



Dave Heineman
Governor

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES
Brian P. Dunnigan, P.E.
Director

February 13, 2014

IN REPLY TO:

Michael J. Ryan, Regional Director
U.S Department of the Interior
Bureau of Reclamation
Great Plains Regional Office
PO Box 36900
Billings, MT 59107-6900

RE: Nebraska's Republican River Compact (Compact) Compliance Efforts During Calendar Year 2014

Dear Mr. Ryan:

This letter responds to your letter of February 5, 2014. I had the opportunity to meet with your staff on January 22, 2014, to discuss a draft of your letter. See attached correspondence from Aaron Thompson. I will not rehash that lengthy discussion now, trusting that your staff has informed you of the factual inaccuracies and misstatements contained in your draft letter. Unfortunately, your February 5, 2014, letter persists in mischaracterizing the situation in the Republican River Basin.

In the past, the Bureau of Reclamation (Bureau) has repeatedly complained that Nebraska was not complying with the Republican River Compact (Compact), and such noncompliance was also harming the Bureau and its water projects. Your letter is remarkably silent on one very important point: Nebraska complied with the Compact in 2013.

As my staff and I explained to your staff through numerous examples on January 22, 2014, it is, in fact, Kansas who is failing to comply with the Compact. Kansas has vetoed: 1) Nebraska's proposed changes to the Republican River Compact Administration (RRCA) Accounting Procedures (designed to eliminate the improper consumption of imported water supplies); 2) the Rock Creek Augmentation Project; 3) the Nebraska Cooperative Republican Platte Enhancement (N-CORPE) Augmentation Project; and 4) Nebraska's Alternative Water-Short Year Administration Plan. The purpose of these proposals is to ensure Nebraska complies with the Compact, which should have the benefit of providing all Nebraska water users increased flexibility. By unreasonably vetoing these projects, Kansas is depriving Nebraska of a significant portion of its Compact allocations, and is therefore depriving the Bureau of its ability to access more water. This usurpation of Nebraska's Compact entitlements is the primary cause of your concerns.

Michael J. Ryan
February 13, 2014
Page 2 of 3

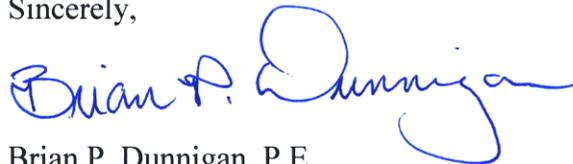
To be perfectly clear: *had Kansas accepted the foregoing, 2013 would not have been a Compact Call Year and the Bureau and its customers would have had access to increased water supplies.* Therefore, I encourage you to address your concerns directly with Kansas.

In addition, I direct you to Appendix G of Special Master Kayatta's Final Report for an excellent description of the arbitrary and capricious behavior that exemplifies what Nebraska maintains constitutes Kansas' violations of Article IX of the Compact.

I have previously attempted to address these Compact violations through a letter I sent to Mr. Barfield on May 24, 2013 (see attached) and additional discussions at the 2013 Annual RRCA meeting held September 11 – 12, 2013, in Colby, Kansas, which your staff also attended. I received no response of note.

With this clarification, I trust the Bureau will pursue its concerns with Kansas and support Nebraska's efforts to address these violations. Until Nebraska has resolved these violations, the Department will continue to manage Nebraska water supplies in accordance with all applicable laws and regulations. I appreciate your ongoing cooperation, and am willing to assist in your efforts to better manage the resource.

Sincerely,



Brian P. Dunnigan, P.E.
Director

Enclosures

cc: David Barfield, P.E.
Kansas State Engineer
Division of Water Resources
109 SW 9th Street, 2nd Floor
Topeka, KS 66612-1283

Kenneth Nelson, Superintendent
Kansas Bostwick Irrigation District No. 2
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Dick Wolfe, P.E.
Colorado State Engineer
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Michael J. Ryan
February 13, 2014
Page 3 of 3

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Lower Republican NRD
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Corps of Engineers, Kansas City District
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Brad Edgerton, Manager
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Environment and Natural Resources Division
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Denver, CO 80202

Schneider, Jim

From: Thompson, Aaron <athompson@usbr.gov>
Sent: Wednesday, January 22, 2014 8:40 AM
To: Schneider, Jim
Subject: Meeting with DNR
Attachments: Draft Letter to DNR Management Plans Jan 21.docx

Jim, as we discussed this morning attached is an advanced draft copy of our letter to DNR. I think it would be productive to discuss it this afternoon before we have it finalized.

