IN RE: NON-BINDING ARBITRATION PURSUANT TO THE FINAL SETTLEMENT STIPULATION, *KANSAS v. NEBRASKA and COLORADO,* NO. 126 COLORADO

BEFORE MARTHA O. PAGEL, ARBITRATOR

Colorado Compact Compliance Pipeline Dispute

Nebraska Crediting Dispute

ARBITRATOR'S JOINT DECISION ON LEGAL ISSUES

May 17, 2010

I. HISTORY OF THE PROCEEDING

This non-binding arbitration arises pursuant to Section VII (Dispute Resolution) of the Final Settlement Stipulation ("FSS"), executed on December 15, 2002 by the states of Colorado, Kansas and Nebraska (the "States"), and approved by the United States Supreme Court. *Kansas v. Nebraska & Colorado,* 538 U.S. 720, 123 S. Ct. 1898 (2003). The FSS was negotiated among the States to resolve litigation then pending before the Supreme Court relating to ground water use under the Republican River Compact ("Compact.")

Section VII.A.1 of the FSS provides that any matter relating to Compact administration, including administration and enforcement of the FSS, in which a State has an "Actual Interest" (as defined in Section II of the FSS), shall first be submitted to the Republican River Compact Administration ("RRCA"). Section VII.A.7 provides that if such a dispute cannot be resolved by the RRCA, and the State raising the dispute desires to proceed, the dispute shall be submitted to non-binding arbitration unless otherwise agreed to by the States with an Actual Interest.

This is the second arbitration proceeding convened pursuant to the FSS. The first was conducted by Arbitratator Karl J. Dreher and was completed in mid-2009. Following briefing and hearings, Mr. Dreher issued two decisions: The Arbitrator's Final Decision on Legal Issues, dated January 22, 2009 ("Dreher Decision on Legal Issues"), and the Arbitrator's Final Decision, dated June 30, 2009 ("Dreher Final Decision").

On March 22-24, 2010, the three States issued a Joint Notice of Arbitration and entered into a contract for this second arbitration proceeding with the selected Arbitrator, Martha O. Pagel. The issues presented for arbitration at this time are identified by the States as Colorado's Compact Compliance Pipeline ("CCP") Issue and Nebraska's Crediting Issue ("Crediting Issue").

On April 8, 2010, the Arbitrator issued a Scheduling and Procedural Order and revised Time Frame Designation for the joint arbitration proceedings, including a timeline for submission of legal motions and briefs, responsive briefs, reply briefs and oral argument on the motions.

On April 9, 2010, the States completed execution of an Arbitration Agreement regarding the Colorado Compact Compliance Pipeline Dispute ("CCP Arbitration Agreement"), and on May 5, 2010, the States completed execution of a similar Arbitration Agreement for the Nebraska Crediting Issue Dispute ("The Crediting Issue Arbitration Agreement"; collectively, the "Arbitration Agreements"). The Arbitration Agreements authorize the States to file legal motions in accordance with the Scheduling and Procedural Order, including motions relating to whether the issues presented are properly the subject of arbitration under the FSS, and direct the Arbitrator to rule on such motions.

Pursuant to the Arbitration Agreements and Scheduling and Procedural Order, the States filed motions on legal issues, along with opening, responsive and reply briefs. Kansas filed Motions to Dismiss both the CCP Issue and the Nebraska Crediting Issue in their entirety; Colorado filed a Motion to Dismiss additional issues raised by Nebraska and Kansas in connection with the CCP Issue and a Motion to Strike certain testimony submitted by Kansas in

support of its Motion to Dismiss the CCP Issue. As provided in the Scheduling and Procedural Order, briefing concluded on May 3, 2010.

On May 5, 2010, the States presented oral argument in a joint hearing on the CCP Issue and Nebraska Crediting Issue held in Portland, Oregon. At the outset of the hearing, Colorado and Nebraska (the "Stipulating States") submitted a Joint Notice of Stipulation to the Arbitrator and the State of Kansas confirming that that the Stipulating States had fully resolved all issues in the Arbitration as between them pursuant to the terms of the Stipulation. Accordingly, no further action was taken on Colorado's Motion to Dismiss with respect to the Nebraska issues.

This Joint Decision on Legal Issues provides the Arbitrator's rulings and analysis on motions in both the CCP Issue and Nebraska Crediting Issue.

