

**From:** [Aycock, Gordon L](#)  
**To:** [Chaffin, John](#)  
**Subject:** RE: last chance review US brief - KS v NE  
**Date:** Friday, February 18, 2011 3:43:47 PM

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I don't other than it's not something we would normally do, that is track cost specific to this type of situation. From experience we know the costs are higher due to the extra work but we probably don't have good records of this since it hasn't been a normal situation in the past.

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P.O. Box 36900  
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From: Chaffin, John  
Sent: Friday, February 18, 2011 3:33 PM  
To: Aycock, Gordon L  
Subject: RE: last chance review US brief - KS v NE

Do you know the story behind Mike's comment that the field could not provide him with sufficient information for him to conclude that Reclamation can back the claim of increased costs?

From: Aycock, Gordon L  
Sent: Friday, February 18, 2011 3:30 PM  
To: Chaffin, John  
Subject: RE: last chance review US brief - KS v NE

Your comments address the issue well. Now we'll see if they do anything to bring this back in. Thanks

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From: Chaffin, John  
Sent: Friday, February 18, 2011 3:20 PM  
To: Bezdek, John; Ryan, Michael J; McKeown, Matthew; Johnson, Kristen  
Cc: Thompson, Aaron M; Campbell, Gary W; Soucy, John F  
Subject: RE: last chance review US brief - KS v NE

I apologize for coming in at this hour, but I am really surprised that BOR cannot substantiate the financial cost. My understanding is that O&M costs at Reclamation dams and major diversion structures go up when there is not water to properly use as designed. I think that part of the substantiation issue is that O&M costs are borne by the irrigation districts and not by Reclamation. That is true for reimbursable costs, but not for non-reimbursable costs – those are borne by Reclamation. I am pretty sure that most of the Republican River Basin O&M costs were reviewed and the current cost accounting

shifted more of the cost of O&M to non-reimbursable (fish & wildlife, recreation, and flood control). Part of this problem is in quantifying impacts to Reclamation when irrigation districts experience higher O&M for the reimbursable costs and at the same time not having the water to grow the crops to pay the costs. Another part of the problem may be the use of the term "irrigation systems," the big costs are at the dams and diversion structures. I recognize that I haven't seen the actual costs on the Republican, and I defer to Reclamation on the numbers.

From: Bezdek, John  
Sent: Friday, February 18, 2011 2:32 PM  
To: Ryan, Michael J; McKeown, Matthew; Johnson, Kristen; Chaffin, John  
Cc: Thompson, Aaron M; Campbell, Gary W; Soucy, John F  
Subject: Re: last chance review US brief - KS v NE

I am good with this change.

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From: Ryan, Michael J  
To: McKeown, Matthew; Johnson, Kristen; Chaffin, John  
Cc: Thompson, Aaron M; Campbell, Gary W; Soucy, John F; Bezdek, John  
Sent: Fri Feb 18 16:29:09 2011  
Subject: RE: last chance review US brief - KS v NE  
Okay, point well made Mr. Matt. How about we do this for the 2nd paragraph on page 19 of the amicus brief ....

"Nebraska's noncompliance with its compact obligations has negative impacts on the interests of the United States. Further decline in irrigation water supply could cause water users to default on repayment and water-supply contracts with the United States, thus potentially reducing revenues needed to repay project costs associated with those contracts. Further, if the Bureau cannot exercise its state-held water rights to provide a water supply to irrigation districts as required by its repayment contracts, those water rights could be injured, and the Bureau could also be subjected to damages actions brought by water districts that hold contracts with the Bureau. The United States also incurs costs from improperly functioning irrigation systems that are designed to operate at predicted water levels, and In addition to these fiscal and litigation risks, a decline in water supply harms fish, wildlife, and recreation in federal reservoirs thus reducing the Bureau's ability to deliver the full range of benefits envisioned and authorized by Congress."

I'm not trying to stretch the point too far; but, I do believe the US interests are impacted in ways beyond our irrigation water supply purpose.

Mike.

From: McKeown, Matthew  
Sent: Friday, February 18, 2011 2:17 PM  
To: Johnson, Kristen; Ryan, Michael J; Chaffin, John  
Cc: Thompson, Aaron M; Campbell, Gary W; Soucy, John F; Bezdek, John  
Subject: RE: last chance review US brief - KS v NE

I do not want to make the statement in red because we really are not suffering an impact from litigation that might exist in the future.

