chief Engineer-Director, Water Resources, Kansas State Department of Agriculture, appeared to brief the committee on (1) Status of KANSAS V. COLORADO, No. 105, Original, United States Supreme Court; (2) Republican River Compact; (3) Missouri River Master Manual Review and Update.

With regard to Kansas vs Colorado, the Special Master found a violation of post-compact well pumping in Colorado had violated Article IV-D of the Arkansas River Compact and recommended that Kansas prevail on this issue. If the Special Master's recommendation is upheld by the United States Supreme Court, the issue will be revisited to argue damages.

Other issues remain in litigation and are outlined in (Attachment 1).

Mr. Pope reviewed the status of the Republican River Compact noting that Nebraska still lacks an effective state law to regulate ground water that affects stream flow. He stated that Kansas' primary concerns are (1) Nebraska's overuse of its allocations, (2) trends showing increasing consumptive use in Nebraska, and (3) the current lack of enforcement mechanisms in the compact. (Attachment 2)

The committee was told preparations for negotiations are being done with the assumption that litigation may be necessary. The chairperson offered the help of the committee should such support be deemed helpful.

With regard to the Missouri River Basin Association, Mr. Pope told the committee there is no binding contract on this body of water although it contains three of the Corps of Engineers' largest reservoirs. (Attachment 3)

Various concerns have been expressed to the Corps of Engineers by both upstream and downstream states. Issues relative to Kansas' best interests have been outlined and presented to the Corps of Engineers and are stated in Attachment 3.

Mr. Pope told the committee the Missouri River Basin Association is reviewing the possibility of developing a consensus process and they are currently seeking a professional facilitator to help them design and implement the process.

The meeting adjourned at 8:55 a.m.

The next meeting is scheduled for January 18, 1995.



Testimony Before  
the Senate Energy and Natural Resources Committee  
January 12, 1995  
Concerning the Status of  
KANSAS V. COLORADO,  
NO. 105, ORIGINAL  
UNITED STATES SUPREME COURT  
by  
David L. Pope, Chief Engineer-Director  
Division of Water Resources  
Kansas State Department of Agriculture

In 1948, Kansas entered into a Compact with the State of Colorado dividing the flows of the Arkansas River. The Compact is administered by the Arkansas River Compact Administration. As Kansas' ex-officio member of that administration, I have been intimately involved in Kansas' lawsuit against the State of Colorado to enforce the provisions of that Compact.

In late July 1994, Special Master Arthur L. Littleworth filed his Report with the United States Supreme Court in the matter of The State of Kansas v. The State of Colorado and The United States, No. 105, Original, a dispute over the right to use the waters of the Arkansas River and the enforcement of the Arkansas River Compact.

After having unsuccessfully attempted to obtain redress before the Arkansas River Compact Administration (ARCA), the entity charged with administering the terms of the Arkansas River Compact of 1948, Attorney General Robert T. Stephan of Kansas filed suit on December 16, 1985, against the State of Colorado in the original jurisdiction of the United States Supreme Court. Kansas alleged that Colorado and its water users had materially depleted the usable and available stateline flows of the Arkansas River in violation of the Compact. Specifically,

Kansas alleged that the stateline depletions of usable flow had been caused by: (1) increased post-compact well pumping in Colorado which annually amounted to pumping of approximately 150,000 acre feet of groundwater in hydraulic connection with the Arkansas River; (2) the operation of Trinidad Reservoir on the Purgatoire River (a major tributary of the Arkansas River in Colorado) in violation of the Operating Principles for Trinidad Dam and Reservoir adopted by ARCA prior to construction; and (3) Colorado's Winter Water Storage Program which involved the use of Pueblo Reservoir and certain offstream reservoirs to store winter irrigation water for use in the summer. The relief Kansas sought initially was a decree commanding that the waters of the Arkansas River be delivered in accordance with the provisions of the Compact. However, when the Court decided Texas v. New Mexico, 482 U.S. 124 (1987), allowing money damages in water compact enforcement cases for the first time, the Court allowed Kansas to amend its complaint to include money damages for most violations.

