

**United States District Court  
District of Nebraska**

**1 Frenchman Cambridge Irrigation District,  
a Nebraska Political Subdivision,  
2 Bostwick Irrigation District in Nebraska, a  
Nebraska Political Subdivision, and  
3 Dale Cramer,  
4 Jay Schilling, and  
5 Steve Henry**

**Plaintiffs,**

**v.**

**1 Dave Heineman, Governor of Nebraska,  
2 Brian Dunnigan, Director,  
Nebraska Dept. of Natural Resources,  
3 Upper Republican Natural Resources  
District, A Nebraska Political Subdivision,  
4 N-CORPE, An Interlocal Cooperative,  
And  
5 United States of America,  
6 United States Department of the Interior,  
Bureau of Reclamation,  
7 Kenneth Salazar, Secretary of Interior,  
8 Michael Connor, Commissioner of Bureau  
of Reclamation, and  
9 Michael Ryan, Director, Great Plains  
Region, Bureau of Reclamation,**

**Defendants.**

**Case No.**

**Judge:**

**Mag. Judge:**

**Complaint,  
Request for Injunction &  
Jury Demand**

Frenchman Cambridge Irrigation District (“FCID”), Bostwick Irrigation District in Nebraska (NBID), Dale Cramer, Jay Schilling, and Steve Henry, Plaintiffs, allege:

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### Case Overview

1. FCID and three (3) of its water user patrons who are directly impacted by the events described below, and NBID, seek injunctive relief and declaratory judgment, for the wrongful acts and threatened actions of Defendants. Defendants have caused or permitted, and threaten to further cause and permit, groundwater of the Republican River Basin and perhaps the Platte Basin, to be pumped from the aquifer, and dumped into

open streams to augment streamflow of the Republican River's mainstem for the purpose of delivering to the State of Kansas sufficient water to comply with the Republican River Compact (RRC the Republican River Accounting Rules (RRCA), and modified Final Settlement Stipulation (FSS) terms.<sup>1</sup>

2. The state Defendants, the State of Nebraska, and Political Subdivisions of the State, announced plans which threaten to interfere with stream flow, prevent and prohibit inflows of water from streams and tributaries of the Republican River to FCID's and NBID's canals, and thereby harm FCID, NBID and their users. Plaintiffs are Dale Cramer, Jay Schilling, and Steve Henry, each of whom is a water user patron of FCID. They collectively comprise the Board of Directors of FCID and are elected by its water user patrons to provide policy oversight and operation for FCID. Unless relief is granted, FCID, NBID, the individual Plaintiffs and similarly situated water user patrons of both Districts, will suffer substantial losses. The losses are threatened by the Defendants and will be the proximate result of the actions they threaten if those actions are taken.

3. The state Defendants threaten to disrupt groundwater supplies and natural movement to surface streams, and to cause groundwater to bypass streams with which it naturally interconnects. By doing so, the state Defendants threaten to disrupt and diminish inflows from naturally occurring groundwater accretions to streams, and from streams to federal reservoirs and lakes in Nebraska, and thereby reduce, disrupt, and intermittently eliminate the availability of surface waters to flow into the irrigation canals and ditches of FCID and NBID, which hold prior and superior water use rights and superior natural flowage easements. These rights predate pertinent water regulations by the State of Nebraska and the IMP and regulations of the URNRD, DNR and state Defendants.

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<sup>1</sup> Nebraska approved the RRC. *Neb Rev Stat App* § 1-106. So did the other states, Kansas and Colorado, and the U S Congress as explained, *infra*. The US Supreme Court approved a 2002 Final Settlement Stipulation as its most recent act concerning approval of the RRC and revisions to it. *Kansas v Nebraska*, 538 US 720 (2003). Litigation between Kansas, Nebraska & Colorado is now pending in the U S Supreme Court in Orig. No. 126.

4. FCID and NBID are each a party to a separate contract between each District and the United States of America, acting through the Department of Interior (DOI), and its subagency, the Bureau of Reclamation (BOR). The Great Plains Region of BOR administers the contracts. BOR contracted to deliver water to FCID and to NBID. FCID and NBID respectively, agreed to pay BOR. But, BOR's ability to obtain water to deliver is diminished, and faces threats to diminish further and be destroyed, by the actions and threatened actions of the state Defendants. The federal Defendants, including BOR, have not protected FCID's or NBID's water supply. BOR has not delivered contracted water due to the accomplished and threatened actions and omissions of the state Defendants. FCID seeks injunctive and declaratory relief against the federal Defendants for their failure to deliver, and protect the supply of, water to FCID and NBID. They also seek declaratory judgment and injunctive relief against the state Defendants for disruption and misuse, and threatened disruption and misuse, of waters of the Republican River Basin in Nebraska (Basin). These waters include both surface and groundwater which are, and are admitted by Nebraska to be, to be hydrologically interconnected.

5. FCID, NBID, and the individual Plaintiffs, seek (a) a permanent injunction, (b) a declaratory judgment declaring the rights of Plaintiffs and duties of all Defendants, concerning waters of the Basin, and (c) attorney's fees for the services of their lawyers along with litigation costs to prosecute these claims.

### **Jurisdiction, Venue**

6. The United States District Court has subject matter jurisdiction under 28 *USC* §§ 1331, 1346(f), 1361 and 1367a, and 43 *USC* §§ 390uu & 666a. Jurisdiction lies here because:

6.1 This case poses questions of federal law arising under the *Constitution*, and an Interstate Compact enacted pursuant to the *Constitution*.<sup>2</sup> It also raises issues under the Reclamation Laws of the United States, and under

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<sup>2</sup> 28 *USC* § 1331. The Republican River Compact was enacted by the affected States and ratified by Congress and signed by Federal officials making the United States a party to the Compact, pursuant to

contracts between FCID and NBID respectively, and the United States. These are described below.

6.2 The United States is a Defendant, and the objective of this litigation is adjudication of rights to use the waters of a substantial part of a river system and the administration of such rights, as the United States is the owner of, and has acquired water rights by appropriation under state law, or otherwise, and is a necessary party to this suit.<sup>3</sup> One additional purpose of this action is to declare and quiet rights to title and use of an estate or interest in water in which an interest is claimed by the United States, i.e., the interest in water which occurs coincidentally with real estate.<sup>4</sup>

6.3 The United States has consented to be sued in this Court with respect to issues related to its contacts with FCID<sup>5</sup> and NBID, and in suits adjudicating rights to water usage in any river or river Basin.<sup>6</sup>

6.4 This Court has supplemental jurisdiction of pendant state law claims.<sup>7</sup> These claims are inextricably related to the federal claims described below. For convenience in understanding the Claims and issues presented, but not for the purpose of prioritizing them, Plaintiffs' claims against state Defendants are described first, below. The acts and omissions of the state Defendants impacts upon, and interferes with, Plaintiffs' ability to receive water for surface irrigation use, and ability of the federal Defendants to deliver water to FCID and NBID.

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<sup>3</sup> 43 *USC* § 666

<sup>4</sup> 28 *USC* § 1346(f); 28 *USC* § 1361.

<sup>5</sup> 43 *USC* § 390uu provides: "Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section can be brought in any United States district court in the State in which the land involved is situated."

<sup>6</sup> 43 *USC* 666a provides: "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

<sup>7</sup> 28 *USC* § 1367(a)

7. Venue is proper in the District of Nebraska, pursuant to 28 USC § 1391(b)(2) & (e)(1) and 28 USC § 1402 as Plaintiffs reside here. A substantial part of the events or omissions giving rise to the claims occurred here, and the water at issue is in the District of Nebraska. Many of the Defendants are present here or have interests here.

### **Plaintiffs & Their Interests**

8. The Plaintiffs are:

8.1 **Frenchman Cambridge Irrigation District (FCID)**, a Nebraska Political Subdivision organized under *Neb Rev Stat* §§ 46-101 through 128. It delivers natural flow irrigation water to more than 45,600 acres of southwest Nebraska farmland, using four (4) different canal systems. FCID holds direct flow permits with priority dates entitling it to divert water from the surface streams of the Republican River Basin to its canals. These direct flow permits bear priority dates ranging from December 22, 1890, to November 13, 1987. They permit FCID to divert 531.5 cubic feet per second of natural flow. FCID is the eighth largest irrigation district in Nebraska based on acres served. FCID lies upstream from the Harlan County Dam and Lake on the Republican River.

8.2 **Bostwick Irrigation District in Nebraska (NBID)**, a Nebraska Political Subdivision organized under *Neb Rev Stat* §§ 46-101 through 128. It delivers natural flow irrigation water to approximately 22,455 acres of south central Nebraska farmland, using the five canals including the Franklin pump canal, Naponee Canal, Franklin Canal, Superior Canal and Courtland Canal. NBID holds direct flow permits with priority dates entitling it to divert 187.93 cubic feet per second of natural flow water from the surface streams of the Republican River Basin to its canals. These direct flow permits bear priority dates that range April 3, 1946 to September 10, 1982, and some have earlier historical antecedents. NBID lies downstream from the Harlan County Dam and Lake on the Republican River. In some of its activities, NBID interacts contractually with the Kansas Bostwick Irrigation District, an entity that exists

and serves a geographic region located in the Republican River Basin below NBID, and in the State of Kansas.

8.3 FCID and NBID are referred to from time to time as Plaintiff Districts and as the Districts in this Complaint.

8.4 Plaintiff **Dale Cramer** is a farmer, landowner, and water user patron of FCID. Mr. Cramer is a duly elected individual member of the FCID Board of Directors. He is the President of FCID's Board of Directors.

8.5 Plaintiff **Jay Schilling** is a farmer, landowner, and water user patron of FCID. Mr. Schilling is a duly elected individual member of the FCID Board of Directors. He is the Vice President of FCID's Board of Directors.

8.6 Plaintiff **Steve Henry** is a farmer, landowner, and water user patron of FCID. Mr. Henry is a duly elected individual member of the FCID Board of Directors. He is the Secretary/Treasurer of FCID's Board of Directors.

9. Dale Cramer, Jay Schilling, and Steve Henry are residents of Nebraska. They farm using surface water from FCID for irrigation of growing crops. They are landowners, taxpayers, electors of Nebraska, and are persons who have suffered and are threatened with, substantial financial losses due to misappropriation of water from FCID and them by Defendants. Each individual water user is engaged in row-crop farming. To farm the Nebraska real estate owned by each individual Plaintiff, and operated by him for agricultural purposes, receipt of surface water from the canals and ditches of FCID is essential. Each individual Plaintiff uses water received from FCID, which is unavailable from any other source, to supply essential irrigation water to his growing crops. If this supply of water is interrupted, and if the relief sought in this Complaint is not granted, each individual Plaintiff, and each similarly situated water patron of FCID, will incur injury and loss.

10. FCID and NBID each obtain water from the Bureau of Reclamation for which each District must pay fees, charges, and maintenance costs. Each District incurs operating expenses to operate and maintain its canals and ditches, provide water service, and assure compliance by water users. It sells water to its water user patrons on a units-

of-usage basis. Unless FCID and NBID respectively can each receive inflows of water into its canals and ditches, it cannot pay its operating expenses, supply water to its user patrons, or engage in business. Each District is an enterprise engaged in a commercial activity, and each will suffer an injury, specifically the threat that each will be put out of business if relief requested in this Complaint is not granted.

