

PUBLIC HEARING - AGENDA

GROUND WATER MANAGEMENT AREA  
August 30, 2007 at 7:00 P.M.  
McCook, NE

Hearing Agenda

1. Convene Hearing
2. Notice of Public Hearing
3. Statement of Purpose
4. Overview of proposed changes and revisions
5. Testimony
6. Close Hearing

In accordance with NRSS section 46-743. (2) Notice of this hearing shall be published in a newspaper published or of general circulation in the affected area at least once each week for three consecutive weeks, the last publication of which shall be not less than seven days prior to the hearing.

The purpose of this joint public hearing is to receive testimony concerning proposed amendments to the Integrated Management Plan controls through District's Ground Water Management Area, Rules and Regulations.

Staff presentation of proposed amendments:

Testimony:

All persons testifying will state their name, address and who they represent. Written testimony shall be clearly marked to identify the provider. Testimony will be taken in the following order:

1. MRNRD Staff or Directors
2. State agencies
3. Federal agencies
4. Other NRDs
5. Other Political Subdivisions
6. Others in order set by Chairman
7. Written Testimony Received

Close Hearing

## PUBLIC HEARING NOTICE

The Middle Republican Natural Resources District will hold a public hearing for the purpose of receiving testimony with regard to proposed amendments to the rules and regulations for the Ground Water Management Area for the Middle Republican Natural Resources District. The hearing will be at the City Auditorium at West 5th and C Street in McCook, Nebraska on August 30<sup>th</sup> 2007 at 7:00 P.M. Written testimony may be sent to the Middle Republican Natural Resources District at PO Box 81, Curtis, Nebraska, 69025. Written testimony will be accepted until the close of the hearing on August 30<sup>th</sup>, 2007. The revisions will be considered at the September regular board meeting.

The authority for these rules and regulations is the authority granted in the Nebraska Ground Water Management and Protection Act. NRRS 46-701 through 46-753. Public Hearing requirements are in NRRS 46-743. This amendment to the Rules and Regulations for the Ground Water Management Area includes revisions to the rules dealing with Definitions, Transfers, Allocation and other management of ground water use.

The purpose of this management area is to (1) protect ground water quantity and (2) the prevention or resolution of conflicts between users of ground water and appropriators of surface water, which ground water and surface water are hydrologically connected through implementation of the goals and objectives identified in the Integrated Management Plan.

The geographic area is the entire Middle Republican Natural Resources District.

The purpose and geographic area of the Management Area are not changed.

Chapter 3, Definitions of a water well and replacement well are changed due to changes in the statutes. Other definitions added to correspond to administration of the rules.

Chapter 4, General Management. Revisions to rules dealing with the moratorium. Language added to Water Short Year Administration to provide for a reduction in allocation should the state be out of compliance for two or more consecutive years. Language added to provide for pooling of allocations under certain circumstances.

Chapter 5, Management of Uses. Revision to the rules for transfers. These revisions refine the existing transfer process. Revision to the rules for allocation of ground water for industrial uses that will require retirement of existing uses for a new or expanded industrial use. Revision to the allocation for irrigation uses that will set the allocation to 60 inches over a 5 year period. This revision also provides for additional allocation if the state is in compliance for two consecutive years. Revision to the allocation for supplemental wells that would adjust the allocation down for any surface water that is delivered to, transferred from or otherwise available to the certified acres served by these wells

The full text of these rules and regulations are available on the district website at [mnrnd.org](http://mnrnd.org) or may be obtained by contacting the Middle Republican NRD, PO Box 81, Curtis NE, 69025 or at 308-367-4281.

**MIDDLE REPUBLICAN NRD**  
**Ground Water Management Area Rules & Regulations**  
**PUBLIC HEARING TESTIMONY ROSTER**  
**Thursday, August 30, 2007, 7:00 PM, McCook, NE**

NAME PLEASE PRINT	ADDRESS
Dan Smith	Maywood
Mark Swanda	McCook
Dale Cramer	Cambridge
Wayne Madsen	Trenton
Bary Rubino	Huges Center



Dave Heineman  
Governor

STATE OF NEBRASKA  
DEPARTMENT OF NATURAL RESOURCES  
Ann Bleed  
Director

August 30, 2007

IN REPLY TO:

Mr. Josh Friesen, Chair  
Middle Republican Natural Resources District  
P.O. Box 81  
Curtis, Nebraska 69025

Dear Mr. Friesen:

In accordance with Neb. Rev. Stat. § 46-743(7)(Reissue 2004), the Department of Natural Resources is providing this letter as our official testimony for the record of the Middle Republican Natural Resources District's hearing on the proposed amendments to the District's Ground Water Management Area Rules and Regulations. The Department reviewed the amendments as changes to the rules and regulations authorized by Neb. Rev. Stat. § 46-712 only; we did not review these as amendments to rules pertaining to the integrated management plan authorized under Neb. Rev. Stat. § 46-715.

The stated purposes of the ground water management area are (1) to protect ground water quantity; and (2) the prevention or resolution of conflicts between users of ground water and appropriators of surface water. The Department does not believe that the proposed amendments to the rules will achieve either of these purposes.

