



STATE OF NEBRASKA
Office of the Attorney General

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JON BRUNING
ATTORNEY GENERAL

JUSTIN D. LAVENE
CHIEF OF THE AGRICULTURE,
ENVIRONMENT & NATURAL
RESOURCES SECTION

May 3, 2012

VIA U.S. MAIL

Aaron M. Thompson
Area Manager
U.S. Bureau of Reclamation
203 West 2nd Street
Grand Island, NE 68801

James DuBois
U.S. Department of Justice
999 18th Street
South Terrace Suite 370
Denver, CO 80202



RE: *Touhy* Request for Supplemental Deposition in *Kansas v. Nebraska & Colorado*, No. 126, Orig., U.S. Supreme Court

Dear Sirs:

The State of Nebraska requests Mr. Thompson appear at a "Supplemental Deposition" pursuant to Paragraph 10 of Case Management Plan No. 2 entered in the above referenced action. On Motion, Nebraska requested leave to re-depose Mr. Thompson out of time, and that motion was granted by the Special Master by Order of April 26, 2012. This request should be considered supplemental to that request embodied in the September 1, 2011 *Touhy* Request and Subpoena for Documents and Information filed jointly by the States of Kansas, Nebraska and Colorado, a copy of which is attached as Exhibit A. The scope of the requested testimony is the same as that previously requested, and also includes the matters referenced in the *Touhy* Request filed by the State of Kansas on January 10, 2012, a copy of which is attached as Exhibit B.

The justification for this request generally is set forth in the September 1, 2011 *Touhy* Request (see Exhibit A) and is incorporated herein by this reference. The supplemental deposition specifically is necessitated by the supplemental disclosure on April 6, 2012, of approximately 2,000 documents in which Mr. Thompson appears as an author, recipient or other participant. Nebraska has scheduled the deposition for 1:30 PM to 5:30 PM on May 21, 2012 as set out in Nebraska's Notice of Deposition of Mr. Aaron Thompson and Subpoena *Duces Tecum*

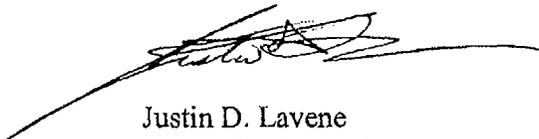
THOMPSON #19

accompanying this request. I understand the time and place of this deposition is convenient for you both.

Nebraska will submit a check for costs to the Department of Interior in accordance with 43 CFR § 2.85, if this request is granted.

Very truly yours,

JON BRUNING
Attorney General

A handwritten signature in black ink, appearing to read "Justin D. Lavene", with a long horizontal flourish extending to the right.

Justin D. Lavene
Counsel of Record

Enclosures



JOHN B. DRAPER
Direct: (505) 986-2525
Email: jdraper@montand.com
Reply To: Santa Fe Office
www.montand.com

September 1, 2011

Aaron M. Thompson
Area Manager
U.S. Bureau of Reclamation
203 West 2nd Street
Grand Island, NE 68801

**Re: Touhy Request and Subpoena for Documents and Information in
Kansas v. Nebraska & Colorado, No. 126, Orig., U.S. Supreme Court**

Dear Mr. Thompson:

The States of Kansas, Nebraska and Colorado respectfully request that you provide the testimony, documents and information specified in Appendices A and B hereto for use in the above-referenced litigation. A copy of the Petition (i.e., Complaint) filed by Kansas, along with a copy of Nebraska's Answer and Counterclaims are attached hereto as Exhibit 1 pursuant to 43 C.F.R. §2.84(b). A copy of the current Case Management Plan governing this proceeding is attached to the accompanying Subpoena to Produce Documents as Exhibit B to the Subpoena.

The appropriate State will submit a check for costs to the Department of Interior (Department), in accordance with 43 CFR § 2.85, if its request is granted. In addition, the appropriate State will pay the costs of duplication in accordance with 43 CFR part 2, appendix A, if its request is granted.