II. LEGAL QUESTIONS PRESENTED

As a result of the foregoing, the following legal questions are presented:

Colorado Compliance Pipeline Issue

1. Whether the CCP Issue should be dismissed in its entirety. (Kansas' Motion to Dismiss and Brief in Support, CCP Issue).

2. Whether the additional issue presented by Kansas relating to South Fork overuse in connection with the CCP Issue should be dismissed. (Colorado's Combined Opening Brief on Legal Issues and Motion to Dismiss).

3. Whether portions of the Statement of Kansas Chief Engineer David W. Barfield regarding the CCP Issue should be stricken. (Colorado's Motion to Strike).

Nebraska Crediting Issue

4. Whether the Nebraska Crediting Issue should be dismissed in its entirety. (Kansas' Motion to Dismiss and Brief in Support, Nebraska Crediting Issue).

III. DECISION ON LEGAL ISSUES

The Arbitration Agreements direct that the Arbitrator shall prepare a written decision and explanation of the decision. The Arbitrator shall be guided, but not bound, by any relevant provisions of the Federal Rules of Civil Procedure ("FRCP) and Federal Rules of Evidence ("FRE") and by the Compact, the FSS and established principles of law. (*See,* Arbitration Agreements, Sections F.3-4.)

COLORADO COMPLIANCE PIPELINE ISSUE

Question 1: Whether the CCP Issue should be dismissed in its entirety.

Decision: The Motion to Dismiss is denied. Ruling against Kansas.

Summary: Kansas argues that the CCP Issue is not a proper subject for arbitration under the FSS because Colorado seeks relief that cannot be granted by the Arbitrator or, ultimately by the U.S. Supreme Court. According to Kansas, arbitration under the FSS is a precursor to Supreme Court litigation. If the issue to be litigated is outside the scope of jurisdiction of the Court, arbitration should not be allowed. The Kansas argument requires a determination that the submission of an issue for non-binding arbitration under the FSS is merely a pre-requisite to pursuing further action before the Supreme Court and has no other purpose under the FSS. This argument fails because the express wording of the FSS allows "any matter" to be submitted for dispute resolution and arbitration. Further, it seems likely that the Supreme Court would accept jurisdiction to consider the issue now presented for arbitration. Whether the Court would ultimately grant the requested relief is less clear, but is not relevant to the determination of whether the CCP Issue is properly the subject of arbitration.

Analysis: The CCP Issue stems from a request by Colorado for approval of an augmentation plan as contemplated under the FSS. The term "augmentation plan" is not defined in the FSS but is used in the context of describing a process by which a State may acquire or construct wells for the purpose of offsetting stream depletions in order to comply with Compact Allocations. *See,* FSS Section III.B.1.k. Pursuant to Section III.B.1.k of the FSS, "Augmentation plans and related accounting procedures submitted under this Subsection II.B.1.k. shall be approved by the RRCA prior to implementation." Under terms of the Compact, decisions by the RRCA, as the administering body of the Compact, must be unanimous and consistent with the provisions of the Compact. (Compact, Article IX.)

Section VII of the FSS describes a process for dispute resolution, providing that "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest, shall first be Submitted to the RRCA." (FSS, Section VII.A.1.) Under Section VII.A.7, if an issue cannot be resolved by the RRCA and the State raising the dispute desires to proceed, the dispute "shall be submitted to non-binding arbitration unless otherwise agreed to by all States with an Actual Interest in the dispute." A State is deemed to have an "Actual Interest" if resolution of the dispute could require action by the State, result in increasing or decreasing the amount of water available to the State, affect the State's ability to monitor or administer water use or water availability, or increase the State's financial obligations. (FSS, Section II.)

Section VII.B of the FSS describes "General Dispute Resolution Provisions," including the process by which a State may initiate non-binding arbitration. (FSS, Section VII.B.1) Under Section VII.B.8, "A State that has submitted a disputed issue to the RRCA and to arbitration as provided in this Section VII shall be deemed to have exhausted its administrative remedies with regard to such issue."