Specific comments related to the amendments are as follows:

1. We read the definition of "consecutive water short years" (proposed Rule 3-1.15) to mean that there would have to be at least two years declared as a water short year, as defined in the Republican River Compact, and in the following August when the Compact Administration meets, Nebraska was found to be out of compliance during the previous two years. If these conditions had to be met before additional measures could be taken related to a water short year, actions to address the water short condition could not take place for three years. This is not consistent with meeting the purpose of the rules to prevent or resolve conflicts.
2. Proposed Rule 3-1.10 (definition of "bonus inches") states that yearly compliance with the Republican River Compact is required for the Board to grant bonus inches whereas in proposed Rule 5-3.7.3.1 it states that yearly compliance must be maintained for the previous two years. This latter rule appears to contradict the first.
3. Proposed Rule 3-1.10 uses the term "yearly compliance"; there is currently no definition for this term. If you are referring to compliance with the Republican River Compact, you may want to clarify how yearly compliance relates to Compact compliance which, although determined on a yearly basis, is based on a five-year rolling average and, if applicable, a two or three year average during water short year designation.

4. Proposed Rule 3-1.18 (definition for "cumulative allocation") references the term "allocation period." There is no such term defined. If it is meant to be "base allocation period" then Rule 3-1.18 should be amended to include the word "base" before "allocation period."
5. Proposed Rule 3-1.44 (definition of "replacement well") refers to Neb. Rev. Stat. § 46-602(2)(a). The definition of a replacement well for purposes of Neb. Rev. Stat. § 46-602(2) is found in Neb. Rev. Stat. § 46-602(2)(b) not Neb. Rev. Stat. § 46-602(2)(a). We recommend changing the statutory reference.
6. In reading proposed Rule 4-7.4 with proposed Rule 3-1.15, it would imply that three years after the beginning of a two-year back-to-back water short year period, but not before, the Board could, but does not have to, reduce the allocation by one inch. There are several problems with this proposal:
  - A. By the time a reduction could occur, the problem would already have occurred for three years.
  - B. With this language the Board is indicating that it may reduce allocations, but provides no assurance that it will if such a reduction is necessary.
  - C. The statement also implies the Board will not reduce the allocation by more than one inch, but proposed Rule 4-7.5 states that the Board may adopt additional measures, as needed to maintain compliance with the Republican River Compact. If this is true, what is the meaning of proposed Rule 4-7.4? Furthermore, the use of the word "may" provides no assurance that if needed, action will be taken.
  - D. Proposed Rule 4-7.5 does not provide adequate notice to the public as to what, if any, additional restrictions there may be.
7. Proposed Rule 4-9.1 does not provide adequate notice to a citizen of what the requirements are related to pooling. It would be in the best interest of the District to have clear rules and guidelines related to pooling. We recommend adding additional rules to make it clear what the requirements are regarding pooling.

Once again, we examined these proposed rules and regulations under Neb. Rev. Stat. § 46-712. We recommend that the District not adopt these proposed amendments to the Ground Water Management Area Rules and Regulations as they do not conform to the stated purposes of the rules and do not provide sufficient notice to the citizens of the District of what the requirements will be. These proposed rules and regulations are not proper for purposes of Neb. Rev. Stat. § 46-715 and the Department will not agree to nor adopt these proposed rules to meet the requirements under Neb. Rev. Stat. § 46-715.

If the Board and/or staff have any questions related to the items discussed in this letter, please let us know.

Sincerely,



Ann Bleed  
Director



IN REPLY REFER TO:

NK-100  
WTR-4.11 FC

# United States Department of the Interior

BUREAU OF RECLAMATION  
Great Plains Region  
Nebraska-Kansas Area Office  
P.O. Box 1607  
Grand Island, Nebraska 68802-1607

AUG 30 2007



Middle Republican Natural Resources District  
220 Center Avenue  
Curtis, NE 69025

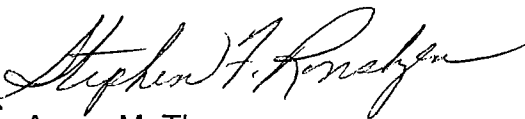
Subject: Written Statement of the Bureau of Reclamation – Middle Republican Natural Resources District (MRNRD) Public Hearing

Dear Sir:

Enclosed is the written statement of the Bureau of Reclamation, Nebraska-Kansas Area Office submitted for the public hearing records as conducted by the MRNRD regarding the proposed rules and regulations for the Ground Water Management Area for the MRNRD. Specific comments concerning the draft Rules and Regulations are included as part of the above-referenced testimony.

Thank you for the opportunity to provide comments to your proposed rules and regulations. If you have any questions, please contact me at the above address or telephone 308-389-5301.

