



Dave Heineman
Governor

STATE OF NEBRASKA

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

April 29, 2013

IN REPLY TO:

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

Dear Mr. Barfield:

Many months ago, Nebraska initiated discussions with Kansas and the Federal agencies in an effort to provide Kansas water users with greater access to water during the irrigation season, even though the Republican River Compact imposes no such requirement. To be clear: Nebraska is well positioned to comply with the Compact today and in the future. Nebraska does not need any assistance from Kansas in meeting its Compact obligation this year, but Nebraska has been willing to entertain proposals that offer Kansas users the ability to increase their irrigation supplies without affecting Nebraska's ability to comply with the Compact. I would like to see your constituents have access to wet water when they need it, in addition to the cool comfort of a balanced spreadsheet. Unfortunately, your singular focus on the latter seems to be driving your most recent proposal. To observe such a priority, I must now call for the release of 20,000 acre-feet of water (approximately six (6) inches of irrigation supply throughout Kansas Bostwick Irrigation District) on or about May 1, 2013, to ensure that water is evacuated from Harlan County Lake no later than May 15, 2013. Additional releases will follow as necessary.

This specifically responds to your April 19, 2013, letter, wherein you propose an alternative management scheme for Harlan County Lake, which you believe meets the conditions set forth in my letter of April 15, 2013. Your proposal does not meet those conditions because you: 1) refused to provide a waiver of liability for actions Nebraska undertakes solely to benefit Kansas; and 2) failed to coordinate with the federal agencies, whose active participation is obviously required. The proposal is substantially similar to what you verbally proposed during our March 29, 2013, and April 12, 2013 teleconferences, when Nebraska explained the proposal was unnecessarily complicated and subjects Nebraska to liability it cannot accept.

Fundamentally, Nebraska is not interested in simply "moving ... towards compliance" as you suggest. Nebraska has been in compliance with the Republican River Compact since 2008, and Nebraska can meet its obligations this year with or without Kansas' participation. Unfortunately, Compact accounting, particularly under the Final Settlement Stipulation (FSS), requires Nebraska to proceed with extreme caution to manage its risk of future noncompliance. That

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construct not only limits Nebraska's flexibility, but also demands that water generated in Nebraska be provided to Kansas throughout the year (sometimes outside the irrigation season). Simply put, the FSS performs poorly in circumstances such as those Nebraska presently faces and compromises Kansas water users' interests, even though the Compact ledger squares.

Kansas' recent legal actions only serve to underscore the importance of our ultra-conservative approach, which Nebraska could reevaluate if assured Nebraska would not be held liable for actions undertaken to benefit Kansas. This does not require a waiver of Nebraska's Compact compliance obligation; only that Nebraska be held harmless for actions that result in less water reaching the State line because it is stored in Harlan County Lake for subsequent beneficial use by Kansas. In return, Nebraska could ensure that Kansas was provided with its share of the Basin's 2013 water supply at a more optimal time (e.g., during the 2014 irrigation season).

Nebraska's Compact compliance efforts have not "presented the states, the federal government, and water users in the Basin with many difficulties." To the contrary, Nebraska's Compact compliance efforts have served only to keep Nebraska in compliance. The "difficulties" arise from the fact that Compact compliance water Nebraska generates in 2013 must reach the State line, so the retention of water in Harlan County Lake as you desire counts against Nebraska, and such water cannot be held over without adverse accounting impacts.

The "difficulties" you cite remain squarely within your power to prevent. But, these matters demand a simple legal solution; not an engineering fix. To that end, Nebraska is prepared to agree to the following, which can be achieved within the current accounting framework:

- 1) The Bureau of Reclamation would retain Compact compliance water Nebraska has called down to Harlan County Lake during 2013 until further Order from Nebraska DNR, at which time that water could be converted to Project Water and made available for distribution exclusively to Kansas Bostwick Irrigation District under contract in 2014 or 2015;
- 2) No additional release Orders would be issued in Nebraska, and water could be temporarily retained until the latter months of 2013, at which point Nebraska DNR would determine whether additional water (if any) would need to be released from upstream reservoirs to Harlan County Lake; if no further releases were required, the water so held would be considered stored water and available for subsequent use in Nebraska;
- 3) To the extent the volume of water in Harlan County Lake under this arrangement on December 31, 2013, is equal to or greater than the amount by which Nebraska would otherwise be out of compliance under current Compact accounting, Nebraska would be deemed to be within its Compact allocation in 2013; to the extent the volume of water in Harlan County Lake is less than the amount by which Nebraska would otherwise be out of compliance, Nebraska would supply the balance to Harlan County Lake not later than April 15, 2014;