The question under consideration is whether the language Mike highlights below can be substantiated by Reclamation. Do I conclude correctly that we should recommend that that language be taken out?

Thanks a lot.

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From: Johnson, Kristen  
Sent: Friday, February 18, 2011 1:58 PM  
To: McKeown, Matthew; Ryan, Michael J; Chaffin, John  
Cc: Thompson, Aaron M; Campbell, Gary W; Soucy, John F; Bezdek, John  
Subject: RE: last chance review US brief - KS v NE

Spoke with Bezdek. Neither of us are sure we would include the added statement in red. However, as we are not as close to this issue, will defer to others' wishes.

KJ

From: McKeown, Matthew  
Sent: Friday, February 18, 2011 3:40 PM  
To: Ryan, Michael J; Chaffin, John  
Cc: Thompson, Aaron M; Campbell, Gary W; Soucy, John F; Johnson, Kristen; Bezdek, John  
Subject: RE: last chance review US brief - KS v NE

Adding Kristen Johnson and John Bezdek in DLW.

What does everyone think? I don't want any statements in the brief that Reclamation isn't completely confident that it can support?

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From: Ryan, Michael J  
Sent: Friday, February 18, 2011 1:35 PM  
To: McKeown, Matthew; Chaffin, John  
Cc: Thompson, Aaron M; Campbell, Gary W; Soucy, John F  
Subject: FW: last chance review US brief - KS v NE

Good afternoon Matt and John,

Please take a look at Aaron Thompson's e-mail. Sounds like we should edit the last sentence of page 19 paragraph 2.

I'm not sure I would concur with Aaron's suggested edit. After all, the paragraph in the amicus brief is meant to describe impacts to the United States. How about an edit something like this .....

Nebraska's noncompliance with its compact obligations has negative impacts on the interests of the United States. Further decline in irrigation water supply could cause water users to default on repayment and water-supply contracts with the United States, thus potentially reducing revenues needed to repay project costs associated with those contracts. Further, if the Bureau cannot exercise

its state-held water rights to provide a water supply to irrigation districts as required by its repayment contracts, those water rights could be injured, and the Bureau could also be subjected to damages actions brought by water districts that hold contracts with the Bureau. The United States also incurs costs from improperly functioning irrigation systems that are designed to operate at predicted water levels, and a decline in water supply harms fish, wildlife, and recreation in federal reservoirs. In addition to a reduction in the public's enjoyment of these natural resources, negative impacts to these natural systems places the Bureau at increased risk from citizen-sponsored litigation (for instance, under the Endangered Species Act). Resolution of that litigation may well carry additional operational and/or financial impacts.

Now I know I'm not an attorney. That's why I'm sending this e-mail to the two of you rather than the larger audience of Matt's earlier e-mail. Perhaps the two of you could consider my suggestion and if it has merit we'll share it with the others.

Mike.

From: Thompson, Aaron M  
Sent: Friday, February 18, 2011 12:39 PM  
To: Ryan, Michael J  
Cc: Buchholz, Marcia L  
Subject: FW: last chance review US brief - KS v NE

Mike, I have the following comments;

- In reply to your question – Reclamation (to my current knowledge) does not have data to support the assertion that O&M cost have increased due to reduced water supply. We have cost with or without water and would find it difficult to determine what scenario cost more. However, the Irrigation Districts ability to pay has been decreased causing a reduction in revenue to the Federal Government. "From the execution of the new contracts to date, the reduced revenue to the Federal Government has been approximately \$5,000,000." The quoted section was taken from our Narrative Response to Kansas Touhy request.
- My opinion the highlighted sentence should be removed and replaced with something like; Per contract...the irrigation districts are responsible for the O&M of the canal systems. During times of reduced water supply the irrigation districts continue to incur O&M cost on the distribution works. The decline in water supply also harms fish, wildlife, and recreation in federal reservoirs.

Below is some additional information on Construction Cost;

Reclamation entered into repayment or water service contracts with each of the irrigation districts to provide for repayment of the irrigation portion of construction and their associated operation, maintenance, and replacement (OM&R) costs for these projects. This was done with the expectation that the irrigation districts would be able to repay their share of the project costs.