Sincerely,

Acting For   
Aaron M. Thompson  
Area Manager

Enclosure

cc: Ann Bleed, Director  
Nebraska Department of Natural Resources  
P. O. Box 94676  
Lincoln, NE 68509-4676

Lee Orton, Attorney at Law  
1233 Lincoln Mall, Suite 201  
Lincoln, NE 68508

Mike Delka, Manager  
Bostwick Irrigation District in Nebraska  
P.O. Box 446  
Red Cloud, NE 68970-0446

Roy Patterson, Superintendent  
Frenchman-Cambridge Irrigation District  
P.O. Box 116  
Cambridge, NE 69022

Don Felker, Manager  
Frenchman-Valley and H&RW Irrigation Districts  
P.O. Box 297  
Culbertson, NE 69024

w/enclosure to all of the above



IN REPLY REFER TO:

# United States Department of the Interior

BUREAU OF RECLAMATION  
Great Plains Region  
Nebraska-Kansas Area Office  
P.O. Box 1607  
Grand Island, Nebraska 68802-1607



**Statement of the Bureau of Reclamation  
Nebraska-Kansas Area Office  
Aaron M. Thompson, Area Manager**

**Regarding Proposed Rules and Regulations for the Ground Water Management  
Area for the Middle Republican Natural Resources District**

**August 30, 2007**

## **EXPERTISE**

This statement was prepared by Bureau of Reclamation (Reclamation) personnel having extensive experience with the hydrology of the Republican River and the construction and operation of Reclamation and Corps of Engineers projects in the basin. This experience also includes considerable involvement with the Republican River Compact (Compact) calculations and the 1998 Compact litigation and 2002 settlement.

## **RECENT HISTORY**

The original Compact, signed in 1942, was negotiated and drafted with the knowledge that significant federal water resource development was being planned for the basin. After Congress approved the Compact in 1943, it authorized a system of federal water development and management projects in the Republican River Basin as part of the Missouri River Basin Development Program (Flood Control Act of 1944). These Federal projects were designed to fit within the terms of the Compact and to insure that the water developed and used by these projects in each of the three states was in compliance with the state's Compact allocations. Construction of these projects commenced in 1945 and was generally completed in 1964.

On May 26, 1998, after several years of disagreement among the three states concerning the Compact accounting, Kansas withdrew from the discussions and filed a complaint with the United States Supreme Court (Court). Kansas alleged that the use of groundwater wells had resulted in the appropriation by the State of Nebraska of more than its allocated equitable share of the waters of the Republican River. The Court accepted the case in 1999. In 2000 the Special Master, appointed by the Court, recommended to the Court that the Republican River Compact restricts a compacting State's consumption of groundwater to the extent the consumption depletes stream flow in the Republican River Basin. The Court agreed. After further briefings and rulings by



the Special Master, the Special Master allowed settlement discussions to be initiated separate from the Court action. The Special Master established a time-frame for completion of settlement discussions and settlement was reached and approved by the Court in May 2003. The settlement established general terms governing the settlement, Compact accounting, and additional administration requirements.

## **COMPACT RULES AND CALCULATIONS**

Changes to the Compact accounting calculations resulting from the 2003 Settlement Stipulation included the accounting of all groundwater depletions and averaging the states' consumptive use and its Compact allocation over a period of years. The handling of reservoir storage was also changed such that water stored in federal reservoirs is not counted as part of the basin water supply until it is released from the reservoir. Water released from Federal reservoirs becomes Compact water subject to allocation only after it is either diverted or flows by a Compact gage. Attempting to deliver stored water to Kansas as a means of making up for Compact deficits does not result in a one for one return to Nebraska. Any stored water that is released is first counted as a new supply that is subject to Compact allocation. Water released from reservoirs in Nebraska becomes Compact supply and is allocated accordingly.

Each irrigation district's historical use of storage water results in a greater increase in Nebraska's allocation than the increase in consumptive use resulting from the irrigation district's diversion. This results in a net positive contribution to Compact compliance for Nebraska. Because of the current imbalance of groundwater use in the basin, groundwater depletions result in a deficit for Nebraska. Due to the continued high level of groundwater use in Nebraska, long-term surface water supplies continue to decline. Unless groundwater use is reduced surface water flows and reservoir storage will be reduced.

## **CURRENT CONDITIONS**

In 2001, the Compact's total surface water supply was 311,368 acre-feet. The Compact's surface water supply for the 2002-2006 has only averaged 147,600 acre-feet. During the 2002-2006 period, Nebraska overused its allocation in each of these years. Nebraska is currently using about 75% of the total water being used in the basin while it is allocated about 56% of the total Compact supply. This has created the present deficit of about 40,000 acre-feet annually. Nebraska groundwater depletion is over 80% of the total groundwater depletion in the Basin. Although this year has been a much better water supply year improving storage and streamflows, water short conditions will return in the future.

## **CONCERNS**

Reclamation is very concerned with Nebraska's failure to meet Compact compliance since Compact compliance accounting was reinitiated in 2003. Extensive groundwater use in the basin has negatively impacted the water supply for the Federal projects as well as resulting in serious overuse of water by Nebraska. Nebraska's use of groundwater has significantly changed the way water use is occurring in the Basin. According to the first four years of accounting calculations, Nebraska has accumulated a deficit or overuse of its allocation that will be extremely difficult to make up. Since Nebraska's groundwater depletion is significantly out of balance with Compact allocations, these groundwater uses and depletions must be further restricted to allow for a balance between use and supply as well as to realize Compact compliance.

It is our understanding the Proposed Rules and Regulations for the Ground Water Management Area for the Middle Republican Natural Resources District is an important part of the development of the Integrated Management Plan (IMP). According to NE Stat. 46-715, the IMP should include clear goals and objectives with the purpose of sustaining the balance between water uses and water supplies. Reclamation is very concerned with this balance in the Basin as it relates to surface water supplies for existing surface water uses.