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- 4) Not later than December 31, 2013, the States would conduct preliminary accounting to determine the additional volume required (if any) under Paragraph No. 3 above;
- 5) Water carried forward from 2014 to 2015 would be treated identically as the water carried over from 2013 to 2014;
- 6) The forgoing would be memorialized as an Alternative Water Short Year Plan and implemented pursuant to Appendix M of the FSS;¹
- 7) Kansas would hold Nebraska harmless for any compliance shortfall that results from strict application of the Compact accounting, provided water were made available to Harlan County Lake on the adjusted schedule in Paragraph 3 above; Kansas would retain all other enforcement rights.

I believe this arrangement will benefit water users in the Basin. Nebraska's Compact compliance plans to date have been based on your previous representations that Kansas would use its entire allocation, particularly during times when Nebraska's compliance was at risk.² Now I understand that Kansas may not desire to use all of its allocation this year.³ Therefore, Nebraska has undertaken this dialogue to try to provide Kansas flexibility beyond that to which Kansas is legally entitled under the Compact or the FSS. In a final effort to resolve this matter and avoid the unnecessary loss of water that might be used for irrigation in the future, Nebraska proposes the States agree to the forgoing terms. Unless Kansas accepts this proposal by 5:00 p.m. Central Daylight Time Tuesday, April 30, 2013, Nebraska will be left with no choice but to compel the release of approximately 20,000 acre-feet of water that has accrued in Harlan County Lake during 2013 as a result of Nebraska's Compact compliance actions.

Finally, I recently received a letter from Aaron Thompson suggesting that Kansas enter into a Warren Act contract for certain water held in Harlan County Lake during 2013, apparently under some authority Reclamation (or Kansas) believes is conveyed by Article VI of the Compact. While I understand that Kansas water users may need a Warren-Act contract to make use of Nebraska's Compact compliance water, Article VI is inapplicable to the current situation. If Kansas seeks such an approach this would seem to be for the sole purpose of frustrating

¹ Even though this would allow for the inclusion of the significant positive balance Nebraska carried forward from 2011, it would have no practical effect on the amount of water Kansas would receive this year. The 20,000 acre-feet currently available to Kansas resulted from our efforts under the present two-year accounting period. Therefore, while Nebraska would benefit from the inclusion of 2011 on paper, Kansas will still receive the wet water.

² For example, in your expert report (Ensuring Compliance by Nebraska, November 18, 2011), you stated: "As had occurred in the early 1990's, once again in 2003 and following, water users in KBID and other water users in the lower Republican basin in Kansas did not receive water which Kansas was entitled under the Compact. Kansas had the capacity and need to use that water, and those users were damaged by Nebraska's failure to comply with the Compact during this time."

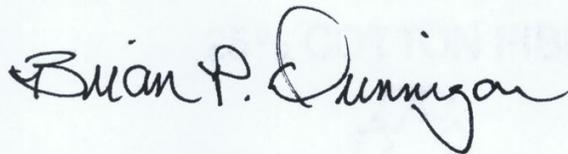
³ Your written representations about the need for water in Kansas this year flatly contradict your verbal statements to myself, my staff, and staff from the Bureau of Reclamation, all of whom I am certain have a clear recollection of your meaning. As anyone on those calls will attest, and as further evidenced by your own proposal to carry-over water to succeeding years, Kansas Bostwick Irrigation District has only minimal, if any, need for the Compact compliance water Nebraska has generated in 2013.

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Nebraska's compliance efforts. Nebraska flatly rejects this approach. Should Kansas persist in pursuing this matter under the guise of Article VI of the Compact, all efforts to provide Kansas with the flexibility to reregulate and carry-over Nebraska's Compact compliance water will terminate.

Please let me know immediately if the terms discussed above are acceptable or if you wish to have additional discussions prior to the impending release of water from Harlan County Lake scheduled to occur on May 1, 2013.

Sincerely,



Brian P. Dunnigan, P.E.
Director

cc: Mike Delka, Nebraska Bostwick Irrigation District
Jim DuBois, U.S. Department of Justice
Kenny Nelson, Kansas Bostwick Irrigation District
Mike Ryan, U.S. Bureau of Reclamation
Tracy Streeter, Kansas Water Office
Aaron Thompson, U.S. Bureau of Reclamation
Dick Wolfe, RRCA Commission, Colorado State Engineer