From: Swanda, Marvin R
To: Thompson, Aaron M
Subject: FW: Kansas v Nebraska filings
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Attachments: Kan v Neb Kan brief - Reclamaiton Comments 11-1-2010.docx

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From: Aycock, Gordon L
Sent: Monday, November 01, 2010 3:57 PM
To: Swanda, Marvin R; Scott, Craig D
Cc: Erger, Patrick J; Guenthner, R S (Scott)
Subject: Kansas v Nebraska filings

Attached is a draft document with my initial comments on the filings. This is real rough and not complete (still have Colorado's brief and Kansas' response to review) but I thought it might be of some use for tomorrows call.

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Kansas v. Nebraska
2010 Filings
Reclamation Comments

Kansas' Motion for Leave to File Petition, Petition, and Brief in Support

Reclamation generally agrees with Kansas' brief in support of its petition. The areas were we take some exception to the statement in the brief are listed below.

1. Page 9, paragraph 18: Kansas states that Nebraska's pumping has generally remained at or above the pumping levels that drove the filing of the Kansas Bill of Complain in 1998. Kansas further claims that because of this, depletion's will continue to increase into the future; further complicating Nebraska's ability to comply, and threatening continued and increasing interference with Kansas' future allocations, especially during dry periods. Based on the Compact accounting records Reclamation has reviewed it appears that Kansas is correct. However, if Nebraska's revised 2010 IMPs are enforced as the Nebraska DNR has recently explained these revised IMPs should limit future groundwater pumping to a level that ensures Nebraska stays within its Compact allocation. If Nebraska is successful in limited pumping to this level, depletions should decrease in the future. The problems Reclamation has at this time are; (1) the revised IMPs need considerable clarification and (2) only the Upper and Middle Republican have new revised IMPs for 2010. The Lower NRD is still working on revisions to its IMP for 2010. Reclamation has requested clarification the Upper and Middle NRD's IMPs has worked with the Lower NRD to assist them with revising its IMPs in a manner that will ensure Compact compliance and also provide a sustainable future water supply for both surface and groundwater use.
2. Page 10, paragraph 21: Kansas states: "Unless restrained by this Court, Nebraska will undoubtedly continue to violate the Court's Decree and retain profits derived therefrom." As explained in comment 1 this remains to be seen. If Nebraska is successful in revising the IMPs to limit groundwater pumping to a level reducing Nebraska streamflow depletions to a level that is equal to Nebraska's allocated share of the Republican River supply meeting Compact compliance then it will not be in violation of the Curt's Decree in future years.. The problem, at this point, is even though Nebraska is attempting to make the needed revisions to its IMPs with the third version of these IMPs it still has no track record to demonstrate that it will be sucessful.
3. Page 11, paragraph 27: Kansas states: "It would be appropriate for the Court to specifically order the necessary actions [to ensure Nebraska meets its Compact compliance obligations], and the public interest would not be disserved thereby." If the case is accepted by the Court one of the first items that should be address is whether the newly revised IMPs are sufficient to limit Nebraska depletions to a level that is within it Compact allocation.

Nebraska's Brief In Response to Kansas' Motion for Leave to File Petition

1. Page 3. 1st full paragraph: Nebraska implies that the extreme drought conditions during 2002-2006 were the main reason for its reduced Compact allocation after executing of the FSS in 2003. This is only partially true. Nebraska continued to develop groundwater up to and to some extend even after the FSS was executed in 2003. This development had lagged effects on depleting streamflow and the impacts of this later development are continuing to increase depletions to the Republican River. In 2000, several years prior to the FSS, the Court ruled that the effect of groundwater pumping on surface water flow needed to be accounted for under the Compact yet Nebraska did little if anything to stop the development of new wells until after the FSS was executed in 2003. This lack of action by Nebraska is the primary reason that Nebraska is out of compliance with the Compact.
2. Page 3. 1st full paragraph: Nebraska claims that the fact that Colorado had consistently overused water since the FSS was signed has complicated Nebraska compliance effort. This over use by Colorado should not affect Nebraska. Each state has its own allocation which is not depended on water use by the other two states. The only impact Colorado's over use could have on Nebraska is that of possibly limiting the availability of water to Nebraska's reducing the probability of out of Compliance use by Nebraska. Apparently this has not been the case.
3. Page 5 and 6: Nebraska claims that the initial IMPs contained a blueprint for sustainable water management in the basin and charted a course for Nebraska' compact Compliance. The initial IMP established in 2005 did little to limit groundwater pumping only requiring a reduction in pumping of 5 percent from the 1998-2002 baseline levels. Since 1998-2002 was a relatively dry period, pumping during this time was higher than average thus the 5 percent reduction provided little or no reduction in water use. This insignificant reduction was completely ineffective in providing sustainable water management or Compact compliance. Groundwater depletions, due to Nebraska's pumping, continued to increase at a significant rate through 2007. The 2008 revisions to the IMP required each NRD to limit its groundwater use to its share of Nebraska's "Allowable Groundwater Depletion" (the allowable depletion to streamflow which would be within Nebraska's allocated share of water under the Compact) but then stated that the Nebraska DNR believed that a 20 percent reduction in groundwater pumping would be sufficient to meet this goal. Since the IMP provided no formula or method for determining what the Allowable Groundwater Depletion amount was it does not appear than any of the NRD did any more than attempt to limit pumping to 80 percent of the 1998-2002 baseline pumping levels. Again groundwater depletions to streamflow continued to increase during 2008-2009. In 2010 the NRDs in collaboration with the DNR attempted to further revise the IMPs. The Upper and Middle NRDs new revised IMPs now include a formula for calculated the Allowable Groundwater Depletion based on forecasted water supplies. While this revised method appears to finally have the components needed to allow Nebraska to come into compliance if properly implemented these IMPs remain unclear on how groundwater use will be regulated in relation to surface water use and also contain some confliction statement. The IMPs do not clarify how groundwater use and surface water use regulation will be implemented. These IMPs