Reclamation is fully supportive of the Federal projects and the water users served by these projects. These projects should continue to operate as planned and authorized. Continued operation of these projects requires the protection of existing water rights and restoration of inflows to the reservoirs.

## **REALITY**

It is obvious to Reclamation that use of available storage water from the Federal projects by irrigation districts is beneficial to Nebraska's Compact compliance. Continuing to allow pumping at the allocation levels proposed by this NRD will only further reduce streamflow resulting in a reduction in the quantity of stored water available to supply surface water users. Reducing groundwater depletions will gradually allow the streamflows to recover and result in improved chances for future Compact compliance. Storage water use during normal operations by the irrigation districts improves the chances of Compact compliance as this increases the total Compact supply allocated to Nebraska. In addition the existing plan for surface water did not include restrictions to surface water use due to its already limited supply. Taking into account that the surface water supply has decreased significantly due to the continued high levels of groundwater use, it is not equitable to impose further surface water restrictions.

## **COMPACT ADMINISTRATION**

The hydrologists and others associated with the Compact Administration have stated that significant reduction in groundwater depletions is necessary for Nebraska to come into long-term compliance with the Compact. Colorado is in the process of making significant reductions in its groundwater use to meet its Compact compliance. Reclamation agrees that long-term Compact compliance can be achieved through significant reductions in groundwater use in Nebraska and Colorado.

## **EXPECTATIONS**

The Bureau of Reclamation expects the water rights associated with the Federal multipurpose projects that were authorized in the Republican River Basin be protected by Nebraska Department of Natural Resources and the Natural Resource Districts. Reclamation expects to continue to operate the Federal projects for their authorized purposes. Reclamation does not believe that the allocations proposed by the Middle Republican Natural Resource District will assist Nebraska in meeting its Compact Compliance. Reclamation also requests action by the NRD and the State of Nebraska to place further and sufficient restriction on groundwater pumping that will allow streamflows to recover and allow Nebraska to achieve Compact compliance.

## **SPECIFIC COMMENTS**

Article 3-1.10 Approving of additional allocations does not help in achieving long-term compact compliance. This should be eliminated.

Article 4-7.4 Reductions may need to be made at much higher levels to achieve long-term compliance.

Article 5.2.11 Transfer of use should be based on offsetting compact compliance instead of offsetting use.

Article 5-3.7.1 Base allocation of 12 inches is unacceptable. A lower allocation is needed to allow Nebraska to be in compliance with the Compact on a long term basis and to allow groundwater supplies to recover.

Article 5-3.7.3.1 Bonus allocations are unacceptable.

Article 5-3.11.1 Combining surface water and groundwater use is unacceptable. If surface water supplies were sufficient to provide adequate water, supplemental wells would not be necessary. If this rule or regulation was implemented, numerous administration problems could be expected.

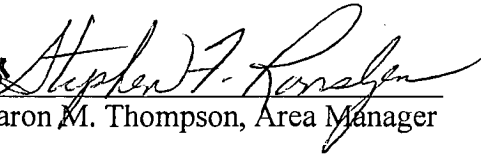
Article 5-3.11.2 Same comment as Article 5-3.11.1.

## Conclusion and Final Statement

Due to the reduced streamflow in the MRNRD, surface irrigators and their water rights have been adversely affected by receiving water supplies that are less than expected from the Federal projects. The reduced water deliveries have reduced the economic benefits provided by the projects. Other impacts associated with reduced streamflows include a reduction in reservoir levels in the MRNRD which reduces the recreational and fish and wildlife benefits associated with these projects.

I would like to note that Chapter 6, Integrated Management Plan of the Proposed Rules and Regulations states the goals and objectives of an integrated management plan must have as a purpose "sustaining a balance between water uses and water supplies so that the economic viability, social and environmental health, safety, and welfare of the Republican River Basin can be achieved and maintained for both the near term and the long term". Sustained surface water inflows to the Federal reservoirs provide not only irrigation benefits, but also significant recreation and fish and wildlife benefits to the area. I would like to again note the water right priority dates associated with the Federal projects are prior to the dates that the majority of the groundwater development occurred. Therefore, in areas of groundwater-surface water interaction, I would request that specific consideration be given to surface water supplies for the Federal projects when establishing long-term and water-short year groundwater allocations.

In conclusion, Reclamation is fully supportive of the Federal projects and the water users served by these projects. These projects should continue to operate as planned and authorized. Continued operation of these projects requires the protection of existing water rights and restoration of inflows to the reservoirs.

Acting For   
Aaron M. Thompson, Area Manager

**TESTIMONY PRESENTED TO THE  
MIDDLE REPUBLICAN NATURAL RESOURCES DISTRICT  
BY THE  
REPUBLICAN BASIN IRRIGATION DISTRICTS COUNCIL  
Hearing on NRD Water Management Plan Allocations  
August 30, 2007**

The Republican Basin Irrigation Districts Council is made up of the surface irrigation project sponsors within the Republican River Basin. Each of our Districts has worked closely with the Middle Republican NRD and the natural resources districts within the Republican Basin on water management policy matters for some time. We have not only tried diligently to represent surface water irrigation interests at discussions and planning meetings; but each of our projects has found the means to provide precious water supplies to the Basin to attempt to satisfy some of the obligations of the Nebraska portion of the Basin under the Republican River Compact commitments.

