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July 30, 2009

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

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**Subject: Republican River Compact Arbitration;
Notice pursuant to Article VII.B.6 of the Final Settlement Stipulation**

Dear Messrs. Ampe, Draper and DuBois:

This letter is submitted pursuant to the Final Settlement Stipulation ("FSS"), art. VII.B.6., *Kansas v. Nebraska and Colorado*, No. 126, Original. As you are aware, the FSS, art. VII.B.6. requires the following: "within 30 days of the issuance of the Arbitrator's decision, the states that are parties to the decision shall give their written notice to the other states and the United States as to whether they will accept, accept and reject in part, or reject the Arbitrator's decision." On June 30, 2009 the Arbitrator, Mr. Karl Dreher, rendered his decision. The Arbitrator's decision in this matter concluded with twelve recommendations. Each of those recommendations is listed

below and is followed by Nebraska's written notice of its response. Nebraska also responds herein to the Arbitrator's Final Decision on Legal Issues, which is incorporated by reference in the June 30, 2009 decision.

RECOMMENDATION 1.

As described in the *Arbitrator's Final Decision on Legal Issue*, Question 3, the Accounting Procedures should be modified so that evaporation from Harlan County Lake is allocated between Kansas and Nebraska in proportion to each state's use of water from Harlan County Lake for all purposes, including use to offset streamflow depletion from consumptive groundwater withdrawals. (*Footnoted as: Changes should apply to all years for which the accounting of water use has not been finalized and approved by the RRCA.*)

NEBRASKA'S RESPONSE: Nebraska rejects the recommendation of the Arbitrator.

RECOMMENDATION 2.

Nebraska's proposed changes to the Accounting Procedures to calculate $CBCU_C$, $CBCU_K$, $CBCU_N$, and IWS, should not be adopted. However, the RRCA should consider reconvening the Technical Groundwater Modeling Committee to thoroughly re-evaluate the nonlinear response of the RRCA Groundwater Model when simulated stream drying occurs, re-evaluate the existing procedures for determining CBCU and IWS, and document its conclusions and any recommendation in a report to the RRCA.

NEBRASKA'S RESPONSE: Nebraska rejects the recommendation of the Arbitrator. Nebraska brought this matter initially to the RRCA Technical Committee, then to Arbitration for final resolution. Reconvening the Technical Groundwater Modeling Committee to resolve this issue ignores the extensive efforts already expended in presenting this issue to the RRCA and defeats the express purpose of this Arbitration.

RECOMMENDATION 3.

Nebraska's proposed changes to the Accounting Procedures involving calculation of VWS for the North Fork of the Republican River in Colorado and the Arikaree River should not be adopted.

NEBRASKA'S RESPONSE: Nebraska rejects the recommendation of the Arbitrator.

RECOMMENDATION 4.

Nebraska's proposed changes to the Accounting Procedures to apportion return flows from irrigation using water diverted through Haigler Canal between the North Fork of the Republican River in Nebraska and the Arikaree River should not be adopted.

NEBRASKA'S RESPONSE: Nebraska rejects the recommendation of the Arbitrator.

RECOMMENDATION 5.

Nebraska's proposed changes to the Accounting Procedures to move the location of the accounting points in the RRCA Groundwater model to correspond to the location of the Sub-basin gages for "Frenchman Creek (River) drainage basin in Nebraska," "South Fork of the Republican River drainage basin," and "Driftwood Creek drainage basin," should not be adopted. However, to the extent groundwater pumping causes depletions to streamflows downstream of the gages in these sub-basins and upstream of the confluence of each associated stream with the Main Stem, the Accounting Procedures for the sub-basins should be modified to subtract the CBCU of groundwater below the designated gage for each Sub-basin and above the confluence of that Sub-basin's stream with the Main Stem from the VWS for that Sub-basin, to avoid a double-accounting of that quantity of water, and add that increment of groundwater CBCU in the VWS for the Main Stem. (*Footnoted as: Changes should apply to all years for which the accounting of water use has not been finalized and approved by the RRCA.*)

NEBRASKA'S RESPONSE: Nebraska accepts in part and rejects in part the recommendation of the Arbitrator. Nebraska rejects the notion that its proposed changes are not consistent with the Compact, but would be willing to accept the recommendations of the Arbitrator with respect to avoiding double counting of water if a methodology for avoiding double counting of water can be developed and implemented.

