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

BEFORE MARTHA O. PAGEL, ARBITRATOR

Colorado Compact Compliance Pipeline Dispute

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

For the State of Colorado:

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Pursuant to the Time Frame Designation, attached as Exhibit D to the Arbitration Agreement (April 9, 2010), 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 it will accept, accept and reject in part, or reject the Arbitrator's decision regarding the Colorado Compact Compliance Pipeline ("CCP") Dispute (October 7, 2010).

Colorado accepts the Arbitrator's decisions on Issues 7 and 8. Colorado accepts in part and rejects in part the Arbitrator's decisions on Issues 2, 3, 4, 5, and 6. Colorado rejects the Arbitrator's decisions regarding Issue 1. Colorado's acceptance of certain of the Arbitrator's decisions, in whole or in part, regarding the CCP Dispute is not a concession that Colorado fully accepts the Arbitrator's findings and conclusions stated in the decision. Nor shall the acceptance or rejection of any decision be binding upon the State of Colorado in any future proceedings.

Colorado accepts the following specific findings, conclusions of law, or recommendations of the Arbitrator and the factual findings necessarily underlying those specific findings or recommendations:

1. That the States in making decisions, as members of the RRCA, are subject to general rules of contract law, including an implied duty of good faith and fair dealing. That the Final Settlement Stipulation (FSS) is a stipulated consent decree, separately negotiated by the three States and not enacted into federal or state law, and, accordingly, actions by the individual States under the authority of the FSS would appear to be subject to contract law and the decisions relating to approval or rejections of a proposed augmentation plan are subject to the law of contracts. The States must exercise discretion reasonably, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties when making decisions relating to approval or rejection of a proposed augmentation plan. CCP Decision at 4.

2. That the CCP Proposal represents an appropriate and necessary augmentation plan. CCP Decision at 4.
3. That the CCP is needed in order for Colorado to meet its compact obligations in the reasonably foreseeable future. Absent a dramatic change in the hydrology of the basin in Colorado, the only way for Colorado to come into and maintain compliance within the next several decades is to build the CCP. Even if Colorado eliminated all beneficial consumptive uses in the basin, including all groundwater pumping, Colorado would not be in compliance with the Compact for approximately 25 years. CCP Decision at 7.
4. To the extent the Arbitrator's recommendation as to "whether the CCP Proposal would allow Colorado to replace South Fork overuse with augmentation flow delivered to the North Fork" finds that augmentation water delivered to the North Fork may not be credited against Colorado's overuse of Kansas' specific allocation of 23,000 acre-feet from the South Fork of the Republican River Drainage basin, as increased or decreased pursuant to Art. III of the Republican River Compact, Colorado accepts that recommendation. CCP Decision at 11-13.
5. That some amount of flexibility is necessary and desirable for CCP operations. CCP Decision at 13.
6. That the proposed maximum AWS was intended to address the concern regarding substantial over- or under-deliveries. CCP Decision at 15.
7. That Kansas and Colorado appear to be in agreement that the Ogallala aquifer should be capable of providing a reliable water supply for the augmentation plan for at least the next 150 years; and that it is reasonable for Colorado to request an approval period sufficient to allow for amortization of the initial project costs and to provide for continuation of the augmentation program in the absence of evidence showing the plan is not sustainable. CCP Decision at 17.
8. The specific changes Colorado proposes to the RRCA Accounting Procedures are complete for purposes of implementing the CCP Proposal as currently proposed. CCP Decision at 17.
9. The proposed "catch up" provisions offer a reasonable mechanism to implement the CCP Proposal as envisioned by Colorado. CCP Decision at 18.
10. In terms of compliance with the Final Settlement Stipulation and general Compact obligations, there is nothing inherently wrong with the methodology Colorado has developed for determining projected deliveries and for making subsequent adjustments in the following year to reflect its actual compliance obligations. CCP Decision at 19-20.

11. The process Colorado proposes for authorizing possible future expansion of the pipeline is not unreasonable and does include provisions for RRCA approval. CCP Decision at 20.
12. The refusal by Colorado and Nebraska to disclose the terms of their stipulated agreement does not mandate that the CCP Proposal be rejected. CCP Decision at 21.
13. The CCP Proposal, in general, provides a reasonable and necessary approach for meeting Colorado's Compact obligations. CCP Decision at 21.
14. To be sure there is a risk that, at some point in the future, continuing objections by Kansas may suggest there is nothing that Colorado can do to develop a plan that would meet with approval by Kansas. CCP Decision at 22.

Colorado rejects any findings or recommendations not specifically accepted herein.

Dated this 1st day of November, 2010.

FOR THE STATE OF COLORADO:

JOHN W. SUTHERS

s/ _____
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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 (CCP) to be served upon all parties herein by email pursuant to section E.3 of the Arbitration Agreement, at Denver, Colorado, this 1st day of November, 2010 addressed as follows:

jdraper@montand.com
samuel.speed@ksag.org
justin.lavene@nebraska.gov
don@aqualawyers.com

and by U.S. Mail, addressed as follows:

James J. DuBois, Esq.
Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, CO 80294

s/ _____
