

## SUMMARY OF SETTLEMENT AGREEMENT

### LITIGATION STATUS LEADING UP TO SETTLEMENT AGREEMENT

In May, 1998 the State of Kansas filed a motion for leave to file a bill of complaint with the U. S. Supreme Court alleging that the States of Nebraska and Colorado were violating the Republican River Compact. On January 19, 1999, the Court granted Kansas leave to file its Bill of Complaint. Nebraska filed an Answer and Counterclaim in April, 1999. Colorado also filed an Answer and Counterclaim. The Court on June 21, 1999, invited Nebraska to file a motion to dismiss on the issue of whether groundwater consumptive use was regulated by the Compact. Nebraska filed its motion to dismiss on August 2, 1999. After briefing by all States and the United States, the Court referred the matter to Special Master, Vincent L McKusick on November 15, 1999. The Special Master subsequently held a hearing on the motion to dismiss on January 4, 2000.

On January 28, 2000, the Special Master issued his First Report containing the following recommendation to the Court: "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 and, therefore, Nebraska's Motion to Dismiss should be denied." *See First Report of Special Master at 45.*

On October 15, 2000, the Special Master designated three questions for early resolution: 1) Are the Republican River Compact Administration's determinations between 1959 and 1994 for a given year of (i) virgin water supply, (ii) allocations of virgin water supply and (iii) consumptive use conclusive so as to foreclose a complaining State from stating a claim for excess water consumption by a defending State in that year?; 2) Is any State entitled to consume any water allocated to another State that the latter does not put to beneficial use?; and 3) Must a complaining State show injury to obtain prospective relief? These questions were significant in that the answers would determine whether Nebraska had violated the Compact in past years and, if so, whether Kansas was entitled to any damages.

After briefing and a hearing in which argument was presented by each State, the Special Master ruled in May 2001, that the answer to question 1 was yes, the Republican River Compact Administration's previous accounting numbers were conclusive on the amounts of each State's allocations and consumptive uses. The Special Master ruled the answers to questions 2 and 3 were no.

In addition to ruling on the three issues for early resolution, the Special Master also identified six additional issues for pretrial resolution. Those six issues were: 1) What do the '59 to '94 Republican River Compact Administration numbers mean in practical terms?; 2) May a complaining State recover damages for water overuse in a year in which the complaining State would not have been able to put undelivered water to beneficial consumptive use?; 3) Is a State free to consume its total allocation without regard to the specific sub-basin allocations?; 4) Is Nebraska required to deliver Kansas' entire main stem allocation at Guide Rock, Nebraska?; 5) What criteria will be used to determine whether a well is pumping water that is subject to Compact accounting?; and

6) How are contributions to stream flow from the groundwater mound to be accounted in the future?

After the rulings by the Special Master in May of 2001, the States began discussing the possibility of settlement negotiations. The first face to face meeting was held in Lincoln, Nebraska in October, 2001. After additional negotiation sessions in November and December, 2001, the Special Master at the request of the States agreed to postpone the progression of the case until December 15, 2002, in order to allow the three States, Nebraska, Kansas and Colorado, to engage in settlement negotiations. The U. S. Department of Justice, U. S. Bureau of Reclamation and the U. S. Army Corps of Engineers also participated in the settlement negotiations. These negotiations have culminated in a settlement package that has presented to and approved by the Governors and Attorneys General of all three States.

## **SUMMARY OF THE TERMS OF THE FINAL SETTLEMENT STIPULATION**

The following is a brief description of the major components of the Final Settlement Stipulation agreed to by the three States.

### General Provisions - Resolution of Pending Litigation

The settlement resolves all pending litigation and disputes between the States that exist as of December 15, 2002 and provides for dismissal with prejudice of the original action. This means all claims arising prior to December 15, 2002, that could be made against another State, including any claims for money or water damages, are waived. The States also have agreed to methods for administering the Compact in the future which are described below.

### Definitions

This section defines many terms that previously were not defined and were, or could be in the future, the source of dispute or controversy

### Existing Development

The States after analyzing all available water data came to the mutual conclusion that the water supplies of the Republican River Basin were for the most part fully developed. As a result, the States have agreed that a moratorium be placed on the construction of new wells upstream of Guide Rock, Nebraska. Rules and regulations previously adopted by Colorado and Kansas in the Republican Basin above Guide Rock created a de facto moratorium. As a result, only very limited well construction has occurred in these areas in the last several years. In Nebraska, the moratorium applies to all or part of three Republican River Natural Resources Districts. All three affected Natural Resource Districts have adopted temporary suspensions on the construction of new wells upstream of Guide Rock. The Upper Republican NRD adopted a moratorium in 1997; the Middle Republican NRD adopted a moratorium in June 2002, and the

Lower Republican NRD adopted a moratorium in the area upstream of Guide Rock, effective on December 9, 2002

The settlement provides that the moratorium may be modified in the future by the Republican River Compact Administration if new information demonstrates that additional ground water development would not cause a State to consume more than its respective allocation. The moratorium applies only to the Republican River Basin and not to any other Basin or any ground water supply located outside of the Republican River Basin.

