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**IN RE: NON-BINDING ARBITRATION PURSUANT TO THE FINAL  
SETTLEMENT STIPULATION, *KANSAS v. NEBRASKA and COLORADO*,  
NO. 126 ORIGINAL**

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**BEFORE KARL J. DREHER, ARBITRATOR**

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**COLORADO'S NOTICE AS TO WHETHER IT WILL ACCEPT, ACCEPT AND  
REJECT IN PART, OR REJECT THE ARBITRATOR'S DECISION**

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For the State of Colorado:

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Pursuant to the Time Frame Designation, attached as Exhibit 2 to the Arbitration Agreement (October 23, 2008), as subsequently modified by agreement among counsel, and Paragraph VII.B.6 of the Final Settlement Stipulation, *Kansas v. Nebraska and Colorado*, No. 126 Original (December 15, 2002) the State of Colorado provides notice to the State of Kansas, the State of Nebraska and the United States as to whether they will accept, accept and reject in part, or reject the Arbitrator's decision.

## **INTRODUCTION**

The State of Colorado hereby provides notice to the States of Kansas and Nebraska and the United States as to whether it accepts, accepts in part and rejects in part, or rejects each of the Arbitrator's Legal Conclusions as contained within the Arbitrator's Final Decision on Legal Issues (January 22, 2009) and the Arbitrator's Final Decision (June 30, 2009, Corrected July 13, 2009). Colorado's acceptance of certain legal decisions and recommendations, in whole or in part, made by the Arbitrator does not represent a concession that Colorado accepts the Arbitrator's underlying analyses and findings that lead to the legal decision or recommendation. Nor shall the acceptance or rejection of any decision be binding upon the State of Colorado in any future proceeding.

## **ARBITRATOR'S DECISION ON LEGAL ISSUES**

### **Legal Decision 1**

**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.**

Colorado accepts the Arbitrator's Legal Decision 1.

## **Legal Decision 2**

**The evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact Accounting.**

Colorado accepts the Arbitrator's Legal Decision 2.

## **Legal Decision 3**

**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.**

Colorado accepts the Arbitrator's Legal Decision 3.

## **Legal Decision 4**

**Under the facts alleged by Kansas, the FSS, as a part of the Consent Decree of May 19, 2003, is 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.**

Colorado accepts the Arbitrator's Legal Decision 4.

## **Legal Decision 5**

**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 cannot 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.**

Colorado accepts the Arbitrator's Legal Decision 5.

## **Legal Decision 6**

**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, ie., 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.**

Colorado accepts the Arbitrator's Legal Decision 6.

### **Legal Decision 7**

**Nebraska's issue of crediting payments for damages for violations from one year in determination 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 material 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.**

Colorado accepts the Arbitrator's Legal Decision 7.

## **ARBITRATOR'S FINAL DECISION**

### **Recommendation 1**

**As described in the *Arbitrator's Final Decision on Legal Issues*, 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 depletions from consumptive groundwater withdrawals.**

Colorado accepts the Arbitrator's Recommendation 1.

### **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, reevaluate the existing procedures for determining CBCU and IWS, and document its conclusions and any recommendations in a report to the RRCA.**

Colorado accepts the Arbitrator's Recommendation 2.

### **Recommendation 3**

**Nebraska’s proposed changes to the Accounting Procedures involving calculation of Virgin Water Supply for the North Fork of the Republican River in Colorado and the Arikaree River should not be adopted.**

Colorado accepts the Arbitrator’s Recommendation 3.

### **Recommendation 4**

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

Colorado accepts the Arbitrator’s Recommendation 4.

### **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 these sub-basins should be modified to subtract the CBCU of groundwater below the designated gages for each Sub-basin and above the confluence of that Sub-basin’s stream with the Main Stem from the Virgin Water Supply for that Sub-basin, to avoid a double-accounting of that quantity of water, and add that increment of groundwater CBCU in the Virgin Water Supply for the Main Stem.**

Colorado accepts the Arbitrator’s Recommendation 5.

### **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.**

Colorado accepts the Arbitrator’s Recommendation 6.

### **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.**

Colorado accepts the Arbitrator's Recommendation 7 as to the award of nominal damages. Colorado rejects the Arbitrator's Recommendation 7 to the extent it purports to allow Kansas to re-initiate non-binding arbitration regarding damages.

### **Recommendation 8**

**Nebraska's Integrated Management Plans for the Upper Republican Natural Resource District, Middle Republican Natural Resource District, and Lower Republican Natural Resource District 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 NRD's should make further reduction in consumptive groundwater withdrawals beyond what's required in the current Integrated Management Plans and should obtain permanent, interruptible supply contracts with surface water irrigators, to ensure compliance with the Compact and FSS during prolonged dry-year conditions.**

Colorado accepts the Arbitrator's Recommendation 8.

### **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.**

Colorado accepts the Arbitrator's Recommendation 9.

### **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.**

Colorado accepts the Arbitrator's Recommendation 10.

**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.**

Colorado rejects the Arbitrator's Final Recommendation 11.

**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.**

Colorado accepts the Arbitrator's Recommendation 12.

Dated this 30<sup>th</sup> day of July 2009.

FOR THE STATE OF COLORADO:

JOHN W. SUTHERS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I caused a copy of the foregoing COLORADO'S NOTICE AS TO WHETHER IT WILL ACCEPT, ACCEPT AND REJECT IN PART, OR REJECT THE ARBITRATOR'S DECISION to be served by sending a true and complete copy by overnight delivery on July 30, 2009, postage prepaid and addressed as follows:

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