

PIPELINE ARBITRATION – ROUND 2

Submitted by Deb Daniel, RRWCD General Manager

The second arbitration on the Compact Compliance Pipeline began on Tuesday, October 1, 2013. The proceedings were held at the Ralph L. Carr Judicial Building in Denver, CO. The states once again selected Ms. Martha Pagel, an attorney from Oregon, to be the arbitrator. Representatives from Kansas, Nebraska and Colorado participated in the proceedings.

Ms. Pagel heard testimony regarding the Compact Compliance Pipeline proposal and Colorado's proposal on how to properly account for Bonny Reservoir now that it has been drained.

Opening Statements

Each state gave opening statements. Scott Steinbrecher, from the Colorado Attorney General's office stated "These proceedings are about a 'moving target'. Colorado has strived for years to get the Compact Compliance Pipeline (CCP) approved by the Republican River Compact Administration."

"The Republican River Water Conservation District (RRWCD) has paid for and built the CCP. The RRWCD has paid well owners to voluntarily retire wells. These actions have been taken in an effort to assist Colorado in reaching compact compliance."

"Colorado brought the CCP to the Republican River Compact Administration for approval and Kansas has denied this proposal. In fact, Kansas keeps 'moving the target'. Kansas has not worked with Colorado. Kansas has no reasonable reason to not work with Colorado. Kansas keeps coming up with new objections and more restrictions than should be allowed."

Tom Wilmoth, legal counsel for Nebraska stated that Nebraska supports Colorado's proposals. "Colorado has gone above and beyond in their efforts to get the CCP approved. Kansas has been unreasonable and has no basis for denying the CCP proposal. Nebraska also has tried to hit a moving target in regards to receiving approval from Kansas on proposals NE has submitted to the RRCA."

Chris Grunewald from the Kansas Attorney General's office stated Kansas has three issues with the CCP proposal. Kansas also has a general issue with the proposal on Bonny Reservoir. Grunewald stated that KS & CO have been able to reach agreement on the other five of the eight items the states had disagreed upon the past.

Testimony from Colorado

On behalf of Colorado, Dr. Willem Schreuder and Mr. Jim Slattery testified on how the ground water model calculates the use of water in the Republican River Basin, and how the states should account for deliveries from the CCP and a dry Bonny Reservoir.

Dr. Schreuder was asked questions regarding calculated beneficial consumptive use through the model and how he recommends the credit should be given to Colorado on the water delivered by the pipeline.

Mr. Slattery was asked questions regarding the Final Settlement Stipulation and how the Compact Compliance Pipeline is designed to assist Colorado in coming into compliance with the Republican River Compact on the North Fork and in all of the tributary sub-basins.

Dennis Coryell, President of the Republican River Water Conservation District was asked to give a history of what actions Colorado decided to make in an effort to reach compact compliance. “Initially the RRWCD was told that setting up voluntary conservation programs would achieve compliance.”

“Later,” Coryell continued, “it was reported to the RRWCD that conservation programs alone would not achieve compliance. Ken Knox, who at that time was with the Colorado State Engineer’s office, came to the Basin and told well owners that even with the curtailment of all large capacity wells in Colorado – our state could not reach compliance with the compact for decades. The RRWCD then started to consider building a pipeline to satisfy the compact.”

When asked about Bonny Reservoir, Coryell reported that he and David Robbins, legal counsel to the RRWCD, traveled to Topeka, KS in 2010, to meet with David Barfield, in an effort to negotiate for the pipeline. During the conversation, Mr. Barfield told Coryell and Robbins that if Colorado were to drain Bonny Reservoir, Colorado would reach compliance on the south fork sub-basin.

In answering one question from KS, Coryell spoke to Ms. Pagel. “From a farmer’s point of view, this pipeline has cost me personally. No one else in this room has paid what I have paid toward the pipeline – and yet 5½ years after we first presented the pipeline proposal, we still do not have approval from the RRCA. I am extremely frustrated. Five and a half years is too long and is not acceptable.”

Dick Wolfe, Colorado State Engineer, was the last witness for the State of Colorado. Mr. Wolfe was asked numerous questions regarding the history of the Final Settlement Stipulation and on the groundwater model. He was also asked about possible programs that would reduce water pumping in Colorado.