Aaron

GP-4600
WTR-4.10

Brian P. Dunnigan, P.E.
Director, Nebraska Department of Natural Resources
301 Centennial Mall South
PO Box 94676
Lincoln, NE 68509-4676

Subject: Nebraska's Republican River Compact (Compact) Compliance Efforts During
Calendar Year 2014, Pick-Sloan Missouri Basin Program, Nebraska

Dear Mr. Dunnigan:

The Bureau of Reclamation (Reclamation) appreciates receiving your Forecast of Allowable Depletions in the Republican Basin During 2014 and 2024 (Forecast) provided by electronic mail from Dr. James Schneider of your staff on January 3, 2014. Reclamation understands the Forecast indicates Nebraska will use 32,510 acre-feet more than its allocation of the Republican River under the Compact in calendar year 2014 unless some management actions are implemented. Considering 2013 and 2014 together, Nebraska must take management actions that yield 42,650 acre-feet in order to meet the two-year test for water-short year accounting.

Reclamation is concerned that its surface water projects, operating pursuant to federal reclamation authorities and with state water rights, will again be disproportionately impacted in 2014 as they were in 2013 when Nebraska's predicted shortfall of 13,600 acre-feet was only one-third of the shortfall now predicted at the outset of 2014. The relevant data and our concerns are outlined in greater detail below. It is hoped that the actual experience of 2013 can inform decisions made in 2014, so that the various users of Nebraska's water resources can receive fair and equitable treatment that is consistent with all applicable authorities. We stand ready to work with Nebraska Department of Natural Resources (DNR) to facilitate achievement of this goal and mandate.

Surface water administration by Nebraska during 2013 resulted in 23,075 acre-feet of water being released from Swanson, Enders, Hugh Butler, and Harry Strunk reservoirs to the Republican River that normally would have been used by Reclamation's Frenchman-Cambridge Division. As a result of the administration, this water was lost to these beneficial users during 2013. An additional 11,466 acre-feet of water was stored in Reclamation's upstream reservoirs at the end of August which could have been delivered for irrigation, but its use was prevented due to the administration. The Frenchman-Cambridge Irrigation District could have delivered about twice as much water to their water users if groundwater users had contributed an equitable share toward Compact compliance.

Nebraska Bostwick Irrigation District water users who rely on water stored in Harlan County Lake were also impacted in 2013 due to the administration. Pursuant to your order issued on May 1, 2013, water released to the river during May totaled 7,765 acre-feet and 10,098 acre-feet was released to the river during November and December. This water was strictly for delivery to Kansas for Nebraska's Compact compliance needs and not available to Nebraska water users. The Nebraska Bostwick Irrigation District could have delivered about fifty percent more water if groundwater users had contributed an equitable share toward Compact compliance. Considered together, in very general terms, surface water users who rely on federal storage facilities contributed no less than 50,000 acre-feet toward Nebraska's Compact compliance during 2013.

The treatment of ground water users during 2013 was markedly different. Nebraska's DNR approved management actions proposed by the Natural Resource Districts (NRDs) to provide the 13,600 acre-feet needed to keep Nebraska compliant with the Compact in 2013. Reclamation's understanding was that the management actions taken by the NRD's were to make up Nebraska's expected Compact shortfall. These management actions included reduction of calculated beneficial consumptive use and implementation of the Rock Creek Augmentation Project. Based on information provided to Reclamation by the DNR, we understood that administration was necessary to "front load" or pre-position water lower in the basin until the water derived from the NRDs' management actions would replace the water curtailed by the administration. The NRD management actions never resulted in replacement water to the detriment of surface water users. As for the Rock Creek Augmentation Project, it is difficult to determine how much of the water was actually available to offset the expected shortfall in 2013. However, Reclamation staff observed that the Republican River above Swanson Reservoir was dry from August through October indicating a significant amount of the water being provided by the upstream Rock Creek Augmentation Project was not available to be used or stored in 2013.

Reclamation is not aware of any requests from DNR to the NRDs requesting additional management actions even as the basin water supply appeared to be less than expected and when it became apparent that the Rock Creek Augmentation Project water was not being realized. Meanwhile, the DNR continued to curtail the use of surface water even after the 13,600 acre-feet amount needed to offset the expected shortfall was available in storage. DNR continued to require the surface water users to do more to aid Nebraska with its Compact compliance.

