

Dave Heineman
Governor

STATE OF NEBRASKA

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

April 29, 2013

IN REPLY TO:

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

Dear Mr. Thompson:

I have reviewed your letter dated April 23, 2013, to Mr. Barfield. Nebraska appreciates the Bureau's commitment to operate in accordance with Orders of the Department of Natural Resources if no accommodation is made among the States to carry over water temporarily retained this year in Harlan County Lake. As the May 1, 2013, deadline nears, that commitment takes on increasing importance.

Your letter also invites Kansas to invoke Article VI of the Compact and to enter a contract under the Warren Act, 43 USC § 523 (Storage and transportation of water for irrigation districts, etc.), for water developed by Nebraska and temporarily stored in Harlan County Lake (HCL) during 2013. In consultation with counsel, we have concluded that your invitation is misguided and, if accepted by Kansas, will destroy any hope of providing Kansas the flexibility it seeks to hold over water in HCL during 2013 for later use. Your invitation should be withdrawn immediately.

According to Nebraska counsel, first, Article VI of the Compact provides:

The right of any person, entity, or lower state to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper state for the purpose of regulating water herein allocated for beneficial consumptive use in such lower state, shall never be denied by an upper state; provided, that such right is subject to the rights of the upper state.

Kansas in no way participated in the construction of HCL and, therefore, Article VI simply does not apply. Moreover, if Article VI were to be invoked, Article VII would correspondingly apply, requiring Kansas to compensate local political subdivisions for the use of such facility. Even if Kansas were willing to do so, the water would remain subject to the laws of the State of Nebraska pursuant to Article VIII.

Second, your reference to the Warren Act is confusing. The Warren Act allows Reclamation to contract for water in its projects that is in excess of water needed for existing project purposes.

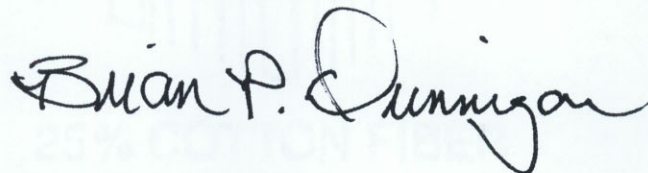
Aaron Thompson
April 29, 2013
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43 USC § 523. *State of Nebraska v. State of Wyoming*, 515 U.S. 1, 17 (1995). Unless Kansas is prepared to commit today to the fact that Kansas Bostwick Irrigation District (KBID) does not need this water in 2013, the Warren Act should not be employed because there will be no surplus water in the project. Although Mr. Barfield made it abundantly clear to all involved on our March 29, 2013, and April 12, 2013 conferences that the water was not needed in KBID this year, he has since backtracked on that representation by virtue of his April 19, 2013, correspondence (attached).

Finally, it is not clear to us that the Warren Act contemplates entry into contracts with States. Rather, according to the plain language of the statute: "Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made[.]" Thus, the statute limits such contracts to be made with irrigation systems, districts, associations, corporations, or individuals. The Warren Act, while possibly available as a vehicle through which KBID could contract for surplus project water, has no relation whatsoever to Article VI of the Compact, and water stored and released under such a contract would not escape Nebraska's ultimate control.

Nebraska continues to work with Kansas to develop an alternative that would allow Kansas to utilize next year water stored in 2013. The present invitation embodied in your letter is unproductive and should be withdrawn.

Sincerely,



Brian P. Dunnigan, P.E.
Director

Enclosure

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

Dick Wolfe, P.E.
Colorado State Engineer
Division of Water Resources
1313 Sherman St., Suite 818
Denver, CO 80203



109 SW 9th Street, 2nd Floor
Topeka, Kansas 66612-1283

phone: (785) 296-3717
fax: (785) 296-1176
www.ksda.gov/dwr

Dale A. Rodman, Secretary
David W. Barfield, Chief Engineer

Sam Brownback, Governor

April 19, 2013

Brian P. Dunnigan, P.E.
Nebraska Commissioner
Republican River Compact Administration
Nebraska Department of Natural Resources
301 Centennial Mall South
PO Box 94676
Lincoln NE 68509-4676

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DEPARTMENT OF
NATURAL RESOURCES

Dear Commissioner Dunnigan :

The purpose of this letter is twofold: first and principally to provide Nebraska with a proposal to obviate the unnecessary and unwise release of waters from Harlan County Lake (HCL) during the current water-short conditions; and second, to respond to your April 15 letter.