11. FCID was organized on April 18, 1946 and NBID was organized April, 12, 1948. Each District was formed for the purpose of owning, leasing, operating, and providing irrigation waters, through surface canals and deflection from surface streams, to farmers for agricultural users to grow crops in southern Nebraska, near the central and eastern reaches of the Republican River's course through Nebraska. From Nebraska the River passes into Kansas Near Hardy NE. FCID operates under arrangements with the United States Department of Interior, Bureau of Reclamation ("BOR"). So does NBID.

12. The United States, through the Department of Interior and the BOR has contracted to provide surface water to the Plaintiff Districts and to maintain surface water through a system of lakes and reservoirs to assure adequate surface waters are present to permit each District to fulfill its mission during years of plentiful, and less than plentiful, precipitation. FCID and NBID have performed their contractual obligations. The United States, DOI, and BOR have not. These federal Defendants and their officials failed to act to assure delivery of water and fulfillment of surface water flowage rights and authorizations into the federal facilities of the Republican River Basin. The federal Defendants breached their contractual duties to FCID and NBID to prevent and object to action by officials of the State of Nebraska including Defendants Heineman and Dunnigan, the URNRD and N-CORPE, to recognize federal interests, and to refrain from interference with natural groundwater movements and stream flows, and have thereby deprived federal surface water structures, and the Plaintiff Districts, of water to which they are entitled.

### **Plaintiffs' Water Rights**



13. FCID holds the priority water rights as well as priority inflow rights from streams to, and for use of waters of, the Republican River Basin. These rights are summarized in the chart below:

<u>Republican River</u>				
S: 8 T: 2 R: 33W Hitchcock				
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	38.70	12/22/1890
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	28.54	04/03/1946
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	1.02	04/03/1946
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	114.62	04/16/1954
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	2.81	02/16/1959
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	7.14	03/17/1961
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	0.80	03/30/1965
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	0.86	05/21/1970
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	18.17	10/15/1974
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	0.19	04/15/1976
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	1.53	10/20/1977
Frenchman Cambridge Irrigation District	Meeker-Driftwood Canal	IR	<u>1.57</u>	03/25/1981
			<b>215.95</b>	
<u>Red Willow Creek</u>				
S: 25 T: 4 R: 29W Red Willow				
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	29.97	04/03/1946
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	7.02	04/16/1954
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	6.90	05/27/1963
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	9.67	08/31/1970
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	1.17	04/01/1971
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	3.42	10/15/1974
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	3.43	04/15/1976
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	0.58	03/25/1981
Frenchman Cambridge Irrigation District	Red Willow Canal	IR	<u>0.56</u>	11/13/1987
			<b>62.72</b>	
<u>Republican River</u>				
S: 17 T: 3 R: 27W Red Willow				
Frenchman Cambridge Irrigation District	Bartley Canal	IR	62.30	04/03/1946
Frenchman Cambridge Irrigation District	Bartley Canal	IR	2.60	04/16/1954
Frenchman Cambridge Irrigation District	Bartley Canal	IR	1.64	05/27/1963
Frenchman Cambridge Irrigation District	Bartley Canal	IR	0.20	02/09/1967
Frenchman Cambridge Irrigation District	Bartley Canal	IR	1.76	04/16/1970
Frenchman Cambridge Irrigation District	Bartley Canal	IR	0.09	10/15/1974
Frenchman Cambridge Irrigation District	Bartley Canal	IR	0.17	04/15/1976
Frenchman Cambridge Irrigation District	Bartley Canal	IR	<u>0.13</u>	03/25/1981
			<b>68.89</b>	
<u>Republican River</u>				
S: 27 T: 4 R: 25W Furnas				
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	140.91	04/03/1946
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	4.47	04/16/1954
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	3.11	04/30/1957
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	1.70	09/17/1959
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	5.89	03/30/1965
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	3.43	02/09/1967
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	11.60	08/31/1970
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	3.70	04/01/1971
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	1.39	10/15/1974
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	2.30	04/15/1976
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	1.10	10/20/1977
Frenchman Cambridge Irrigation District	Cambridge Canal	IR	<u>4.29</u>	03/25/1981
			<b>183.89</b>	

14. NBID holds priority water rights as well as priority inflow rights from streams to, and for use of waters of, the Republican River and its Basin. These rights are summarized in the chart below:

Republican River

S: 11 T: 1 R: 17W Harlan

Bostwick Irrigation District	Franklin Canal	IR	35.87	04/03/1946
Bostwick Irrigation District	Franklin Canal	IR	31.23	04/03/1946

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	K			
Bostwick Irrigation District	Franklin Canal	IR	15.43	02/26/1948
Bostwick Irrigation District	Franklin Canal	IR	1.20	04/16/1954
Bostwick Irrigation District	Franklin Canal	IR	1.21	11/21/1955
Bostwick Irrigation District	Franklin Canal	IR	.76	05/21/1958
Bostwick Irrigation District	Franklin Canal	IR	.26	04/24/1959
Bostwick Irrigation District	Franklin Canal	IR	4.13	10/06/1966
Bostwick Irrigation District	Franklin Canal	IR	1.47	01/23/1973
Bostwick Irrigation District	Franklin Canal	IR	.30	04/07/1976
Bostwick Irrigation District	Franklin Canal	IR	.81	06/11/1979
Bostwick Irrigation District	Franklin Canal	IR	1.44	05/05/1982
Bostwick Irrigation District	Naponee Canal	IR	10.33	02/26/1948
Bostwick Irrigation District	Naponee Canal	IR	.66	04/16/1954
Bostwick Irrigation District	Naponee Canal	IR	1.23	04/19/1957
Bostwick Irrigation District	Naponee Canal	IR	.16	04/24/1959
Bostwick Irrigation District	Naponee Canal	IR	2.41	10/06/1966
Bostwick Irrigation District	Naponee Canal	IR	.93	09/10/1982

S: 3 T: 1 R: 14W Franklin

Bostwick Irrigation District	Franklin Pump Canal	IR	.08	04/03/1946
Bostwick Irrigation District	Franklin Pump Canal	IR	14.93	02/28/1948
Bostwick Irrigation District	Franklin Pump Canal	IR	1.47	04/16/1954
Bostwick Irrigation District	Franklin Pump Canal	IR	.11	10/06/1966
Bostwick Irrigation District	Franklin Pump Canal	IR	.33	09/10/1982

S: 7 T: 1 R: 9W Webster

Bostwick Irrigation District	Superior Canal	IR	39.29	04/03/1946
	HK			
Bostwick Irrigation District	Superior Canal	IR	.06	02/26/1948
Bostwick Irrigation District	Superior Canal	IR	1.86	04/16/1954
Bostwick Irrigation District	Superior Canal	IR	.64	04/24/1959
Bostwick Irrigation District	Superior Canal	IR	.70	12/30/1960
Bostwick Irrigation District	Superior Canal	IR	1.04	10/06/1966
Bostwick Irrigation District	Superior Canal	IR	1.67	05/05/1982
Bostwick Irrigation District	Courtland Canal	IR	11.95	02/26/1948
Bostwick Irrigation District	Courtland Canal	IR	.84	04/16/1954
Bostwick Irrigation District	Courtland Canal	IR	1.94	10/06/1966
Bostwick Irrigation District	Courtland Canal	IR	.49	09/20/1974
Bostwick Irrigation District	Courtland Canal	IR	.70	09/10/1982

### Defendants & Their Roles

15. The Defendants are:

15.1 **Dave Heineman.** Mr. Heineman is the duly elected incumbent Governor of the State of Nebraska. As Governor, Mr. Heineman has administrative responsibility for the Nebraska Department of Natural Resources (DNR), and enforcement responsibility for the State's statutes, including statutes and actions of the DNR, challenged in this Complaint.

15.2 **Brian Dunnigan.** Mr. Dunnigan is the Director of the DNR, appointed by Defendant Heineman. Mr. Dunnigan is charged by Nebraska law with actions related to, and governing, Nebraska's surface waters, including the waters of the Republican River Basin. Mr. Dunnigan is also Nebraska's Commissioner for the Republican River Compact Administration. Along with Mr. Heineman, Mr. Dunnigan has undertaken certain steps in conjunction with other state Defendants named below, ostensibly to achieve compliance with the Republican River Compact of 1943, as amended.

15.3 The steps selected for this purpose are contrary to Nebraska law and contrary to federal law, because they (a) fail to recognize legal priorities of water uses and users, including Plaintiffs, (b) ignore and violate state constitutional and state statutory priorities for use of Nebraska's surface water and groundwater, (c) fail the reasonable beneficial use test governing the use of water in Nebraska, and (d) purport to convert groundwater to surface water by by-passing its natural water course and streams, which benefit Nebraska users, all for the purpose of permitting ongoing excessive groundwater irrigation in the Republican River Basin, rather than requiring that groundwater and surface water resources be used in the manner prescribed by Nebraska's law and sound water policy. These Defendants failed to abide by Nebraska's obligations to the United States, a signing party to the Republican River Compact (RRC or Compact), requiring recognition of, protection of, preservation of, and ongoing respect for the federal interests in waters of the Basin and the regular, natural, and ongoing movement of those waters from surface streams and sources, and from groundwater supplies, to

the streams, rivers, reservoirs, and lakes, including federal reservoirs and lakes, of the Republican River Basin.

15.4 **Upper Republican Natural Resources District**, a Nebraska political subdivision (“URNRD”). URNRD’s principal place of business is 511 East Fifth Street, Imperial, Nebraska 68039. Its manager is Jasper Fanning. The Chairman of its Board of Directors is Terry Martin of Benkelman, Nebraska. The Secretary-Treasurer of its Board of Directors is Tom Terryberry.

15.5 **N-CORPE**, an Interlocal Governmental Cooperative formed by an Agreement; it is also known as the Nebraska Cooperative Republican Platte Enhancement Project. N-CORPE was organized by URNRD, other NRDs and the Nebraska DNR with the knowledge and consent of Defendants, Heineman and Dunnigan. It was formed in 2012 for the purposes described below. N-CORPE is an entity that may sue and be sued under the Nebraska *Interlocal Governmental Cooperation Act*, *Neb Rev Stat* § 13-801 *et seq.*

15.6 **The United States of America, its Department of the Interior, and the Bureau of Reclamation of the US Department of Interior are Defendants. Kenneth Salazar** is Secretary of the Interior of the United States of America, **Michael L. Connor** is Commissioner of the Bureau of Reclamation, and **Michael J. Ryan** is Regional Director of the Great Plains Region of the US’s Department of Interior, Bureau of Reclamation (“BOR”).<sup>8</sup> The regional office is at 316 N. 26<sup>th</sup> Street, Billings Montana 59101.