Mindful of the lessons of 2013, and looking ahead to 2014 and future years, Reclamation observes that the Integrated Management Plans (IMPs) between the DNR and NRDs have the following as one of the stated goals:

Ensure that ground water and surface water users within the NRDs assume their share, but only their share, of the responsibility to keep Nebraska in compliance with the Compact.

It appears to Reclamation that this goal was arbitrarily disregarded or forgotten during 2013, when surface water users who have approximately 100,000 acres of irrigation in the basin provided no less than 50,000 acre-feet toward Compact compliance. Conversely, groundwater users, through the NRDs, who have more than 1,000,000 acres irrigated, provided less than 13,600 acre-feet. It is evident that surface water users were disproportionately impacted so that Nebraska could achieve Compact compliance during 2013, contrary to the IMP goal. Surface water users, for whom Reclamation is a major provider, are obligated to provide their proper share of water to obtain Compact compliance. We fail to see the propriety in the 2013 division between surface and groundwater toward Compact compliance. Reclamation is responsible for administering contracts under federal reclamation law with the irrigation districts in the basin to provide a water supply and fulfill the purposes of the reclamation program and our state law water rights. We must protect the rights of federal reclamation project uses and users with all available remedies and in all appropriate forums. These comments to DNR should be considered in that spirit.

Looking ahead in 2014, Reclamation expects the DNR to approve management actions proposed by the NRDs that will ensure those actions make up Nebraska's projected Compact shortfall rather than disproportionately rely on surface water users. The management actions should be flexible so that the actions can be modified when water supply conditions in the basin deviate from what was forecast, such as what happened in 2013, or when the management actions do not generate the amount of water originally predicted. This flexibility should be possible with the large reliance on augmentation projects now in place to aid in Nebraska's Compact compliance efforts. Curtailment of all groundwater uses in the Rapid Response Area and more firm and limiting groundwater pumping allocations during 2014 are viable options that should be available for use for Compact compliance.

Reclamation remains committed to working with you as Nebraska seeks to achieve compliance with the Compact. If you have any questions, please contact me at 406-247-7600.

Sincerely,

Michael J. Ryan
Regional Director

cc: David Barfield, P.E.
Kansas State Engineer
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109 SW 9th Street, 2nd Floor
Topeka, KS 66612-1283

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NK-Thompson (electronic pdf file)
NK-Scott (electronic pdf file)
NK-Peck (electronic pdf file)



Dave Heineman
Governor

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES
Brian P. Dunnigan, P.E.
Director

May 24, 2013

IN REPLY TO:

David Barfield, P.E.
Kansas Commissioner, RRCA
Kansas State Engineer
Division of Water Resources
109 SW 9th Street, 2nd Floor
Topeka, KS 66612-1283

RE: Republican River Compact Administration

Dear Commissioner Barfield:

The State of Kansas is violating the Republican River Compact (Compact) by failing to administer it. Kansas' unwillingness or inability to resolve key elements of Compact implementation has harmed and continues to harm Nebraska's water users. Through its neglectful or intentional acts, Kansas has failed to comply with its duty under Article IX of the Compact, and Nebraska demands that violation be remedied.

Article IX of the Compact reads in material part:

It shall be the duty of the three States to administer this compact through the official in each State who is now or hereafter may be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact.

Kansas has breached this duty by, among other things: 1) neglecting to devote sufficient resources to the tasks required for Compact administration; 2) arbitrarily rejecting the efforts of the other States to comply with the Compact; and 3) unnecessarily burdening Nebraska's water users by frustrating Nebraska's Compact compliance efforts.

This is a serious allegation, but I have reached my conclusion based on years of experience trying to work with Kansas within the RRCA context. Kansas has consistently blocked matters critical to Compact administration, including: 1) Nebraska's proposed correction of the Accounting Procedures to avoid the consumption of imported water (submitted in 2007); 2) the Colorado Compliance Pipeline (CCP) and Bonny Reservoir accounting change (submitted by Colorado in 2008); and 3) the more recent submittals of Nebraska's Alternative Water-Short

David Barfield, P.E.
May 24, 2013
Page 2 of 3

Year Administration Plan and an augmentation plan for Rock Creek. Proposals of Colorado and Nebraska have been rejected without sound or sufficient analysis, and in some cases for no stated reason.