The requested testimony, documents and information are expected to be relevant and useful in resolving disputes among the States as those disputes are presently framed in the litigation. In summary, these concern: (a) Nebraska's alleged non-compliance with the 2003 Decree entered in the above referenced litigation, as well

Exhibit A to Subpoena

REPLY TO:

325 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone (505) 982-3873 • Fax (505) 982-4289

Post Office Box 2307
Santa Fe, New Mexico 87504-2307

6301 Indian School Road NE, Suite 400
Albuquerque, New Mexico 87110
Telephone (505) 884-4200 • Fax (505) 888-8929

Post Office Box 36210
Albuquerque, New Mexico 87176-6210 Exhibit A
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as the underlying Republican River Compact; (b) Kansas' concerns that Nebraska will be unable to comply with these obligations in the future, and (c) certain changes to the Republican River Compact Administration's Accounting Procedures as proposed by the State of Nebraska.

The parties to the litigation include the three States. The U.S. Bureau of Reclamation (Reclamation) maintains projects in all three States. The United States appeared as *amicus curiae* in the proceeding in the original jurisdiction of the United States Supreme Court, and, with input from Reclamation, was a full participant in the negotiations that resulted in the 2003 Decree. The United States is presently participating as *amicus curiae* in the litigation. The outcome of the pending litigation is likely to impact directly, or indirectly, Reclamation's customers in the Republican River Basin.

The information requested is not reasonably available from any other source. Reclamation possesses unique information on the matters at issue in this proceeding, including the history of Reclamation's projects and facilities in the Republican River Basin. There is no record or set of records that can conveniently be provided and used in lieu of the testimony, documents, and information requested.

The States believe this request complies with 43 CFR § 2.88 because: (a) the information is not available from another source as explained above; (b) the information, to our knowledge, would not be inconsistent with any other federal statute or regulation; and (c) providing the information would be consistent with the Department's ability to:

- (1) Conduct its official business unimpeded: This request has been tailored to minimize as much as possible any interference with your schedule and official obligations;
- (2) Maintain impartiality in conducting the Department's business: The information requested is information about Reclamation's policies applicable to its Projects in the Basin for the benefit of water users in the Basin;
- (3) Minimize the possibility that the Department will become involved in issues that are not related to its mission or programs: The outcome of the pending litigation is likely to affect, directly or indirectly, Reclamation's customers;
- (4) Avoid spending public employee's time for private purposes: Providing the information will facilitate resolution of ongoing interstate conflicts concerning a Supreme Court decree and an interstate compact;

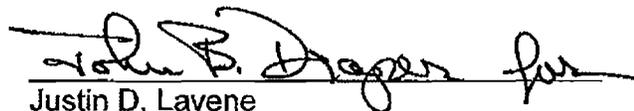
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- (5) Avoid the negative cumulative effect of granting similar requests: Given the unique character of the present interstate proceeding, it is not expected that there will be many similar requests that would have an unwanted cumulative negative effect on the Department;
- (6) Insure that privileged or protected matters remain confidential: No privileged or protected information is requested; and
- (7) Avoid undue burden on the Department: This request has been tailored to minimize any impact on the Department.

Thank you very much for your consideration of this request.

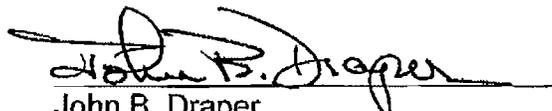
Sincerely yours,

For the State of Nebraska



Justin D. Lavene
Counsel of Record
Assistant Attorney General
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(402) 471-2682
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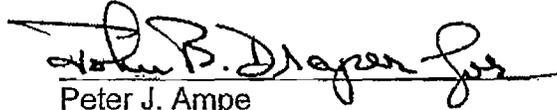
For the State of Kansas



John B. Draper
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Santa Fe, NM 87504-2307
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Aaron M. Thompson
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For the State of Colorado



Peter J. Ampe
Counsel of Record
First Assistant Attorney General
Autumn L. Bernhardt
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Appendix A

Please provide the following to the State of Nebraska (through counsel at the address indicated above):

1. The testimony of Mr. Aaron Thompson, Area Manager. In accordance with 43 C.F.R. 2.84(e), Nebraska submits that Mr. Thompson's testimony is required because Mr. Thompson has unique and personal knowledge of events leading to Reclamation's critique of Nebraska's Integrated Management Plans, including the scope of analyses conducted to support that critique. In addition, Nebraska expects Mr. Thompson will be able to provide:
 - a. An explanation of how record adjustments are made after Nebraska Bostwick Irrigation District and Kansas Bostwick Irrigation District submit irrigation information to Reclamation.
 - b. An explanation of how Reclamation verifies the amount of water actually delivered to producers.
 - c. An explanation of the process by which Reclamation uses actual gaged flows to derive the diversion numbers for the Courtland Canal reported in Table 2 of Reclamation's Annual Operating Plan, including a discussion of how canal losses enter into these calculations.