As described in the Arbitration Agreement for the CCP issue, Colorado desires to use wells under an augmentation plan. Accordingly, Colorado submitted a "Colorado Compact Compliance Pipeline Proposal ("Proposal") to the RRCA. (CCP Arbitration Agreement, p. 1.) The RRCA rejected the Proposal and thereafter Colorado initiated non-binding arbitration in accordance with the FSS procedures. (*Id.*)

In its Motion to Dismiss, Kansas argues that the request is in the nature of a motion to dismiss under FRCP Rule 12(b)(6), which allows dismissal as a matter of law upon failure to state a claim upon which relief can be granted. (Kansas' Motion to Dismiss and Brief in Support, at 16.) In addition, Kansas asserts that a claim for arbitration must also meet requirements to maintain a suit under the original jurisdiction of the Supreme Court. (*Id.*) In summary, Kansas argues only the RRCA has the power to grant the relief that Colorado seeks in approval of her CCP Proposal. Because the FSS states expressly that RRCA approval is required before implementation of an augmentation plan, and because the RRCA declined to approve the proposed augmentation plan and related changes in the FSS accounting procedures, Kansas contends that neither the arbitrator nor the Court has power to approve the plan. (*Id.*, at 16-21.) Kansas argues that "the dispute resolution provisions [of the FSS] contemplate only those matters that are ultimately amenable to judicial resolution by the Court" and asserts the Court has no authority to resolve the present controversy. (*Id.*, at 17.) In its brief and oral argument, Kansas offers authority in support of its contention that the Court's original jurisdiction in addressing matters related to interstate compacts is limited to "interpretation and enforcement" of the compact. (*Id.*, at 17.) Kansas argues the Supreme Court therefore could not and would not assert jurisdiction to affirmatively change the provisions of the Compact or FSS as requested by Colorado.

Colorado responds that arbitration of the CCP dispute is consistent with the FSS and is a pre-requisite to bringing an action in the Supreme Court. Colorado asserts the dispute resolution provisions of the FSS are broad and inclusive, citing extensively from the detailed analysis provided by Arbitrator Dreher in addressing a similar issue raised by Kansas in the previous arbitration proceeding. (Colorado's Response Brief to Kansas' Motion to Dismiss, at 3-13.) In summary, Arbitrator Dreher concluded that the plain meaning of the FSS allows "any matter" relating to the compact administration to be considered in non-binding arbitration unless specifically excluded from the FSS. (*See,* Dreher Decision on Legal Issues, at 3-7.) Colorado also contests Kansas' assertion that the U.S. Supreme Court would lack jurisdiction to address the issues, arguing that both the arbitrator and the Supreme Court have authority to interpret the FSS and resolve disputes in the manner requested. (Colorado's Response Brief to Kansas' Motion to Dismiss, at 13-20.)

In their briefs and in oral argument, both States relied heavily upon the case of *Texas v. New Mexico*, 462 U.S. 554 (1983) in support of their respective positions regarding whether the U.S. Supreme Court would have jurisdiction over and authority to address the matter of the CCP dispute. The *Texas v. New Mexico* case was also addressed, at length, at pages 6-7 of the Dreher Decision on Legal Issues. It bears further review here.

The case arose from claims by Texas that New Mexico breached its obligations under the Pecos River Compact by depleting the flows of the Pecos River. Texas invoked the original jurisdiction of the Supreme Court to resolve the dispute. The Pecos River Compact, like the Republican River Compact, created an administrative body, the Pecos River Commission, to administer the compact. The Commission had two voting members who were unable to reach agreement on a proposal by Texas to adopt a so-called "Double Mass Analysis" accounting system. The Court appointed a special master who filed a report to which the two states filed exceptions.

The Court resolved three primary issues relating to the compact dispute between the two states: First, the Court rejected the special master's recommendation that a third party be given a vote on the interstate commission. The court reasoned that the special master's proposal would require re-writing the express terms of the compact with respect to voting members. (*Texas v. New Mexico* at 564-566.) The Court noted that "the States' failure to agree on one issue, however important, does not render the Compact void, nor does it provide a justification for altering is structure by judicial decree." (*Id.,* at 565.) After suggesting that the States "might well consider" amending the Compact to provide some mechanism for resolving "paralyzing impasses" such as the one at issue, the Court concluded the solution for impasse "is judicial resolution of such disputes as are amenable to judicial resolution, and further negotiation for those disputes that are not." (*Id.*) Kansas relies largely on this portion of the case in support of its assertion that the Court would not and could not take action to effectively re-write the Compact and FSS by overriding the requirement for unanimous decision-making and approving the CCP Proposal.