For a number of years, not just including the recent drought condition years, our project water users have been forced to rely upon ever declining water supplies. Both private surface projects and projects relying upon U.S. Bureau of Reclamation water storage facilities have found continuing declines in available water.

Our water users have had to learn to operate with that declining base, since most of our users do not have adequate access to supplemental ground water supplies to assure a greater quantity of water for crop support.

Historically, our projects plan documents and Republican Basin planning documents and original compact development data relied upon reasonable assurances that adequate surface water would exist generally to fully support the planned surface project developments. Those early planning efforts contemplated some ground water development in the entire basin; but the reality of basin development has proven to be significantly greater, just in Nebraska, than was contemplated by early basin planners.

Our members have studied the water resources management obligations, including the Compact commitments; probably in as much depth as each of the natural resources districts and as the State of Nebraska. While we wish that those obligations might be different, we know that they are not...and will not be different. All water users

in the Basin must recognize that they each have obligations to the other and to the commitments which have been made to other basin states.

Our surface water project water users have done their part over the last several years to contribute precious water supplies to satisfy Basin obligations. We cannot expect less from ground water users who must submit to management of that portion of the supply through natural resources districts.

Your proposal to set a 12 inch annual supply allocation [60 inches in five years] in our opinion fails to acknowledge that obligation and fails to encourage and expect similar commitments to adequate management of the Basin from Basin ground water irrigators. The suggestion that "bonus" water could also be available is beyond comprehension.

You must be willing to set limits on allocations as a minimum at levels which match the actual use levels which you report publicly for the last several years. Irrigators apparently have learned to manage the use of the available supply to minimize water consumption and to save energy and other production costs which will contribute to the net profit of their operations.

Many of our surface water users have learned from necessity to operate successfully with less than 8 inches of water, most of them without any other sources for supplementing that amount. Your experience would indicate that producers using ground water have likewise been generally able to succeed with those levels as well.

All Republican Basin NRDs are required to propose water management plan allocations that will achieve compact compliance. Your currently proposed irrigation water allocations fail to do so. Failure to self regulate increases the likelihood of a decision forced upon us all by State or Federal regulators. We encourage you to step forward with the necessary leadership to make what is certainly a difficult and unpopular decision that we all can live with, or be faced with the probability of having an even more restrictive and less popular decision forced upon us.

We pledge our continued support of a Basin wide effort; but that support requires a real commitment from other users to assure water will again find the River for all user needs and for compact compliance goals.

RECEIVED

SEP 05 2007

No. 126, Original

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In The  
**Supreme Court of the United States**

◆  
STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

◆  
**FIRST REPORT OF THE SPECIAL MASTER  
(SUBJECT: NEBRASKA'S MOTION TO DISMISS)**  
◆

VINCENT L. MCKUSICK  
Special Master  
One Monument Square  
Portland, Maine 04101  
(207) 791-1100

January 28, 2000

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964  
OR CALL COLLECT (402) 342-2831

Excerpt from the ruling

The agricultural activities in the Basin require an adequate and reliable water supply. When during the 1930s the Basin experienced an extended drought, interrupted in 1935 by a highly destructive flood, the need to regulate the flow of the Republican River became apparent. See 87 Cong. Rec. 9606-07; Oral Arg. Tr. At 7-8. The United States began to examine ways to control the Republican River so that swollen spring flows could be retained in reservoirs for flood control in the spring and released for irrigation in the late summer and fall. See H.R. Doc. No. 842, 76<sup>th</sup> Cong., 3d Sess. (1940). As a result of those examinations, and based on the recommendations of the United States Army Corps of Engineers (“Corps of Engineers”), Congress appropriated funds for construction of the Harlan County Reservoir in Nebraska, See Act of Aug. 18, 1941, ch. 377, 55 Stat. 646. Meanwhile, the Federal Bureau of Reclamation studied the feasibility of irrigation projects in the Basin, but delayed construction of any such projects until Colorado, Kansas, and Nebraska reached agreement on an interstate compact to allocate the water in the Basin.

In the years following approval of the Republican River Compact, the Federal Bureau of Reclamation completed a system of seven reservoirs in the Basin, and the Corps of Engineers completed construction of, and has continued to operate, the Harlan County Reservoir in Nebraska and the Milford Reservoir in Kansas.

Article I of the Compact sets forth its major purposes. Among them are: To provide for the most efficient use of the waters of the [Basin] for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; [and] to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use.

The upstream state is sometimes referred to as the “upper” State, as contrasted with a “lower” State. See, e.g., Compact, Art. VII. never uses the word “groundwater.” Stream flow, which the Compact fully allocates, comes from both surface runoff and groundwater discharge. See *supra* note 3. Interception of either of those stream flow sources can cause a State to receive more than its Compact allocation and violate the Compact. Because of the factual assumption on this Motion to Dismiss of a hydraulic connection between groundwater and stream flow in the Basin, any stream flow depletion by groundwater pumping in Nebraska must be counted against Nebraska’s Compact allocation. Therefore, excessive amounts of such pumping can cause Nebraska to consume more than its allocation of the virgin water supply in violation of the Compact. Thus, the comprehensive definition of virgin water supply, even without use of the express term “groundwater,” requires a conclusion that, as a matter of law, a State can violate the Compact through excessive pumping of groundwater hydraulically connected to the Republican River and its tributaries.