15.7 This action seeks to compel the Secretary of the Interior of the United States, and other officials of the United States Department of Interior, to enforce the requirements of the *Reclamation Act* of June 17, 1902, 43 *USC* § 431. This Court has subject matter jurisdiction of this action under 28 *USC* § 1361 by reason of the claims against these Defendants. Defendant Salazar is Secretary of the Interior of the United States and is charged with the duties of carrying out the Act, 43 *USC* § 373. Defendant Michael L. Connor is the Commissioner of the

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<sup>8</sup> Source: <http://www.usbr.gov/main/about/commissioner.cfm>

Bureau of Reclamation of the United States, and is charged with the duty of administering the Act under the supervision and Director of the Secretary of Interior, by reason of 43 *USC* § 373a. Defendant Michael J. Ryan is Regional Director of the Great Plains Region of the Bureau of Reclamation, the region of the Bureau in which the Republican River Basin is located. The regional Director is in charge of reclamation projects within the District of Nebraska, and in the Republican River Basin.

15.8 The Defendants identified in ¶¶ 15.5 & 15.6 are referred to at times in this Complaint as the federal Defendants.

15.9 The United States of America has consented to be sued as a Defendant in any suit, including this one, for the adjudication of rights to use the water of a river system or other sources, or the administration of such rights, as the United States is the owner of, and has acquired water rights by appropriation under state law, or otherwise, and is a necessary party to this suit.<sup>9</sup> While the United States is subject to judgments and has waived certain rights, privileges, and immunities, it cannot have judgment entered against it for costs in this case.<sup>10</sup> Summons or other process in this suit must be served upon the Attorney General, or his designated representative.<sup>11</sup> This is a comprehensive action involving determination of all rights in the Republican River Basin in Nebraska. Plaintiffs believe all potential claimants necessary to determination of the controversy have been joined. They are ready, willing and able to join absent parties, if any.<sup>12</sup> Exhaustion of state remedies is not required.<sup>13</sup>

### Judicial Notice

16. The Court is asked to judicially notice:

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<sup>9</sup> 43 *USC* § 666

<sup>10</sup> 43 *USC* § 666(a)

<sup>11</sup> 43 *USC* § 666(b)

<sup>12</sup> *Cf.*, *Wagoner County Rural Water Dist No 2 v Grand River Dam Auth*, 577 F3d 1255 (10<sup>th</sup> Cir 2009).

<sup>13</sup> *US v Cappaert*, 508 F2d 313 (9<sup>th</sup> Cir), affirmed 426 US 128 (1974); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo 1988), affirmed, 492 US 938 (1989).



16.1 All Evidence offered and received before the Special Masters appointed by the United States Supreme Court in the Original Action styled *Kansas v Nebraska*, U S SCt Orig No. 126, and all Findings and Recommendations of all Special Masters appointed by the Supreme Court, and all Orders and Decrees of the Supreme Court in Orig No. 126, including orders and reports rendered after the date of this Complaint and prior to the time of trial.

16.2 All publications, records and documents of the BOR recording rainfall, evaporation, water levels, flowage to the Plaintiff Districts' canals and ditches, since 2005.

16.3 All records of consumptive use of water, ground water pumping, water levels and stream flow maintained by the Republican River Compact Administration (RRCA) since implementation of the Final Settlement Stipulation of the States in 2002 following its approval by the United States Supreme Court in May 2003.

16.4 All contracts and agreements between the Plaintiff Districts and BOR.<sup>14</sup>

16.5 The Republican River Compact Administration Accounting Rules, Groundwater Model, Groundwater Model Documentation, Accountings for approved years, Model updates, and Model results filed with RRCA.<sup>15</sup>

16.6 All surveys, audits, studies and report of the Republican River Basin issued by the BOR.

16.7 All surveys, audits, studies and report of the Republican River Basin issued by the U S Geological Survey.

16.8 All surveys, audits, studies and report of the matters related to Harlan County Dam and Reservoir in the Republican River Basin issued by the U S Army Corps of Engineers since 2003.<sup>16</sup>

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<sup>14</sup> Plaintiffs believe these contracts were made pursuant to 43 USC § 485h-1. Congress appropriated funds to build the federal assets contracted to FCID and NBID.

<sup>15</sup> See, generally, data available to the public or through the "Restricted" portal at <http://www.republicanrivercompact.org/>

16.9 The surveys, audits, studies and reports of the Basin and its aquifers conducted by DNR and URNRD.

16.10 All relevant weather records, including precipitation and evaporation, and flood or other recorded events and records of the National Oceanic & Atmospheric Administration, the US Army Corps of Engineers, and the Republican River Compact Administration for the period from January 1, 2003 to the time of trial.

16.11 The Integrated Management Plans currently in effect for Defendant URNRD as approved by the Nebraska Department of Natural Resources, relevant 2012 minutes of the URNRDs' meetings, and all documents enacted or approved by them to create, form, or fund Defendant N-CORPE.

16.12 4 CT Jenkins, *Techniques of Water-Resources Investigations of the USGS Ch D1* Computation of Rate & Volume of Stream Depletion by Wells, (US GPO 1968, reprinted 1977) and updates.<sup>17</sup>

16.13 Nebraska DNR forecasts of noncompliance and negative balances due to overpumping ground water, presented November 16, 2012 to the Nebraska Republican River Management Districts Ass'n.<sup>18</sup> This document forecasts a "Compact Call" that will deprive the Plaintiff Districts and the federal Defendants of water, despite their surface water inflow rights, in 2013. The Court is also asked to judicially notice updates or additional publications of the DNR under the direction of Defendants Heineman and Dunnigan to this effect.<sup>19</sup>

### **General Allegations**

### **The Republican River, The RRCA, non-Federal Actions, Federal Relations**

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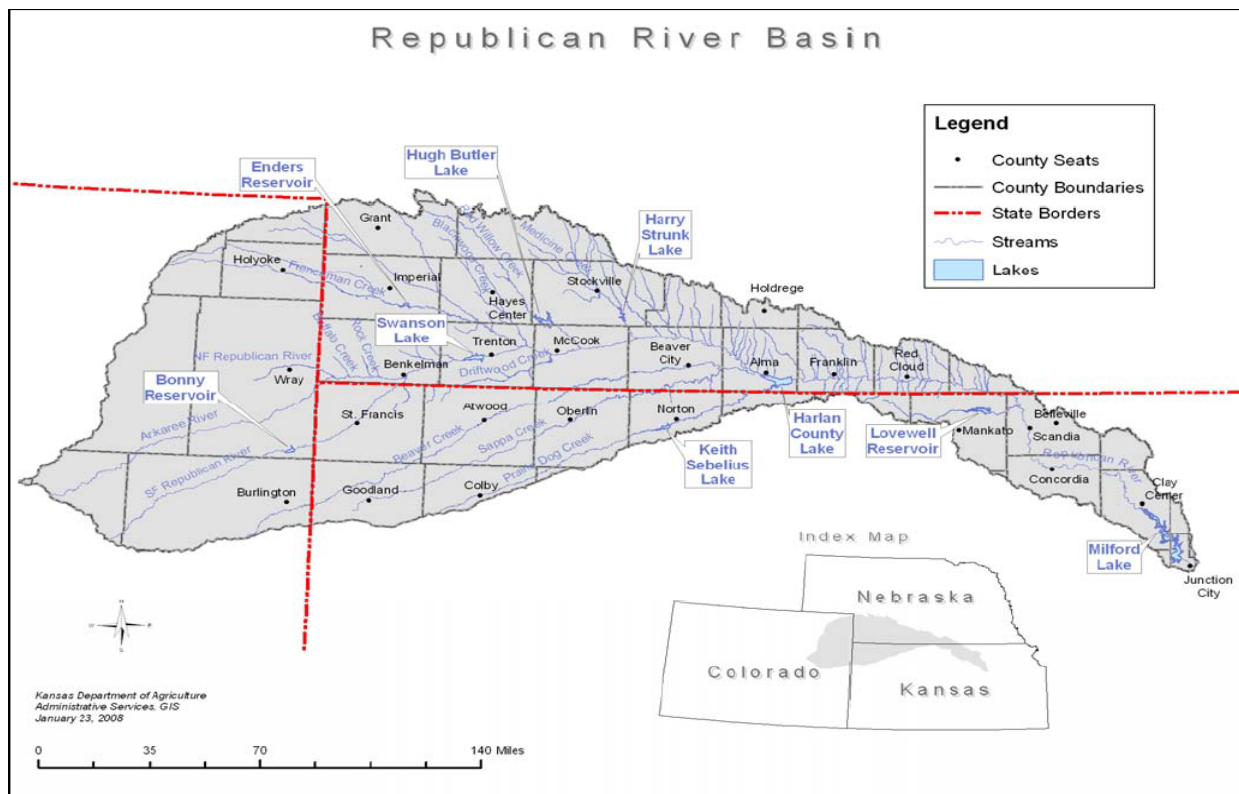
<sup>16</sup> The Corp of Engineers' control of Harlan County Dam and lake was adjudicated by the 8<sup>th</sup> Circuit. *Bostwick Irrig Dist v United States*, 900F2d 1285 (8<sup>th</sup> Cir 1990).

<sup>17</sup> Available at [http://dnr.ne.gov/TWM/AnnualReport\\_2012/AppendixC.pdf](http://dnr.ne.gov/TWM/AnnualReport_2012/AppendixC.pdf)

<sup>18</sup> Available at [http://dnr.ne.gov/TWM/Presentations/NRRMDA\\_Presentation\\_11162012Color.pdf](http://dnr.ne.gov/TWM/Presentations/NRRMDA_Presentation_11162012Color.pdf)

<sup>19</sup> The shortfall forecasted, and the overconsumption in 2012 in the URNRD is so acute that the URNRD is unlikely to achieve intra-NRD allocated usage levels to eliminate a negative impact on Nebraska's use of waters of the Basin even by pumping no groundwater for irrigation in 2013.

17. The Republican River, formed by the confluence of three (3) smaller rivers or streams which originate in the high plains of northeast Colorado, flows generally eastward from Colorado into and along the southern border of Nebraska, into Kansas. There, the Republican River joins the Smoky Hill River and forms the Kansas River. The River's Basin forms this configuration:



The River encompasses approximately 24,900 square miles within its Basin.

18. In 1943, with the consent of Congress granted pursuant to US *Const* Art I, § 10, Cl 3,<sup>20</sup> Colorado, Kansas, and Nebraska entered into the Republican River Compact (“RRC”) to divide virgin the water supply of the Republican River Basin.

19. Kansas filed suit against Nebraska and Colorado to enforce the RRC on January 19, 1999. After the United States Supreme Court overruled Nebraska’s Motion to Dismiss the Kansas case on June 29, 2000, the states negotiated a settlement which they presented to the Supreme Court. The settlement called the “Final Settlement

<sup>20</sup> The Act of Congress is Pub. L. No. 78-60, 57 Stat. 86 (1943)



Stipulation” (“FSS”) was dated December 16, 2002 and approved by the United States Supreme Court in original action No. 126, on May 19, 2003. As a result of the approved FSS, the states adopted the Republican River Compact Administration Groundwater Model. The Compact allocated a specific number of acre feet to each state, on a Basin-by-Basin basis. The allocation, which appears in Articles III & IV of Compact, is as follows:

#### Article III

The specific allocations in acre-feet hereinafter made to each State are derived from the computed average annual virgin water supply originating in the following designated drainage Basins, or parts thereof, in the amounts shown:

- North Fork of the Republican River drainage Basin in Colorado, 44,700 acre-feet;
- Arikaree River drainage Basin, 19,610 acre-feet;
- Buffalo Creek drainage Basin, 7,890 acre-feet;
- Rock Creek drainage Basin, 11,000 acre-feet;
- South Fork of the Republican River drainage Basin, 57,200 acre-feet;
- Frenchman Creek (River) drainage Basin in Nebraska, 98,500 acre-feet;
- Blackwood Creek drainage Basin, 6,800 acre-feet;
- Driftwood Creek drainage Basin, 7,300 acre-feet;
- Red Willow Creek drainage Basin in Nebraska, 21,900 acre-feet;
- Medicine Creek drainage Basin, 50,800 acre-feet;
- Beaver Creek drainage Basin, 16,500 acre-feet;
- Sappa Creek drainage Basin, 21,400 acre-feet;
- Prairie Dog Creek drainage Basin, 27,600 acre-feet;

The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line and the small tributaries thereof, 87,700 acre-feet.