Colorado denied the Kansas claims and asserted two counterclaims: (1) that Kansas had stored water released from John Martin Reservoir in violation of the Compact; and (2) that wells in Kansas had depleted the supply of the surface water available to Kansas users and had thus caused Kansas to make additional demands for releases of water stored in John Martin Reservoir in Colorado, to the detriment of Colorado water users.

The Special Master bifurcated the liability and remedy phases of the case. At the close of the proponent's evidence, he recommended dismissal of Kansas' Trinidad claim and of both of Colorado's counterclaims. After full trial with

regard to liability on the two remaining Kansas claims (a total of 143 days of trial for all claims), the Special Master stated in his Report:

"The major issue in the trial, ... is whether post-compact well pumping in Colorado has violated Article IV-D of the Arkansas River Compact. I recommend that the Court find that such a violation has occurred and that Kansas prevail on this issue."

He further recommended, however, that the Court find that Kansas had failed to prove that operation of the Winter Water Storage Program had violated the Compact.

In the course of reaching his conclusions on the Kansas claims, the Special Master made a number of interesting determinations, including the following. He determined that the burden of proof should be a preponderance of the evidence, not the "clear and convincing" standard proposed by Colorado. He declined to hold that equitable defenses were inapplicable as a matter of law, but he determined as a matter of fact that the defenses of laches, equitable statute of limitations and acquiescence should not bar the Kansas claims. He rejected the Colorado positions that Kansas was bound by the water decrees of the Colorado Court and that the pre-compact Colorado well capacities were grandfathered.

On November 17, 1994, Kansas filed exceptions to the Special Master's Report relative to Kansas' claims concerning: Trinidad Reservoir, the Colorado Winter Water Storage Program, and the method of determining depletions to usable stateline flow selected by the Special Master.

On the same date, Colorado filed exceptions related to the issues of: laches (delay), the amount of Colorado pre-compact well pumping which should be grandfathered, whether the benefits from the 1980 Resolution concerning the operation of John Martin Reservoir were separately bargained for and a challenge to the Special Master's determination that the burden of proof in this case should be merely the preponderance of the evidence.

Reply briefs to the Exceptions were filed by all parties on January 3, 1995.

The matter will now be set for oral argument before the United States Supreme Court in Washington, D.C., probably in late March, 1995.

After oral argument, the Supreme Court will review the record, the Special Master's Report, the exceptions filed by the parties and oral arguments. If the Court concludes that the Compact has been violated, it is expected the Court will return the case to the Special Master for a determination of the actual number of acre feet of water of which Kansas has been unlawfully deprived, the damages to be paid by Colorado in water or money, and remedies necessary to prevent future violations of the Compact by Colorado.

Testimony Before  
the Senate Energy and Natural Resources Committee  
January 12, 1995

Re: REPUBLICAN RIVER COMPACT

by

David L. Pope, Chief Engineer-Director  
Division of Water Resources  
Kansas State Department of Agriculture

On December 31, 1942, the state of Kansas entered into a compact with the states of Nebraska and Colorado equitably dividing the waters of the Republican River. (K.S.A. 82a-518) A map of the Republican River Basin is attached as exhibit A.

The provisions of the Compact divided up the Virgin Water Supply of the Basin, which was defined as "the water supply within the Basin undepleted by the activities of man." The Compact set allocations by basin, sub-basin and by state. Kansas' total allocation was 190,300 acre feet of water.

In 1983, I became Chief Engineer and the Kansas Commissioner to the Compact. In my first few years in this position, I began raising concerns about the methods being used to administer and enforce the Compact. During the next few years, Kansas began raising serious concerns about Nebraska's failure to comply with the terms of the Compact, primarily relating to unregulated well pumping in the Republican Basin in Nebraska. Nebraska is one of only three western states that does not have state regulation of groundwater pumping.

In 1989, Kansas made a specific proposal to resolve the matter which would have given Nebraska five years to develop the tools necessary to come into compliance with the Compact and to get into compliance. This proposed action

failed in a vote of 2 to 1, with Colorado supporting it, but not Nebraska. Unanimous consent is required for Compact actions.