Next, the Court rejected New Mexico's argument that the Court had no jurisdiction to resolve the dispute regarding New Mexico's alleged breach of the Compact. The Court clearly stated it had jurisdiction over a suit to apportion the waters of an interstate stream and to, among other things, declare rights under a compact and interpret it. (*Id.,* at 567.) The Court said it would withdraw "if it were clear [from the compact] that the Pecos River Commission was intended to be the exclusive forum for disputes between the States…." (*Id.,* at 569.) However, the Court found that the express terms of the compact did not prevent judicial review. The Court also stated (as quoted by both Kansas and Colorado in their briefs):

> In the absence of an explicit provision or other clear indications that a bargain to that effect was made [i.e. that the parties could not invoke the jurisdiction of the Court], we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights."
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> (*Id.,* at 569-570)

This finding by the Court suggests support for Colorado's contention that the Court could and would consider granting the requested relief.

Third, the Court rejected Texas' proposal to use a "Double Mass Analysis" method of flow accounting. The compact expressly provided for use of an "inflow-outflow" method, so the Court reviewed the Double Mass Analysis method to determine whether it qualified as an inflow-outflow method under the compact. The Court held that the Double Mass approach was not close enough to the contemplated inflow-outflow approach to be acceptable for use under the compact, although the Court noted that the question was a close one. (*Id.*, at 571-574). Both Colorado and Kansas rely on this aspect of the case: Colorado asserting the Court was clearly willing to undertake substantive review of an issue upon which the Pecos River Commission could not agree, and Kansas arguing the decision demonstrates the Court is not willing make changes in a Compact except as expressly provided therein.

With respect to the CCP issue in this arbitration, the most important point to be taken from the *Texas v. New Mexico* decision is that the Court *took jurisdiction and addressed all of*

the issues. The Court determined the compact itself would have to clearly preclude judicial review to keep the Court from asserting jurisdiction and deciding issues related to interstate waters. Thus, in the present arbitration, a critical question is whether the Republican River Compact expressly precludes review by the Court. Because the Compact contains no such preclusion, it seems likely the Court will take jurisdiction.

Whether the Court would impose a reasonableness test, as urged by Colorado, to consider approval of the CCP Proposal is less clear. Given its determination on the Double Mass argument in *Texas v. New Mexico,* the Court may very well decline to grant Colorado's requested relief because of potential inconsistency with the existing provisions of the Compact or FSS. But, these issues need not be resolved at this juncture and are not the deciding factor as to whether an issue is properly before this arbitration. The broad wording of the FSS dispute resolution provision appears to establish a process for neutral third-party review through non-binding arbitration regardless of whether the Court may ultimately grant jurisdiction for review or grant the relief requested by a State. The FSS expressly provides that a State is "deemed" to have exhausted its administrative remedies upon submission of the issue to arbitration; however, there is nothing in the FSS that compels a State to seek judicial review of an issue submitted to arbitration.

During oral argument, the States responded to the Arbitrator's question as to whether there is a purpose to the non-binding arbitration process separate and apart from what might be accepted for review by the Court. (Transcript, at 16.) Relying on wording in Section VII.B.8 of the FSS regarding exhaustion of administrative remedies and the arguments in its brief, Kansas concluded that only those issues that can ultimately be accepted for review by the Court should be considered for arbitration. In further support, Kansas pointed to the time and cost required for arbitration, arguing that the process was intended or should be reserved "to consider issues in a formal setting and get an independent view on how those [issues] should be resolved before the parties seeking some kind of relief took their case to the Supreme Court." (*Id.,* at 17-18.) While the argument reflects a certain amount of common sense and pragmatism in light of the resources the States must invest on the non-binding proceedings, it contradicts the plain meaning of the FSS provision stating that "any matter" may be offered for dispute resolution. Additionally, as argued similarly by Colorado and Nebraska, the FSS process can provide an independent forum and opportunity by which the States may seek to resolve significant disputes through a neutral, third-party review. (*Id.,* at 52-53.)

As a potential remedy for future disputes, the States may wish to consider seeking agreement on modifications to the FSS that would narrow the scope of issues subject to arbitration, provide for mediation as an alternative to arbitration, create a less formal arbitration process to address certain categories of issues, or identify certain categories of issues which may by-pass dispute resolution entirely and proceed directly to the Supreme Court. In the absence of such clarification, the FSS must be broadly construed.