Kansas Proposal

Regardless of the apparent misunderstandings surrounding the states' positions, some of which are discussed below, pursuant to discussions with Nebraska on March 29 and April 12, Kansas has crafted an offer that we believe meets the conditions stated in your April 15 letter, accommodating Nebraska's need to assure that its management actions are moving it towards compliance, while protecting Kansas' rights under the Compact to put Kansas' water to beneficial use. This offer consists of two main parts: first, the establishment of a temporary irrigation sub-account for Kansas in HCL; and second, an accounting adjustment for 2013 in the amount provided by Nebraska to that sub-account.

First, the states and the federal government (both the U.S. Bureau of Reclamation (Reclamation) and the U.S. Army Corps of Engineers) would agree to establish a Kansas Exclusive Irrigation Sub-account ("KEIS") in HCL on the following terms:

- a. The KEIS water shall consist of water made available to Kansas pursuant to the terms below via agreement of the state of Nebraska, the federal agencies, and the Bostwick irrigation districts.
- b. The KEIS shall be under Kansas' exclusive control for irrigation use in 2013, 2014, and 2015, including the exclusive right to determine the timing of releases.
- c. Water in the KEIS not released in 2013 shall be carried over in the KEIS for 2014, with appropriate reductions for evaporation loss as determined by Reclamation according to methods mutually agreed upon. In like manner, any water not used in 2014 will be carried over to 2015.

- d. Unless otherwise agreed, Kansas shall exhaust the KEIS by December 31, 2015.
- e. Reclamation shall agree to maintain an accounting of the irrigation water supply in HCL, and maintain accounting for the KEIS as a sub-account separate from the Bostwick Irrigation District water supply.
- f. The project water supply available for the Bostwick Districts in 2014 shall be determined by the Consensus Plan. Any remaining KEIS water shall remain available to Kansas and be treated separately from the amount of project water available to be shared between the Bostwick Districts for 2014. The same principles shall apply in 2015, if any KEIS water remains in 2015. If water remains in the KEIS at the end of 2015, unless otherwise agreed upon, that water will be included with the amount of project water available to be shared between the Bostwick Districts.
- g. The split in Operation and Maintenance (O & M) costs between the Bostwick Districts shall continue to be based on the methods established in their contracts with Reclamation. Kansas shall not be responsible for any additional costs to access its normal water supply or the KEIS water supply.
- h. With respect to the additional evaporation from HCL due to the KEIS, Kansas is willing to bear responsibility for such in the RRCA accounting from the day that the water supply is irrevocably committed to Kansas. Additional discussion between the states will be necessary to establish a means to compute the split in evaporation over the multi-year period envisioned herein with part of the pool be charged based on content and another part based on use.

Second, in exchange for a KEIS in HCL according to the preceding terms, Kansas would agree to an adjustment to the RRCA accounting as follows.

- a. The mainstem Computed Water Supply (“CWS”) will be increased for 2013, acre-foot for acre-foot, according to the fixed quantity delivered to the KEIS.
- b. This adjustment in the accounting for 2013 will ensure that the water delivered in the KEIS in 2013 will become part of the year’s CWS and not be counted as consumption by Nebraska in the year 2013. We believe this moves Nebraska toward compliance. However, Kansas does not waive any other rights under the Compact, Decree, or FSS .
- c. When the KEIS water is released, it shall not be counted as part of the mainstem CWS. That is, when the mainstem CWS is calculated, the amount of release of KEIS water, acre-foot for acre-foot, will be deducted from the mainstem CWS for the year of release. Kansas will notify Nebraska and Reclamation when this release occurs, including the amount released.

Please provide a response to Kansas’ offer as soon as is reasonably practicable, so that Kansas may take it under consideration while reviewing other options.

Finally, given that any additional notices issued by Nebraska calling for water to be passed through HCL before the irrigation season could result in the loss forever of water that potentially could be used for irrigation in 2013, Kansas requests that Nebraska not issue any notices that call for releases to occur before the end of the irrigation season this year.

Response to April 15, 2013 Letter

Your letter dated April 15, 2013, which was intended to confirm the State of Nebraska's understanding of the situation surrounding the present and future needs of Kansas' irrigation water users, was helpful to Kansas' understanding of your position. However, your letter mischaracterizes or misrepresents Kansas' irrigation needs, and Kansas' positions regarding the Compact, the Final Settlement Stipulation (FSS), and the operations of HCL. A complete correction of these misinterpretations and mischaracterizations is beyond the scope of this letter, which has been prepared in a short time frame to respond to Nebraska's request and to Nebraska's announced intention to order, on May 1, 2013, the release of water through HCL that might otherwise be usable as irrigation water in 2013 or later.