Testimony from Nebraska

Dr. Jim Schneider, Deputy Director of the Nebraska Department of Natural Resources was brought to the stand by Nebraska. Kansas and Colorado did not cross-examine Dr. Schneider.

Testimony from Kansas

At the beginning of Kansas’ case, Burke Griggs, attorney from the Kansas Attorney General’s Office stated, “The Compact Compliance Pipeline and the drying up of Bonny Reservoir will permanently change the Republican River Basin. Building the CCP is unprecedented. Draining Bonny Reservoir is unprecedented.”

Mr. Griggs stated that KS insists that when considering the Compact Compliance Pipeline, the RRCA should run the groundwater model with the augmented water from the pipeline and another model without the augmented water provided by the pipeline. “The CCP is unreasonable and draining Bonny Reservoir is unreasonable.” stated Mr. Griggs

David Pope, former Chief Engineer from KS, was asked questions about his participation in writing the Final Settlement Stipulation (FSS). Scott Steinbrecher from Colorado asked Mr. Pope if the FSS required reasonable actions by states to negotiate proposals and if states can vote unreasonably on proposals. “States can vote unreasonably.” stated Pope. Mr. Pope’s testimony, in effect, was that KS had veto power over the other states.

Tom Wilmoth from Nebraska asked Pope if Kansas wants curtailment of wells in northeast Colorado. “I do not know of this position in Kansas,” replied Pope. Wilmoth then asked if Kansas has been

reasonable in voting against every proposal brought before the RRCA. Pope stated he did not think KS was unreasonable for voting against every proposal.

Steve Larson and Dale Book, outside consultants for Kansas, were asked questions on calculating water runs in the groundwater model. Larson and Book were members of the engineering team involved in writing the Final Settlement Stipulation.

Next on the stand was David Barfield, KS Chief Engineer. Steinbrecher asked Barfield, "Has Colorado tried to work with Kansas in trying to reach compliance?" "Yes," replied Barfield. "How long has CO tried to work with Kansas on the Compact Compliance Pipeline?" asked Steinbrecher. "Five years," stated Barfield. "How much longer do you anticipate CO will have to continue to work with KS on this project?" continued Steinbrecher. "Well... until Kansas' concerns are addressed." Barfield responded.

Scott Ross, recently retired water commissioner from Kansas, was the last witness from Kansas to take the stand. He was asked questions about his study of phreatophytes in the Basin. Steinbrecher asked, "Is Kansas charged for phreatophytes on the compact?" "No," replied Ross.

Ross was asked if he had inspected Bonny Reservoir after Mr. Wolfe had declared it completely drained. "Yes, I did go to Bonny after it was drained and I saw a pool of water behind the dam." Mr. Ross said he took a photo of the water but was not able to find it to submit it as documentation for the arbitration.

Colorado asked to bring Willem Schreuder and Dick Wolfe back to the stand. Dr. Schreuder was asked to explain how groundwater models are run with and without federal reservoirs. "Now that there is no Bonny Reservoir, the Republican River model needs to be changed to consider the removal of Bonny as a reservoir. Right now the groundwater model recognizes Bonny Reservoir as an 8 square-mile body of water – when in reality there is no body of water in Bonny – only a stream flowing through the bottom of the dam. The way the groundwater model is run needs to be changed to take Bonny Reservoir out of the model run."

CO State Engineer Dick Wolfe was asked to explain how Bonny Reservoir was drained. "Colorado monitored the draining of Bonny and continues to monitor conditions of Bonny after rain events in the area. Water dissipates quickly after rainfall events through seepage and evaporation. There was no dead pool storage in Bonny Reservoir prior to draining Bonny. Now there is only a stream channel flowing through the bed of the dam."

When asked about the testimony Scott Ross had given stating he saw a pool of water behind the dam after Bonny Reservoir was drained, Mr. Wolfe replied, "I also inspected Bonny Reservoir after it was drained. I have seen what Mr. Ross thought was a pool of water when in fact it is only an optical illusion. When standing on the top of the dam what appears to be a pool of water is in reality only a sand bar where no weeds will grow. I have inspected this area myself."

Following Mr. Wolfe's final testimony, Ms. Pagel closed the arbitration hearing. Simultaneous closing briefs are due from each state by October 25th. The Arbitrator's written decision is due 30 days later. Colorado, Kansas and Nebraska then have 30 days to accept or reject the arbitrator's decision.