Question 2: Whether the additional issue presented by Kansas relating to South Fork overuse should be dismissed.

Decision: The Motion to Dismiss is denied. Ruling against Colorado.

Summary: Colorado asserts Kansas seeks to broaden the scope of the arbitration by raising an additional issue relating to potential overuse of water in the South Fork sub-basin. In actuality, Kansas has raised a question of fact concerning the adequacy of the CCP Proposal and whether the Proposal complies with Compact and FSS requirements with respect to discrete sub-basins. Kansas has not requested arbitration of the issue relating to over-use in the South Fork sub-basin. Whether hypothetical, or real, the question of whether overuse in one sub-basin may be addressed by replacing flow in another sub-basin is relevant to a factual determination of what the CCP Proposal includes and whether it may approved under the Compact and FSS.

Analysis: Colorado asserts that Kansas has presented an issue for arbitration that is not within the scope of the current proceeding and was not properly raised by Kansas as a separate issue for arbitration, or as an amendment to the scope of this proceeding. (*See,* Colorado Combined Opening Brief on Legal Issues and Motion to Dismiss, at 36-38.) The basis for Colorado's contention is a statement contained in a November 30, 2009 letter sent by Kansas RRCA Commissioner David W. Barfield to Colorado Commissioner Dick Wolfe. The letter is included as Exhibit 3 to Colorado's brief. The letter was written following the RRCA meeting on August 12, 2209, at which the Commissioners for Kansas and Nebraska voted against Colorado's CCP resolution, and states that it was prepared in response to a request by Colorado to Kansas and Nebraska shortly thereafter seeking "an explanation of the reasons for their votes and the concerns behind them." (*Id.,* at Exhibit 3, p.1)

Colorado objects to the following statement in the letter:

> Under the current CCP proposal, Colorado seeks to comply with the Compact by pumping groundwater from the North sub-basin and placing it in the North Fork alone. This approach fails to address Colorado's overuse on the South Fork; as a result, Kansas' South Fork water users would remain deprived of their Compact share.

(*Id.*, at 36, quoting Exhibit 3)

According to Colorado, this wording from the Kansas letter purports to raise an issue for arbitration regarding overuse in the South Fork sub-basin. Therefore, Colorado argues the Arbitrator does not have subject matter jurisdiction to address the issue because it was not first submitted by Kansas to the RRCA, as required under Section VII.A.1 of the FSS. (*Id.*) Colorado asserts both that the issue may not be considered independently for arbitration and is not relevant to the CCP Issue. (*Id.*) Alternatively, however, Colorado recognizes acknowledges the issue may be one of mixed law and fact, and requests an opportunity to present further testimony at the scheduled arbitration hearing. (*Id.,* at 37.)

Kansas does not specifically respond to the motion and underlying assertions in her Response brief. However, the plain meaning of the letter, considering both the text and context of the Kansas comments, indicate that it was not intended to raise a new issue for arbitration. On its face, the letter was submitted by Kansas in response to Colorado's request for an explanation of why Kansas refused to approve the CCP Proposal when that issue was presented to the RRCA. The letter does not request arbitration of the issue relating to alleged South Fork overuse, nor has Kansas asserted such a right in the Arbitration Agreement or pleadings on this matter.

Kansas further explains the relevance of the South Fork issue to consideration of the overall CCP Issue in its response brief. (*See,* Kansas' Response to Colorado's Combined Opening Brief on Legal Issues and Motion to Dismiss at 4-6.) The rationale includes an assertion of overuse by Colorado within the South Fork sub-basin, but does not directly request or rely upon such a finding to explain Kansas' prior vote on the issue as a member of the RRCA, or to support its argument against approval of the CCP Proposal in this arbitration proceeding.