Contrary to Nebraska’s claim, Kansas does not seek to apportion to itself millions of acre-feet of water in the Ogallala Aquifer or any other table-land groundwater source in situ. See Nebraska Brief at 10. Rather, Kansas seeks only to protect what the Compact promises—its full apportionment of the virgin water supply within the Basin as measured by stream flow, no matter what its source.

The Compact does not use the term “surface water” either. In sum, the language of the Compact is not ambiguous. A straightforward reading of its terms yields the



conclusion that a State's groundwater pumping, to the extent it depletes the stream flow in the Basin, is intended to be allocated as part of the virgin water supply and to be counted as consumptive use by the pumping State. However, even if the language of the Compact were thought to be ambiguous, extrinsic evidence of the parties' intent leads clearly to the same conclusion. To consideration of that other evidence I now turn.

Although the hydraulic connection between groundwater pumping and stream flow is already assumed for purposes of this Motion, the further fact that the hydraulic connection was well known by the early 1940s is significant in reinforcing my conclusion that the Compact negotiators did not ignore the effect of groundwater pumping on stream flow. The connection between groundwater discharge and stream flow was a widely known scientific fact well before the Compact was drafted and recognition of that connection is plain from the records of the Compact negotiations.

Most significantly, documents from the negotiation and drafting of the Compact demonstrate that the Commissioners who represented the compacting States were well aware (1) that groundwater diversions prior to its entrance into the stream flow can have the effect of depleting the virgin water supply and (2) that groundwater contributions to the virgin water supply would be allocated under the Compact. Bases upon the following evidence, it is clear that the Compact negotiators intended the Compact to regulate all the natural stream flow in the Basin, including any groundwater contributions to that flow. At the fourth meeting of the commission formed by the three States to negotiate the Republican River Compact, on January 27-28, 1941, Mr. Harry P. Burleigh of the United States Bureau of Agricultural Economics appeared and "outlined the scope of the work which the Bureau has been carrying on throughout [sic] the Republican River basin to determine the extent and usability of the underground waters of the basin. "Minutes of the Fourth meeting at 28a of the United States Brief. Mr. Burleigh "presented the Commission with a tabular statement showing estimated amounts of underground water available...in the three states." Id. He also advised the Commission that...he was desirous of obtaining a statement from the Commission as to whether the amounts of underground waters he had determined would be feasibly possible of use, would...exceed the allotments of water to each state which the Commission may have agreed upon; [and] that his department did not want to recommend developments of underground water supplies in excess of the allocations of water to each state. ...Upon inquiry, Mr. Burleigh advised the Commission that all of the underground waters of the basin above Scandia, Kansas, are included in the total water supplies of the basin, as reflected in measurements of stream flow at Scandia and other points in the basin, and that any underground water developments must be considered as reducing to that extent the amount of surface water available for use within the basin. Id. at 29a (emphasis added). Mr. Burleigh's statements and activities clearly show that the States in negotiating the Compact (1) understood the connection between groundwater use and surface water depletion, and (2) were thinking about the impact of groundwater pumping at the time of the Compact negotiations.

In addition to the State Commissioners, federal officials understood that the Compact would restrict groundwater pumping. J.R. River of the United States Bureau of Reclamation discussed the term "virgin water supply" in a memorandum to the Bureau of Reclamation's Chief Engineer, S. O. Harper, stating: Under the compact each state is accorded a limited "beneficial consumptive use" regardless of whether such waters are

derived from virginal natural flow, captured storage water, return flow from irrigation, ground waters recovered by pumping, recovered waste water, or otherwise. In short, the compact merely defines the extent to which streams may be depleted regardless of the methods of use.

Memorandum from J.R. Riter to S.O. Harper 3 (May 21, 1941) (emphasis added).

Another official of the Bureau of Reclamation, C.T. Judah, also wrote to the Bureau's Chief Engineer, describing meetings held with county land use planners. His memorandum stated, in part: A special effort was made to impress on local people that water for both ground water pumping and for gravity stream diversions were from the same source and that new developments supplied by either source would be limited to the amount of water allocated to each state under the proposed compact.

Memorandum from C. T. Judah to S.O. Harper (May 31, 1941).

In the face of this evidence, it is irrelevant that, at the time the Compact was negotiated and approved, none of the compacting States had laws permitting regulation of groundwater for the protection of surface water. Article IV of the Compact, which explicitly makes reference to state law, states in pertinent part: "The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made." (emphasis added). By its plain terms, this sentence of Article IV merely states that it is up to each State to decide how to use the water it is allocated; it says nothing about which water is allocated under the Compact. Furthermore, the Compact is a duly adopted statute of all three compacting States, as well as a federal law. Although none of the compacting States in 1943 put any limit on groundwater consumption within its borders, those States could, and did, enter an interstate agreement apportioning among the States the entire stream flow of the Basin undisturbed by the activities of man, whatever the source of that flow. The negotiators agreed to be "guided by [the Court's decision in *La Plata River and Cherry Creek Ditch Co. v. Hinderlider*, 304 U.S. 92 (1938)] establishing the right of states to make an equitable division of the waters of an interstate stream, regardless of its effect upon presumably vested interests in either of the signatory states." Minutes of the Third meeting at 23a of the United States Brief.