There are a number of exceptions to the moratorium provided for in the settlement stipulation. Certain areas of the Basin are generally excepted for three reasons 1) they are an area where the USGS has measured ground water levels rising by at least 10 feet from a time prior to well development. This is due to the build up of groundwater mound created by water imported from the Platte River canal system; 2) they are located downstream of Guide Rock, Nebraska or 3) they are located in Natural Resource Districts that are generally not part of the Republican River Basin (Twin Platte and Little Blue). Specific exceptions include: test holes; dewatering wells with an intended use of one year or less; replacement wells as long as they do not consume more water than that used by the old well, small wells that pump either 50 gallons per minute or less or 15 acre-feet per year or less; wells for certain emergency purposes and wells for expansion of municipal or industrial uses. Transfer from use of an existing well are also allowed again as long as the new well does not consume more water than the old well consumed. Such transfers are not allowed if they would cause an increased depletion upstream of Trenton Dam.

Any State has the option of proposing construction of new wells for the sole purpose of offsetting stream depletions in order to comply with that State's Compact Allocations. If such proposal is approved by the other States, such wells cannot cause any new net depletion to stream flow, either on an annual basis or long-term.

The settlement also recognizes that each State has previously taken actions that essentially result in a de facto moratorium on new surface water rights. The States have agreed they will notify the other States and the U.S. Bureau of Reclamation prior to lifting any surface water moratoriums or granting any new surface water rights. The settlement stipulation recognizes the right of each State to grant new rights to surface water if use under such rights could be made within the State's compact allocation.

#### Compact Accounting

Historically, the States have administered the Compact through the Republican River Compact Administration ("RRCA"). The settlement agreement provides

that the RRCA will continue to administer the Compact and provides detailed procedures for the RRCA to follow in carrying out the Compact accounting.

Under the Compact, each State receives an allocation from the available virgin water supply for beneficial consumptive use. The settlement agreement refers to the available virgin water supply as the computed virgin water supply. Each State's consumptive use must be no more than its total allocation. The Compact allocates specific amounts of water to each State from designated tributaries, generally referred to as sub-basins. The remaining unallocated water supply in each sub-basin and the water supply of the main stem of the river are then collectively shared between Kansas and Nebraska, with 51.1% percent of the unallocated sub-basin water and water from the main stem allocated for use by Kansas and the remaining 48.9% is allocated for use by Nebraska.

Under the terms of the settlement, the RRCA Accounting Procedures establish general principles for future Compact accounting. Major aspects of the accounting procedures include determining depletions from surface and ground water use; sub-basin flexibility; averaging; imported water credits; and measurement and data collection.

Determining Depletions: Each year the Engineering Committee of the Compact will use these procedures to determine virgin and computed virgin water supply, the allocations to each State and each State's computed beneficial consumptive use. Computed beneficial consumptive uses include depletions to stream flow in the Basin resulting from the irrigation of lands in excess of two acres, non-irrigation uses diverting more than 50 acre feet per year, net evaporation from federal reservoirs and evaporation from non-federal reservoirs with a storage capacity of greater than 15 acre feet. All computed beneficial consumptive uses from surface water diversions and ground-water diversions, including both alluvial and non-alluvial wells, that deplete stream flow of the Republican River or its tributaries, will be considered when making these calculations. A joint groundwater model, which is currently being developed by the three States, will be used to determine the depletions to stream flow resulting from groundwater use.

Sub-basin flexibility: The settlement agreement provides that Compact compliance will be determined based on statewide allocations and not by specific sub-basin allocations, except that: a) use in excess of a specific allocation in a sub-basin cannot impair the ability of a downstream State to use its allocation in that sub-basin; and b) in dry years, allocations to Nebraska from the virgin supply that originate within the main stem cannot be moved up into a sub-basin.

Averaging: The settlement agreement provides that Compact accounting and compliance will be done on a five-year rolling average, with extreme flood flows removed, except in water-short years when a two or three-year average will be used (see the discussion of Guide Rock below). A State will be considered to be

in compliance with the Compact as long as the five-year running-average statewide computed beneficial consumptive use does not exceed the State's five-year running-average statewide allocation and as long as any upstream State's sub-basin use greater than the specific sub-basin allocation does not impair the ability of a downstream State to use its allocation from the same sub-basin. Imported water will be allowed to be used as a credit to offset Nebraska's computed beneficial consumptive use when determining Compact compliance.

Imported water credit: The settlement agreement also provides that a State may receive credit for water imported into the Republican River Basin from another river basin. The joint groundwater model will determine the amount of water that is imported into the basin. Currently, the only imported water is from the North Platte, South Platte and Platte River irrigation projects. Imported water will not be considered as part of the virgin water supply allocated to the three States, but will be considered as a credit that can be used to offset Nebraska's computed beneficial consumptive uses.

Measurement and data collection: The seventy plus page RRCA Accounting Procedures describe the measurements to be made, data to be compiled, format of the reports, and the deadline by which reports must be submitted to the RRCA Engineering Committee.