Should the future computed virgin water supply of any source vary more than the (10) percent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportions that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

#### Article IV

There is hereby allocated for beneficial consumptive use in Colorado, annually, a total of fifty-four thousand, one hundred (54,100) acre-feet of water. This total is

to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

North Fork of the Republican River drainage Basin, 10,000 acre-feet;  
Arikaree River drainage Basin, 15,400 acre-feet;  
South Fork of the Republican River drainage Basin, 25,400 acre-feet;  
Beaver Creek drainage Basin, 3,300 acre-feet; and

In addition, for beneficial consumptive use in Colorado, annually, the entire water supply of the Frenchman Creek (River) drainage Basin in Colorado and of the Red Willow Creek drainage Basin in Colorado.

There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

Arikaree River drainage Basin, 1,000 acre-feet;  
South Fork of the Republican River drainage Basin, 23,000 acre-feet;  
Driftwood Creek drainage Basin, 500 acre-feet;  
Beaver Creek drainage Basin, 6,400 acre-feet;  
Sappa Creek drainage Basin, 8,800 acre-feet;  
Prairie Dog Creek drainage Basin, 12,600 acre-feet;

From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water supplies of upstream Basins otherwise unallocated herein, 138,000 acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska; and

In addition there is hereby allocated for beneficial consumptive use in Kansas, annually, the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line.

There is hereby allocated for beneficial consumptive use in Nebraska, annually, a total of two hundred thirty-four thousand, five hundred (234,500) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

North Fork of the Republican River drainage Basin in Colorado, 11,000 acre-feet;  
Frenchman Creek (River) drainage Basin in Nebraska, 52,800 acre-feet;  
Rock Creek drainage Basin, 4,400 acre-feet;  
Arikaree River drainage Basin, 3,300 acre-feet;  
Buffalo Creek drainage Basin, 2,600 acre-feet;

South Fork of the Republican River drainage Basin, 800 acre-feet;  
Driftwood Creek drainage Basin, 1,200 acre-feet;  
Red Willow Creek drainage Basin in Nebraska, 4,200 acre-feet;  
Medicine Creek drainage Basin, 4,600 acre-feet;  
Beaver Creek drainage Basin, 6,700 acre-feet;  
Sappa Creek drainage Basin, 8,800 acre-feet;  
Prairie Dog Creek drainage Basin, 2,100 acre-feet;

From the North Fork of the Republican River in Nebraska, the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line, from the small tributaries thereof, and from water supplies of up-stream Basins otherwise unallocated herein, 132,000 acre-feet. The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made.

20. The Compact also provides in its Art X that:

Article X

Nothing in this compact shall be deemed:

(a) To impair or affect any rights, powers or jurisdiction of the United States, or those acting by or under its authority, in, over, and to the waters of the Basin; nor to impair or affect the capacity of the United States, or those acting by or under its authority, to acquire rights in and to the use of waters of the Basin;

(b) To subject any property of the United States, its agencies or instrumentalities, to taxation by any State, or subdivision thereof, nor to create an obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States, its agencies or instrumentalities, to the laws of any State to any extent other than the extent these laws would apply without regard to this compact.

21. The provisions of Art X are further carried into effect by Art XI which requires the Legislature of each state and the Congress of the United States approve the

RRC and, within its approval, recognize the interests of the United States with these specific provisions found in the RRC's Art XI.<sup>21</sup>

Article XI

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(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a state, of the waters allocated by this compact, shall be made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.

(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.

22. The FSS adopted the Republican River Compact Administration Groundwater Model ("RRCA Model" or "Model"). The Model was summarized and described in a submission to the Supreme Court of the United States when Special Master Vincent L.

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<sup>21</sup> The U S Congress ratified and approved the Compact. 57 Stat 86 (1943).

McKusick reported to the Court on September 17, 2003 in original action No. 126.<sup>22</sup> The Special Master made these findings among others:

“Nebraska’s assertion that the Compact does not restrict ground water pumping because it never mentions ground water misses a critical fact: Although the Compact never uses the word “ground water”, stream flow, which the Compact fully allocates, comes from both surface runoff and ground water discharge. Interception of either of those stream flow sources can cause a State to receive more than its Compact allocation and violate the Compact. Thus, the comprehensive definition of virgin water supply, even without use of the express term “ground water”, requires a conclusion that, as a matter of law, a State can violate the Compact through excessive pumping of ground water hydraulically connected to the Republican River and its tributaries.”

Thereafter the parties settled their differences by recognizing and implemented this finding by agreeing on a Final Settlement Stipulation and adoption of the Republican River Compact Accounting Rules. (RRCA). The Special Master expressly or impliedly found that the surface and ground waters of the Republican River Basin are hydrologically interconnected and that ground water is included in “waters of the Republican River”.<sup>23</sup> The Supreme Court approved the two reports of Special Master McKusik.<sup>24</sup>

23. The RRCA Model includes a global water budget. Within the budget, as one data subset, is a description of annual average amounts of outflows expressed in acre feet, describing outflows from the Basin in springs, well pumping, constant head boundaries, stream gains, and increased storage. A description of the historical outflows, summarized in a chart found in the Special Master’s report at page 16, is as follows:

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<sup>22</sup> Mr. McKusick’s final report may be read at [www.republicanrivercompact.org/v12p/SMReportOnGWModel.pdf](http://www.republicanrivercompact.org/v12p/SMReportOnGWModel.pdf). Special Master McKusik’s two reports are found at 2003 WL25904134, and at 2003 WL 25904173.

<sup>23</sup> *Id.*, See also, Popelka, "The Republican River Dispute: An Analysis of the Parties Compact Interpretation and Final Settlement Stipulation," 83 Neb L Rev 596, 624-25 (2004).

<sup>24</sup> *Kansas v Nebraska*, 538 US 720 (2003)(approval of 1<sup>st</sup> report); the second report was received and ordered filed but did not require additional approval as it was supplemental to the approved first report. 540 US 964.

<b>RRCA Model Global Water Budget</b> Annual Average Amount in acre-feet						
Years	<b>Outflows</b>					
	Phreatophyte ET	Springs	Well Pumping	Constant Head Boundaries	Stream Gains	Increase in Storage
1921-1930	477,250	65,435	6,227	167,033	448,280	923,836
1931-1940	460,743	65,368	10,059	165,869	439,771	339,611
1941-1950	466,106	76,599	52,441	434,574	511,874	1,746,297
1951-1960	502,402	86,981	227,993	581,770	489,936	1,234,618
1961-1970	542,580	86,624	898,512	553,367	509,096	1,276,170
1971-1980	493,572	85,542	2,553,584	557,971	466,483	1,414,830
1981-1990	487,373	83,919	2,595,959	575,350	426,078	1,412,304
1991-2000	470,615	87,937	2,537,878	554,059	411,616	1,586,317

24. The parties and the Special Master reported to the United States Supreme Court that canals and laterals in the canal systems of irrigation districts within the Republican River Basin and its tributaries influence the flow of the river. Seepage from the canals is a recharge term for the waters of the Basin.<sup>25</sup> Similarly, surface water irrigation from the canals supply recharge.<sup>26</sup>

25. Within the Republican River Basin, streamflows are captured and retained in seven (7) federal reservoirs upstream from the Nebraska-Kansas state line. The reservoirs and associated tributaries are as follows, progressing from the headwaters downstream:<sup>27</sup>

<b>Federal Facility</b>	<b>Location</b>
Bonny Reservoir	South Fork, Republican River, CO
Swanson Reservoir	Main Stem, Republican River, NE

<sup>25</sup> *Id* at 12

<sup>26</sup> *Id* at 23-24

<sup>27</sup> *Id* at p28

Enders Reservoir	Frenchman Creek, NE
Hugh Butler Reservoir	Red Willow Creek, NE
Harry Strunk Reservoir	Medicine Creek, NE
Keith Sebelius Reservoir	Prairie Dog Creek, KS
Harlan County Lake	Main Stem, Republican River, NE
Irrigation Canals & Ditches	Contracted to Various Irrigation Districts including FCID & NBID

26. FCID operates pursuant to a Repayment Contract, dated July 25, 2000, entered into by the United States, under the authority of the Secretary of Interior, by the Bureau of Reclamation and the Director of the Great Plains Region. The contract with FCID was executed pursuant to the discretionary provisions of law governing the Pick-Sloan Missouri Basin Project. NBID operates pursuant to a Repayment Contract revised by an Agreement of October 4, 2002 with a prior addendum of March 5, 2002, and an original Repayment Contract dated July 25, 2000 between NBID and the United States, under the authority of the Secretary of Interior, by the Bureau of Reclamation and the Director of the Great Plains Region. The contract with FCID was executed pursuant to the discretionary provisions of law governing the Pick-Sloan Missouri Basin Project

27. FCID participates in a canal automation project with the United States and the Secretary. So does Defendant URNRD. Both Plaintiff and Defendant URNRD accepted water and efficiency grants in 2012 pursuant to the WATER SMART (“Sustain and Manage America’s Resources for Tomorrow”) program of the US Department of the Interior.<sup>28</sup>