RECOMMENDATION 6.

Nebraska's proposed change to the Accounting Procedures to move the location of the accounting point in the RRCA Groundwater model for the "North Fork of the Republican River in Colorado drainage basin" to the location where the North Fork of the Republican River crosses the Colorado-Nebraska state line should be adopted. (*Footnoted as: Changes should apply to all years for which the accounting of water use has not been finalized and approved by the RRCA.*)

NEBRASKA'S RESPONSE: Nebraska accepts the recommendation of the Arbitrator.

RECOMMENDATION 7.

Kansas should be awarded nominal damages of \$10,000 for Nebraska's overuse of water in 2005 and 2006 until Kansas can correct its estimates of the amounts of water that would have been available to KBID from the Courtland Canal, but for Nebraska's overuse, and can demonstrate that its assumptions and methodology for estimating lost profits and establishing damages is reasonably reliable, during subsequent arbitration or before the Court.

NEBRASKA'S RESPONSE: Nebraska accepts in part and rejects in part the recommendation of the Arbitrator. Nebraska accepts that nominal damages of \$10,000 should be awarded. Nebraska rejects that it is responsible for overuse in 2005 and further rejects the recommendation of the Arbitrator that further arbitration is appropriate.

RECOMMENDATION 8.

Nebraska's IMPs for the URNRD, MRNRD, and LRNRD are inadequate to ensure compliance with the Compact and FSS during prolonged dry-year conditions, such as occurred from 2002 through 2006. Nebraska and the Republican River NRDs should make further reductions in consumptive groundwater withdrawals beyond what's required in the current IMPs and should obtain permanent, interruptible supply contracts with surface water irrigators, to ensure compliance with the Compact and FSS during prolonged dry-year conditions.

NEBRASKA'S RESPONSE: Nebraska rejects the recommendation of the Arbitrator.

RECOMMENDATION 9.

To ensure Nebraska's compliance with the Compact and FSS into the future, it is not necessary to impose Kansas' proposed remedy. However, Kansas is entitled to injunctive relief enjoining Nebraska from exceeding its future allocations determined in accordance with the Accounting Procedures using the averaging provisions for normal administration and Water-Short Year Administration as set forth in the FSS.

NEBRASKA'S RESPONSE: Nebraska accepts in part and rejects in part the recommendation of the Arbitrator. Nebraska accepts that it is not necessary to impose Kansas' remedy to ensure future compact compliance. Nebraska rejects the remainder of the Arbitrator's recommendation.

RECOMMENDATION 10.

Should Nebraska fail to comply with an injunction, sanctions may be appropriate in addition to the award of additional damages to Kansas. While such sanctions may be significant, those sanctions should be based on the specific circumstances of Nebraska's failure to comply.

NEBRASKA'S RESPONSE: Nebraska rejects the recommendation of the Arbitrator.

RECOMMENDATION 11.

Nebraska should not receive credit in subsequent 5-year averages for damages that may be paid to Kansas for Nebraska's violations of the FSS in 2005 and 2006.

NEBRASKA'S RESPONSE: Nebraska rejects the recommendation of the Arbitrator.

RECOMMENDATION 12.

A river master for the Republican River should not be appointed until the specific duties and authorities that a river master could or should undertake in the Republican River Basin have been specifically identified and determined to be necessary.

NEBRASKA'S RESPONSE: Nebraska accepts in part and rejects in part the recommendation of the Arbitrator. Nebraska accepts that a river master should not be appointed. Nebraska rejects the remainder of the Arbitrator's recommendation.

LEGAL ISSUES

In addition to the Arbitrator's final decision, the Arbitrator also submitted his final decision on legal issues on June 30, 2009. The following is Nebraska's response to the Arbitrator's decision on the legal issues.

QUESTION 1:

Decision: Nebraska's proposed changes to the Republican River Compact Administration Accounting Procedures are proper subjects of dispute resolution and for this arbitration. If any changes to the Accounting Procedures are determined to be warranted, the appropriate effective date for such changes will be determined following a hearing of the facts. Finding for Nebraska and Colorado; finding against Kansas.

