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SUBJECT TO JOINT DEFENSE/COMMON INTEREST PRIVILEGE

Kansas v. Nebraska & Colorado
No. 126, Original, United States Supreme Court
Final Settlement Stipulation

**STIPULATION BETWEEN THE STATE OF COLORADO AND THE STATE OF
NEBRASKA TO RESOLVE ISSUES REGARDING ARBITRATION**

of the

Colorado “Compact Compliance Pipeline”

and the

Nebraska “Crediting Issue”

This Stipulation is entered this ___ day of April, 2010, by the State of Colorado (“Colorado”) and the State of Nebraska (“Nebraska”) to resolve, as between the two States, issues that have been submitted to non-binding arbitration in accordance with the Final Settlement Stipulation in *Kansas v. Nebraska and Colorado*, No. 126, Original (U.S. Supreme Court).

RECITALS

WHEREAS, the Final Settlement Stipulation (“FSS”) incorporated in the May 19, 2003 Decree of the United States Supreme Court in *Kansas v. Nebraska & Colorado*, 538 U.S. 720 (2003), provides, in Subsection VII.A.7 thereof, that the Republican River Compact Administration (“RRCA”) will attempt to resolve any dispute submitted to the RRCA pursuant to Section VII of the FSS and that if such a dispute cannot be resolve by the RRCA as provided therein 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; and

WHEREAS, the Republican River Water Conservation District is a water conservation district created by Colorado statute to assist Colorado to comply with the Compact and the Republican River Water Conservation District may be bound to this agreement by signature of the State; and

WHEREAS, the Republican River Water Conservation District, acting by and through its Water Activity Enterprise (“RRWCD WAE”), has acquired, along with certain surface water rights, wells (“Compact Compliance Wells”) and groundwater rights in the Republican River Basin in Colorado for the purpose of offsetting stream depletions in order to comply with Colorado’s Compact Allocations; and

WHEREAS, Colorado and the RRWCD WAE have proposed to pump the historical consumptive use of all or some of these groundwater rights from the Compact Compliance Wells

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into a pipeline and deliver that water into the North Fork of the Republican River near the Colorado/Nebraska State Line to offset stream depletions in order to comply with Colorado's Compact Allocations ("Colorado Compact Compliance Pipeline") in the future; and

WHEREAS, in March 2008, Colorado and the RRWCD WAE submitted an application for approval of an augmentation plan and related accounting procedures to the RRCA for approval under Subsection III.B.1.k of the FSS to account for water delivered to the North Fork of the Republican River for the purpose of offsetting stream depletions in order to comply with Colorado's Compact Allocations; and

WHEREAS, Colorado submitted a resolution to the RRCA dated August 12, 2009, to approve a plan for augmentation and related accounting procedures under Subsection III.B.1.k of the FSS, attached hereto as Exhibit A ("Colorado Resolution"), to attempt to resolve issues regarding the proposed plan for augmentation and related accounting procedures under Subsection III.B.1.k of the FSS ("Colorado Compliance Pipeline Issues"); and

WHEREAS, the Resolution was submitted to a vote at the regular annual RRCA meeting in August 2009, but the Nebraska and Kansas members voted against the Resolution; and

WHEREAS, the Colorado Compliance Pipeline Issues were Submitted to the RRCA by Colorado as "fast-track" issues pursuant to the dispute resolution provisions of Section VII.A of the FSS; and

WHEREAS, the Colorado Compliance Pipeline Issues were Addressed by the RRCA, as defined in the FSS, but not resolved by the RRCA pursuant to Section VII.A of the FSS; and

WHEREAS, by letter of August 21, 2009, Colorado initiated non-binding arbitration ("Arbitration") of the Colorado Compliance Pipeline Issues pursuant to Section VII.B and C of the FSS, which letter is attached hereto as Exhibit B; and

WHEREAS, by letter of September 4, 2009, Nebraska identified additional issues ("Nebraska Issues Regarding the Colorado Compliance Pipeline") that Nebraska individually believed were subsumed within and necessary to properly resolve the Colorado Compact Compliance Pipeline Issues, which letter is attached hereto as Exhibit C; and

WHEREAS, on June 15, 2009, by letter from Director Dunnigan, a copy of which is attached as Exhibit D, certain issues ("Nebraska Crediting Issues") were submitted to the RRCA for resolution as "fast track" issues; and

WHEREAS, the Nebraska Crediting Issues are identified in the Resolution of the RRCA dated August 12, 2009, attached hereto as Exhibit E ("Nebraska Resolution"); and

WHEREAS, the Nebraska Crediting Issues have been Addressed by the RRCA, as defined in the FSS, but not resolved by the RRCA pursuant to Section VII.A of the FSS; and

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WHEREAS, by letter of August 28, 2009, Nebraska initiated non-binding Arbitration on the Nebraska Crediting Issues pursuant to Section VII.B and C of the FSS, which letter is attached hereto as Exhibit F; and;

WHEREAS, Colorado and Nebraska have discussed the disputes and desire to resolve the Colorado Compliance Pipeline Issues and the Nebraska Crediting Issues.

