



Dave Heineman
Governor

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

March 22, 2013

IN REPLY TO:

Aaron Thompson
Area Manager
Great Plains Region
Bureau of Reclamation
1706 West Third
McCook, NE 69001

Dear Mr. Thompson:

Since November 2012, the Department of Natural Resources has provided the Bureau of Reclamation the opportunity to maximize its flexibility to deliver water to its contractors throughout the Republican River Basin (Basin), notwithstanding the existence of a Compact Call Year in 2013 in the Nebraska portion of the Basin. We previously understood the Bureau was pursuing a plan with the Army Corps of Engineers to allow the use of water in the sediment pool at Harlan County Lake, effectively in exchange for inflows to that facility. While such a plan might have held promise for Kansas water users, it remains unresolved among the federal agencies and there does not appear to be adequate inflow to implement the plan.

We now understand the Bureau is focusing on the allocation of available project water. Based on recent conversations among Department and Bureau staff, we understand that the Bureau has determined that under their existing contracts:

- 1) All 2013 inflows to Harlan County Lake, which to date have been temporarily retained under the flexibility provided under the Closing Notices, will be provided exclusively to KBID;
- 2) The total available water supply will not be greater than 84,500 acre feet, as calculated December 31, 2012;
- 3) Inflows to Harlan County Lake (currently estimated to be about 12,000 acre feet by May 31) will be treated as part of the 84,500 total available water supply, as opposed to water over and above that supply and provided solely to Kansas in 2013; and
- 4) A greater portion of the previously stored water will be reallocated to NBID to make up for the 2013 inflows sent exclusively to KBID.

Aaron Thompson
March 22, 2013
Page 2 of 3

As to the first point, Nebraska expects that all 2013 inflows occurring under the Closing Notices will be delivered exclusively to Kansas. This is the only legally available outcome in light of the Closing Notices under which the Bureau must operate.

As to the second and third points, none of the inflows made available to KBID may be counted as part of the total available water supply because this water is not available to NBID under the Compact or State law. In fact, the purpose of the earlier deviation request from the Corps was to allow the Bureau to retain those inflows as stored water in exchange for releasing additional water (over and above the 84,500 acre-feet) from the sediment pool for the benefit of Kansas water users.

As to the fourth point, the only water that may be considered as part of the water supply to be divided between NBID and KBID is that which has been legally stored; this does not include 2013 inflows. Unless and until the Closing Notices are lifted, NBID is entitled to receive only its portion of that water stored prior to December 31, 2012. Nebraska is not entitled to consume, and therefore NBID is not entitled to receive any water in excess of that previously stored water. The Bureau's intention to reallocate to NBID, for consumption, water that it is not entitled to receive under Compact Call Year administration by treating 2013 inflows as if they had been legally stored is not consistent with the Compact, Nebraska law or even the definition of project water in the Bostwick contracts.¹

While the Department would like to provide flexibility to the Bureau and their water users, this will be difficult given the constraints the Bureau is creating through their current contract interpretation as set forth above. It appears that the Department's efforts to provide flexibility are being considered in the most restricted light and could adversely affect the State's Compact compliance efforts.

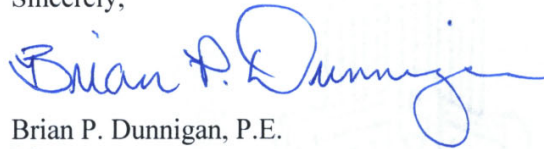
Given the Bureau's intentions as we understand them, the Department is now left with no option but to order the release from Harlan County Lake (and all upstream reservoirs) of all water the Bureau has retained since January 1, 2013. This is the only way Nebraska can ensure the 2013 inflows represent an increase in supply solely to Kansas consistent with the intent of Compact Call Year administration. The effective date of the Order will be April 1, 2013. Please plan accordingly.

¹ The contracts clearly define "district water supply" as "that portion of the project division water supply allocable to the State of Nebraska within the provisions of the Republican River Compact and any order issued by the United States Supreme Court in *Kansas v. Nebraska*, No 126 Orig. ..." The "project division water supply" is in turn defined as the "total supply of water made available in any irrigation season to the Bostwick Division under the Federal Reclamation laws and under the applicable state laws of Nebraska and Kansas and water rights issued thereunder ..." In short, the Bureau's contracts are subservient to Nebraska's Compact Call Year administration.

Aaron Thompson
March 22, 2013
Page 3 of 3

It is important to Nebraska that Kansas water users receive their water in as timely a fashion as they can. However, after many months, it is clear that the Bureau has no plan that will accomplish this without interfering with Nebraska's paramount legal obligation, Compact compliance. The Department remains ready to evaluate any alternative operating plan that furthers this obligation.

Sincerely,



Brian P. Dunnigan, P.E.
Director

cc: Gary Campbell, Bureau of Reclamation