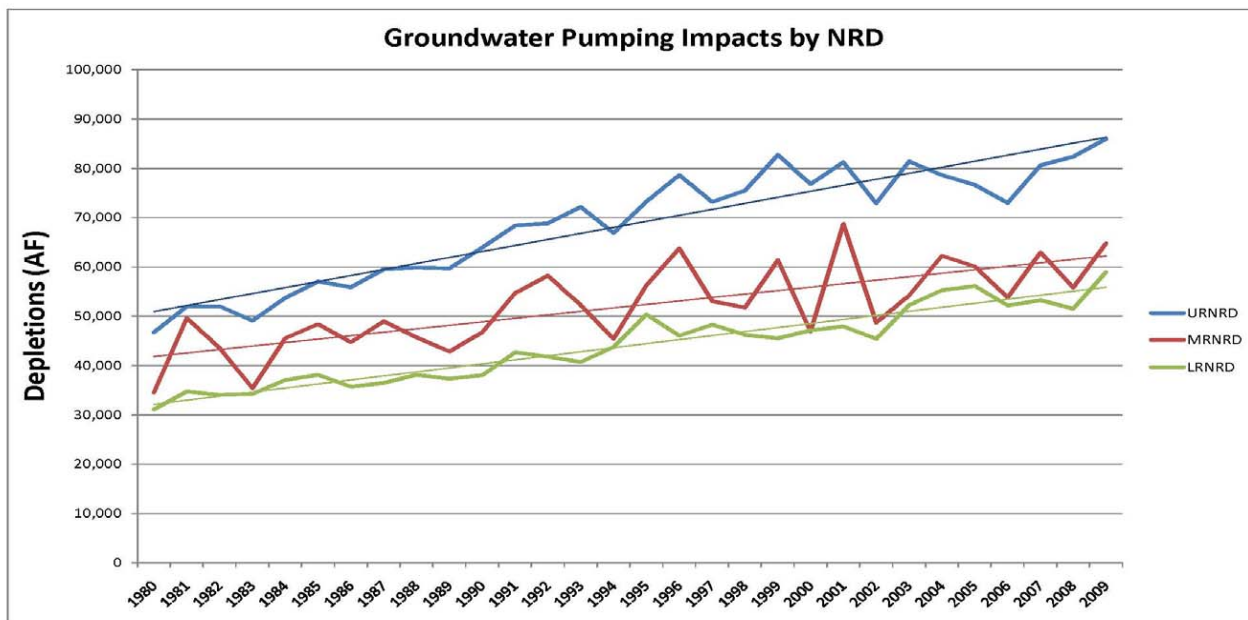
28. The Bureau of Reclamation identified changes in estimated irrigated acres within the Republican River Basin in Nebraska as increasing from approximately 185,000 acres in 1954, to more than 1,000,000 by 2009.<sup>29</sup> Reclamation projects were constructed to operate in a manner that would assure compliance with the Republican River Compact. But, Nebraska failed to manage its groundwater resources, and

<sup>28</sup> A complete description of the WATER SMART program and all selected projects if available at [www.usbr.gov/WaterSMART/](http://www.usbr.gov/WaterSMART/)

<sup>29</sup> [www.usbr.gov/gp/nkao/republican\\_presentation\\_031810.pdf](http://www.usbr.gov/gp/nkao/republican_presentation_031810.pdf)



Nebraska, the DNR, and URNRD permitted groundwater pumping to exacerbate so dramatically as to threaten the federal projects and assets, and the Plaintiff Districts, which are dependent upon them. Groundwater pumping depletions, in acre feet, have been graphically estimated and described by the Bureau of Reclamation as follows:



[http://www.usbr.gov/gp/nkao/republican\\_presentation\\_031810.pdf](http://www.usbr.gov/gp/nkao/republican_presentation_031810.pdf). (Page 8).<sup>30</sup>

29. As this occurred, inflows, in acre feet, declined dramatically, as groundwater irrigation robbed streamflows. The Bureau of Reclamation estimated this graphically, by the chart above. Groundwater pumping has had a significant impact on the federal structures identified in ¶ 25 above, including structures that are directly involved in inflows of water to the canals and ditches used by Plaintiffs. For example, Enders Reservoirs' inflows declined from more than 60,000 acre feet per year in 1964, to less than 10,000 acre feet in 2009.<sup>31</sup> At Harlan County Lake, the inflow decline was from more than 300,000 acre feet in 1961, to 100,000 acre feet in 2009.<sup>32</sup>

<sup>30</sup> See also fn 19 above.

<sup>31</sup> [www.usbr.gov/gp/nkao/republican\\_presentation\\_031810.pdf](http://www.usbr.gov/gp/nkao/republican_presentation_031810.pdf). p9.. See subsequent pages for Swanson Lake and Harlan County Lake.

<sup>32</sup> *Id.* at p11.



30. FCID and NBID contend the United States, the Secretary, the Commissioner, and the Great Plains Regional Director owe, but have breached, contractual duties to FCID and NBID respectively, and legal duties to the individual Plaintiffs, to protect, preserve, and assure the continuity of inflows into the federal reservoirs from which FCID and NBID are entitled to draw, and do draw, waters for sale to the individual Plaintiffs and other users. This duty includes the obligation to protect surface water stream inflows from groundwater sources in the hydrologically interconnected matrix of Republican River Basin ground and surface water supplies. The continuous flow of the waters of the Basin require that groundwater be used in appropriate moderation so as to refrain from achieving a superficial short term objective while compromising the ground to stream flows of the Basin's waters.

31. The United States, and the Secretary, Commissioner, and Regional Director are further obligated to protect the federal structures against debilitation, disrepair, misuse, or inadequate water for storage due to the intervention of mankind, and expressly overuse of ground water irrigation in the Republican River Basin. The federal Defendants have not fulfilled this obligation to Plaintiffs

32. Under the *Reclamation Act* and Amendments to it, the Secretary of Interior exercised authorization, through the Bureau of Reclamation and its officials, to cooperate with FCID for the construction and use of FCID's canals and ditches<sup>33</sup>, and FCID's beneficial use of the reservoirs and lakes owned by the United States, within the Republican River Basin, and upstream from FCID. This occurred through construction of canals and ditches as provided by law and by the construction and management of surface water and streamflows to permit outflow from federal structures and inflow into FCID's canals and ditches.<sup>34</sup> Pursuant to the *Reclamation Act* and Amendments to it, the Secretary of Interior exercised authorization, through the Bureau of Reclamation and its officials, to cooperate with NBID for the construction and use of NBID's canals and

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<sup>33</sup> FCID is the contractual user of the canals and ditches within the District. They continue to be owned by the United States and administered by the Department of Interior and the BOR.

<sup>34</sup> All this was accomplished pursuant to 43 *USC* § 524

ditches<sup>35</sup>, and NBID's beneficial use of the reservoirs and lakes owned by the United States, within the Republican River Basin, and upstream from NBID. This occurred through construction of canals and ditches as provided by law and by the construction and management of surface water and stream flows to permit outflow from federal structures and inflow into NBID's canals and ditches.<sup>36</sup>

33. The "Reclamation Law"<sup>37</sup> provides the right to use of water acquired under the Reclamation Act "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."<sup>38</sup> The Secretary of Interior is authorized to perform any and all acts, and to make such rules and regulations as are necessary to carry out the Reclamation Law.<sup>39</sup> The Commissioner of Reclamation administers the Reclamation Law.<sup>40</sup> The Reclamation Law further provides that it is not intended to "in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation or any vested right acquired thereunder. It requires the Secretary of Interior to "proceed in conformity with" state laws.<sup>41</sup>

34. The Reclamation law permits the Secretary of the Army to determine, upon recommendation by the Secretary of the Interior, that a dam or reservoir project be utilized for irrigation purposes. When this occurs, the Secretary of the Interior is authorized to construct, operate, and maintain, under the Reclamation Law, additional works in connection therewith as necessary for irrigation purposes.<sup>42</sup> Under this authority, the federal structures, identified at above, within the Republican River Basin, were constructed and are operated and used for irrigation purposes. The federal

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<sup>35</sup> NBID is the contractual user of the canals and ditches within the District. They continue to be owned by the United States and administered by the Department of Interior and the BOR.

<sup>36</sup> All this was accomplished pursuant to 43 *USC* § 524

<sup>37</sup> This phrase is defined by 43 *USC* § 371 to mean the Act of June 17, 1902, and all Acts amendatory thereof or supplementary thereto. The same statute defines "project" as "a Federal Irrigation Project authorized by the Reclamation Law.

<sup>38</sup> 43 *USC* § 372

<sup>39</sup> 43 *USC* § 373

<sup>40</sup> 43 *USC* § 373(a)

<sup>41</sup> 43 *USC* § 383

<sup>42</sup> 43 *USC* § 390

structures in the Republican River Basin are described below.<sup>43</sup> All these structures are upstream from FCID and NBID, except Lovewell Reservoir in Kansas. The BOR operates and maintains all federal structures except Harlan County Dam; it is operated and maintained by the Corps of Engineers.

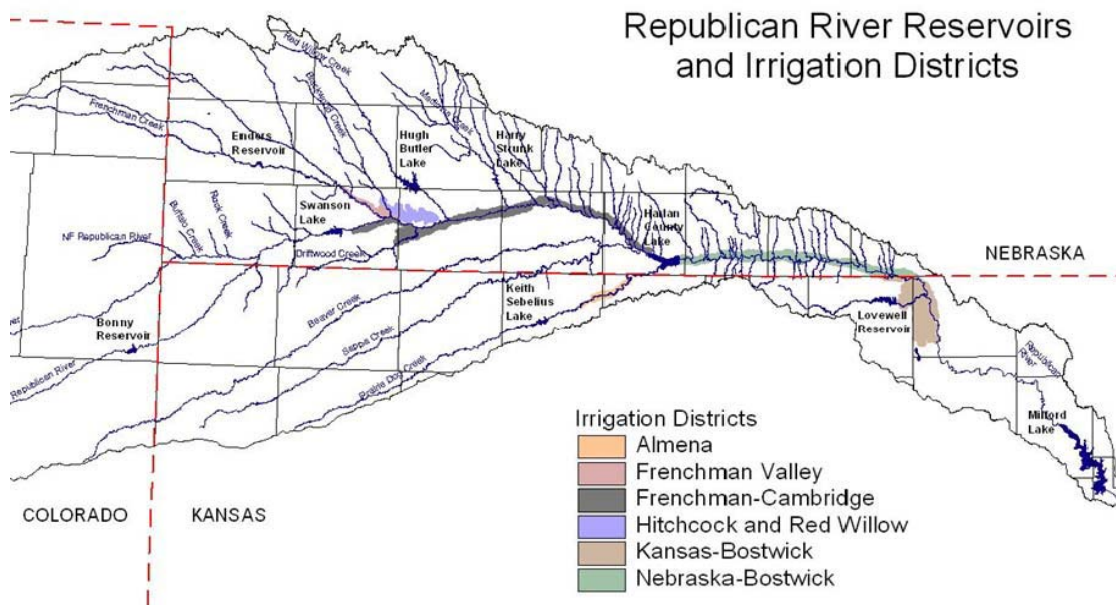
35. Historically, early attempts at irrigation in the Republican River Basin resulted in disappointments because the potential for irrigation from the Republican River was over-estimated and streamflow was not then predictable. As a result, in 1895, Nebraska enacted its first major water law and included in the law the Prior Appropriation Doctrine, protecting the rights of the oldest water-right holder first, then junior water-right holders. This Doctrine has remained part of the State's policy and law.

36. Cooperation between the Bureau of Reclamation and the Secretary of the Army, and the Army Corps of Engineers, proceeded under the 1943 *Flood Control Act*<sup>44</sup> providing for the Pick-Sloan Missouri River Basis Program. The Republican River Valley is in the Missouri River Basin. As a result, the structures identified above were built. The final structure in the Basin, the Milford Reservoir, was completed in 1962. FCID and NBID are among the Irrigation Districts in the Republican River Basin. Certain others are identified in this chart which is provided to assist the reader with awareness of locations and structures in the Basin:

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<sup>43</sup> [www.usbr.gov/WaterSMART/bsp/docs/fy2012/FactSheet-RepublicanRiverBasinStudy.pdf](http://www.usbr.gov/WaterSMART/bsp/docs/fy2012/FactSheet-RepublicanRiverBasinStudy.pdf)

<sup>44</sup> PL 534, 78<sup>th</sup> Cong, 2d Sess.