By 1993, it had become apparent that many people in Nebraska were not aware of Nebraska's non-compliance with the Compact. Therefore, with assistance of several of you, we began meeting directly with Nebraska legislators, water users and other officials.

On November 12, 1993, a meeting occurred in Fairbury, Nebraska, between legislative delegations from Kansas and Nebraska. At that time, a briefing paper was distributed to all attendees. Since that time, the Division of Water Resources has spoken to at least six other Nebraska groups. Two additional talks are scheduled in February and March of 1995.

As a result of these meetings and speeches, Nebraskans' level of awareness of Kansas' Compact concerns has risen dramatically. (For example, see newspaper article - exhibit B). To date, the official Compact response from Mike Jess, Nebraska's Compact representative, has remained largely unchanged, although more meaningful discussions seem to be occurring. He is still maintaining that groundwater use is not covered by the Compact and that he has no authority to regulate groundwater pumping in Nebraska. The local people who reside in the Republican Basin in Nebraska, however, have expressed a real interest in getting informed and understanding Kansas' concerns. The Nebraska Governor's Water Council has drafted legislation which would give authority to regulate groundwater pumpage to Natural Resource Districts (NRD) in Nebraska (three of which are in the Republican River Basin) or to the state of Nebraska if the NRDs



fail to utilize their authority to regulate groundwater pumping when necessary to protect surface water rights or to ensure Compact compliance. However, there is some doubt that the Nebraska legislature will pass any "conjunctive use" legislation related to this issue during the 1995 session. Regulating groundwater usage in Nebraska is an extremely difficult and delicate issue. The groundwater users' lobby in Nebraska is apparently quite strong, particularly due to the very large reliance on groundwater. In addition to the Republican River concerns, regulation of groundwater in Nebraska is further complicated by an interstate compact, a Supreme Court decree, litigation and endangered species issues in the Platte River Basin. Merely passing legislation to regulate groundwater use in Nebraska will not solve the problems in the Republican Basin. Implementation will be necessary and probably time consuming. However, Nebraska is legally bound to comply with the Compact, irrespective of their own state water laws, or lack thereof.

Kansas is continuing to try to favorably resolve its concerns through the Republican River Compact Commission. Kansas' primary concerns continue to be: (1) Nebraska's overuse of its allocations, (2) trends showing increasing consumptive use in Nebraska, and (3) the current lack of enforcement mechanisms in the Compact.

At the June 9, 1994, annual meeting of the Republican River Compact Administration, Kansas presented two briefs to the Compact Administration regarding findings from its legal and historical research on the inclusion of groundwater in the Compact. Two resolutions with supporting data were offered

by Kansas to the Compact Administration to seek to improve Compact data and otherwise resolve Kansas' concerns. This resulted in more focused discussions.