No record can be provided and used in lieu of Mr. Thompson's testimony.

2. The following documents¹ and information:
 - d. All analyses, including supporting data and related documentation, conducted or reviewed by Reclamation to formulate testimony Reclamation has offered since 2004 concerning Nebraska's Integrated Management Plans.
 - e. All correspondence between or among Reclamation and one or more of the States concerning matters raised in the pending litigation.
 - f. Documents showing crop type acreage and yields by canal service area within the Republican River Basin from 1995 through 2010.
 - g. Copies of logs maintained by ditch riders within the Republican River Basin from 1995 through 2010.

¹ The term "documents" as used in this letter, is defined in the accompanying Subpoena to Produce Documents.

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- h. Conveyance loss or other efficiency studies conducted in the Republican River Basin.
 - i. Grant applications related to irrigation within Reclamation service areas in the Republican River Basin.
 - j. Documents evidencing the location and description of conveyance, delivery, and application infrastructure transmitting water resources under Reclamation management within the Republican River Basin
 - k. Improvements made to conveyance, delivery, and application infrastructure transmitting water resources under Reclamation management within the Republican River Basin since 2003
 - l. Studies evaluating return flows from or within Reclamation projects within the Republican River Basin
 - m. Reports of cost share funds used to improve irrigation infrastructure within the Republican River Basin (e.g., Water Smart grants)
 - n. Historical diversions of storage water by canal service area within the Republican River Basin
 - o. Historical diversions of natural flow by canal service area within the Republican River Basin
 - p. Historical deliveries to producers by canal service areas within the Republican River Basin
 - q. Agreements to sell additional water for irrigation to producers served by Reclamation resources within the Republican River Basin
 - r. All historical Monthly Water Distribution Tables, including electronic spreadsheets, for all Reclamation-contracting irrigation districts within the Republican River Basin including both the final versions prepared by Reclamation and the preliminary versions provided by the irrigation districts with related correspondence.
 - s. The cost structure Reclamation uses to price irrigation water.
3. All data and supporting information used to determine if water short administration is in effect, including completed determinations for of the years 2003 – 2010.

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Appendix B

Please provide the following to the State of Kansas (through counsel at the address indicated above):

1. All updates to the documents and information provided in response to Kansas' previous Touhy request letter, dated January 29, 2009, a copy of which is attached as Exhibit 2 to the 9/1/11 Touhy letter.



**MONTGOMERY
& ANDREWS**

JOHN B. DRAPER
Direct: (505) 986-2525
Email: jdraper@montand.com
Reply To: Santa Fe Office
www.montand.com

January 10, 2012

By U.S. Mail and Email

Aaron M. Thompson
Area Manager
U.S. Bureau of Reclamation
203 West 2nd Street
Grand Island, NE 68801
athompson@gp.usbr.gov

**Re: Touhy Request for Testimony in *Kansas v. Nebraska & Colorado*,
No. 126, Orig., U.S. Supreme Court**

Dear Mr. Thompson:

The State of Kansas requests that you appear as a witness in the above-referenced case. The trial in this case has not been scheduled, but may occur in the latter half of 2012. In anticipation of this Touhy Request, the State of Kansas submitted Kansas' Expert Witness Disclosure for Aaron M. Thompson (Disclosure) in this case on November 18, 2011, a copy of which is attached hereto, as Exhibit A. In addition, the State of Nebraska has scheduled your deposition for January 24, 2012 as set out in the Nebraska's Notice of Deposition of Mr. Aaron Thompson and Subpoena Duces Tecum, a copy of which is attached hereto (without exhibits), as Exhibit B. I understand that the time and place of this deposition are convenient for you and your counsel.

Kansas will submit a check for costs to the Department of Interior (Department), in accordance with 43 CFR § 2.85, if this request is granted.