The scope of the arbitration proceeding for the CCP Issue was established by Colorado in the letter of August 21, 2009, Notice of Invocation of Non-Binding Arbitration (Arbitration Agreement, Exhibit B). That letter describes the scope as being "in the form of Colorado's rejected Resolution and exhibits" which were attached as exhibits to the letter. (*Id.,* at 2.) These documents, in turn, describe in detail the plan by which Colorado proposes to augment flow in the North Fork Republican River from ground water in order to offset stream depletions to assist Colorado in complying with the Compact. (Colorado's Combined Opening Brief, at 13.) The comments contained in the Kansas letter relate to questions of fact that are material to a determination of whether the CCP should be approved, as requested by Colorado. Whether hypothetical, or real, the question of whether overuse in one sub-basin may be addressed by replacing flow in another sub-basin is relevant to a factual determination of what the CCP Proposal includes.

Question 3: Whether portions of the Statement of Kansas Chief Engineer David W. Barfield regarding the CCP Issue should be stricken.

Decision: The Motion to Strike is granted. Ruling in favor of Colorado.

Summary: Paragraph 6 of the Statement of Mr. Barfield includes conclusions of law relating to interpretation of Sections III.B.1.k and IV and should therefore be stricken from the record.

Analysis: Colorado's Motion to Strike was filed on May 3, 2010, in reply to a witness statement submitted by Kansas in support of her Response to Colorado's Combined Opening Brief on Legal Issues and Motion to Dismiss. Colorado takes issue with statements contained in Paragraph 6 of the "Statement of Kansas Chief Engineer David W. Barfield" asserting that contested paragraph "Goes beyond a factual statement and is instead opinion testimony providing his legal conclusions as to the requirements of the FSS." (Colorado's Motion to Strike, at 2) In support of the motion, Colorado cites FRCP 56(e)(1) (supporting affidavit must be made on personal knowledge…that would be admissible in evidence) and FRE 602 (personal knowledge of a witness), along with cases addressing the well-established legal principles relating to opinion testimony and legal conclusions. (*Id.*) At oral argument, Colorado explained:

> Mr. Barfield, despite his familiarity with the document, cannot step into the shoes of the Court, in this case, the arbitrator, and give a legal opinion as to what was meant either in that document or by those who were negotiating that document.
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> (Transcript, at 108.)

In response, Kansas argued that administrative water officials such as Mr. Barfield and his counterpart in Colorado are often called upon to apply legal standards. As part of that

process, Kansas states they may be allowed to say what the standard is that they are applying and would not be subject to the kind of objections presented in the Colorado motion. (*Id.,* at 109.) Kansas noted that similar legal conclusions appear to be drawn in Paragraphs 6 and 9 of the Affidavit of Dick Wolfe submitted by Colorado in support of its Combined Opening Brief on Legal Issues and Motion to Dismiss, and reasoned: "We don't object to it [Mr. Wolfe's affidavit]. We think it's appropriate. And we also think it's appropriate in the case of Mr. Barfield to the extent that he is doing the same thing." (*Id.,* at 112.)

Colorado responded by distinguishing the statements in Mr. Wolfe's affidavit, arguing that, in context, the statements explain "...what he did and why he did it, rather than what the future interpretation of the requirements are." (*Id.*) Review of the specific paragraphs in the affidavit confirms that the statement in Paragraph 6 describes procedural facts that have not been contested by the States regarding submission of the CCP Issue to the RRCA and invocation of the arbitration process. The statement in Paragraph 9 describes how the CCP Proposal is designed to work, "in accordance with Subsection III.B.1.k." This comment comes close, but does not rise to the level of a legal conclusion regarding compliance with the FSS. In context, the statement can reasonably be read as a description of the CCP Proposal in relation to FSS requirements.

As a practical matter, the contested portions of the testimony by Mr. Barfield (and Mr. Wolfe), whether included or excluded from the record, will not make or break either State's case for this non-binding arbitration. As Kansas points out, administrative water officials such as Mr. Barfield and Mr. Wolfe are often called upon to interpret and apply the law, and their perspective may be of value in understanding the facts at issue in this arbitration. Given that the testimony is offered in connection with legal issues presented to an arbitrator – rather than to a jury – the risk of misuse or misunderstanding of the statement is low. Further, pursuant to the CCP Arbitration Agreement, the Arbitrator is to be guided, but not necessarily bound, by applicable FRCP and FRE provisions. (CCP Arbitration Agreement, at F.2 and F.3.) With this latitude, it is tempting to deny the motion regarding Mr. Barfield's comments. However, a plain reading of Paragraph 6 of Mr. Barfield's Statement reveals a conclusion of law regarding the interpretation of Sections III.B.1.k., and IV.B. of the FSS. Paragraph 6 is therefore stricken.