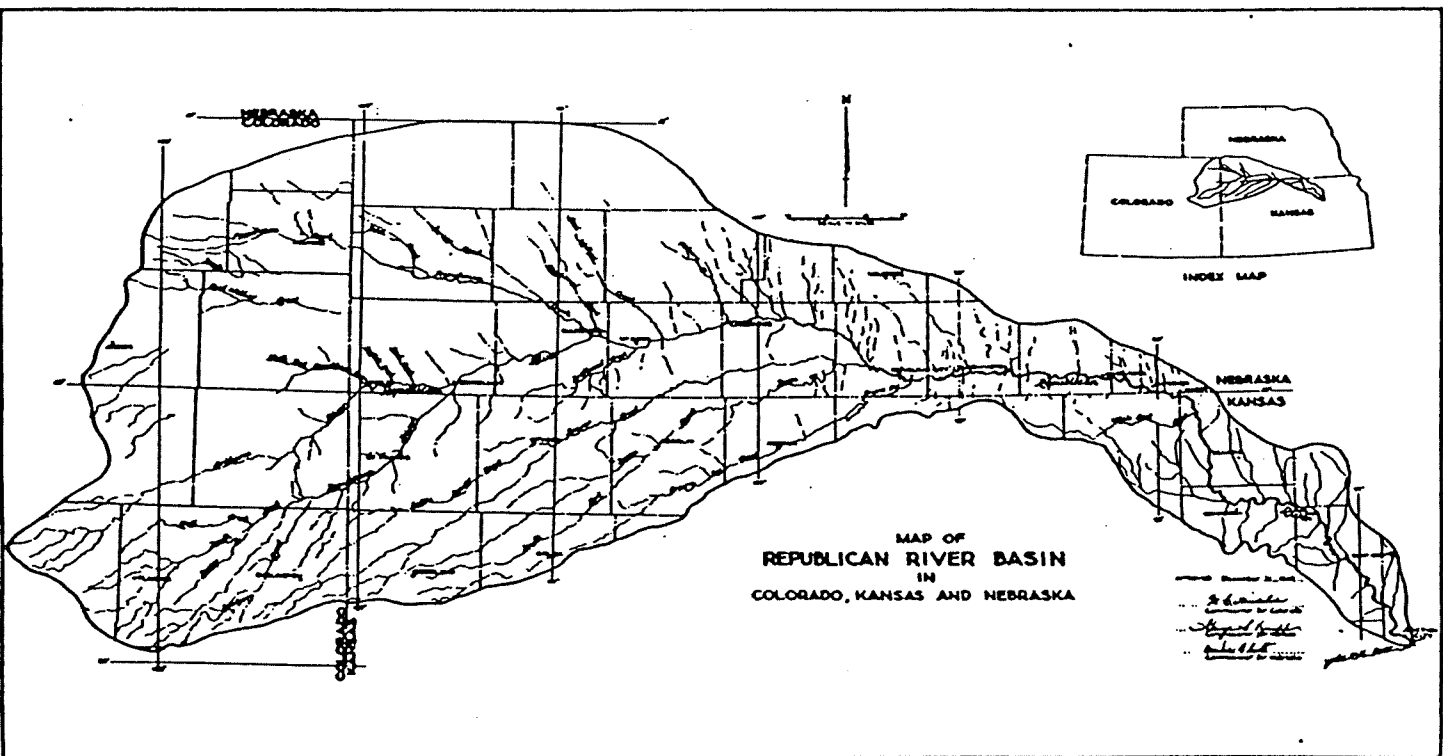
At a special Compact work session on September 28, 1994, in Wichita, Kansas, a legal opinion on the extent of rule-making authority was provided by the legal committee to the Compact Administration. Kansas prepared two resolutions for improved administration of the Compact. It was agreed that the three states would review these proposals and discuss them at a second special work session scheduled for January 19, 1995, in Denver, Colorado. That meeting will be occurring next week.

Where are we going from here? Our Interstate Water Team (an engineer, an attorney and a secretary), along with other staff of the Division of Water Resources, is continuing its legal, technical and historical research related to the Republican River Compact with a goal of resolving Kansas' concerns with Nebraska administratively through the Compact Administration, while keeping in mind that there is a substantial possibility that this may not be successful. All preparations for negotiations are also being done with the assumption that litigation may be necessary. At the Republican River Compact work session next week in Denver, Kansas may learn more about whether Nebraska is willing to take positive action to attempt to resolve Kansas' concerns.

### Future Courses of Action

This committee might consider whether another legislative delegation to Nebraska in the near future would be helpful to urge Nebraska to take legislative action during this session to regulate groundwater usage in Nebraska.

At some point, if no administrative solution is reached, the legislature, the Governor and the Attorney General, in conjunction with our office, will have to decide whether Kansas has tried long enough to resolve this matter administratively and that litigation is the only way that it will ever satisfactorily be resolved. Such a lawsuit against Nebraska may help to motivate Nebraska's legislature to pass the legislation specifically authorizing the regulation of groundwater. However, we should not file suit against Nebraska until we are adequately prepared, funded and committed to such an endeavor, because it is a very time consuming and expensive process.



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# 43 Water, water everywhere?

## Kansas ready to go to court over Republican River

KEARNEY, Neb. — Nebraska could face serious consequences if it forces Kansas to go to court to gain what it deems proper allocation of Republican River water under a 50-year-old agreement, a Kansas official said.

