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

BEFORE MARTHA O. PAGEL, ARBITRATOR

Colorado Bonny Reservoir Proposal Dispute

**ARBITRATOR'S DECISION ON
BONNY RESERVOIR PROPOSAL DISPUTE**

November 27, 2013

I. History of the Case

This non-binding arbitration arises pursuant to Section VII (Dispute Resolution) of the Final Settlement Stipulation (“FSS”), executed on December 15, 2002 by the States of Colorado, Kansas and Nebraska (the “States”), and approved by the United States Supreme Court. *Kansas v. Nebraska & Colorado*, 538 U.S. 720, 123 S. Ct. 1898 (2003). The FSS was negotiated among the States to resolve litigation then pending before the Supreme Court relating to groundwater use under the Republican River Compact (“Compact”).

Section VII.A.1 of the FSS provides that any matter relating to Compact administration, including administration and enforcement of the FSS, in which a State has an “Actual Interest” (as defined in Section II of the FSS), shall first be submitted to the Republican River Compact Administration (“RRCA”). Section VII.A.7 provides that if such a dispute cannot be resolved by the RRCA, and the State raising the dispute desires to proceed, the dispute shall be submitted to non-binding arbitration unless otherwise agreed to by the States with an Actual Interest.

On April 5, 2013, Colorado submitted the Bonny Reservoir Accounting Proposal (“Bonny Proposal”) to the RRCA, requesting “Fast track” review.

On May 2, 2013, the RRCA rejected the Bonny Proposal with Colorado and Nebraska voting in favor of approval and Kansas voting against, and thereafter, Colorado initiated non-binding Arbitration proceedings pursuant to Sections VII.B. and C of the FSS, and the States entered into a joint Arbitration Agreement and Time Frame Designation.

Pursuant to the Time Frame Designation, on July 12, 2013, the States submitted a Stipulated Statement of Issues and briefs regarding Kansas’ Requests to Amend the Scope of the Disputes, and on July 24, the States submitted Response briefs. On August 5, 2013, the Arbitrator issued a Combined Decision on the Scope of Arbitrations.

On October 1-3, 2013, the Arbitrator conducted a joint evidentiary hearing in Denver, Colorado.

This decision includes the Arbitrator’s summary of the applicable standards and rules of law, a summary of the decision, and opinion including further discussion of the facts, conclusions, analysis and recommendations.

II. Nature of the Arbitration Proceeding

The arbitration addresses a request by Colorado for approval of the Bonny Reservoir Proposal by submitting the matter to dispute resolution under the FSS. An earlier version of the Proposal was initially included as part of the 2010 arbitration proceedings considering approval of the CCP Proposal, but was withdrawn from consideration before the hearing.

The FSS does not provide specific guidance as to the nature and scope of non-binding arbitration. However, based on the experience of the States to date, and direction contained in the Arbitration Agreement entered into among the States, it appears the process has two key purposes: First, to provide findings of facts, analysis and conclusions of law that may inform

further actions by the States; and second, to provide recommended remedies as may be appropriate to help promote resolution of the issues.

The primary issue presented for consideration in this arbitration is whether the Bonny Reservoir Proposal should be approved. The evaluation includes two sub-issues identified the Scope of Arbitration, as described further below.

In rendering a decision on the facts and law, the Arbitrator is guided by the same standards and rules applicable to a court. In recommending a proposed remedy, the Arbitrator offers the opinion of a third-party neutral, applying general background and experience in the field of water law and administration.

III. Applicable Standards/Rules of Law

Section IV of the FSS deals with Compact Accounting. Subsection IV.A provides that the States will determine the Virgin Water Supply, Computed Water Supply, Allocations, Imported Water Supply Credit, augmentation credit and Computed Beneficial Consumptive Use (“CBCU”) based on a methodology set forth in the RRCA Accounting Procedures.

Subsection IV.C. of the FSS provides, in pertinent part, that determination of stream flow depletions caused by Well pumping will be accomplished by the RRCA Groundwater Model as used in the RRCA Accounting Procedures. Subsections IV.C.1 through IV.C.1.9 describe the process by which the Groundwater Model was to be developed and ultimately adopted.