NEBRASKA CREDITING ISSUE

Question 4: Whether the Nebraska Crediting Issue should be dismissed in its entirety.

Decision: The Motion to Dismiss is denied. Ruling against Kansas.

Summary: Kansas asserts the Nebraska Crediting Issue should be dismissed for failure to state a claim, on grounds similar to the arguments made in connection with its Motion to Dismiss the CCP Issue. In addition, Kansas argues the Nebraska Crediting Issue presents legal questions stemming from the legal principles of "ripeness" and "*res judicata*" that support dismissal of the Crediting Issue. Dismissal on the basis of failure to state a claim is not warranted for the same reasons described above, in connection with the decision on Question 1. Dismissal on the basis

of "ripeness" is also denied for the similar reasons. The argument relating to *res judicata* raises unique questions in the context of a non-binding arbitration process under the FSS and subject to the specific direction of the Arbitration Agreement. Because there is no established legal precedent for applying *res judicata* within this procedural framework, the Motion to Dismiss cannot be granted.

Analysis: Kansas asserts the Nebraska Crediting Dispute should be dismissed in its entirety for three reasons: First, that it is not an appropriate issue for arbitration because is not appropriate for resolution in the Supreme Court; next, that the issue should be barred from adjudication at this time on the basis of the legal doctrine of *res judicata;* and third, that Nebraska fails to state a claim upon which relief may be granted. (Kansas' Motion to Dismiss and Brief in Support, at.12) On the first and third points, Kansas offers argument similar to that presented in support of Question 1, *supra*, relating to the CCP arbitration. However, Kansas argues the Crediting Issue also includes an additional consideration in that it does not present a "case or controversy" as required for jurisdiction under Article III of the United States Constitution. (*Id.,* at 13-16.)

Kansas asserts there are no actual facts in controversy at this time because "There is no claim as yet by Kansas asserting violation for years that would provide an occasion for the Arbitrator or the Court to address Nebraska's crediting issue." (*Id.,* at 14) The question presented by Kansas is whether the crediting issue is "ripe" for judicial review. Citing extensive authority, Kansas explains the ripeness doctrine is designed to prevent the courts from taking action prematurely on contingent future events that may not occur as anticipated, or may not occur at all. In this case, Kansas states the Nebraska Crediting Issue is not ripe for arbitration because it rests on such contingent future events.

The argument regarding *res judicata* is based on the fact that the crediting issue – at least to some extent – was addressed in the previous arbitration proceeding before Mr. Dreher. The legal principle of *res judicata* dictates that a final judgment on the merits of an action precludes the parties from re-litigating issues that were or could have been raised in the prior action. (*See,* Kansas' Motion to Dismiss and Brief in Support at 16, citing cases.) With respect to the current arbitration proceeding, Kansas asserts that principles similar to *res judicata* should apply to preclude Nebraska from contesting a matter that has already been decided. (*Id.*)

Nebraska contends that the issue is properly within the scope of dispute resolution and non-binding arbitration under the FSS because the FSS allows "any matter" to be resolved through the dispute resolution provisions of Section VII. (Nebraska's Opening Brief Re: Legal Issues, at 12-16.) Nebraska argues that the required procedural steps were followed to submit the issue for arbitration, and therefore, the State is entitled to proceed with arbitration as a matter of law. Alternatively, in response to the issue of *res judicata*, Nebraska essentially argues that Kansas cannot have it both ways: if the matter was fully arbitrated in the prior adjudication, Kansas should so stipulate and allow the matter to move forward directly to the U.S. Supreme Court. If not, the issue should proceed to hearing now. (Nebraska's Response to Kansas' Motion to Dismiss, at 1.)

As noted, the arguments by Kansas regarding Supreme Court jurisdiction and failure to state a claim are substantially similar to those presented and addressed in Question 1relating to

the CCP Issue. As described in the above analysis, a careful review of the case of *Texas v. New Mexico*, *supra,* and the clear wording of Section VII of the FSS, support a conclusion that the FSS establishes a procedural option for non-binding arbitration that stands separate and apart from the option of judicial review. The same analysis and conclusion apply here with respect to the Nebraska Crediting Issue.

