



Kathleen Sebelius, Governor
Adrian J. Polansky, Secretary

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February 19, 2008

Ann Bleed, P.E.
Nebraska Commissioner,
Republican River Compact Administration
Director, Nebraska Department of Natural Resources
P.O. Box 94676
Lincoln, Nebraska 68509-4676

Subject: Remedy for Nebraska's violation of the Decree in *Kansas v. Nebraska & Colorado*, No. 126, Original, U.S. Supreme Court

Dear Commissioner Bleed:

Thank you for your letter of February 4, 2008. That letter demonstrates that there is a significant dispute between our States regarding remedies for Nebraska's violation of the Republican River Compact (RRC) and the Final Settlement Stipulation (FSS). Nevertheless, Kansas would like to pursue any opportunities to diminish the disagreement between the States, on the condition that that can be done without affecting in any way the dispute resolution process initiated by Kansas on February 8, 2008. Kansans for too long have suffered as a result of Nebraska's overuse, and it is my duty to pursue a sufficient remedy as expeditiously as possible. Consequently, we are providing the following detailed response to your February 4 letter.

First, there were aspects of Kansas' proposed remedy to which you did not respond specifically. As a result, no further Kansas response on those subjects is called for at this time. Those subjects include Kansas' demand for (1) a Supreme Court order and a remedy for past violations, and (2) the need for further measures beyond well shutdown to achieve continuing compliance with the five-year and Water-Short Year requirements of the FSS. Responses are needed from you on these subjects. For instance, does Nebraska agree in concept that Nebraska owes Kansas a remedy for Nebraska's compact violations for the period 2005-2006? If not, why not?

Second, you raised concerns with the Kansas analyses, to which I will now respond as specifically as your statements allow.

A. Nebraska's Concerns with the Computed Beneficial Consumptive Use Above Guide Rock Calculations.

Ann Bleed, P.E.
February 19, 2008
Page 2

You stated that with respect to “several accounting issues,” you “have presented the compact commissioners with information and analyses that point out what we see as flaws and limitations in the currently-used processes for calculating and accounting for the virgin water supply, the imported water supply and consumption of water supplies by the three states.” Yet you have made no specific proposal for changing “the currently-used processes for calculating and accounting,” except as noted below. Until you do so, there is nothing to which Kansas can respond. Before and at last month’s engineering committee meeting, Kansas provided evidence that Nebraska’s position paper (January 2008) entitled “Calculation of Computed Beneficial Consumptive Use and Imported Water Supply Credit Using the RRCA Groundwater Model” is both incomplete and inconsistent with the FSS. In any event, changing the currently-used procedures would require the approval of all three States.

The figures quantifying Nebraska’s Compact violations submitted to you with my letter of December 19, 2007, and which Kansas submitted to the Republican River Compact Administration (RRCA) on February 8, 2008 included values based on Kansas’ earlier proposals on two disputed accounting issues. These two issues together have the potential to affect those figures by only about 10% of Nebraska’s violation for years 2005-2006.

One of the accounting disputes relates to evaporation from nonfederal reservoirs below Harlan County Lake. Kansas provided a memorandum to Nebraska on November 16, 2006 (copy attached). By memorandum of August 10, 2007, Nebraska rejected the Kansas position (copy attached). Based on that response, we assume that the RRCA will not be able to resolve this dispute.

The other accounting dispute relates to the allocation of evaporation from Harlan County Lake between Kansas and Nebraska for 2006. As per assignment of the RRCA, Kansas submitted a proposal to Nebraska on this issue on November 15, 2006. That proposal is used in our submittals of December 19, 2007 and February 8, 2008. In a further attempt to resolve this issue, however, I am providing the attached Kansas Proposal for Allocation of Harlan County Lake Evaporation in the form of a memorandum dated today. We look forward to your thoughts on this revised proposal and hope that you find it constructive.

B. Nebraska’s Concerns with Analysis Used to Develop Kansas’ Proposed Remedy

You refer to “significant logical flaws” in the scenario Kansas used to develop its proposed remedy, but it is difficult to understand what you mean. The RRCA Groundwater Model is capable of and intended to deal with both dry and wet conditions. We applied the Model using a pattern of water supply that was actually experienced over the last 15 years. Further, it is imperative that Nebraska be in compliance under all water supply conditions,

Ann Bleed, P.E.
February 19, 2008
Page 3

including dry periods. You have provided only one short paragraph in response to Kansas' 19 pages of supporting materials. A more detailed response would be very helpful.

With regard to reproducing the numbers presented in Attachment No. 5, we would be glad to provide an explanation of how we reached our results in order to determine why your results were different.