Section VII of the FSS describes the Dispute Resolution process. Subsection VII.A establishes the process for initial submission of a matter for review by the RRCA. Under Subsection 1 “any matter” relating to the Compact administration, including administration and enforcement of the FSS, shall first be submitted to the RRCA. Under Subsection VII.A.2, each member State has one vote on each issue, and RRCA action must be by unanimous vote. Subsection VII.A.3 provides the options of a “fast track” process – requiring action within 30 days – if a State believes the issue presented for RRCA determination requires immediate resolution.

Article IX of the Compact requires decisions by the RRCA, as the administering body of the Compact, must be unanimous and consistent with the provisions of the Compact.

A key legal question presented by the briefing is whether a State, as a member of the RRCA, is bound to a standard of reasonableness in exercising its discretion under the FSS. This issue was addressed in the 2010 arbitration in relation to the Colorado Compact Compliance Pipeline dispute, and is also raised in connection with the related CCP Proposal under review at this time. As determined in the 2010 proceeding, the States are obligated to act reasonably, and in good faith, in fulfilling their duties under FSS. (Arbitrator’s Final Decision, CCP Dispute, October 7, 2010, p.4.) These obligations arise under general principles of contract law applicable to stipulated agreements such as the FSS. As noted in the 2010 Decision, the U.S. Supreme Court has determined the terms of an interstate compact are not subject to these same general rules because of the unique character of a compact as not only an agreement among the affected States, but also as a federal statute enacted by Congress. (*See, Alabama v. North Carolina*, 130 S. Ct. 2295, 2212-2213, 176 L. Ed. 2d 1070 (2010)). In contrast, the FSS is a

stipulated consent decree, separately negotiated by the three States and not enacted into federal or state law. As such, it is an agreement subject to general principles of contract law. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 (1975). General principles of contract law include an implied duty of good faith and fair dealing. (Restatement (Second) of Contracts §205 (1981); *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139, 158 (E.D. N.Y., 2000).) Further, when a contract includes provisions for approval by the parties, the parties must exercise discretion reasonably, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.” *Behara v. Baxter Health Care*, 956 F.2d 1436, 1443 (7th Cir. 1992).

In its Post-Hearing Brief, Kansas objects to the prior decision on this issue, arguing that the Compact itself – not the FSS – establishes the requirement for unanimous decision-making, and that nothing in the FSS can override that provision or impose additional requirements on the decision-making process. (Kan. Brief, p. 5-7.) Kansas also re-asserts arguments made in the prior arbitration that neither the Arbitrator nor the Supreme Court has authority to revise or override the Compact requirement for unanimous approval. (*Id.*)

As a separate legal issue, Kansas provides argument in support of its own ability – under an apparent reasonableness standard for implementation of FSS requirements – to rely on expert testimony developed during the arbitration proceeding to further explain and inform its RRCA decisions on the matters now in dispute. (*Id.*, at 8-10.) This argument is persuasive. The argument was made in response to Colorado’s attempt to exclude certain evidence during the hearing on the basis that it was not available to Kansas at the time of the RRCA decision on the revised CCP Proposal, and therefore not relevant to an assessment of whether the Kansas vote was “reasonable.” Kansas is correct in asserting that basic principles of litigation allow parties to engage experts to further support and assist in the advocacy process. Additionally, the nature of the “fast track” process itself suggests a need for States to act quickly on the basis of the information and analysis that can be reasonably accomplished within a 30-day period. Accordingly, Kansas is entitled to rely on its expert witnesses and evidence to further support its positions in this proceeding.

IV. Summary of Decision

Colorado offers a reasonable and persuasive proposal for modifying inputs to the Groundwater Model and the method in which Model outputs are summarized in response to the current conditions at Bonny Reservoir. The Bonny Proposal also reasonably assesses the impact of Colorado’s groundwater pumping on the Basin’s Virgin Water Supply under existing provisions of the Groundwater Model, Accounting Procedures, FSS and Compact. However, the objections raised by Kansas are not unreasonable; therefore, as a matter of law, the Bonny Proposal cannot be approved.