[http://www.kwo.org/Kansas\\_Water\\_Plan/KWP\\_Docs/VolumeIII/KLR/Rpt\\_KLR\\_BPI\\_Lwr\\_Republican\\_River\\_System\\_Mngt\\_KWP2010.pdf](http://www.kwo.org/Kansas_Water_Plan/KWP_Docs/VolumeIII/KLR/Rpt_KLR_BPI_Lwr_Republican_River_System_Mngt_KWP2010.pdf)

37. FCID's geography extends along the main stem of the Republican River from downstream of Swanson Reservoir to Harlan County Lake. NBID's geography extends from at or near the Nebraska Kansas Border at Hardy NE westward to at or near Harlan County Lake.

38. The United States is a signatory to the Republican River Compact, and a party to the Compact with vital interests recognized in it, expressly.<sup>45</sup>

39. Through a series of steps that occurred in litigation resulting in the Final Settlement Stipulation (FSS), and the US Supreme Court's approval of it, a comprehensive set of accounting rules were negotiated, agreed upon, and approved by the Supreme Court<sup>46</sup>, amending the Compact. The FSS also provided for a moratorium of new groundwater wells and accounts for groundwater pumping from table land wells, and all reservoirs 15 acre feet or larger within the Basin.<sup>47</sup>

40. Nebraska admitted that it exceeded its lawful allocation of virgin waters of the Republican River Basin in 2005 and 2006, after the Supreme Court approved the

<sup>45</sup> Republican River Compact, Art X

<sup>46</sup> *Kansas v Nebraska*, 538 US 720 (2003).

<sup>47</sup> See fn 19, above.

FSS and the Republican River Accounting Rules and Groundwater model. It admits “exceedance”<sup>48</sup> of at least 42,860 acre feet of water in 2005 and exceedance in 2006. It admits net evaporation from Harlan County Lake in 2006 of 16,182 acre feet though it disputes how to account for the 2006 exceedance and the evaporation from the Lake.<sup>49</sup>

### Nebraska Non-Compliance; Misuse of Waters

41. Nebraska did not comply with the mandatory accounting rules of the Compact. It overused at least 78,968 acre feet of water upstream from Guide Rock, Nebraska, during 2005 and 2006, and its overuse continued thereafter, into and through 2012, though Nebraska is believed to have achieved Compact compliance from 2008 – 12. In 2012, URNRD, within Nebraska, overused its intrastate allocation of water by an amount so extensive that decades will be required, at minimal use in the URNRD region, to achieve parity and stability, and prevent depletion of groundwater sources.

42. Disputes between Kansas and Nebraska arose during recent years concerning overuse of water by Nebraska were partially resolved when the parties agreed overuse by Nebraska during the 2005-2006 time period. The amounts of this overuse admitted by Nebraska were at least<sup>50</sup>

2005	42,860 acre feet
2006	Disputed, but estimated at 36,100

43. Nebraska and Kansas remain involved in litigation now pending in the United States Supreme Court in Original Action No. 126. Trial has been conducted

<sup>48</sup> “Exceedance” is the amount by which something exceeds a standard or permissible measurement. *Merriam-Webster Dictionary* (Updated 2012).

<sup>49</sup> See, admissions in *State of Nebraska’s Response to State of Kansas’ Brief re Amount of Nebraska’s Exceedance*, filed in Orig 126, US SCt on 7-8-11. It is available at [http://www.pierceatwood.com/files/14286\\_1041\\_2011-07-08\\_NE%27s%20Response%20to%20KS%27s%20Brief%20re%20Amount%20of%20NE%27s%20Exceedance%20%28W2528376%29%5B1%5D.pdf](http://www.pierceatwood.com/files/14286_1041_2011-07-08_NE%27s%20Response%20to%20KS%27s%20Brief%20re%20Amount%20of%20NE%27s%20Exceedance%20%28W2528376%29%5B1%5D.pdf)

<sup>50</sup> Transcript, Vol 1 of 7, Proceedings before Special Master in Orig Action 126, US Supreme Court, September, 2012, including submissions by Kansas and concessions by Nebraska. See, <http://www.pierceatwood.com/KansasversusNebraskaandColorado126Original> where the Transcripts can be found.

before the Court's Special Master. His Recommendations to the Supreme Court are awaited. Plaintiffs are not parties to the litigation.

44. Nebraska continues to threaten to overuse its allotted units of consumptive beneficial use from the Republican River Basin under the terms of FSS. Indeed, FCID and NBID, like Kansas, respectfully contend Nebraska is engaged in a reckless indifference toward the RRC and Nebraska's obligations due to the decisions, indecisions, actions, and inertia of Defendants Heineman and Dunnigan. Nebraska has not curtailed groundwater irrigation use and has permitted users in the western reaches of the Basin, within Nebraska, to particularly abuse groundwater supplies, deplete the Ogallala Aquifer which is hydrologically interconnected with the stream flows of the Basin, and reverse groundwater flowage directions due to depressions in the groundwater supply. It has done so for the purpose of facilitating groundwater irrigation in an arid region of the state not as suited to irrigation as other regions of Nebraska and where irrigation water is required in greater quantities to produce lesser crops than in less arid, more fertile and suitable areas to the east. In litigation now pending before the Supreme Court of the United States, Nebraska has not denied its violations. Instead, it has requested that the RRC Model be modified to permit Nebraska's continued conduct.<sup>51</sup>

45. The Compact regulates virgin water supplies as noted above. But, Nebraska proposes to comply with the Compact by taking farmland irrigated with groundwater out of production, operate the groundwater irrigation pumps, but pipe water from the land taken out of production to one or more streams of the Republican River (and also streams of the Platte River located in a Basin north of the Republican River Basin and not interconnected with it) to "augment" stream flow in the main stem of the Republican River, and thereby assure the volume of water to reach Kansas annually. The Compact and FSS regulate the virgin water supply of the Basin. It does not permit the virgin water supply to be augmented from non-Basin sources or otherwise, and it does not permit water to be "retimed", i.e., accelerated into the Basin by pumping it out

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<sup>51</sup> *Id.*

of the groundwater supply and transporting it by pipeline, thereby accelerating its movement from the groundwater supply where it slowly travels, constantly, to the River. Yet, this is what the state Defendants propose to do.

46. The state Defendants propose to restrict or preclude the inflow of water from streams of the Basin to the irrigation canals and ditches of FCID, and therefore to the farms of FCID water user patrons like the individual Plaintiffs, in order to further augment stream flow in the Republican River's main stem, all in an effort to assure an adequate water supply passes from Nebraska to Kansas. Defendant Dunnigan, with the authority of Defendant Heineman, has approved the N-CORPE plan.<sup>52</sup>

47. The state Defendants refuse meaningful curtailment and threaten to continue the misallocation and misuse of water within the Basin by irrigators in the westernmost reaches of the River where a large quantity of water is required to accomplish a relatively modest amount of crop production. This occurs because, in the southwestern-most reaches of the Basin within Nebraska, the evaporation rate exceeds the annual precipitation rate and the climate is arid. More groundwater is required there than eastward for crop production. Specifically, in 2012, groundwater users in URNRD violated the common water plans of the NRD standards adopted cooperatively by the state Defendants. These plans are called "Integrated Management Plans" and are known as "IMPs". Each NRD is required to adopt an IMP; if any fails the DNR and Dunnigan impose an IMP on the NRD that does not do so. Further, IMPs cannot be approved without concurrence of the DNR. This means they cannot be approved without concurrence of Defendants Heineman and Dunnigan.

48. URNRD, its sister NRDs in the Basin, and the DNR (through Defendants Heineman and Dunnigan.) adopted an IMP effective November 1, 2010.<sup>53</sup> The IMP declares that:

- I. This Integrated Management Plan (IMP) was prepared by the Board of Directors for the Upper Republican Natural Resources District (URNRD) and the Nebraska

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<sup>52</sup> Public statements of Defendant Dunnigan in press release of DNR and reported by *Flatwater Group*, and *The Imperial Republican* in November 2012.

<sup>53</sup> URNRD's IMP is published on its website at <http://www.urnrd.org/2010IMP.pdf>



Department of Natural Resources (DNR) in accordance with the Nebraska Ground water Management and Protection Act, *Neb. Rev. Stat.* §§ 46-701 to 46-754 (Cum. Supp. 2008).

The IMP declares and describes the amount of groundwater usage in the URNRD and other NRDs in the Basin:

- II. ....The DNR has determined the following pumping volumes for the period 1998-2002: 531,763 acre-feet for the URNRD, 309,479 acre-feet for the MRNRD and 242,289 acre-feet for the LRNRD. These pumping volumes are used throughout this IMP and are referenced as the “1998-2002 baseline pumping volumes.” DNR, through the use of the Republican River Compact Administration Ground water Model, has also determined each NRD’s depletions to stream flow for the period 1998-2002 (“1998-2002 baseline depletion”): 74,161 acre-feet for the URNRD, 52,168 acre-feet for the MRNRD and 43,954 acre-feet for the LRNRD. Those depletion numbers have resulted in the following depletion proportions: 44% for the URNRD, 30% for the MRNRD and 26% for the LRNRD. These depletion proportions are used throughout this IMP and are referenced as the “1998-2002 baseline depletion proportions.” The percentage of allowable ground water depletions for each Republican River NRD were based on the proportion of the average ground water depletions caused by ground water pumping within each district that occurred during the base-line period from 1998-2002 as determined by model runs of the Republican River Compact Administration Groundwater Model with ground water pumping in each district alternated, turned off and then turned on.

The IMP contains definitions and standards used by URNRD and all the state Defendants in a manner that caused, and threatens to cause, the harms sought to be enjoined. URNRD’s IMP provides these definitions and values adopted by URNRD with the direction and consent of Heineman and Dunnigan:

**A. Allowable Ground water Depletions** - the maximum level of depletions to stream flow from ground water pumping within the Nebraska portion of the Republican River Compact area that can be allowed without exceeding the Compact allocation, in any one year.

**B. Allowable Ground water Depletions for the URNRD** - the depletions to stream flow from ground water pumping in the URNRD that are no greater than 44% of the total allowable ground water depletions.

**C. Allowable Stream flow Depletions** – the maximum amount of stream flow depletion in the Republican River Basin that can be allowed without violating the Compact.



**D. Baseline Depletion Percentages** – the annual mean depletions to stream flow in the Republican River Basin caused by surface water and ground water use in the years 1998-2002 inclusive. The baseline depletions are 74,161 acre feet for the URNRD, 52,168 acre feet for the MRNRD, and 43,954 acre feet for the LRNRD. The percentage depletions assigned to the NRDs are: URNRD, 44%; MRNRD, 30%; and LRNRD, 26%.

**E. Baseline Pumping Volumes** – the annual mean ground water pumping from the period 1998 to 2002. The baseline pumping volumes are 531,763 acre-feet for the URNRD, 309,479 acre-feet for the MRNRD and 242,289 acre-feet for the LRNRD.

