



**Dave Heineman**  
Governor

# STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

Brian P. Dunnigan, P.E.  
Director

April 15, 2013

IN REPLY TO:

David W. Barfield, P.E.  
Chief Engineer  
Division of Water Resources  
Kansas Department of Agriculture  
109 SW 9th St., 2nd floor  
Topeka, KS 66612-1283

Dear Mr. Barfield:

This letter is intended to confirm Nebraska's understanding of Kansas' irrigation water needs in 2013. During our April 12, 2013, teleconference with representatives of the U.S. Bureau of Reclamation (Bureau), you stated Kansas water users in the Kansas Bostwick Irrigation District (KBID) had already established their 2013 irrigation water delivery at nine (9) inches. You noted this figure was fixed and would not be revisited by KBID. You further stated Kansas does not necessarily want to receive the additional water Nebraska is developing through its present Compact compliance efforts until, perhaps, 2014. In sum, Nebraska understands Kansas is requesting that Nebraska allow the Bureau to hold water generated through Nebraska's 2013 Compact Call and carry over that water in Harlan County Lake until at least next year, when Kansas will eventually have a use for that water. This presents a number of significant challenges we are willing to help overcome, but not at the expense of a Compact violation.

First, the Republican River Compact establishes an annual compliance obligation. Although the Final Settlement Stipulation (FSS) modified Compact accounting to include the concept of averaging, Nebraska nevertheless must meet its averaged allocation annually under these accounting principles. Nebraska's obligation must be met through a reduction in computed beneficial consumptive use (CBCU), augmentation of the available water supply, or other mechanisms that ensure Nebraska's overall Compact balance remains positive during the relevant Compact compliance period.

Second, the Compact is not a delivery compact. Contrary to Kansas' persistent refrain, Nebraska simply is not required to deliver water to Kansas in the time and location Kansas desires. While Nebraska has spent the last six months working with the Bureau to maximize the potential for beneficial use in Kansas during the irrigation season, it now appears KBID is satisfied with the currently available water supply and desires nothing more. Unfortunately, due to the obligations imposed under the Compact, Nebraska does not possess the flexibility to authorize the Bureau to carry over water that Kansas is required to receive in 2013 in Harlan County Lake until 2014.

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Such an operation could result in Kansas not receiving the water to which it is entitled in 2013, potentially increasing CBCU in Nebraska, and ultimately threatening Nebraska with non-compliance in 2013 and beyond.

Nebraska has long represented that it would attempt to maximize the Bureau's flexibility to deliver to KBID the water resulting from its management actions. As early as March 15, 2012, Nebraska made clear this intent in the expert report of Dr. James C. Schneider filed before Special Master Kayatta. The matter was discussed extensively during the August 2012 trial, and Nebraska reaffirmed its commitment before Special Master Kayatta in January 2013. Nebraska has done everything it can to delay the ultimate release of 2013 inflows for the benefit of Kansas water users. All inflows arriving at reservoirs since January 1, 2013, are presently available for use in Kansas during the 2013 irrigation season. Now we learn there is, in fact, no need for such water in Kansas this year. As to KBID's decision to establish its water irrigation need at nine (9) inches, responsibility for that decision lies solely with the KBID Board.

Nebraska is committed to ensuring that Kansas receives all of the water it is entitled to, in the timing required by the Compact and the multi-year averaging of the FSS. Our forecasting indicated that this may not occur in 2013 without additional management actions, which we subsequently have undertaken. Now that Kansas has no need of the water that it is entitled to receive this year, you are seeking flexibility in when this water is delivered. To provide this flexibility, Nebraska has simply required the Bureau to propose a management plan that would have the same practical effect as if Nebraska had imposed an unconditional call on the River, which would have required all water arriving at federal facilities since January 1, 2013, to be bypassed. To date, the Bureau has been unable to produce such a plan, apparently due, in part, to Kansas' objections.

Nebraska stands ready to facilitate the postponed delivery of water Kansas now seeks, but only insofar as Nebraska can accommodate that desire within the framework of the Compact and the FSS. Having defended itself against Kansas' legal attacks for the past five years, Nebraska will accept no additional risk of non-compliance and intends to comply with the terms established through the Compact, the FSS and the subsequent litigation.

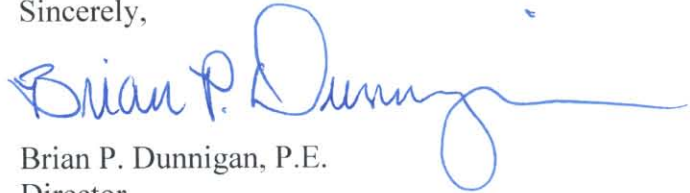
Therefore, if Kansas desires to maximize the amount of water available to its users in 2014, Nebraska will consider a carry-over arrangement provided Kansas agrees: 1) all evaporation loss attributable to the carry-over operation is charged exclusively to Kansas; and 2) Kansas absolves Nebraska of any liability under the Compact attributable to the operation Kansas is requesting. On our teleconference, you stated Kansas was unwilling to agree to such terms and rather insists that Nebraska accommodate Kansas' desires and accept all inherent risk of doing so. That is unacceptable to Nebraska.

Unless the Bureau proposes a plan, which has received Kansas' prior approval, Nebraska will be required to compel the release of all water that has been temporarily reregulated during 2013. In the absence of any particular need for this water in Kansas during 2013 (as you have

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expressed) there is therefore no need for any particular timing of these releases during 2013, so Nebraska intends to initiate releases through Harlan County Lake on or about May 1, 2013. Please plan accordingly.

Sincerely,

A handwritten signature in blue ink that reads "Brian P. Dunnigan". The signature is fluid and cursive, with a long horizontal line extending to the right from the end of the name.

Brian P. Dunnigan, P.E.  
Director

cc: Aaron Thompson, Bureau