In this proceeding it is not enough for Colorado to demonstrate that its proposal is reasonable. When approval is required by the RRCA, the decision must be unanimous, subject to each state’s obligation to act reasonably and good faith. Here, the deciding factor is whether Kansas has met those obligations. Because the Bonny Proposal reflects a substantial change of

circumstances that previously has not been encountered in administration of the Compact and FSS, it is not unreasonable for Kansas to raise questions about whether existing procedures are adequate to address the potential impacts. Although Colorado proposes only technical changes to Model inputs and the way Model outputs are utilized, Kansas has expressed reasonable concerns about whether additional changes should be considered to avoid potentially excessive increases in unaccounted residuals that will have the effect of substantially reducing Colorado's CBCU, to Kansas' detriment. Colorado has a strong argument that, regardless of Kansas' concerns, it was entitled to rely on the existing protocols in making its decision to drain Bonny Reservoir, and is now entitled to approval of the changes needed to reflect that decision in the Model. Based on the weight of evidence presented at this hearing, the scale might tip in favor of Colorado for approval of the Proposal. But the legal standard here is not a preponderance of evidence, or any measure of the weight of evidence. By raising questions that are not unreasonable, Kansas has secured its right to withhold approval at this time.

The decision is in favor of Kansas and against Colorado and Nebraska.

V. Opinion

A. Overview of the Proposal

Bonny Dam is a U.S. Bureau of Reclamation project located on the South Fork of the Republican River in Colorado. The Reservoir has a state water right with a priority date after the effective date of the Republican River Compact. (C-25.)

From 1951 until 2012, water was stored in Bonny Reservoir and beneficially used in Colorado for recreation and fish and wildlife purposes. (C-9, p. 4.)

In 2011, the Colorado State Engineer ordered the Bureau of Reclamation to release all waters then held behind Bonny Dam and, in the future, to pass all inflows through the dam. As a result, the Reservoir was completely drained by May, 2012. The action was taken to help Colorado achieve and maintain Compact compliance. (C-15, p. 11.)

The former active storage pool in Bonny Reservoir is empty and the outflow gates in Bonny Dam have been left open so as to pass all inflow reaching the gates. There is no dead pool and no water in storage. (J-2, p. 2, C-15, p.11, C-3, p.13.)

Bonny Reservoir is planned to be operated as a "run of the river" dam without active storage and is unlikely to store water in the future; however, the Bonny Dam could continue to provide flood control benefits including related temporary storage as needed. (J-2)

The RRCA Groundwater Model currently simulates Bonny Dam and Reservoir as an active storage reservoir. (*Id.*)

The Bonny Proposal requests changes in Model inputs to reflect three potential conditions: "Dry Bonny" when the monthly average reservoir stage is less than 3638.5 feet;

“Small Bonny” for any stage between 3638.5 and 3679.82; and “Full Bonny” when the stage reaches 3679.83 feet. (*Id.*).

The Bonny Proposal does not include changes in the formulas provided in the current RRCA Accounting Procedures, but it changes how the output of the Groundwater Model is summarized for use in the accounting spreadsheets. (C-3, p. 14-15.)

B. Disputed Issues

Pursuant to the Arbitration Agreement and pre-hearing rulings on the scope of arbitration, two key issues were identified for consideration in connection with the principal question of whether the Bonny Reservoir Proposal should be approved. Each issue is addressed below, along with further analysis of the principal question.

1. Whether the Bonny Proposal is consistent with Subsections III.D.2 and IV.A.2.e.2 of the RRCA Accounting Procedures and Reporting Requirements.

Ultimate Findings and Conclusions

The Bonny Proposal does not propose changes to the Accounting Procedures and Reporting Requirements in Subsection III.D.2 and IV.A.2.e.2 and therefore is consistent with those provisions.

Analysis and Recommendations

Subsection III.D.2 of the Accounting Procedures describes the procedure for calculating the annual CBCU of surface water, including the following provisions for reservoirs:

“...The Computed Beneficial Consumptive Use of surface water from Federal Reservoir and Non-Federal Reservoir evaporation shall be the net reservoir evaporation from the reservoirs, as described in Subsections IV.A.2.e.-f.

Under Section II of the Accounting Procedures, the term “Federal Reservoir” is defined to include Bonny Reservoir.

Subsection IV.A.2.e. describes the specific formulas and procedures for computing evaporation for Bureau of Reclamation Reservoirs on a monthly basis.