NEBRASKA'S RESPONSE: Nebraska accepts the decision of the Arbitrator.

QUESTION 2:

Decision: The evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact Accounting. Finding for Kansas; finding against Nebraska.

NEBRASKA'S RESPONSE: Nebraska rejects the decision of the Arbitrator.

QUESTION 3:

Decision: The current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation. However, the Accounting Procedures should be modified so that evaporation from Harlan County Lake is allocated between Kansas and Nebraska in proportion to each state's use of water from Harlan County Lake for all purposes. Finding in part for Nebraska and in part for Kansas; finding in part against Kansas and in part against Nebraska.

NEBRASKA'S RESPONSE: Nebraska accepts in part and rejects in part the decision of the Arbitrator. Nebraska accepts the first sentence of this decision. Nebraska rejects the remainder of the Arbitrator's decision.

QUESTION 4:

Decision: Under the facts alleged by Kansas, the FSS, as part of the Consent Decree of May 19, 2003, is properly enforced as a contract, like the Compact itself. Any damages awarded to Kansas are properly limited to the actual damages suffered by Kansas, and evidence pertaining to Nebraska's gains for its alleged overuse of water will not be considered. Finding for Nebraska and Colorado; finding against Kansas.

NEBRASKA'S RESPONSE: Nebraska accepts the decision of the Arbitrator.

QUESTION 5:

Decision: Kansas' proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation is a proper subject for this arbitration; however, Kansas can not mandate its proposed remedy. Any alternative remedy to that proposed by Kansas can also be considered during this arbitration, and the U.S. Supreme Court can formulate and mandate a remedy for future compliance, as it determines to be necessary. Finding for Kansas and finding in part for Nebraska and Colorado; finding in part against Nebraska.

NEBRASKA'S RESPONSE: Nebraska accepts in part and rejects in part the decision of the Arbitrator. Nebraska accepts that Kansas cannot impose on Nebraska a remedy of Kansas' choosing, but acknowledges that the Supreme Court can formulate and mandate a remedy for future compliance, as it determines to be necessary. Nebraska rejects the remainder of the Arbitrator's decision.

QUESTION 6:

Decision: If Nebraska's alleged violations during both 2005 and 2006 are substantiated, Kansas is entitled to damages for both 2005 and 2006, but not based on the methodology set forth by Kansas, i.e., not two times the average of the shortages from 2005 and from 2006. Nebraska's compliance with the Compact in 2005 will be determined based on the evidence presented at hearing. Finding in part for Kansas and in part for Nebraska; finding in part against Nebraska and in part against Kansas.

NEBRASKA'S RESPONSE: Nebraska accepts in part and rejects in part the decision of the Arbitrator. Nebraska accepts the Arbitrator's decision that any finding for damages not be based on the methodology set forth by Kansas. Nebraska rejects that it is responsible for any alleged overuse occurring in 2005.

QUESTION 7:

Decision: Nebraska's issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years is not a proper subject for this arbitration at this time, since the issue has not been directly and fully submitted together with supporting materials to the RRCA. However, this issue can be addressed at hearing and in post-hearing briefs to the extent it must be addressed in considering Kansas' proposed remedy, or other alternative remedies or plans that may be considered at hearing, for future compliance with the Compact and the Final Settlement Stipulation. Alternatively, since this issue was identified in Exhibit 4 to the Arbitration Agreement, once directly and fully submitted with supporting materials to the RRCA and if the RRCA is unable to resolve this issue, it would then be a proper subject as an issue in this arbitration. Finding in part for Kansas, Nebraska, and Colorado; finding in part against Kansas, Nebraska, and Colorado.

NEBRASKA'S RESPONSE: Nebraska rejects the decision of the Arbitrator and believes the issue was properly part of the Arbitration. Nebraska has, however, submitted the issue to the RRCA and intends to pursue its resolution.

With this submission, Nebraska concludes this portion of the Arbitration process. As you are all aware, additional issues are anticipated to be arbitrated in the near future and will be subject to separate notices.

Sincerely,



Justin D. Lavene
Special Counsel to the Attorney General

cc Samuel Speed, Kansas Attorney General's Office
Don G. Blankenau, Husch Blackwell Sanders, LLP