Kansas' actions, or lack thereof, in resolving important technical matters before the Republican River Compact Administration (RRCA) have caused Nebraska to unduly burden its water users with regulations and management actions. For example, by refusing to approve Colorado's CCP, Kansas has precluded additional water from entering Nebraska at the stateline in the North Fork. Kansas initially indicated that there were three issues with the CCP proposal (see letter from David Barfield to Dick Wolfe dated November 30, 2009). During the subsequent arbitration Kansas raised a total of eight issues. The arbitrator, Martha Pagel, concluded in her final decision dated October 7, 2010:

*The CCP Proposal, in general, provides a reasonable and necessary approach for meeting Colorado's Compact obligations. With changes as recommended herein, the revised CCP Proposal should be approved. However, the facts presented in this Arbitration proceeding do not support a conclusion that Kansas has acted in bad faith or has breached a duty of fair dealing in questioning and challenging key aspects of the proposed augmentation plan. **To be sure there is a risk that, at some point in the future, continuing objections by Kansas may suggest there is nothing that Colorado can do to develop a plan that would meet with approval by Kansas.** (bold emphasis added)*

Now, Colorado has addressed the arbitrator's recommendations; however, the State of Kansas continues to block the CCP Proposal and has forced Colorado to initiate a second arbitration. Moreover, the states have very recently learned that Kansas intends to raise additional, new issues in the upcoming arbitration (see letter from Chris Grunewald to Scott Steinbrecher and Justin Lavene dated May 15, 2013). It would appear that, with regard to the CCP, we have reached that "point in the future" envisioned by arbitrator Pagel in 2010.

This is not the only example of Kansas' obstructionist tactics. Recently, we received the Kansas Expert Report on Nebraska's 5-Run Proposal. Therein, Kansas' expert Mr. Larson explains that Kansas analysis of Nebraska's initial solution to the problem of imported water supply consumption was only "cursory." Nevertheless, that analysis generated the Virgin Water Supply (VWS) Metric, to which Nebraska responded by devoting substantial resources over a three-year period to develop a 16-Run Solution to address the problem. Of course, Kansas rejected and litigated that proposal despite its perfect satisfaction of the VWS Metric, and Mr. Larson went so far as to state that the VWS Metric was meaningless. Now, Kansas has inexplicably proposed a new solution to resolve imported water consumption that relies entirely on the VWS Metric and has the exact same effect as Nebraska's 16-Run Solution. It is very likely that, had Kansas devoted something more than a "cursory" analysis to the original problem in 2007, we might have avoided litigation of the issue altogether.

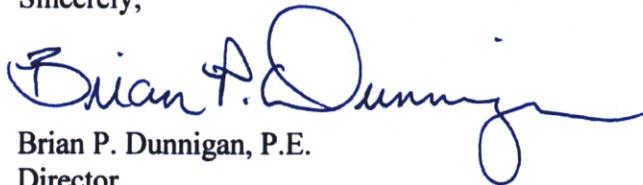
David Barfield, P.E.
May 24, 2013
Page 3 of 3

To be clear, I respect Kansas' right to disagree with Nebraska's plans and proposals. But, in order to perform its duty under Article IX, Kansas must work to resolve technical disputes within the RRCA framework. Kansas' pattern of obfuscation, misdirection, delay and neglect has continued for over five years.

I still hold out hope that the states can begin to work in a cooperative fashion to find solutions to fully implement the Compact, but that will require a major shift in Kansas' behavior and attitude toward its Article IX duties. Kansas' actions during my tenure as Director have left me only with the sense that Kansas has no intention of working cooperatively with Nebraska or Colorado. My hope is running out.

In conclusion, Nebraska respectfully requests that, no later than September 1, 2013, Kansas submit to the RRCA a plan for ensuring Kansas complies with Article IX. If Kansas is unable to provide Nebraska (and Colorado) assurance that it can perform its obligations under Article IX, Nebraska intends to submit this issue to the RRCA for resolution under Section VII of the Final Settlement Stipulation. Should Nebraska be required to work through the dispute resolution process, Nebraska will be required to seek full compensation in the form of money damages or an offset in the RRCA accounting for water rendered unavailable to it as a result of Kansas' efforts to frustrate Nebraska's and Colorado's Compact compliance actions.

Sincerely,

A handwritten signature in blue ink that reads "Brian P. Dunnigan". The signature is fluid and cursive, with a large loop at the end of the last name.

Brian P. Dunnigan, P.E.
Director

cc: Dick Wolfe, P.E., Colorado Commissioner, RRCA