Colorado asserts the Bonny Proposal is fully consistent with Subsections III.D.2 and IV.A.2.e.2 of the RRCA Accounting Procedures and reporting requirements for surface waters because it requires no changes in the current procedures. Under the Bonny Proposal, Colorado argues when no water is being stored in Bonny Reservoir, no evaporation calculation will be made. (J-2, Ex. 1.) When water is stored under either the Small Bonny or Full Bonny conditions, calculation of evaporation will be made according to the procedures in IV.A.2.e.2. (C-3, p. 14.) Colorado explains the purpose of the Proposal is to change inputs to the RRCA Groundwater Model, and how the output of the Model is summarized for use in the accounting

spreadsheets. (*Id.*, C-5, p.11.) The method for setting Model inputs and for summarizing Model outputs is not otherwise addressed in the Accounting Procedures. (C-3, p.14-15.)

Kansas acknowledges the proposed use of the Accounting Procedures for calculating the impacts, or changes, to evaporation losses and reservoir seepage from draining Bonny Reservoir is acceptable. (Kan. Brief, p. 30.) However, as addressed further in Section V.B.2, below, Kansas contends the Colorado Proposal also has the effect of granting a “credit” to Colorado for reductions in groundwater pumping that do not actually occur. Kansas argues reliance on the existing procedures and merely changing the model inputs, as Colorado proposes, results in an outcome that deviates from “hydrological reality” by substantially reducing Colorado’s CBCU for groundwater, even though Colorado will be taking no other actions to reduce its groundwater pumping. (*Id.*) Kansas asserts this results in an undue benefit for Colorado, and causes harm to Kansas.

Despite the concerns expressed by Kansas, the Bonny Proposal does not include any changes to the Accounting Procedures and Reporting Requirements in Subsections III.D.2 and IV.A.2.e. Rather, Colorado proposes to apply the existing formulas to reflect reservoir conditions as they exist at any given time. Because no changes are required to implement the proposal, and use of the existing procedures will give rise to results that reflect actual reservoir conditions, the Proposal is determined to be consistent with the identified provisions.

2. Whether the proposed model change reasonably assesses the impact of Colorado’s groundwater pumping (computed beneficial consumptive use) on the Basin’s Virgin Water Supply.

Ultimate Findings and Conclusions

The Bonny Proposal reasonably assesses the impact of Colorado’s groundwater pumping and related CBCU on the Basin’s Virgin Water Supply because the approach is consistent with existing methodologies and assumptions reflected in the Groundwater Model and Accounting Procedures.

Analysis and Recommendations

Kansas argues the proposed changes to model inputs do not reasonably assess the impacts of Colorado’s groundwater pumping on the Basin’s Virgin Water Supply. (Kan. Brief, p. 30-37.) Specifically, Kansas argues the Bonny Proposal is deficient because it results in an undue benefit to Colorado through substantial and unreasonable reductions in Colorado’s CBCU for groundwater. (*Id.*) Kansas asserts this would occur for several reasons: First, because the Proposal would effectively move the accounting point downstream from its current location at Bonny Reservoir to Benkelman, Nebraska – resulting in “paper water gains” for Colorado. Next, because the Proposal fails to adequately address a substantial increase in “residuals” under the Dry Bonny condition. (Residuals are the computed difference between the sum of the individual pumping impacts for each State and the total impact that would be calculated if the pumping in all of the States were considered simultaneously. (K-3, p. 6-7.) Colorado explains residuals evident in the Model are the result of the Model’s representation of nonlinear behavior of the physical system that do not reflect “activities of man” charged to a State’s allocation under the

Compact. (C-2, p. 5.) Kansas also asserts the Proposal fails to adequately address increased consumptive uses from evapotranspiration. (Kan. Brief, p. 38-40.)

Colorado counters that the proposal does reasonably assess the impact of Colorado's groundwater pumping because it does not change any provisions of the Compact, FSS, or Accounting and Reporting Procedures. Colorado acknowledges a change in residuals, but argues the treatment of residuals under the Bonny Proposal is consistent with Compact requirements. Colorado also argues the position taken by Kansas in opposing the Proposal is unreasonable because it is inconsistent with the reality of current conditions at Bonny; it does not result in a paper water rights gain as Kansas asserts; and Kansas' current objections to the Bonny Proposal based on the impact of residuals is inconsistent with arguments Kansas has made in other proceedings. (Colo. Brief, p. 16-32, citing to the record; C-2, p. 4-6.)