C. Nebraska's Concerns with Kansas' Proposed Remedy

You make the assertion that Kansas is proposing a remedy that requires reduction of "consumptive use of streamflow by approximately 50,000 acre-feet per year more than required under the Compact." You provide no basis for this statement, however and I am at a loss to understand your meaning. Kansas has provided a thorough basis for its position in the attachments to my December 19, 2007, letter. The Kansas proposal is based on the assumption that Nebraska needs to be in compliance in all years with all the compliance requirements of the FSS. We would appreciate a complete explanation of your assertion with engineering backup of the kind Kansas provided with its December 19 letter. For instance, your assertion that Kansas is asking for 50,000 acre-feet per year too much reduction in consumption of streamflow is inconsistent with the fact that Kansas is only asking for a reduction of 25,000 acre-feet per year, from 200,000 to 175,000, as I explain in the last paragraph on page 2 of my December 19, 2007 letter. And your assertion is especially confusing given your agreement that you need to reduce your "consumptive use of stream flow in dry years to around the target of 175,000 acre-feet Kansas proposed for a dry condition scenario." Obviously, further explanation of your concern is needed.

You assert also that the NRDs' have developed "integrated water resources management plans that will enable Nebraska to maintain compliance with the Republican River Compact." It is at best an overstatement for you to assert that Nebraska will "maintain" compliance with the Compact, given the fact that Nebraska has not been in compliance with the Compact in any year since the FSS compliance conditions became applicable.

We understand that the three Natural Resource Districts (NRDs), by means of some proposed Integrated Management Plans (IMPs), are reducing their pumping allocations via multi-year allocations. You provide no specifics on the IMPs referenced in your letter, nor any evidence that any such restrictions will actually reduce Nebraska's consumptive use to provide compliance with the RRC and FSS. This is especially troubling if one reviews them in light of the significant reduction in groundwater return flows that will surely accompany this type of management. As a result, there may be little or no reduction in Nebraska's actual net consumptive use as a result of the NRDs' limited reductions in these pumping allocations. These actions appear to be woefully inadequate in view of the fact that we calculate that acreage irrigated by groundwater needs to be reduced by 43% (see page 4 of Attachment 5 to my

Ann Bleed, P.E.
February 19, 2008
Page 4

December 19 letter). Nebraska's violations of the Compact must cease immediately. Nebraska needs to be in compliance in all years with all the compliance requirements of the FSS. Nebraska needs to demonstrate how the NRDs' IMPs could bring Nebraska into Compact compliance. Nebraska also needs to explain how and by whom Compact compliance requirements are enforceable against the NRDs and their groundwater pumpers.

In summary, Kansas has not seen a specific, concrete enforceable plan that would achieve compliance with the RRC and FSS beginning in 2008. If Nebraska has such a plan, what is it?

We hope that the foregoing will be helpful in reducing the disputes between our two States. It is provided on the condition that the formal dispute resolution process will proceed within the time schedule attached to my letter of February 8, 2008, submitting enforcement matters to the RRCA.

Sincerely,



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

Attachments:

- Memorandum from Leland E. Rolfs and John B. Draper to Pam Anderson and Pete Ampe dated November 16, 2005
- Memorandum from Ron Theis to Lee Rolfs and Pete Ampe dated August 10, 2007
- Memorandum from David Barfield to Ann Bleed and Dick Wolfe dated February 19, 2008

Pc

Stephen Six, Kansas Attorney General
Dick Wolfe, Colorado RRCA Commissioner
Aaron M. Thompson, U.S. Bureau of Reclamation
Colonel Roger Wilson, Jr., U.S. Army Corps of Engineers
James J. DuBois, U.S. Department of Justice

MEMORANDUM

To: Ann Bleed, Nebraska Commissioner
Dick Wolfe, Colorado Commissioner 

From: David Barfield, Kansas Commissioner

Subject: Kansas Proposal for Allocation of Harlan County Lake Evaporation

Date: February 19, 2008

BACKGROUND

Historically, the division of Harlan County Lake evaporation was accomplished through an examination of actual diversions by the two Bostwick Irrigation Districts. Proportions were based on the annual diversions by each district. In a review of this process in 1994, the engineering committee computed 5 and 10 year averages of the divisions and found them to be 51% to Kansas and 49% to Nebraska. Allocations of Harlan County Lake evaporation using the Final Settlement Stipulation (FSS) procedures for 1995 through 2005 average very nearly the same proportions. In addition, the annual percentages do not vary much from the average.

In the original accounting procedure adopted with the FSS, the two States agreed to allocate the charge for Harlan County Lake evaporation on a basis similar to the method used by the Bureau of Reclamation to allocate the charge for operation and maintenance (O&M) between the Nebraska Bostwick Irrigation District (NBID) and the Kansas Bostwick Irrigation District (KBID). The accounting procedure adopted in the FSS states:

"The total annual net evaporation (Acre-feet) will be charged to Kansas and Nebraska in proportion to the annual diversions made by the Kansas Bostwick Irrigation District and the Nebraska Bostwick Irrigation District during the time period each year when irrigation releases are being made from Harlan County Lake. In the event Nebraska chooses to substitute supply for the Superior Canal from Nebraska's allocation below Guide Rock in Water-Short Year Administration years, the amount of the substitute supply will be included in the calculation of the split as if it had been diverted to the Superior Canal at Guide Rock." FSS, App. C, § IV.A.2.e.1.