- Construction costs associated with the Republican River Basin Reclamation projects totaled more than \$233,000,000. Of the total construction costs, \$139,000,000 was allocated to irrigation and subject to reimbursement to the Federal government. The remaining construction costs were allocated to non-reimbursable public benefits such as flood control, fish and wildlife, and recreation. In accordance with Reclamation law, irrigation districts are responsible for repayment of the total construction costs allocated to irrigation, subject to their ability to repay these costs. In cases where it is determined that irrigation districts lack the ability to repay their share of the total construction costs allocated to irrigation, the remaining construction costs are included in the rates charged for the purchase of hydropower generated at Federal facilities in the Missouri River basin. This is known as "aid-to-irrigation". Of the approximate \$139,000,000 irrigation construction costs, about \$39,000,000 will have been repaid by districts, leaving approximately \$100,000,000 to be repaid by Federal power users. These costs do not include the future revenues received from the associated OM&R costs for these projects. The reduced water supply also has effects to the local and State economies as a result of lower crop yields and decreased recreational opportunities. These types of effects are not quantified in the above mentioned impacts.

From: Ryan, Michael J  
Sent: Friday, February 18, 2011 11:59 AM  
To: McKeown, Matthew; Castle, Anne; Caramanian, Lori; Amos, Adell; Brown, Laura; Connor, Michael L  
Cc: Thompson, Aaron M; Esplin, Brent; Campbell, Gary W; Soucy, John F  
Subject: RE: last chance review US brief - KS v NE

Good morning,

I reviewed the section you reference. I have a call into our Nebraska-Kansas Area Office to verify something.

Language near the end of the second paragraph on page 19 drew my attention. I've copied that paragraph below and highlighted the words that drew my attention ....

"Nebraska's noncompliance with its compact obligations has negative impacts on the interests of the United States. Further decline in irrigation water supply could cause water users to default on repayment and water-supply contracts with the United States, thus potentially reducing revenues needed to repay project costs associated with those contracts. Further, if the Bureau cannot exercise its state-held water rights to provide a water supply to irrigation districts as required by its repayment contracts, those water rights could be injured, and the Bureau could also be subjected to damages actions brought by water districts that hold contracts with the Bureau. The United States also incurs costs from improperly functioning irrigation systems that are designed to operate at predicted water levels, and a decline in water supply harms fish, wildlife, and recreation in federal reservoirs."

My question for the area office is: The phrase implies Reclamation's O&M costs have increased due to reduced water supply. Do we have the data to support that assertion?

I should hear back from the Nebraska-Kansas Area Office soon.

Mike.

From: McKeown, Matthew  
Sent: Friday, February 18, 2011 10:11 AM  
To: Castle, Anne; Caramanian, Lori; Amos, Adell; Brown, Laura; Connor, Michael L; Ryan, Michael J  
Subject: FW: last chance review US brief - KS v NE

Hi everyone: I just reviewed this brief again and deem it to be in good shape. I would really appreciate it if each of you would take a look at pp. 19-20, where Reclamation's interests are described. I think that section is also fine, but would like to verify that you all agree. Thanks a lot.

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From: Johnson, Kristen  
Sent: Friday, February 18, 2011 9:42 AM  
To: Castle, Anne; Connor, Michael L; Caramanian, Lori; Ryan, Michael J; Campbell, Gary W; Thompson, Aaron M; Esplin, Brent; Amos, Adell; Brown, Laura; McKeown, Matthew; Bezdek, John; Chaffin, John  
Subject: last chance review US brief - KS v NE

All,

Please find attached a very near final brief to be filed by the United States in *KS v NE*. I have not done a thorough read-through yet, but don't think this draft has changed dramatically since the last version that was circulated at the end of December/early January. The SG's Office has requested some additional citations from Reclamation, which we are awaiting, and should receive shortly. Once those citations are dropped in – early next week - we expect the SG to file quickly. In light of this expedited timeline, please review and let me know if you have comments/edits by COB Tuesday, February 22. I appreciate that this is a quick turn-around, but again, don't think much has changed. Please let me know if you have questions.

Kristen  
202.208.4583