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Sam Brownback, Governor

October 30, 2012  
 VIA EMAIL

Signe Snortland, Reclamation Environmental Specialist  
 Bureau of Reclamation  
 Dakotas Area Office  
 PO Box 1017  
 Bismarck ND 58502

RE: Comments on the Draft EIS for the  
 Arkansas Valley Conduit and Long-Term  
 Excess Capacity Master Contract

Dear Ms. Snortland:

I am writing to provide the state of Kansas' comments in response to the Bureau's draft Environmental Impact Statement (EIS) for the Arkansas Valley Conduit (AVC) and related projects, issued in August 2012. This comment letter will focus on our primary concerns: the daily model assumptions and the EIS's related assumption of future Compact compliance by Colorado, water quality concerns, and the need for the Bureau to commit to on-going operational review of the projects it enables. Kevin Salter is providing a separate letter with additional comments from our review.

**Arkansas River Compact Compliance and the EIS' Daily Model Assumptions**

The USBR's approach in this EIS, as written, continues to rely on Colorado's assurances that Arkansas River Compact (Compact) compliance will be maintained without independent review or confirmation. The Compact is a federal statute having been enacted by Congress, as well as the State of Colorado and the State of Kansas (Federal Statute, 63 Stat. 145; State of Colorado, C.R.S. 37-69-101; and State of Kansas, K.S.A. 82a-520). As a federal statute, the Compact obligates the Bureau to independently review projects for Compact compliance. The Bureau should be aware of the Special Master's admonishment to the United States in *Kansas v. Colorado* (No. 105, Original) on this same concern. In his First Report (1994) to the U.S. Supreme Court (Vol. II, p. 322), the Special Master expressed the following regarding USBR's review of the impacts of the Pueblo Winter Water Storage Program:

Signe Snortland  
Bureau of Reclamation  
October 30, 2012  
Page 2

“Pueblo Reservoir is a major storage facility, and to alter the regime of the Arkansas River by storing winter flows is not a trivial change. The compact is a law of the United States, binding on the Bureau of Reclamation as well as on the States of Kansas and Colorado. *Texas v. New Mexico*, 462 U.S. 554, 564, 77 L.Ed.2d 1, 103 S.Ct. 2558 (1983). In a development of this kind, the United States should not operate the project or participate in its operation, without a good faith belief, based on whatever data or studies may be needed, that the United States is acting in full compliance with the law. This is not to suggest that United States' officials have not been acting in good faith. But their beliefs appear to rest primarily on assurances from Colorado, without independent review or confirmation.”

Modeling and Assumptions: As Kansas has repeatedly expressed, we remain concerned with a primary assumption of the daily model that the flows of the Arkansas River at Las Animas will remain at historical levels. This result is accomplished via an artificial constraint (call) that is not done in the real-world of Colorado water administration. The assumption in essence determines that there will be no impacts of the proposed alternatives below this gage. While the study with this assumption may demonstrate that the AVC and long-term excess capacity contracts can potentially be done within Compact requirements, the study does not provide assurance that the projects and contracts enabled by the Bureau's action will be done in compliance with the Compact.

Fry-Ark Return Flows: The EIS' treatment of Fry-Ark return flows is described in Appendix D.3 (page D.3-52). As is acknowledged, Kansas is concerned with the treatment of return flows derived from native Arkansas River flows. The EIS' daily model assumes these flows are usable to extinction. The Bureau states that this assumption is in accordance with the Special Master's ruling. However, the Special Master's ruling made it clear that Kansas' concern was not resolved with respect to future uses of such waters. Despite this, the Bureau made the assumption to treat these native waters as consumable to extinction.

The excerpt of the Special Master's order on page D.3-52 is misleading. His full statement from the order:

“In short, this issue comes too late to be decided in the drafting of the Decree. It is more properly left to the Dispute Resolution provisions of the Decree if, and when, John Martin Reservoir is again full and spilling, and agreement cannot be reached between the States. For the purposes of drafting the Decree, no change should be made in Data Set 14, Appendix B, Section III.B.6, and it should continue to read ‘Monthly transmountain deliveries (Data Set 14).’”

The Special Master was referring to Colorado's request that the Decree include references to both transmountain and native components in the description of Data Set 14. He was not referring to how these native east slope return flows would be handled into the future.

Thus, the Special Master's order explicitly left the resolution of treatment of native Fry-Ark return flows until a future time when native water is again stored under the Fry-Ark Projects east slope water rights. At that time, unless an agreement is reached, the States will use the dispute resolution procedure under the *Kansas v Colorado* decree. The daily model is contemplating those future conditions and in Kansas' view inappropriately assumes that these native return flows are usable to extinction. A more appropriate assumption would be that those return flows are not usable to extinction.

In summary, the projects and contracts the Bureau is enabling at this juncture, taken together with the Southern Delivery System (SDS) and other actions, will increase Colorado's ability to more fully utilize the waters of the Basin. Given that actual operations may differ from the operations assumed by this model, we continue to stress the importance of independent review to assure Compact compliance. We recommend that a Compact compliance section be added to the EIS as a commitment of the Bureau along with on-going monitoring of both water quality and quantity.

### Water Quality

Because of the relationship of water quantity and water quality, the assumptions that cause concern in water quantity would also cause concern with the water quality evaluation. Therefore, water quality degradation is more apparent in the cumulative effect section.

Kansas is concerned with the potential for further water quality degradation at the Colorado-Kansas state line due to cumulative, long-term impacts of this and other projects the Bureau is enabling in the Basin. Water quality impacts associated with the AVC could become more pronounced as other water-related projects are implemented in the Arkansas River Basin. The concern here is if the enabled project expands use of higher quality upper basin water from the historic conditions, there is a real potential for further water quality degradation. A mitigation measure in the final EIS should include long-term water quality monitoring due to the uncertainties related to cumulative and long-term impacts.

### Conclusion

As expressed above, Kansas is concerned with assumptions of the daily model that the flows for Arkansas River at Las Animas be maintained at historic levels. With this assumption, the daily model demonstrates that it can show no impacts below this gage, but there is no assurance that there will be no impacts under actual operating conditions.

Including these projects being reviewed, there are several projects that are or will be enabled by their use of federal facilities. We believe, as a minimum, it is the Bureau's responsibility to conduct regular operational reviews and monitoring of these project's impacts

Signe Snortland  
Bureau of Reclamation  
October 30, 2012  
Page 4

on the Arkansas River Basin. Although useful, the EIS modeling cannot capture all of the situations that may arise and assumptions used in the modeling process may not be valid.

The operational reviews and monitoring should determine if the modeled conditions and assumptions were appropriate and whether the expectation of Compact compliance and no water quality degradation were valid. If not, then the projects should be reviewed to determine actual impacts to the river system. Such operational reviews and monitoring would represent a commitment by the Bureau to independently review impacts to the Arkansas River and compliance with the Arkansas River Compact.

Please feel free to contact Kevin Salter (620-272-2901) if you have any questions or need clarification. I appreciate the opportunity to comment.

Sincerely,



David Barfield, P.E.  
Chief Engineer

pc: Randy Hayzlett, Kansas ARCA Representative  
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