In 2004 and 2005, however, for the first time in the 50-year history of storage releases to NBID and KBID for irrigation under the Bostwick Project, neither State diverted releases from Harlan County Lake. Because this unprecedented situation had not been anticipated in drafting the FSS, the States agreed to add the following language after the first sentence above:

"For any year in which no irrigation releases were made from Harlan County Lake, the annual net evaporation charged to Kansas and Nebraska will be based on the average of the above calculation for the most recent three years in which irrigation releases from Harlan County Lake were made." [Republican River Compact Administration Accounting Procedures And Reporting Requirements, Revised July 27, 2005]

In 2006 another unprecedented situation occurred when, for the first time in the history of the Bostwick Project, Nebraska paid NBID not to use its share of Harlan County Lake (HCL) storage water or direct flow rights in order to diminish Nebraska's noncompliance with the FSS. As a result, NBID diverted no surface water during that year. Again in 2007, Nebraska paid NBID for the same purpose, and NBID again made no diversions. Also in 2007, the Natural Resource Districts agreed to pay the Frenchman-Cambridge Irrigation District (FCID) not to use a portion of its water supply, which was subsequently stored in Harlan County Lake. The forbearance by FCID was also unprecedented in the 52-year history of irrigation storage by Frenchman-Cambridge Project. Operations in 2007 resulted in carryover of unused FCID water and carryover and reallocation of all NBID and KBID water.

In 2006 and 2007 the Bureau of Reclamation based the allocation of O&M charges on the amount of stored water that would have been available to NBID and KBID, regardless of whether and where it was used.

BASIS FOR KANSAS' PROPOSAL

The operations conducted in 2006 and 2007 show the difficulty of predicting the types of operations that may occur and the likelihood that agreements between the States will fail to cover all possibilities. The 2006/2007 operations were not anticipated in the FFS. For purposes of allocating the evaporation charge, the only change in operations anticipated in the FSS was the possibility that Nebraska would substitute groundwater pumping under the Superior Canal for surface diversions into the Superior Canal during Water-Short Years. Thus, allocation of evaporation in Harlan County Lake under the 2006/2007 type of operations was not considered or agreed to in the FSS.

The Compact provides that "Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a state, of the waters allocated by this compact, shall be made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State." Article XI (a). The Compact further provides that "beneficial consumptive use" includes "water consumed by evaporation from any reservoir...." Article II. Therefore, *all* HCL evaporation is allocable to Nebraska under the Compact. Nevertheless, Kansas has historically been willing to pay a share of the evaporation from Harlan County Lake, and is willing to do so in the future, provided that the allocation is equitable.

In Kansas' view, when Nebraska uses Harlan County Lake for Compact compliance purposes, Nebraska is sharing in the benefits of HCL storage and should share in the evaporation charges. In essence, surface water that historically was applied to irrigate crops in Nebraska is being used to replace groundwater depletions or is otherwise being used in Nebraska. The result is that Kansas is not receiving "additional" water. It is simply receiving water to which it is entitled under the Compact anyway and it should not incur additional evaporation charges. Similar logic was used by the Bureau of Reclamation and the Bostwick Irrigation Districts to deal with the O&M charges for 2006 and 2007.

KANSAS' PROPOSAL

Although Kansas has explored several accounting options, some of which were based on separate storage accounts and were quite complex, Kansas offers the following simplified and comprehensive proposal to replace the current accounting procedure for allocating evaporation in Harlan County Lake. We believe this proposal is not only much simpler to apply but also eliminates the chance that future unanticipated operations will create new problems of interpretation. And both States would benefit from a comprehensive and final resolution of the allocation of Harlan County Lake evaporation. Kansas' proposal is supported by the historic allocation of evaporation. In Kansas' view the following proposal represents a fair allocation of the benefits of Harlan County Lake storage and thus a fair allocation of the evaporation charge.

Kansas proposes that, starting in 2006, the annual evaporation from Harlan County Lake be charged to Kansas and Nebraska every year based on the historic percentages of 51% to Kansas and 49 % to Nebraska, regardless of the particular operations during that year. Therefore, Kansas proposes that the accounting procedures be amended as follows:

Replace the existing language in Appendix C, § IV.A.2.e.1, last paragraph, with the following language:

"Beginning in 2006, the total annual net evaporation (Acre-feet) of Harlan County Lake will be charged 51% to Kansas and 49% to Nebraska."