The controversy centers around interpretation of the 1943 Republican River Compact between Colorado, Kansas and Nebraska.

Nebraska officials said the agreement involves only surface water, not groundwater.

Kansas officials say the pact mentions allocating virgin water that is unaffected by activities of man.

Kansas officials say they believe the installation of groundwater wells near the river and its tributaries — the work of man — is depleting those virgin flows.

During a discussion of the compact Monday at the convention of the Nebraska Water Resources and Nebraska State Irrigation Associations in Kearney, a Kansas water official said failure by Nebraskans to acknowledge the link between surface water and groundwater could result in a lawsuit.

David Pope, chief engineer and director of the Kansas Division of Water Resources, said Kansas officials are frustrated

that little or no action has been taken to maintain the river flow.

"The failure of action by Nebraska most certainly will push us into that action (a lawsuit)," he said. "We really do not seek litigation. We seek resolution."

Pope said a lawsuit could mean serious consequences for Nebraska besides legal costs.

He said if the court appoints a federal master, it would limit state authority over water management and permit restrictions on the number of wells.

Kansas likely would seek economic damages in the form of water or money for the many years the compact wasn't followed, Pope said.

Testimony Before the Senate Energy and Natural Resources Committee  
on the Missouri River Master Manual Review & Update

by

David L. Pope, Chief Engineer-Director  
Division of Water Resources, Kansas State Department of Agriculture

January 12, 1995

I am David L. Pope, Chief Engineer-Director of the Division of Water Resources. In my capacity as Chief Engineer-Director, I have also served as the Governor's representative on the Missouri River Basin Association (MRBA). The MRBA is comprised of representatives of the States, Indian Tribes and Federal Agencies (Ex officio) with water interests in the basin. In this capacity, my staff and I have been reviewing and commenting on the Corps of Engineers' Missouri River Master Manual review. I appreciate this opportunity to address the Committee to update you on this process.

I would like to begin by providing a **brief overview** of the Corps of Engineers' Missouri River mainstem system. Attached is a map of the Missouri River basin and its major features. The Corps of Engineers operates six major dams on the mainstem Missouri River. The upper three dams (Ft. Peck, Garrison, and Oahe) are the Corps of Engineers' largest reservoirs. In addition to the major reservoirs, the Missouri River mainstem system includes channel modifications to allow for navigation on the Missouri River from Sioux City, Iowa to the Mississippi River at St. Louis. The significant benefits derived from the Missouri River system include hydropower, water supply, flood control, navigation and recreation.

The operation of this large and complex system by the Corps of Engineers is governed by a document called the Master Water Control Manual. As a result of the extended drought during the period from 1986 to 1992, the upper reservoirs were drawn down significantly to support downstream uses. This led to **significant controversy**, lawsuits and counter lawsuits and political action by both upstream and downstream states. The Corps of Engineers ultimately agreed to review its operations of its Missouri River system in the form of the current Master Manual Review.

The Corps of Engineers has expended \$12 million over the last five years conducting the Master Manual review. The study has been **very complex** due to the size of the basin and the many **competing needs** within the basin. The upstream states are seeking more stable pools at higher levels. The downstream states, including Kansas, are seeking to continue the current benefits of the system including water supply, flood control and navigation. During the course of the review, significant environmental concerns have been raised. These environmental concerns spring from the significant change in basin hydrology resulting from the reservoir operations and the significant modifications made to the channel. There are currently two bird species and one fish species that are listed as endangered species on the mainstem Missouri River. The Corps of Engineers is required by law to consider their needs in the Master Manual review.

In July 1994, the Corps of Engineers issued its Draft Environmental Impact Statement (DEIS) for the Missouri River Master Manual Review identifying a preferred alternative. This has been followed by extensive public hearings throughout the basin during the fall of 1994. In Kansas

we had two public hearings: the first in Atchison, Kansas on October 13 and second in Topeka, Kansas on October 24th. I provided comments at both public hearings. The Kansas Water Office and Kansas Department of Wildlife & Parks also offered comments at the Topeka public hearing.