The States appear to agree that the proposed changes to Model inputs will have the effect of removing an accounting point in Colorado during Dry Bonny conditions; but the necessary inquiry is what does that mean and why does it occur? The expert reports and testimony offered by each State provide extensive – and often conflicting – details and analysis on this point. Kansas contends the draining of Bonny Reservoir enables Colorado to obtain accounting benefits under the FSS that vastly exceed the clear savings in evaporation and seepage. This change results in a significant reduction in the computed pumping depletions for Colorado, even though Colorado has not actually reduced groundwater pumping. (K-7, p. 4., K-10, p. 8.) Colorado responds that the change is appropriate to reflect the fact that the reservoir has been drained, and inflow is now passed through the site as streamflow. (C-9, p. 4.) Colorado acknowledges there are transit losses on the South Fork between the outlet of Bonny Reservoir and the Benkelman Gage, but explains this condition has been reflected in the Model from the outset, and that the proposed modifications by Colorado to represent a drained Bonny Reservoir are exactly the same as those used to represent the South Fork from 1940-1950 (pre-Bonny) in the groundwater model. (*Id.* at 4-8.)

Kansas responds that when the accounting for Colorado well depletions is moved to Benkelman, credit to Colorado accrues for losses in the 54-mile reach downstream. This effectively converts CBCU currently being assessed to Colorado to unaccounted residuals which are “excused” under the accounting procedures. (K-7, p. 4, K-8, 12:18-13:6.) Kansas argues it has been consistent in expressing concern that any change to the Accounting Procedures that generates larger residuals, and has a trend toward increasing residuals, would be inappropriate. (C-21, p. 3; Kan. Brief, p. 36.) Colorado acknowledges the Proposal will decrease Colorado's CBCU and increase residuals, but counters that the treatment of residuals under the Bonny Proposal is no different than elsewhere in the Model and is consistent with the Compact's methodology for computing a State's CBCU. (C-2, p.5.) Colorado also notes that the effect would be the same if Colorado were to comply with its obligations on the South Fork by curtailing groundwater pumping. (C-3, p. 18.)

With respect to the treatment of residuals, Colorado also asserts that the argument Kansas offers in this arbitration is inconsistent with the position it has taken with respect residuals in other proceedings. (Colo. Brief, p. 26-27.) Kansas responds that its position has been consistent based on the facts of this proposal. (K-11, p. 11, p. 37-39.) Further, in a Notice of Supplemental Authority filed November 18, 2013, Colorado offers additional support for its argument on the

treatment of residuals, referencing a recently-issued Report of the Special Master in *Kansas v. Nebraska and Colorado*, No. 126, Orig., that includes findings on the subject. In response, on November 22, 2013, Kansas filed a Combined Notice of Supplemental Authority and Response to Colorado's Notice of Supplemental Authority. Kansas argues it would be prejudicial to Kansas and inappropriate for the final decision in this arbitration to rely upon the factual findings of the Special Master related to residuals without the related record materials that are absent from this record or without additional time to respond. (Kan. Response, p. 2.) This argument is correct. Even without consideration of the supplemental authority, however, the evidence presented by Colorado establishes that the proposed treatment of residuals under the Bonny Proposal is consistent with existing provisions of the Model and Accounting Procedures.

The objection Kansas raises regarding increased evapotranspiration from phreatophytes presents a similar analytical question: even assuming such an increase (which Colorado disputes), the objection is rebutted by Colorado's evidence that under existing protocols, evapotranspiration from plants which are concentrated around Federal Reservoirs is not included in the CBCU for any State. (C-2, p. 5.) The Colorado Proposal does not propose any change in the way the impact of evapotranspiration would be addressed under the Model or Accounting Procedures.

Based on the above examples, it seems clear the Bonny Proposal will result in accounting benefits to Colorado that will assist Colorado in meeting its Sub-basin non-impairment obligations under the Compact. But the evidence also demonstrates that the Bonny Proposal reasonably assesses the impact of Colorado's groundwater pumping impacts on the Virgin Water Supply because it proposes no changes in how such impacts are computed under the Model. Although the Proposal will result in a reduction of groundwater CBCU for Colorado, that potential benefit is consistent with Compact requirements and presumably part of the benefit of the bargain that Colorado made in deciding to drain the reservoir as a means of achieving Sub-basin compliance.