(3) Prior decisions of this Court are entirely consistent with the view that an interstate compact can restrict groundwater use even though that compact does not expressly use the term "groundwater," and no decision of either this Court or any court of any of the compacting States detracts from the plain and inclusive meaning of the term "virgin water supply" as defined in the Compact: "the water supply within the Basin undepleted by the activities of man" and

(4) Nebraska violates the Compact if, as a factual matter, Nebraska's groundwater pumping, whether from alluvial or table-land wells, depletes stream flow in the Basin to the extent that Nebraska exceeds its allocated share of the virgin water supply.

In the early 80's Kansas requested Nebraska to curtail well drilling while Kansas and Colorado put on a moratorium, the Nebraska's Legislature passed LB 375 in 1982, which took all protection of the sustaining the aquifer and surface water away from the state and gave the NRD's the authority to deplete the aquifer within their districts boundaries with no requirement or way for another district who were being affected by the declining ground water level to control the taking of water from their district..

Lee Orton representing the Nebraska Association of Resources Districts testified at the hearing on the bill that ("We think the proposal right now mandates a goal and that goal is an actual depletion of the aquifer. I'm not certain that is what everybody wants").

The bill appears from the hearing and floor debate that economic gain for Nebraska was the motivation of the bill.

(SENATOR KREMER: during the closing statement of the bill; quote "We have got water and believe me, it is going to be used."

(SENATOR KREMER: "Oh, my, I need another thirty minutes. Okay. So we have the water. Now we believe that this is another tool now we can use. We passed LB 577 that allowed the NRDs to go under control. We set up the NRD organization. That is the grass roots. That is what the people want and we have got that. Okay, most NRDs have not taken advantage of going under control, so here is another tool they can use. They can use a water management system and I think it is going to work. With these two tools, I think Nebraska can take care of its water and I think we are going to, if the whole world hangs together, we are going to come forth as the greatest agriculture state in all the United States of America. I move that we advance LB 375 to E & R.").

The legislation took all power to manage ground water away from DWR, later becoming DNR and gave it to the NRD's. DNR can only request and recommend protection of surface water and had no power to require.

The URNRD and MRNRD written goals, as allowed by this legislation, until recently, were for depletion of the aquifer, even though studies showed almost precisely what was going to happen.

In Approximately 1994 Governor Nelson appointed various water people from the whole basin to be on a Governors Republican Advisory Committee because Kansas was threatening to do something unless Nebraska stopped the well drilling and depletion to the stream flow.

In the 1994 to 1996 period, an agreement was reach between Nebraska representative and Kansas representatives, but when that agreement was presented to the committee, several felt it was too harsh on Nebraska and not severe enough on Kansas. When it was turned down by Nebraska, Kansas said they were going to sue.

In 1996 LB 108, the conjunctive legislation was passed, without funding to implement it.

In 1997 the Nebraska Attorney General, Don Stenberg gave a speech at Elwood Nebraska stating, "The first thing we need to understand is if Kansas sues, it will lose. They do not have a case." More quotes from that speech. "In Nebraska, surface water rights are property rights, which are prioritized and protected by our state constitution. As

Nebraska's Attorney General, I acted to uphold the Nebraska Constitution and statutes which protect the rights of irrigators and cities in our valuable water supplies by filing a brief in response to the environmentalists' motion with the Federal Energy Regulatory Commission" another quote "While a fair agreement would be preferable to an expensive lawsuit with Kansas, Nebraska should not agree to shut down existing irrigation wells in Nebraska as part of any agreement. Kansas could never win that result in court and Nebraska should not surrender it at a bargaining table. Further on he states, "Nebraska should not have their wells shut down in a misguided attempt to satisfy Kansas politicians".

In 1997 the legislature funded the provision of LB 108 and the NRD's implement a management plan. Studies were implemented.

Kansas file suit in 1998. The attorney general then ordered all state entities and the Governors advisory board to not do anything to show a sign of weakness to Kansas.

In late fall of 1999 at the Middle Republican Natural Resources District Board meeting, Claude Cappel verbally made a formal request, during the open forum session before the Board, to protect the surface flows in the rivers in accordance with the provisions established with the criteria set out with the passage of LB-108 and statue 46-656.28. Claude was told that the problem was caused by another NRD and they couldn't do anything about that situation. The Middle Republican Natural Resources District did not cause the problem. He was also told that due to the Kansas, Nebraska and Colorado lawsuit there was nothing the NRDs could do, under state orders from the attorney General.

Senator Ed Schrock, a member of the Governors Republican Advisory Committee, introduced a bill and in 2001 that most likely was not a mandate because of the Attorney General orders. It passed.

Statue # (46-739 (6-c)) "For a management area in a river basin or part of a river basin that is or was the subject of litigation over an interstate water compact or decree in which the State of Nebraska is a named defendant, the district may establish different provisions for restriction of water wells constructed after January 1, 2001, if such litigation was commenced before or on May 22, 2001. If such litigation is commenced after May 22, 2001, the district may establish different provisions for restriction of water wells constructed after the date on which such litigation is commenced in federal court. An appeal from a decision of the district under this subdivision shall be in accordance with the hearing procedures established in the Nebraska Ground Water Management and Protection Act".