That same conclusion must also be reached with regard to the question of ripeness under Article III, despite the fact that no binding award of damages has been rendered against Nebraska. At oral argument, the Arbitrator questioned counsel about the need for action at this time, prior to any judicial determination of damages that would give rise to the crediting concern. In response, Nebraska offered several reasons why it is important to pursue the issue from the standpoint of planning and on-going administration of Compact allocations. (Transcript, at 90-97) Counsel also addressed implications of the fact, entered into the record as part of preliminary matters, that Kansas has now filed a petition before the Supreme Court asserting overuse by Nebraska and seeking relief in the form of damages or other remedies. (*Id.,* at 4, 88, 96) As a bottom line, however, it is not necessary to decide whether the change Nebraska seeks in the Compact accounting procedures is premature because, as previously determined, the FSS permits arbitration on "any matter" submitted by following the procedures described in Section VII.

The argument to dismiss on the basis of *res judicata* presents a new issue for consideration in light of the express provisions of the FSS. The abstract question of whether or to what extent the legal principle should apply to a non-binding arbitration under the FSS was raised by the Arbitrator during oral argument. (*Id.,* at 72 – 80.) The issue was also addressed in oral argument relating specifically to the Nebraska Crediting Issue. (*Id.,* at 104-106.) It must be granted, as noted in oral argument, that the extensive discussion of whether "non-binding arbitration is binding" is, at one level, somewhat comical. (*Id.,* at 77.) But, the discussion among the States underscored apparent practical and procedural complications with the non-binding process as provided under the FSS. As stated by Mr. Draper, "The thing that is binding here is the requirement that the parties engage in the Dispute Resolution Process…." (*Id.,* at 77.) Having done so, the States seem to be in general agreement that they are not bound to implement the decisions and recommendations from the previous arbitration except to the extent that the recommendations are unanimously adopted. At the same time, they recognize the value of judicial economy in avoiding multiple proceedings on the same or similar issues, and therefore seem to agree, generally, that some concept related to *res judicata* should apply. (*See, Id.,* at 75 - 78.)

In the present arbitration, it is clear from the pleadings and oral argument that Nebraska's ultimate goal is to preserve its ability to present the Crediting Issue to the Supreme Court. An apparent concern at this point is to ensure that the goal is not thwarted by a procedural flaw in failing to exhaust administrative remedies as may be implied under the FSS. It is also clear that the States have already invested substantial time and resources to address the Crediting Issue, to some extent, in the previous arbitration proceeding and are doing so again in connection with this arbitration. If the Motion to Dismiss is denied, the issue will be fully heard at the scheduled evidentiary hearing, and a Final Decision will be rendered, thereby confirming Nebraska's option to proceed to the Court. If the Motion to Dismiss is granted on the basis of *res judicata* the outcome with respect to exhaustion of remedies is uncertain. During oral argument, the

Arbitrator asked the States directly whether granting the motion to dismiss would satisfy the exhaustion requirement, based on the procedural steps completed to date. (*Id.,* at 107.) Both Kansas and Nebraska responded that it would. But, as stated by Nebraska, there does not appear to be any established precedent confirming that the doctrine of *res judicata* may be applied in this fashion. *(Id.,* at 76.) Further, Nebraska asserts that it was not provided an opportunity to fully brief and present evidence on the crediting issue during the first arbitration proceeding because of the restrictions imposed by the Arbitrator's decision on legal issues. (Nebraska's Response to Kansas' Motion to Dismiss, at 3) As a result, if the Motion to Dismiss were granted on the basis of *res judicata*, Nebraska may be faced with limitations on the scope of review before the Supreme Court.

Most persuasive however, is the lack of precedent. Pursuant to the Arbitration Agreement, the Arbitrator must decide the issues based only on published legal precedent in addition to the specific background documents provided under the Agreement and the submittals of the States in this Arbitration." (Nebraska Crediting Issue Arbitration Agreement, at F.1.c.) Kansas submits (and, indeed, Nebraska may agree) that principles similar to *res judicata* should apply to the arbitration. However, there is no clear precedent for doing so. As a result, the Motion to Dismiss cannot be granted on this basis.

Dated: May 17, 2010

Martha O. Pagel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that on 17th day of May, 2010, I served a copy of the foregoing **ARBITRATOR'S JOINT DECISION OF LEGAL ISSUES** by e-mail and by sending a true and correct copy thereof by overnight courrier on:

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