3. Whether the Bonny Proposal Should Be Approved

This is a razor-thin call. Colorado offers substantial and persuasive evidence in support of the Bonny Proposal. The evidence establishes a reasonable basis for modifying the Model inputs and the manner in which Model outputs are summarized to reflect actual conditions at Bonny. The approach is consistent with existing Accounting Procedures, and consistent with the way in which similar conditions are addressed by the Model in other Sub-basins. The proposed changes are technical and fact-based and necessary to accurately reflect the physical conditions at Bonny.

Further, Colorado's decision to drain Bonny Reservoir reflects a reasonable and legitimate strategy to address non-compliance in the South Fork Sub-basin. The decision to drain Bonny was a difficult one for Colorado; the reservoir provided recreational and other benefits for Colorado and the region that are now lost. However, the decision was made as an apparent trade-off to help Colorado achieve compliance with its Compact obligations in the South Fork Sub-basin. This decision was Colorado's to make. Unlike the augmentation plan under consideration in the CCP Proposal, nothing in the FSS required RRCA approval of a plan to drain the reservoir.

However, RRCA approval is needed to change the Model inputs and summaries, as described in the Proposal. When the inputs are changed, as Colorado proposes, the outcome from running the Model will be a recalculation of CBCU and downstream residual impacts that will be in Colorado's favor. Kansas objects because the results will create an apparent windfall to Colorado by transforming consumptive uses formerly charged to Colorado to unaccounted residual consumptive use that is not charged to any State. Thus, Colorado gains a substantial reduction in its own CBCU for groundwater without taking any related steps to reduce groundwater use. The change does not limit Kansas' ability to make use of its own Allocation of South Fork waters, but it may result in Colorado being able to gain access to unallocated, excess water that may be available.

Colorado relied on the workings of the Model and Accounting Procedures in this manner when it decided to drain to Bonny, and it now reasonably asserts that it should be able to make the requested changes in order to achieve the expected results. But the need for RRCA approval opens the door for Kansas to question the overall impacts of the Proposal, including consideration of whether the existing policies and procedures are adequate. This is precisely the question that Colorado and Nebraska apparently hoped to avoid in objecting to Kansas' prior proposals to broaden the scope of the arbitration proceeding. (*See*, Arbitrator's Combined Decision on Scope of Arbitrations, p.8-10.) In ruling to allow Sub-issue 2 to be addressed in the current arbitration proceeding, the Arbitrator determined that the broader issue presented for arbitration by Colorado involved some change in the model or inputs, which allowed for further review as to the potential impacts:

"The issue presented by Kansas would not arise independently of the Bonny Proposal. Accordingly, it is properly viewed at this stage of the proceeding as a sub-issue within the scope of the principal question of whether the Bonny Reservoir Proposal should be approved. During the evidentiary hearing, and in subsequent argument, the States can further address the question of whether, in fact, the Proposal will change the model as well as the potential significance of changes to model inputs.

"Similarly, the fear expressed by Colorado that Kansas may seek to use this issue as a vehicle to propose further changes in the model is speculative and not ripe for a decision at this time. If and when Kansas offers such a proposal in this Arbitration, Colorado and Nebraska will have the opportunity to raise objections and the issue can be addressed." (*Id.* at 9.)

At the hearing, Kansas did not offer a proposal for changing the Model, but it did raise the issue of whether further changes may be needed in the Proposal to reflect the unique circumstances created by draining the reservoir – circumstances that were not specifically anticipated or addressed when the Model was constructed. Colorado and Nebraska assert Kansas is not dealing fairly, and that its questions are intended only to delay or prevent Colorado from realizing the benefit of its efforts. Indeed, it is inevitable that a finding in favor of Kansas will further delay Colorado's ability to receive the benefits of its difficult decision.

At this point, however, because of the applicable legal standard, the decision must go to Kansas. The evidence Kansas presented at the hearing demonstrates a reasonable basis for further evaluation of the Proposal and there is not sufficient evidence to support a finding of bad

faith or unfair dealings by Kansas. Under the construct of the FSS and Compact, the States are therefore left with further negotiation on the issue, or further litigation.

Dated: November 27, 2013



Martha O. Pagel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that on 27th day of November, 2013, I served a copy of the foregoing **ARBITRATOR'S JOINT DECISION OF LEGAL ISSUES** by e-mail and by sending a true and correct copy thereof by overnight courier on:

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