Guide Rock - (years when there is less than normal water supply available)

The Compact provides that Kansas may take all or a portion of its allocation from the main stem and unallocated sub-basin supply at or near Guide Rock, Nebraska. The States disagreed in the lawsuit when and how this would occur. The settlement agreement resolves this issue by providing for water administration in Nebraska above Guide Rock at times when it will provide a needed benefit to Kansas. In general, Nebraska has agreed to provide for regulation of natural flow between Harlan County Lake and the Superior-Courtland Diversion Dam near Guide Rock, Nebraska. Nebraska will also recognize a priority date of February 26, 1948 for the Kansas Bostwick Irrigation District. This is the same priority date held by the Nebraska Bostwick Irrigation District's Courtland Canal. There are two levels of projected water supply that trigger additional action by the States.

1. When the U.S. Bureau of Reclamation forecasts an irrigation water supply in Harlan County Lake of less than 130,000 acre-feet (the amount considered to be a full supply for the Nebraska Bostwick and Kansas Bostwick Irrigation Districts) and water is needed for direct irrigation at Guide Rock, Nebraska will close permits between Harlan County Lake and Guide Rock that are junior to February 26, 1948 and restrict diversions by senior diverters to their permitted amount. Nebraska will also protect any storage water released from Harlan County Lake from diversions by those without a contract for the water. If, however, there is excess water passing the Superior-Courtland Diversion Dam, Nebraska

will allow junior surface water rights to divert up to a rate not to exceed the amount of water passing the dam. The level of supply will be determined in October of each year and in each month thereafter, by the U. S. Bureau of Reclamation for the following irrigation season.

2. When the U.S. Bureau of Reclamation projected or actual irrigation supply in Harlan County Lake is less than 119,000 acre feet, (known as "Water-Short Year Administration") Nebraska has agreed to further limit its computed beneficial consumptive use above Guide Rock to no more than the amount of its allocation derived above Guide Rock. This will be calculated using a two-year average. In addition, Nebraska will limit its computed beneficial consumptive use in the sub-basins above Harlan County Lake to the two-year running average of the sum of its specific sub-basin allocations and 48.9% of the sum of the unallocated Supply from those same sub-basins. In these years, Kansas will also limit its computed beneficial consumptive use in the sub-basins in Northwest Kansas to no more than the two-year running average of the sum of its specific sub-basin allocations and 51.1% of the sum of the unallocated supply from those same sub-basins and 51.1% of any unused Colorado allocation from any of those same sub-basins. In these years Colorado also will limit its five-year running average sub-basin use above Swanson Lake to the sum of the five-year running average specific allocations from those sub-basins. In other words, Colorado cannot use its allocation from Beaver Creek, which flows into the Republican River below Swanson Lake, to offset computed beneficial consumptive uses in the other three Colorado sub-basins.

During Water-Short Year Administration years Nebraska has the discretion to determine how it will comply but Nebraska will advise the other States and the United States, no later than April 30 of that year, of any measures Nebraska plans to take to limit its computed beneficial consumptive use.

In Water-Short Year Administration only imported water derived from sources above Harlan County Lake or imported water from below Harlan County Lake that can be diverted at Guide Rock for irrigation or to fill Lovewell Reservoir may be used to offset Nebraska's depletions above Guide Rock.

As an alternative to the two-year running average compliance schedule in Water-Short Year Administration, Nebraska may elect to implement a plan for reduction of computed beneficial consumptive use above Guide Rock when the projected or actual water supply in Harlan County Lake is less than 130,000 acre feet. Such plans must be previously approved by the Compact Administration. If Nebraska chooses to implement such a plan, compliance above Guide Rock will be based on a three-year running

average. For any year in which Nebraska implements an approved plan, the plan shall be in effect for the remainder of the year, unless the projected supply rises above 130,000 acre feet.

#### Soil and Water Conservation

In addition to counting evaporation from non-federal reservoirs larger than 15 acre-feet, the States, in cooperation with the United States, have agreed to undertake a study to assess the impacts of non-federal reservoirs and land terracing on the water supply of the Basin. The cost of the study is to be no more than one million dollars and the federal government will pay for 75% of the study, with each State agreeing to pay their share of the remaining 25%. The States shares may be paid for entirely by in-kind contributions. Participation in the study does not commit any State to include soil and water conservation measures in the Compact accounting.

#### Dispute Resolution

Any disputes related to the Compact must be submitted to the Compact Administration before further legal action can be taken. If the State raising the issue for consideration believes the issue requires immediate attention, the issue must be addressed by the Compact Administration within 30 days. Any issue that cannot be resolved by the Compact Administration shall be submitted to non-binding arbitration unless otherwise agreed to by all States with an actual interest in the dispute. The States involved in the dispute may agree that the arbitration shall be binding, but no State shall be subject to binding arbitration without its express written consent. Only after a State has participated in dispute resolution will it have exhausted all administrative remedies and only then can it seek relief from the United States Supreme Court for resolution of the dispute.