First, the Kansas Bostwick Irrigation District (KBID) has not, as you state, established a "fixed" water supply that "would not be revisited." Instead, KBID established a projected supply for its farmers, and it did so in the usual time frame for making such projections, which was well in advance of the irrigation season. These projections are a key component of sound farm management, allowing farmers to plan for the coming growing season by making advance purchases of the necessary inputs such as seed and fertilizer. KBID's projected supply is not a limit that prohibits the use of additional water. Instead, it represents KBID's proposed balancing, as of the time the projection was made, of the benefits of irrigation uses in 2013 and the benefits of carryover irrigation storage for 2014. KBID, as an irrigation district with rights in an upstream federal storage project, made that projection expecting to call for some water this year while carrying over other water to protect itself against dry conditions in future years. This established practice has been ongoing for the 60+ years that HCL has been in existence. Indeed, irrigation storage and flood control are the two primary purposes of the reservoir. For KBID irrigators located above Lovewell Reservoir, HCL represents the only irrigation storage option to protect against extended drought. Eliminating the ability to use HCL for carryover storage directly interferes with KBID's operations. During the spring and during irrigation season, KBID regularly assesses updated water supply estimates; in many years, KBID will increase the allocations depending upon conditions.

Second, both whether Nebraska would declare a "Compact Call Year" and the operational details of Nebraska's Compact Call Year administration evolved throughout 2012 and 2013. For instance, at the time of the August 2012 trial Nebraska's own compliance forecast predicted that Nebraska was virtually guaranteed Compact compliance in 2013 "without additional management actions." Nebraska's actions in the last several months have created more uncertainty regarding the ability of water users in the Republican River Basin to plan ahead effectively than would have otherwise existed. Nebraska's integrated management plans are described often as a dynamic and flexible approach to Compact compliance. These plans allow Nebraska to impose or lift Compact Call Year administration based on changing hydrologic conditions or negotiations with other entities, such as Reclamation. Negotiations such as these between Nebraska and Reclamation remain ongoing even today. It is not accurate to imply that Nebraska had committed to the exact implementation details of its 2013 compliance plans at the time that KBID was making its water supply projections for 2013. KBID made its irrigation projections based on the best information available at the time, and it can be expected to make adjustments as needed based on the existing conditions.

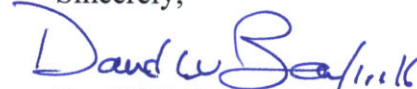
Third, Nebraska has many options for achieving Compact compliance, including curtailment of groundwater pumping. Nebraska has chosen an approach that includes blocking Reclamation from collecting and storing inflows to HCL. Nebraska does not appear to be certain that blocking Reclamation's water storage is even necessary to achieve that outcome. Nebraska has forecast that compliance "may not occur in 2013 without additional management actions," but Nebraska does not guarantee that any particular action is both necessary and sufficient to ensure compliance. Nebraska's actions have presented the states, the federal government, and water users in the Basin with many difficulties going forward. These difficulties are due primarily to Nebraska's projected overconsumption and its subsequent decision to block water storage by the Bureau. There is no basis for Nebraska to assert that Kansas is to blame for these difficulties.

Fourth, Kansas has not stated that the Compact is a "delivery compact." Kansas continues to assert, however, that it is illegal for an upstream state to interfere with the ability of a downstream state to use its Compact allocation beneficially by means of storage and delivery of its water through a federal irrigation storage project.

Fifth, your letter states that "there is . . . no need for such water in Kansas this year." This is not true. As a practical matter, water released from HCL during the irrigation season would be usable by KBID's irrigators in the same way that any other water reaching Guide Rock during the irrigation season would be usable. Water released at a time when it is not fully usable is unnecessarily wasteful. Assuming that Nebraska intends to deprive Kansas and KBID the ability to store water for later beneficial use, there is no basis to dump this water in a way that eliminates all possibility of using it for irrigation in 2013.

I encourage you to continue the current dialogue between the states and the federal government so that we can avoid any unnecessary and irreparable harm to any one entity in the Republican River Basin.

Sincerely,



David W. Barfield, P.E.
Kansas Chief Engineer
Chairman, RRCA

DWB:spf

Cc:

Aaron Thompson, Area Manager, United States Bureau of Reclamation
Matt Jeppson, Esq. Office of Counsel, U.S. Army Corps of Engineers
Dick Wolfe, P.E. , RRCA Commissioner