also allow groundwater users to bank water and use averaging in staying within their allocated limits. This system of regulation is very problematic during low water supply years when significant reduction in water use is required to meet Compact compliance. In addition the Lower NRD is still working on drafting its IMP. Reclamation is working with the NRDs and the DNR to obtain clarification for the IMPs

4. Page 6 1st paragraph: Nebraska states: "Together these 'second generation' IMPs (1) limit each NRD to its share of Nebraska's allowable groundwater depletion, and (2) require each NRD to further reduce its share of groundwater consumptive use by 20% from the baseline period." This is not true. The 2nd generation IMP (2008 version) required each NRD to reduce its share of groundwater pumping by 20% from the baseline period which the DNR believed was sufficient to allow them to be within their allowable groundwater depletion (see bottom of page 2 of the Middle Republican NRD IMP dated Jan 8, 2008). Also note that the 20% reduction limitation reduction was applied to pumping rates not depletions rates. These limitations were one in the same not additive as described in the brief. Nebraska also claims that these additional limitations (20% reduction versus 5% reduction in 2005 IMP) were needed in part because of the length and severity of the drought. Reclamation does not agree. Even with improved conditions and above average precipitation during 2008 and 2009 Nebraska has barely maintained compact compliance during 2009 based on its own accounting numbers. Reductions in pumping in excess of 20% are needed to provide a sustainable water supply and allow Nebraska to be in compliance on a long term basis.
5. Page 6, last paragraph: Nebraska states that from 2006 to 2008, the NRDs and DNR leased a total of 98,368 acre-feet of surface water from irrigation districts to reduce Nebraska's consumption under the Compact by 51,614 acre-feet. It's important to note that this was needed because the IMPs failed to provide Compact compliance. Also, even with this extra measure Nebraska was still out of compliance in 2006.
6. Page 7, 1st paragraph under heading III: Nebraska states: "DNR has compiled annual information concerning irrigation levels within the Basin, and contrary to Kansas' implications, groundwater pumping in the Nebraska portion of the Basin has declined steadily and significantly since the FSS was executed. Figure 2 in Dunnigan's Decl. shows groundwater pumping steadily declining between 2002 and 2009, however, this figure conflict with the following Figure 3 as this tables show Nebraska's Computed Beneficial Consumptive Use (CBCU) significantly increasing from 2006 to 2009. In 2006 the CBCU was 228,420 acre-feet and in 2009 this had increased to 288,200 acre-feet. If groundwater pumping had decreased by nearly 20,000 acre-feet as shown on Figure 2 it is hard to believe that CBCU would increase by nearly 60,000 acre-feet during this same period. The only other CBCU would be from surface water use and there has not been that much variation in irrigation deliveries to explain this large difference.
7. Page 8, 2nd paragraph: Nebraska claims there are significant accounting errors which prevent accurate accounting of each State's CBCU. This may or may not be true but Nebraska agreed to the current accounting method under the FSS and is obligated to abide by this accounting until a better more accurate method is agreed to by all three states.

8. Page 8. bottom of 2nd paragraph: Nebraska states that they communicated concerns over Kansas' excessive demands in light of Nebraska's efforts to maintain compliance, asserting that Kansas's proposed remedy could reduce Nebraska's consumptive use far more aggressively than required under the Compact. Nebraska urged Kansas to take a close look at Nebraska's second generation IMPs. It appears that even Nebraska was not convinced that its second generation IMPs were adequate as it is now in the process of making significant revisions to the 2008 IMPs. Kansas' remedies may be too severe but until Nebraska comes up with something that it can demonstrate will work neither Kansas or Reclamation can accept that they have gone far enough.