49. The IMP calls for URNRD to reduce groundwater pumping by at least 20% but it has not done so. The IMP also expresses the agreement of URNRD with Nebraska, and specifically Defendants Heineman and Dunnigan who acted for Nebraska, to include these provisions in the IMP, which call for intentional and designed impairment of surface water rights including those of Plaintiffs:

#### **VII. Surface Water Controls - Department of Natural Resources**

The authority for the surface water component of this IMP is *Neb. Rev. Stat.* §§ 46-715 and 46-716 (Reissue 2004). The surface water controls that will be continued and/or begun by the DNR are as follows:

To provide for regulation of natural flow between Harlan County Lake and Superior-Courtland Diversion Dam, Nebraska will recognize a priority date of February 26, 1948 for Kansas Bostwick Irrigation District, the same priority date as the priority date held by the Nebraska Bostwick Irrigation District's Courtland Canal water right.

When water is needed for diversion at Guide Rock and the projected or actual irrigation supply is less than 130,000 acre-feet of storage available for use from Harlan County Lake as determined by the Bureau of Reclamation using the methodology described in Harlan County Lake Operation Consensus Plan attached as Appendix K to the Settlement Agreement, Nebraska will close junior, and require compliance with senior, natural flow diversions of surface water between Harlan County Lake and Guide Rock.

Nebraska will protect storage water released from Harlan County Lake for delivery at Guide Rock from surface water diversions.

Nebraska, in concert with Kansas and in collaboration with the United States, and in the manner described in Appendix L to the Settlement Agreement, will take actions to minimize the bypass flows at Superior-Courtland Diversion Dam.

50. URNRD violated its IMP and Nebraska DNR's common "integrated management plans" (IMPs) purporting to govern water consumption or units of beneficial use actually used in each NRD in each year. URNRD, in 2012 exceeded its target maximum annual units of consumptive use by approximately 68%. Cumulatively, to catch up with its own targeted use URNRD would have to forego pumping for a year or more.

51. The IMPs violated were adopted to permit Nebraska to claim, in litigation against Kansas before the US Supreme Court that it had a regulatory scheme in place to assure compliance with the RRC during years when water is short and stream flows are not adequate. These are among the IMP provisions germane to URNRD's violation of its own rules and those of the State DNR and enforced by Defendants Heineman and Dunnigan:

A. Compliance Standards

1. Purpose.

These Compliance Standards are established by DNR and URNRD to assess whether the course of action taken by the URNRD, with the intention of providing their proportionate share of assistance to the State in order for the State to maintain compliance with the FSS and Compact, are sufficient. The action taken by the URNRD shall be evaluated in connection with the action taken by the other NRDs in the Republican River Basin and any other relevant considerations, including the information and data provided by DNR and past action by the NRD.

2. Duration

These Compliance Standards shall be used to assess the action taken by the URNRD. On an annual basis the DNR and URNRD shall reexamine the sufficiency and effectiveness of the Compliance Standards to determine if amendments or modifications are necessary to ensure the State's compliance with the FSS and Compact. Nothing contained herein shall prohibit or preclude any amendment or revision, at any time, by the DNR and URNRD, when such action is necessary. Further, nothing contained in this subsection shall be construed as eliminating the review of the provisions of this IMP as required by NEB.REV.STAT. §46-715.

3. Standards

The URNRD shall adopt and implement rules and regulations which shall ensure that the following standards are met. The standards shall be effected through the procedure described in Section IX - Monitoring and Studies. Section IX specifies a forecast and

resulting actions needed at the Guide Rock compliance point (during Water short years) and at the Hardy compliance point. The procedures for determining whether the compliance standards are met will be based on the RRCA Accounting Procedures, the baseline ground water pumping volumes, and the annual forecast as outlined in Section IX. The standards are:

- a. Provide for a minimum of twenty percent (20%) reduction in pumping from the 98-02 pumping volume using a combination of regulation and supplemental programs so that the average ground water pumping volume is no greater than 425,000 acre-feet over the long term. If precipitation is lower than average for any given year, the ground water pumping volume for that year may be above 425,000 acre-feet.
- b. An additional reduction in 98-02 pumping volumes of five percent (5%) during the next five year period shall be accomplished primarily through voluntary incentive programs and other means as determined by the URNRD. The necessity for continuing this annual reduction shall be reevaluated by DNR and the URNRD in 2015.

The URNRD's net depletions to stream flow shall be no greater than 44% of the allowable ground water depletions determined in accordance with RRCA Accounting Procedures using the RRCA GWM. The average shall be computed using the annual allowable ground water depletion for the same years as are used to determine the averages for Nebraska's compliance with the FSS.

52. URNRD's net depletions to stream flow have been significantly in excess of a reasonable allocation of responsibly used waters of the Basin. The five year average for 2008-2012 use of Basin water by Natural Resources Districts in the Basin, including URNRD are:<sup>54</sup>

	Av GW pumped	Target GW	Excess Used
URNRD	444,203 ac ft	425,000	19,203 ac ft
MRNRD <sup>55</sup>	238,753 ac ft	247,580	* <sup>56</sup>
LRNRD	156,842 ac ft	194,000	0

This means URNRD consumes more water than is reasonable or beneficial, and more than is consistent with the requirements of the Nebraska Constitution's priorities and those of the Groundwater Management Act. URNRD's overuse occurs in the most arid region of the Basin, where the most water is required for the least economic benefit. Excess use of water there renders water unavailable for use lower in the basin where it would be more beneficial, and

<sup>54</sup> The average includes estimated values for 2012.

<sup>55</sup> RNRD is "Middle Republican Natural Resources District. LRNRD is Lower Republican Natural Resources District. Both are Nebraska political subdivisions located each of URNRD in the Basin.

<sup>56</sup> MRNRD's number gives the Middle Republican NRD credit for water rights acquired from a private canal irrigation company the MRNRD purchased. But this credit is claimed, incorrectly, for all years, including those in which there was insufficient stream flow to allow inflow into the canals of the acquired district. This results in understating the MRNRD actual consumption.

URNRD's excess use removes critical groundwater from its natural locations and prevents its natural and continuous subterranean flow to surface streams where it is needed to supply water to meet the Plaintiffs' needs and water rights. In 2012 alone URNRD used an estimated 717,345 acre feet of water or nearly 68% more than its annual maximum target level; the URND annual maximum target level is, itself, and unreasonable allocation of water within Nebraska, and an allocation that has been approved and promoted by Defendants Heineman and Dunnigan. This target level is too high to permit sustenance of the beneficial uses of waters of the Basin to meet the reasonable and most effective level of achievement of compliance with Nebraska's Constitutional<sup>57</sup> and statutory priorities, and to most reasonably assure that ground water will not be pumped in southwestern Nebraska to the detriment of Plaintiffs and all users to the east of URNRD in the Republican River Basin.

53. Plaintiffs are without an adequate remedy at law. They are at risk to suffer grave, irreparable injury. The public will be harmed as well unless injunctive relief is granted. The Defendants will not be harmed as they are obligated to use the waters of the Basin in accord with the RRC, and Nebraska law. They are not doing so and cannot claim to be harmed because they are enjoined from compliance with the law. It is necessary and proper under prevailing legal standards that injunctive relief be granted.<sup>58</sup> In addition, federal assets, including lakes, reservoirs, canals and ditches will suffer bypasses of inflows, diminution in utilization, utility and value.

#### **Declaration Necessary; Questions Designated for Jury**

54. It is necessary to declare the rights of Plaintiffs and the federal Defendants to waters of the Basin, and to declare the rights and duties of the state Defendants to the waters, and control of the waters of the Basin. Upon declaration of those rights, and to prevent actions in violation of those rights like the matters described in the First, Second, Third and Sixth Claims below, permanent injunctive relief is necessary. Declaratory Judgment is sought on each claim as described below under 28 USC § 2201. No other adequate remedies exist, but the

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<sup>57</sup> *Neb Const* Art XV, §§ 4, 5 & 6, and *Neb Rev Stat* § 46-702, requiring that the water resources of Nebraska be used first for human consumption, then agriculture, then industrial purposes, for the people of Nebraska.

<sup>58</sup> *Dataphase Sys, Inc. v CL Sys, Inc.* 640 F2d 109 (8<sup>th</sup> Cir 1981) ( elements for preliminary injunction)

existence of such remedies, if any, do not preclude declaratory judgment.<sup>59</sup> Trial by jury is demanded on all issues so triable including, but not limited to:

54.1 Does the N-CORPE augmentation project cause bypass of surface water past locations where inflow rights exist to surface waters for the benefit of Plaintiffs?

54.2 Does the N-CORPE augmentation project cause bypass of surface water past locations where inflow rights exist to surface waters for the benefit of the federal Defendants?

54.3 Does the Rock Creek augmentation project cause bypass of surface water past locations where inflow rights exist to surface waters for the benefit of Plaintiffs?

54.4 Does the Rock Creek augmentation project cause bypass of surface water past locations where inflow rights exist to surface waters for the benefit of the federal Defendants?

54.5 Is groundwater pumping in the URNRD geographic region excessive and unreasonable in view of the Constitutional and statutory priorities governing water in Nebraska and the obligations of Nebraska to the federal Defendants and Kansas under the Republican River Compact?

54.6 Does groundwater pumping cause bypass of natural stream flows or inadequate stream flows, or threaten to do so, and does it thereby impair and place in jeopardy the surface water to which Plaintiffs and the federal Defendants are entitled?

54.7 Does the current water short year compact call process of the state Defendants impair and place in jeopardy the surface water to which Plaintiffs and the federal Defendants are entitled?

54.8 Plaintiffs invoke their right under *F R Civ P 38* to specify issues for determination by the jury. This case is too complex to identify all such issues now so they respectfully reserve the right to add issues for presentation to the jury until the time of the pretrial conference or such other time as the Court determines in the exercise of its judicial power.

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<sup>59</sup> *F R Civ P 57*.

**First Claim: Injunction; Declaratory Judgment  
Nebraska's Overuse of Its Allocation Due to  
Excess Groundwater Consumption and Improper Transfers—N-CORPE**

55. All allegations above are renewed here.

56. URNRD sponsored and spearheaded project to form N-CORPE and located for acquisition land that could be retired from production as irrigated crop land, and be used instead, as a well-field to pump groundwater to be piped over great distance out of the aquifer and overland, bypassing federal lakes and reservoirs, and bypassing the Plaintiff District's canals and ditches. The N-CORPE project resulted in arrangements announced by URNRD and approved by the State Defendants, involving the acquisition of thousands of acres of Lincoln County Nebraska real estate by N-CORPE. The proposed acquisition is to be followed by cessation of irrigated row crop production, construction of new ground water wells and an aqueduct to transport the ground water in an intrastate pipeline. At the terminus of the pipeline, the water is to be discharged into a surface tributary of the Republican River. From there about half the water will evaporate and about half will reach the Kansas Border in the main stem of the Republican River and never be beneficially used by Nebraskans as the State's Constitution requires. This is all occurring with the direct aid and assistance of Defendants Heineman and Dunnigan. The in-progress and threatened action poses a grave threat, and a clear illustration, of the misappropriation of groundwater and its artificial insertion into streams at a point that bypass one or more of the federal structures, and deprive FCID, NBID, and their water user patrons, including the individual Plaintiffs, of the waters required to permit fulfillment of the obligations owed by the United States and its officials, who are Defendants, to FCID and NBID.

