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**Testimony on Substitute for SB 89
Disposition of moneys recovered from Republican River Compact litigation
to
the House Agriculture and Natural Resources Committee**

**By David W. Barfield
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January 31, 2008

Mr. Chairman and members of the committee, I am David Barfield, chief engineer of the Kansas Department of Agriculture's division of water resources. I am here in support of Substitute for Senate Bill 89, as amended by your committee last session, and to respectfully request it be amended.

This bill is similar to legislation passed in 1996 to address the receipt and expenditure of money from Colorado for their violations of the Arkansas River Compact. As you know, we ultimately received damages from that litigation, and the statute has served us well.

Substitute for SB 89 would establish two new funds in the state treasury and direct where moneys would be credited if damages are recovered in a settlement, judgment or decree from Republican River Compact litigation. The amended bill would require monetary damages to be credited first to the existing Interstate Water Litigation Fund in an amount necessary to cover the state's expenses for the past Republican River litigation. Five percent of any remaining monetary damages would be credited to a new Republican River Compact Compliance and Enforcement Fund. The balance would be credited to a new Republican River Water Conservation Projects Fund.

It is prudent to maintain the Interstate Water Litigation Fund for future compact litigation because it demonstrates to other states that Kansas is prepared to defend its rights under our water compacts. However, I believe the message and our readiness would remain equally strong without monies being added to the Interstate Water Litigation Fund. We do not expect future litigation on the Republican River Compact to be as costly as the Arkansas River Compact because of the groundwork laid in the 2002 settlement stipulation between Kansas, Colorado and Nebraska. I believe a better use for the money would be in the Republican River Water Conservation Projects Fund. I encourage the committee to drop the requirement that money be added to the Interstate Water Litigation Fund.

The Kansas Water Office would administer the Republican River Conservation Projects Fund. The director of the Kansas Water Office and chief engineer would review and approve each project. Of the moneys deposited in the fund, two-thirds would be available for projects in the lower basin and one-third would be available for projects in the upper basin.

The lower Republican River basin has not received water it is entitled to and it continues to suffer shortages, due to excessive use upstream in Nebraska and Colorado. Many projects exist to allow us to make better use of water we receive under the compact, including the potential to modify Lovewell Reservoir to provide an improved water supply for the lower basin.

The upper Republican River basin also has important needs, but it is especially important that we ensure that Kansas continues to comply with the compact, as this area of Kansas is restricted by the compact. While Kansas is fully in compliance with the terms of the settlement, it may be prudent for our state to encourage limited, targeted reductions in water use in this area to ensure we remain in compliance in the future.

The bill stipulates that the Kansas Department of Agriculture would administer the Republican River Compact Compliance and Enforcement Fund. Money deposited in this fund would be available for expenditures related to monitoring Nebraska and Colorado's compliance, and for resolving compact disputes and enforcing the compact through the Republican River Compact Administration, alternate dispute resolution, or litigation.

Attached to my testimony is a brief summary of our past and current efforts to enforce the terms of the Republican River Compact. Our efforts resulted in a binding, enforceable decree of the U.S. Supreme Court. The settlement provided Nebraska and Colorado time to reduce their use of Republican River water so we would get our fair share. While they have taken action, it has been insufficient.

Last year was the first year to measure whether Nebraska complied with settlement terms. According to our calculations, Nebraska used 82,240 acre-feet more water than it was entitled to in 2005 and 2006. As a result, on December 19, 2007, I wrote to my counterpart in Nebraska formally demanding that they promptly take steps to provide Kansas with its share of water under the compact and that they compensate Kansas for damages due to noncompliance during 2005 and 2006. This initiated a formal process which, if not resolved, could lead to our petitioning the U.S. Supreme Court for enforcement.

The first time to definitively determine Colorado's compliance will be later this year, when they, too, will be found out of compliance with settlement. At Colorado's request, key officials of our two states met Monday to discuss actions Colorado is either taking or considering to take to come into compliance.

Our support of this bill should not be construed to mean that we will stop pursuing the water Kansas is entitled to. We prefer that all states comply with the compact and settlement terms. However, it is appropriate that we prepare to receive damages that could be recovered as a result of any future enforcement action.

By passing this bill, you continue to send the strong message that Kansas is serious about enforcing its water compacts. It also serves an important purpose if damages are recovered in the future.

I would be happy to answer questions at the appropriate time. Thank you.



FACT SHEET

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Republican River Compact Enforcement

In 1943, Colorado, Nebraska and Kansas entered into the Republican River Compact to divide the entire virgin water supply of the Republican River basin.

The Republican River basin includes portion of eastern Colorado, northwest Kansas and southwest Nebraska. The Republican River eventually flows through portions of north-central Kansas to Milford Reservoir.

In the early 1980s, Kansas and Colorado stopped allowing new groundwater irrigation to be developed in the basin. Nebraska, however, continued to allow wells to be drilled.

In the mid-1980s, Kansas began to express its concern that Nebraska was not complying with the Republican River compact in several subbasins.

In 1998, after many failed attempts to resolve the dispute, Kansas filed suit against Nebraska in the U.S. Supreme Court to enforce the terms of the compact. That case was settled December 15, 2002, when the final settlement stipulation was signed by the states. That stipulation was later approved by the Supreme Court. Since then, Kansas has waited patiently for Nebraska to come into compliance with the compact.

Under the final settlement stipulation, 2006 was the first year to measure whether Nebraska complied with settlement terms for water-short years for the two-year period from 2005 to 2006. According to our calculations, Nebraska used 82,240 acre-feet more water than it was entitled to in 2005 and 2006.