WHEREAS, Colorado and Nebraska have a Common Interest in defending certain claims made by the State of Kansas and pursuing claims against the State of Kansas concerning the Republican River Compact;

WHEREAS, Colorado and Nebraska have concluded it is in their mutual interest to jointly defend and prosecute the claims at issue in the present Arbitration as well as certain others addressed in the prior Arbitration before Mr. Karl Dreher, and Colorado and Nebraska have determined to work cooperatively to pursue their Common Interest in developing strategies related to those issues, including in future litigation concerning the same;

WHEREAS, Colorado and Nebraska have concluded the sharing of confidential and privileged information and documents between the two States will be mutually beneficial in pursuit of their Common Interest, but no exchange of information in connection with such Common Interest is intended to waive any attorney-client or attorney work product privilege, or other protection from disclosure, to third parties which may be otherwise available;

NOW, THEREFORE, the States agree as follows:

1. With regard to the operation of the Colorado Compact Compliance Pipeline in accordance with the terms of the Colorado Resolution, Colorado and the RRWCD WAE shall deliver water to the North Fork of the Republican River to offset stream depletions in order to comply with Colorado's Compact Allocations as agreed upon by the two States not later than December 31 of the year preceding scheduled deliveries. Colorado and the RRWCD WAE together shall consult with Nebraska as needed to coordinate the timing and volume of deliveries to the North Fork of the Republican River. To the maximum extent possible, Colorado and the RRWCD WAE will make such deliveries per Nebraska's request consistent with the following delivery schedule:
 - a. For each year, except as provided in paragraph 1.b, Colorado shall begin deliveries on January 1 and shall make the minimum annual delivery of 4,000 acre-feet provided for in the Colorado Resolution during the months of January through March. Colorado will calculate and provide notice of the Projected Delivery, as defined in the Colorado Resolution, to the Kansas and Nebraska RRCA Members by April 1 as provided in the Colorado Resolution. Unless Colorado determines by April 1 that it will not be able to deliver any remaining Projected Delivery in the months of October through December, Colorado shall stop deliveries at the end of March. If Colorado anticipates that deliveries in the months of November and December will not be sufficient for Compact compliance, Colorado shall maximize deliveries first in January, then sequentially

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in the months of February, March, and April. Only if there is reason to believe that additional deliveries in the months of October through December as described below in this paragraph will not be sufficient for Compact compliance will deliveries extend into the month of May. By September 1, Colorado will gather provisional hydrologic data for the months of January through August of the year and shall estimate the amount of deliveries needed for Compact compliance for the remainder of the year after accounting for the deliveries earlier in the year. Colorado shall then maximize any additional water deliveries first in the month of December, then sequentially in November, and October.

- b. For the first year the Pipeline becomes operational, if the Pipeline becomes operational after January 1 and Colorado cannot make the minimum annual delivery of 4,000 acre-feet provided for in the Colorado Resolution during the months of January through March, Colorado and the RRWCD WAE together shall consult with Nebraska as needed to coordinate the timing and volume of deliveries to the North Fork of the Republican River and shall maximize deliveries prior to March 31 and in the months of October through December.
- c. If the minimum annual delivery of 4,000 acre-feet provided for in the Colorado Resolution is modified by arbitrator's decision, RRCA action, or United States Supreme Court decision or by agreement of the States, the States agree to work together in good faith to agree upon a delivery schedule that, to the maximum extent possible, will make such deliveries per Nebraska's request consistent with the delivery schedule provided in paragraph 1.a. In the event the States are unable to agree upon a delivery schedule pursuant to this Stipulation, and the dispute is not resolved, the States shall proceed in good faith to submit the dispute to mediation. Mediation is a process in which the parties meet with an impartial person who helps to resolve the dispute informally and confidentially. The parties to the dispute must agree before any settlement is binding. The States will jointly appoint an acceptable mediator and will share equally in the cost of such mediation. The mediation, unless otherwise agreed, shall terminate in the event the dispute cannot be resolved within 30 calendar days of the date written notice requesting mediation is delivered by one State's RRCA Member to the other State's RRCA Member.
- d. Unless otherwise requested by Nebraska, deliveries during the Irrigation Season, defined as being the months June through September, shall be avoided to the maximum extent possible and shall only be made as a last resort in order to satisfy the water deliveries called for under the Colorado Resolution.
- e. Augmentation Water Supply Credit: Augmentation Water Supply Credit for deliveries of water from the Colorado Compact Compliance Pipeline to offset stream depletions in order to comply with Colorado's Compact Allocations shall be credited in the Compact accounting year (currently January 1 through December 31) the deliveries are made and shall be included in the year of delivery

PRIVILEGED AND CONFIDENTIAL
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for the purposes of all Compact accounting done on a running average in accordance with Subsection IV.D of the FSS and the RRCA Accounting Procedures, but such deliveries shall not otherwise offset stream depletions in any year prior to the year the deliveries are made.