The preferred alternative identified in the DEIS envisions a number of significant operational changes. First, the most significant change of the preferred alternative is its **spring rise**. Under the preferred alternative an additional 20,000 cubic feet per second (cfs) beyond normal navigation needs will be released from the Gavins Point Dam from April through mid-June of most years. The purpose of this spring rise is to more closely mimic the natural flows of the Missouri River for environmental benefits. The U.S. Fish & Wildlife Service, in its biological opinion, has stated that this is necessary for the recovery of the listed endangered species. In fact, the Service desires a greater spring rise than the Corps of Engineers has included in its preferred alternative along with other structural changes to the Missouri River and its floodplain.

The Corps of Engineers has received significant comments from residents of both downstream and upstream states regarding the spring rise. Downstream critics have three primary concerns. (1) The spring rise will increase the potential for flooding during the spring as a result of more water being in the river; (2) The higher river stages may produce drainage problems and higher water tables behind the agricultural levees along the River. This could delay crop plantings or render some land unproductive. (3) Significant reductions in navigation support, which would result in a shorter navigation season and lower flows, at times.



Our comments to the Corps regarding the spring rise has been four-fold: (1) We have requested the Corps do further work to better identify the effect of the spring rise on flooding and drainage problems. They admit they have done little work to identify these impacts to date. (2) We have asked the Corps to review a broader range of options for the spring rises. This includes a shorter duration rise, a lesser peak, or perhaps even two separate but shorter rises. We believe the Corps should find the minimum spring rise necessary to enhance the environment while minimizing potential flooding and drainage problems. (3) We have asked the Corps to review how structural changes in the River might enhance the environment and therefore lessen the requirements for the spring rise and its impact on floodplain uses. (4) We've asked the Corps to consider how the economic impacts associated with the spring rise might be shared more equitably between the upstream and downstream states. As we review the DEIS, it appears that the downstream states are taking the entire economic cost of the spring rise.

A misconception expressed at the hearing regarding the spring rise needs clarification. During times of normal flow, the spring rise will put two to three feet of additional water in the River. Many at the public hearings have sought to add this two or three feet of additional water in the River on top of the river stages experienced during the flood of 1993. This is not correct. The additional water in the spring could increase the frequency of lesser floods, but will have little effect on major floods like the Great Flood of 1993.

The second significant feature of the preferred alternative, which was not a significant change from current operations, was its support for **use of the River for water supply**. We have

consistently expressed to the Corps of Engineers the priority and importance of these water supply benefits. The preferred alternative does adequately address Kansas' needs for water supply along the River, both now and in the future.

A third change in operation under the preferred alternative is its **reduced navigation support**. The preferred alternative will reduce navigation support by one month (November) and also reduces the service level in the summer and fall. The Corps of Engineers included a single rule curve in all 400 plus alternatives it evaluated. Our preliminary response has been to request the Corps of Engineers to review a broader array of rule curves which dictate the level of navigation support during critical, dry periods.

**Where we go from here?** The Corps of Engineers will be accepting comments on the DEIS until March 1, 1995. The Division plans to continue to work with the other state water-related agencies to reach a consensus position to recommend to the Governor for submittal to the Corps of Engineers. At this time, I have not yet had an opportunity to brief Governor Graves on this issue and seek his guidance, but I am assuming he will want to provide additional comments to the Corps before the March 1 deadline.

Ultimately the Corps of Engineers will develop a final environmental impact statement. After additional federal review, a record of decision will be made and a new operating plan developed. Due to the significant controversy already noted, it would appear that years of litigation is likely, and/or political disputes within the States and Federal Government, at the highest levels.

It was with this prospect in view, Colonel Thus, the Missouri River Division Engineer for the Corps of Engineers, at a recent MRBA Directors meeting, challenged the Directors to seek a consensus on an alternative that might be more acceptable to the States and Tribes and meet legal requirements related to environmental concerns. This consensus process might be able to identify structural changes in the River which could enhance the environment and lessen the impacts on other project purposes. Compromises could possibly be found which the Corps of Engineers might not have identified in its process.