By 2002 the majority of the surface water in the Republican River had been depleted by ground water irrigation. The dams west of Cambridge have very little water inflow. Even though most of the irrigation districts had no water to deliver to their patrons, there still wasn't enough inflow to meet compacts requirements.

The settlement was announced December 16, 2002. Since that time there has been no appreciable water flow for either surface water irrigation or compact requirements in the river west of Cambridge until 2007 when abnormal snow fall and rain events caused abnormal runoff.

Some of the Nebraska Legislature, Governor Johanns and Governor Heineman were informed on what was happening and what was going to happen.

At the water task force meeting August 23, 2006 in Kearney, the AG office made it clear that they were upset about some things that have happened since the last meeting. Dave Cookson cited the recent articles in the World Herald and the Supalla study. The study basically points out the economic value of the water that is not going to Kansas. The study really irritated Cookson. Most members were unaware that the study was being done; apparently Supalla did it for free and presented it to the finance committee of the water task force. A majority of the task force expressed concern that we were talking about a subject that few task force members had received or been able to review. The AG representative made it very clear, that what happens in the Republican Basin is of no concern to the water policy task force, and would not be a discussion item. Any further discussions would take place from agencies that could actually do something about the issues, (DNR, NRDs, and AG). There were several objections that many in the room represented the interests of the Republican basin, and felt that people in the basin should have the information. Cookson said "I cannot make this any clearer; you will not discuss the Republican Basin Issues and dollars". This order is still in effect.

In summary there was nothing an individual, DNR or the NRD's could have done to prevent what has happened due to the legislation that was passed and the curtail of doing anything under orders of the attorney generals order. The state legislature and attorney generals with the blessing of the governors encouraged the overdevelopment of the aquifer, stopped anyone from being able to do something, had studies showing what was going to happen that were very accurate, and were warned when the compact was signed of the limited supply available.

The question is, why should only part of a basin be required to pay for something that no one but the states governors, and legislature who had all the information from accurate studies on what was happening. This is a state responsibility. With the carry over built up and a known continuous decline in the river flow, the next dry spell for a year will be virtually be the end of the flow of the Republican River west of Cambridge and the Medicine is an a down hill depletion course. The state is trying to put the whole burden on the local level taxpayer, when there is no viable solution the local level can come up with that is sustainable, to meet the Stated Compact requirements. Correlative rights, which everybody shares equal when there is a shortage is in the statutes. It would have to be assumed this means the State as a whole.

August 31, 2007

Testimony for hearing and proposed rule changes.  
Middle Republican Natural Resources Board

5-3.11 **SUPPLEMENTAL WELLS** ---5-3.11.1 Allocation: Sixty (60) inches minus the amount of surface water delivered to, transferred from or otherwise available to those acres also irrigated with ground water.

The provision "otherwise available" in Irrigation districts and especially the Frenchman Valley Irrigation District will impose hard ships if left as written. In the Frenchman Valley Irrigation District the water is not storage water and is natural flow, which the district starts delivering in April and the river is usually dry by the second week of July. Most of the land that is irrigated by supplemental wells is now pivot irrigated. First; there are few if any that are setup to filter and pump ditch water to the pivot. The cost to do so would be substantial for two to three inches of water. Second: the water delivery is on a rotational basis with a couple days on and a long period of being off while other use what water that is available. Third; most irrigators don't start watering corn until close to July and beans later. Fourth; this looks like a rule to make surface water irrigator vote to not allow them to use or sell their water, but rather to leave it in the river in order to meet the compact requirements to benefit groundwater irrigators outside the quick response area. Fifth; in other irrigation districts since 2002 you might of got four to six inches one year out of the last six.

The rule could be written where only those who use the surface water available or get paid for the surface water would have it deducted. If only those acres that can't be irrigated because the irrigator doesn't have wells of sufficient capacity to irrigate all of the land in the irrigation district or no wells at all on the land that is in an irrigation district, the cost for the water would be a lot less for the state to purchase the surface water, fairer and I think meet the intent of the law.

An additional rule to consider is no temporary or permit transfer of allotments be allowed to be transferred into an area that has a declining aquifer as determined by the University of Nebraska Conservation and Survey Division Groundwater-Level Changes in Nebraska. In areas that have a shallow aquifer, transfer in causes a lowering of all wells output around where additional allotments are being added. In areas where there is an abundant aquifer and the aquifer is declining, as determined by the "University of Nebraska Conservation and Survey Division Groundwater-Level Changes in Nebraska", it is causing the fringe areas to have wells decline in capacity and also reducing the stream and river flows necessary to meet the compact requirements.

The allotments need to be set where the aquifer is sustainable by NRD and still meet the compact requirements using each individual NRD contribution to the river flow from the past. The statutes states correlative rights for all irrigators, which means everyone share equal in the shortage. It is a known fact that if they are set above sustainability, the next dry spell we have, the river will be virtually dry to Cambridge. That means at that point that the quick response wells will be shut down and probably at an expanded distance. At that point, surface water irrigators will be harmed and it will then be determine if surface water irrigators in an irrigation district have a property right that will need to be compensated for. Surface water irrigators have either received prevented planting, CREP, had their water purchased, or had supplemental wells and would be considered not harmed to this point.

*Claude Laffel*