The requested testimony is expected to be helpful and relevant in resolving the current dispute among the States of Kansas, Nebraska and Colorado (States) regarding Nebraska's compliance with the Supreme Court Decree (Decree) of May 19, 2003, enforcing the Republican River Compact (Compact). The Decree is found at 538 U.S. 720 (2003). The Final Settlement Stipulation (FSS), which is approved by the Decree,

REPLY TO:

325 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone (505) 982-3673 • Fax (505) 982-4289

Post Office Box 2307
Santa Fe, New Mexico 87504-2307

6301 Indian School Road NE, Suite 400
Albuquerque, New Mexico 87110
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Post Office Box 36210
Albuquerque, New Mexico 87176-6210

Aaron M. Thompson
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is found on the U.S. Supreme Court website at
<http://www.supremecourtus.gov/SpecMastRpt/SpecMastRpt.html>.

The U.S. Bureau of Reclamation (Reclamation) has projects in all three States. The United States appeared as an *amicus curiae* (friend of the Court) in the proceeding in the original jurisdiction of the United States Supreme Court, and, with significant input from Reclamation, was a full participant in the negotiations that resulted in the Decree. See Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska & Colorado*, No. 126, Orig., at 24-25 and App. E (2003) (also found at the U.S. Supreme Court website address cited above).

Your testimony is not reasonably available from any other source. You, as Reclamation Area Manager, possess a unique perspective on the matters at issue in this proceeding, as set out and referenced in the attached Disclosure.

There is no record or set of records that can be provided and used in lieu of your testimony. While certain public Reclamation documents will be relevant, your testimony is necessary in order to provide Reclamation's perspective on the issues before the Supreme Court in this proceeding.

The substance of the testimony is described in the attached Disclosure. The Disclosure references Kansas Exhibits 76-80, 82 and 83 from the non-binding arbitration (Arbitration) initiated 10/21/08 before Arbitrator Karl J. Dreher, copies of which are attached hereto as Exhibit C. Reclamation previously provided testimony on these subjects in the Arbitration on April 14, 2009. A copy of the transcript of that testimony is attached hereto as Exhibit D.

I believe this request for your testimony complies with 43 CFR § 2.88 because: (a) the testimony is not available from another source as explained above; (b) the testimony, to our knowledge, would not be inconsistent with any other federal statute or regulation; and (c) the testimony would be consistent with the Department's ability to

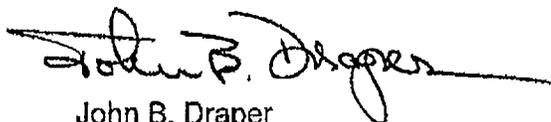
- (1) Conduct its official business unimpeded: Every effort will be made to schedule your testimony at a time to minimize as much as possible any interference with your schedule and official obligations;
- (2) Maintain impartiality in conducting the Department's business: The testimony would be consistent with Reclamation's policies applicable to its projects in the Basin for the benefit of water users in both Nebraska and Kansas;

Aaron M. Thompson
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- (3) Minimize the possibility that the Department will become involved in issues that are not related to its mission or programs: This proceeding raises issues that are central to Reclamation's mission and programs in the Nebraska-Kansas Area of Reclamation's Great Plains Region and is likely to affect the future viability of Reclamation's projects there;
- (4) Avoid spending public employee's time for private purposes: Your testimony will contribute to two important public purposes, namely, achieving compliance with a U.S. Supreme Court Decree enforcing an interstate compact and enhancing the viability of Reclamation projects in the Basin;
- (5) Avoid the negative cumulative effect of granting similar requests: Given the unique character of the present interstate proceeding, it is not expected that there will be any similar requests that would have a negative cumulative effect on the Department;
- (6) Ensure that privileged or protected matters remain confidential: No privileged or protected matters will be inquired into by Kansas in the course of your testimony; the Case Management Plan entered by the Special Master in this proceeding, attached hereto as Exhibit E, protects privileged matters; and
- (7) Avoid undue burden on the Department: Kansas will make every effort, and we expect the other States to cooperate fully, to minimize any impact on your other responsibilities.

Thank you very much for your consideration. I would be glad to provide any additional information that would be helpful.

Sincerely yours,



John B. Draper

JBD:dlo

cc: (by U.S. Mail and email) (w/attachments)
Donald B. Verrilli, Jr., US Sol. Gen.
James J. DuBois, Esq., USDOJ

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January 10, 2012
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John Chaffin, Esq., USDO
Justin D. Lavene, Esq., State of Nebraska
Peter J. Ampe, Esq., State of Colorado