The MRBA Directors are still reviewing this possibility of developing a consensus process. We are currently seeking a professional facilitator to help us design and implement the process.

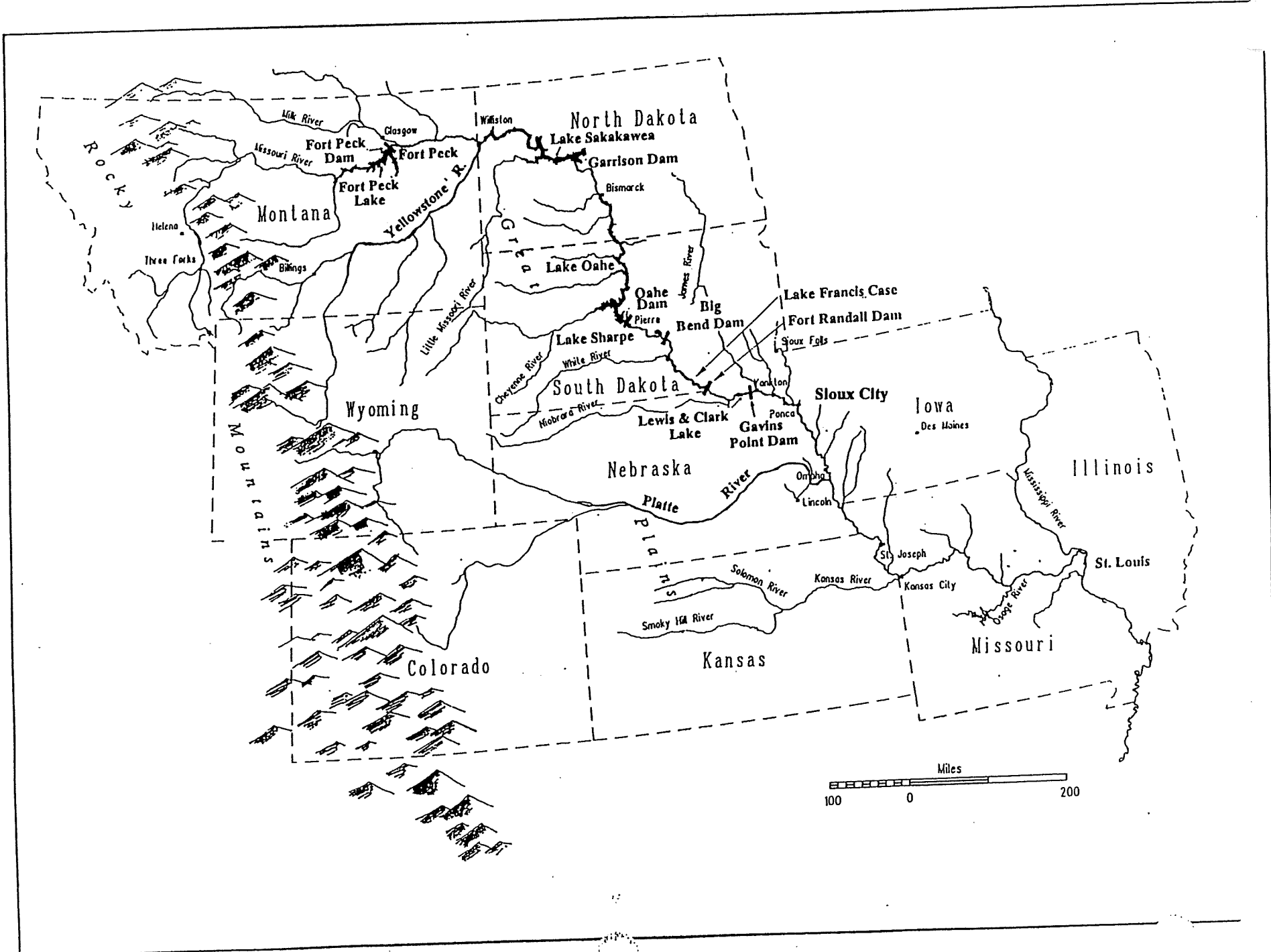


Figure 3. Missouri River basin.