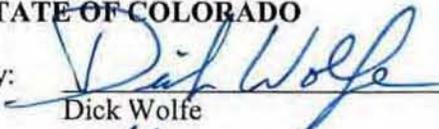
2. Nebraska will support approval of the Colorado Compact Compliance Pipeline in the Arbitration, including the ancillary changes to the Accounting Procedures attached hereto as Exhibit G, as clarified by this Stipulation. Nebraska will withdraw the Nebraska Issues Regarding the Colorado Compliance Pipeline from the Arbitration and agrees that its concerns have been satisfied. Nebraska, however, may continue to participate in the Arbitration to ensure compliance with this Stipulation and to defend challenges to the Nebraska Crediting Issue as may be presented by the State of Kansas ("Kansas").
3. Colorado will support Nebraska in proposing a change to the RRCA Accounting Procedures and Reporting Requirements ("RRCA Accounting Procedures") for the calculation of annual Computed Beneficial Consumptive Use of groundwater using the RRCA Groundwater Model consistent with the approach set forth in Exhibits H and I (the "Joint CBCU Accounting Proposal"). Colorado, acting through its RRCA member, will vote in favor of the Joint CBCU Accounting Proposal and, if the Joint CBCU Accounting Proposal is approved by the RRCA, Nebraska will hold in abeyance its prior proposal for the calculation of annual Computed Beneficial Consumptive Use of groundwater using the RRCA Groundwater Model using 16 runs of the RRCA groundwater model as summarized in paragraph I.A.1 of Exhibit 4 to the Arbitration Agreement of October 23, 2008. If the RRCA does not agree to the Joint CBCU Accounting Proposal, Nebraska agrees to invoke non-binding arbitration to resolve that dispute and Colorado agrees to support the Joint CBCU Accounting Proposal in the arbitration and any subsequent litigation regarding the Joint CBCU Accounting Proposal. Further, Nebraska will not pursue its 16-run proposal until the Joint CBCU Accounting Proposal has been voted on by the RRCA and, if the RRCA does not agree to the Joint CBCU Accounting Proposal, until non-binding arbitration to resolve that dispute has been completed; provided nothing in this Agreement shall prevent Nebraska from pursuing its 16-run proposal if Kansas seeks leave to file a Bill of Complaint before the United States Supreme Court in furtherance of its claims set forth in the December 19, 2007 letter from Kansas to Nebraska entitled "Remedy for Nebraska's Violation of the Decree in *Kansas v. Nebraska and Colorado*, No. 126 Original, U.S. Supreme Court."
4. Nebraska will support Colorado in proposing a change to the representation of Bonny Reservoir in the RRCA Groundwater Model if water stored in Bonny Reservoir is released and water is no longer stored in the reservoir, provided that Nebraska reserves the right to propose any modification that may be necessary if water is stored in a "dead pool" in Bonny Reservoir or to address flood control storage. Nebraska agrees that Colorado may submit such a proposal to the RRCA prior to the time water currently stored in Bonny Reservoir is actually fully released and that the representation in the model cell where Bonny Reservoir is currently simulated should be returned to the same representation in that model cell as the South Fork of the Colorado was represented

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SUBJECT TO JOINT DEFENSE/COMMON INTEREST PRIVILEGE

before Bonny Reservoir was built, subject to any modification that may be necessary if water is stored in a "dead pool" in Bonny Reservoir or to address flood control storage. See Exhibit J.

5. Colorado will support Nebraska's position with regard to the Nebraska Crediting Issue in the Arbitration and any subsequent litigation regarding that issue.
6. Nebraska acknowledges the RRWCD WAE's current lease of water rights on the North Fork of the Republican River is designed to address Nebraska's concerns regarding the availability of water for diversion from the North Fork of the Republican River at the Pioneer Ditch or Canal (a/k/a Haigler Canal) by the Pioneer Irrigation District of Dundy, Nebraska; but as exemplified by Exhibits K and L, Nebraska's concerns remain unresolved pending further study of the impact of the lease on long-term flows in the North Fork of the Republican River. Nebraska will await the outcome of further analysis before pursuing its concerns, but nothing in this Agreement precludes Nebraska from raising this issue in the future.
7. Nebraska expressly reserves any and all claims it may have concerning past non-compliance, if any, by Colorado with the Republican River Compact or the FSS, including claims for contribution arising from claims brought against Nebraska by Kansas, and nothing herein shall be deemed to constitute a waiver of any such claims by Nebraska.
8. This Stipulation shall be and remain confidential and neither State shall release this Stipulation, or any part thereof, unless and until compelled by an Order of a court of competent jurisdiction or by agreement of the States.
9. This Stipulation shall be executed as two identical original documents, with each State retaining one original document.

STATE OF COLORADO

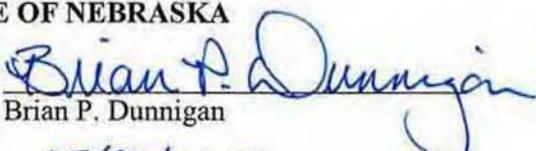
By: 
Dick Wolfe

Date: 4/29/10

By: 
Peter J. Ampe

Date: 4/29/10

STATE OF NEBRASKA

By: 
Brian P. Dunning

Date: 05/03/2010

By: 
Justin D. Lavene

Date: 5-3-10