A city with 100,000 residents will take about 10 years to use 82,000 acre-feet of water. One acre-foot is equal to 325,851 gallons.

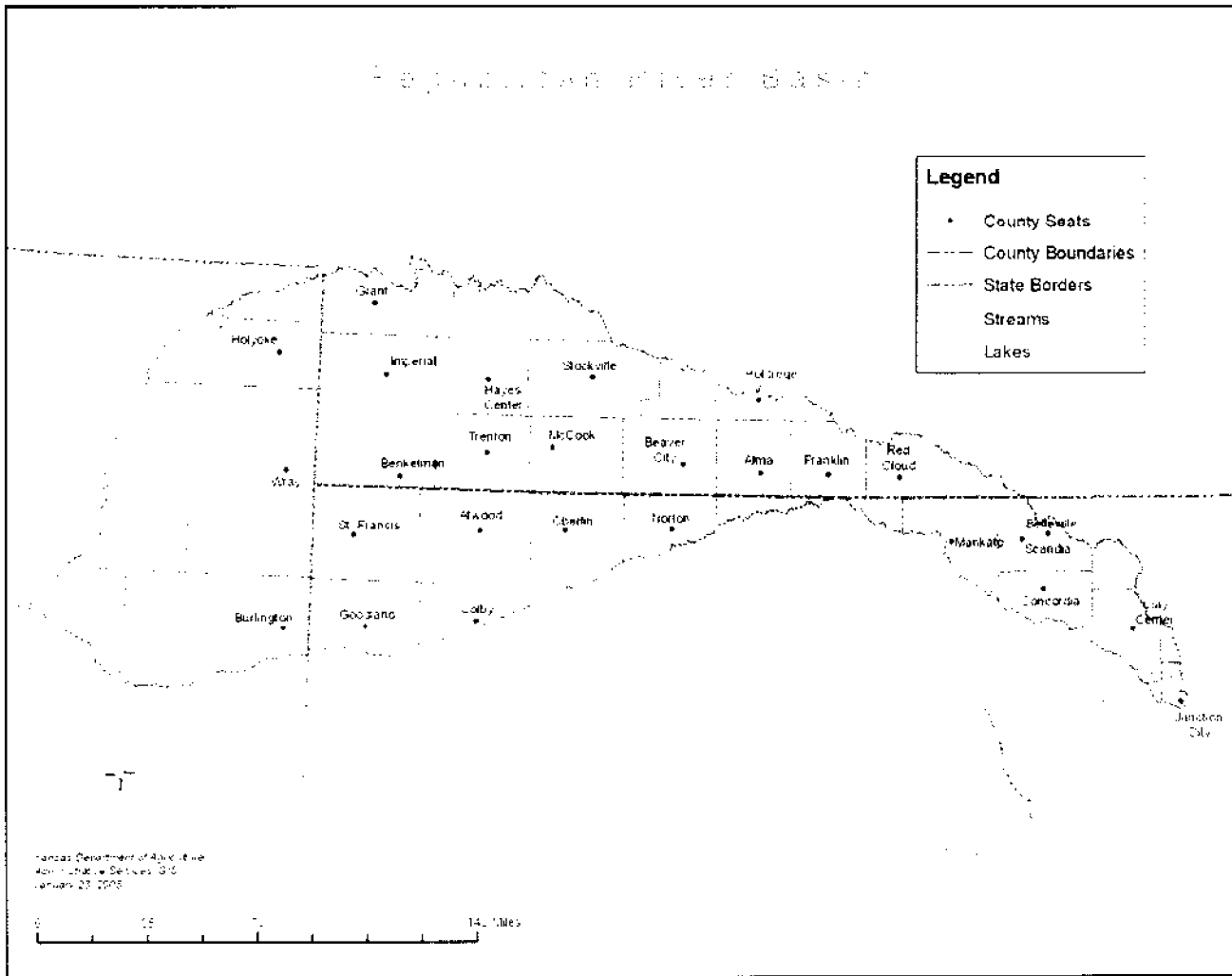
The settlement also specifies 2007 as the first year to measure normal-year compliance for the five-year period from 2003 through 2007. The accounting for 2007 is not done, but Nebraska's overuse from 2003 to 2006 is 143,840 acre-feet.

During the years Nebraska's overused its share of water in violation of the settlement terms, Kansas has not had adequate water for its Kansas Bostwick Irrigation District and mainstem Republican River users.

Because Nebraska has failed to comply with settlement terms, on December 19, 2007, Chief Engineer and Compact Administrator David Barfield sent a letter to Ann Bleed, his Nebraska counterpart, demanding an immediate shutdown of wells within 2.5 miles of the Republican River and its tributaries and on lands added after the year 2000, or their hydrologic equivalent.

Additional actions may be needed for the next several years for Nebraska to meet water-short year obligations until stream depletion caused by groundwater pumping decreases.

Since it appears impractical for Nebraska to repay Kansas with water, Kansas has asked for monetary compensation for past shortages in an amount equal to Nebraska's gains or Kansas' losses, whichever is greater. Nebraska also is asked to pay interest, attorney fees, costs and any other relief the court deems appropriate.



Kansas gave Nebraska until February 4, 2008, to respond to its demand. This is the first step in a dispute resolution process prescribed by the settlement.

Colorado also must meet its first five-year test of normal-year compliance ending with 2007. Although data for 2007 is not yet available, Colorado exceeded its allocations for 2003,

2004, 2005 and 2006, the first four years of the five-year period, by 44,270 acre-feet.

More information about the Republican River Compact and the final settlement stipulation is available from the Kansas Department of Agriculture at (785) 296-3717 or online at www.ksdca.gov/interstate_water_issues/content/142.