57. The state Defendants cooperated with Defendants Heineman and Dunnigan, to create an Interlocal Cooperative Agency by adopting an Interlocal Cooperation Agreement.<sup>60</sup> They did so with virtually no public comment and no available public input as reflected in the minutes of the meetings of URNRD, and other formative entities, in October 2012, respectively. For example, URNRD's minutes reflect this information as the total input and discussion concerning the creation of the Interlocal Cooperative Agreement and N-CORPE:

Jasper reviewed the Interlocal Cooperation Agreement for acquiring real estate as presented. This Agreement provides the information on the funding for project in terms for reimbursement.

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<sup>60</sup> *Neb Rev Stat* §§ 13-801 *et seq.* authorizes interlocal governmental cooperation agreements.

Terryberry moved to approve the resolution adopting the Interlocal Cooperation Agreement for acquiring real property. Seconded by Gaschler.

Roll call: 11 yes. Motion carried.

58. There was no public input. The only known prior consideration of the Interlocal Agency Agreement occurred at URNRD on October 2, 2012 when this action was taken:

\*Gaschler moved to go into Executive session to discuss negotiations on possible joint augmentation project and other real estate with the Board. Management and legal counsel present. Seconded by Bernhardt.

Roll call: 10 yes. 1 absent. Motion carried.

The Board went into Executive session at 8:26 p.m.

Jason Kunkel arrived at 9:05 p.m.

Gaschler moved to come out of Executive session at 10:12 p.m. Seconded by Schroeder.

Roll call vote: 11 yes. Motion carried.

\*Gaschler moved to direct management and the Executive Committee to negotiate on the offset of acres at Rock Creek and to pursue the joint augmentation project. Seconded by Bernhardt.

Roll call vote: 11 yes. Motion carried.

59. The Interlocal Cooperation Agreement was accomplished pursuant to *Neb Rev Stat* §§ 13-801 *et seq.* The parties created an organization called The Nebraska Cooperative Republican Platte Enhancement Project (“The N-CORPE”) to be governed by the terms of the Interlocal Cooperative Agreement. N-CORPE was created as an entity separate and distinct from the parties, with separate contracts, obligations, and liabilities that are not to be contracts, obligations, or liabilities of N-CORPE.

60. The Agreement recites that N-CORPE is to provide authority, resources, services, studies, and facilities to represent the interests of the parties in proceedings before agencies, tribunals, courts, etc. affecting NRD actions, decisions, and policies to regulate and



manage water to assist the State of Nebraska in compliance with the Republican River Compact.<sup>61</sup>

61. N-CORPE is to be governed by a Board of Directors with each member entitled to one vote, unanimity required before the issuance of bonds, a chairman, vice chairman and secretary/treasurer, committees, and certain powers. The Directors of N-CORPE are not required to be elected officials, and two (2) of the Basin's NRD's appointed their non-elected employee managers as voting members of N-CORPE. These powers include authority to:

61.1 Acquire and sell real property.

61.2 Sue and be sued.

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(d) Receive and accept donations, gifts, grants, bequests, appropriations, or other contributions or assist in monies, services, materials, or otherwise from the United States or any of its agencies, from the State or any of its agencies or political subdivisions, or from any persons, and to use or expend all such contributions in carrying out its operations.<sup>62</sup>

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(i) Make and execute contracts, leases, easements, and other instruments necessary or convenient in the exercise of its powers.

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(k) Borrow money, make, and issue negotiable bonds, bond anticipation notes, refunding bonds, and notes, all in accordance with the *Interlocal Act* and LB701.

62. Withdrawal from N-CORPE is prohibited while N-CORPE has any outstanding indebtedness.<sup>63</sup>

63. In October 2012, URNRD announced plans to form N-CORPE with other political subdivisions to purchase 19,300 acres of farmland in southern Lincoln County for \$83 million from a group of investors in Delaware. Approximately 16,000 acres of the land is irrigated. Approximately three fourths (3/4) of the acres are in the

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<sup>61</sup> The Compact as ratified by Nebraska is codified at *Neb Rev Stat App* § 1-106.

<sup>62</sup> Agreement at ¶ 7

<sup>63</sup> Agreement at ¶ 10

Republican River Basin, with the remainder in the South Platte River Basin. The Nebraska Cooperative Republican Platte Enhancement Project (“N-CORPE”) was formed as a distinct entity..

64. Upon announcing the acquisition, It was announced that N-CORPE plans to take the 19,300 acres of farmland, and approximately 16,000 irrigated acres, out of irrigation production, drill wells into the Ogallala Aquifer, extract groundwater, and build pipelines to pipe the groundwater from the purchased land to tributaries of the Republican River to enhance streamflow in the Republican River.

65. N-CORPE announced plans to use limited obligation bonds to be issued by N-CORPE to pay for the land, related equipment, and improvements, and to finance the bonds with a \$5 to \$6 per acre occupation tax on irrigated land in each NRD in the Basin and Twin Basin NRD which is partially in the Platte River basin and partially in the Republican River Basin.<sup>64</sup> N-CORPE’s spokesperson announced intentions to erect approximately thirty (30) new wells, including pipelines traversing a distance of more than seven (7) miles, to dump the groundwater into Medicine Creek, a Republican River tributary. A purported hearing on the N-CORPE plan was held in Wallace NE during the week of November 26, 2012. The state Defendants are cooperating to move forward the planned land acquisition and conversion of groundwater to surface water for the purpose of allowing it to flow out of the State and not to be used for any beneficial human, agricultural or industrial purpose within Nebraska. There is a grave threat that this plan will be implemented and Plaintiffs will be harmed unless an injunction is issued and the plan is declared invalid.

66. N-CORPE is believed to have taken affirmative steps to acquire the real estate and commence the process of preparing to let contracts to drill water wells, and install pipeline to transport groundwater to the Medicine Creek tributary of the Republican River. On or about October 16, 2012 Defendant Dunnigan, with authority from Defendant Heineman, issued a draft of a proposed letter approving the N-CORPE

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<sup>64</sup> The taxed land will include surface water acres that receive only small amounts of water by comparison with groundwater users.

scheme and giving URNRD purported credit against calculations of allowable units of beneficial consumptive Basin water use to permit URNRD to continue to over pump the ground waters of the Basin for irrigation purposes while withdrawing groundwater to augment stream flow and discharge Nebraska's water. Decades will be required and extraordinary circumstances will be needed to make up the loss or disruption of groundwater subterranean movement to the Republican River and its streams.

67. The state Defendants claim the NCORPE projects will "retime" the arrival of ground water by pumping it from the earth to the stream instead of allowing natural processes to occur. This "retiming" mis-describes true events as the actions artificially move ground water to streams, bypasses several surface streams and inflow points and removes groundwater that would naturally move over many years as recharge occurs over extended time. The pumping proposed by the state Defendants abuses the virgin waters of the Basin on both an annual and a long term basis on terms and in ways that do not comply with the RRC, RRCA, or the lawful, prioritized uses of water under the Nebraska Constitution and statutes.<sup>65</sup> This interference robs the Federal defendants of water needed for delivery to FCID, and in turn, the individual Plaintiffs, for both present and future years and decades.

68. The N-CORPE Project plan to acquire the real estate and withdraw groundwater from beneath it for the purpose of transporting the groundwater by pipeline to a surface stream to accommodate stream flows, is not a use of Aquifer water that is authorized by Nebraska's Constitution or the Nebraska *Groundwater Management & Protection Act*.<sup>66</sup> The N-CORPE plan will not result in the use of the pumped water for (a) human consumption by Nebraskans, (b) irrigation for agricultural purposes, or (c) industrial uses. Instead, the sole purpose of the project is to transport the water to a stream where it can flow out of Nebraska. These uses all have priority over pumping virgin waters of the Basin out of the aquifer to allow about half of it to evaporate and half to travel out of State. This is occurring to allow excessive groundwater pumping,

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<sup>65</sup> See fn 57 above.

<sup>66</sup> *Id.*

particularly where arid conditions prevail and high levels of water are consumed to produce average crops at best, and when the same water would produce more economic benefits for less water if deployed where it will be most impactful.

69. An additional unlawful aspect of the proposed N-CORPE project of the state Defendants involves plans to cause the groundwater from beneath the land to be acquired to be pumped and piped to streams so it will bypass federal lakes and reservoirs without impounding it or permitting its withdrawal for any priority beneficial use.<sup>67</sup> The N-CORPE plan proposed by the state Defendants will cause groundwater to be removed from the Aquifer, discharged to a stream, and to flow outside the State of Nebraska to the State of Kansas. It will not be used by Nebraskans for any beneficial purpose or as a natural want. The N-CORPE plan will prevent the groundwater from serving its interconnected purpose to periodically, steadily, and over time enhance streamflows, and contribute to surface waters of the Basin in the natural and continuous course of events. The pumping will deprive Nebraska and Nebraska surface water users, including FCID and NBID and their water patrons like the individual Plaintiffs, of the advantage of interconnected groundwaters and surface waters, enhanced streamflows, increased impoundment of waters in the Bureau of Reclamation structures from which FCID and NBID receive water into their canals and ditches.

70. The proposed project is unlawful, contrary to Nebraska public policy, and in violation of the Nebraska *Constitution*, statutes, and the law governing water user rights as defined by the Nebraska Supreme Court. Specifically:

70.1 The Plan violates the rules of reasonable use of groundwaters and surface waters.

70.2 The proposed use violates the doctrine of correlative rights as defined by the Nebraska Supreme Court in *Olsen v. City of Wahoo*.<sup>68</sup>

70.3 The action violates the constitutional priorities governing the use of water in Nebraska.<sup>69</sup>

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<sup>67</sup> Plaintiffs understand these waters will flow through Harlan County Lake without being impounded there.

<sup>68</sup> 124 Neb 802, 248 NW 304 (1933)

70.4 The proposed action violates the priorities of *Neb Rev Stat* § 46-613 and the Nebraska *Groundwater Management & Protection Act*.<sup>70</sup>

70.5 The proposed use violates the Republican River Compact, which provides in Art 10 of the 1943 Compact (a section of the Compact unaffected by subsequent proceedings) that Nebraska and the other states must respect, honor, preserve, and protect the priority of the right to use the waters of the Republican River Basin to protect federal interests including interests in federal water impoundment, reservoir, and lake structures.

71. There is a grave threat of irreparable harm. In 2012, extreme drought affected Nebraska, Kansas, and eastern Colorado. The drought conditions starved the Aquifer of water, deprived the land and groundwater of replenishment through rainfall, and depleted streams. These conditions have a substantial likelihood, which FCID believes has risen to a near certain prospect, that the Nebraska DNR, acting through Defendants Heineman and Dunnigan, will declare 2013 to be a year in which water is in insufficient supply in the natural streamflow of the Republican River, as it is expected to exist, resulting in delivery of insufficient water to Kansas at the Nebraska/Kansas border to comply with the RRC.<sup>71</sup> If Heineman, Dunnigan, URNRD, and N-CORPE are permitted to pump water from the Aquifer, transport it through tubes, and discharge it into the Republican River Basin's flowing streams to augment streamflow at the Kansas border, federal facilities at all Nebraska lakes and reservoirs identified above will be avoided and the water will pass into, but immediately through, Harlan County Lake and proceed to the Kansas border and out of the state. This is contrary to Nebraska public policy. It is also contrary to the policy of the United States.

72. Unless Defendants are restrained and enjoined from pumping groundwater to augment streamflow on the terms forecasted, FCID, NBID and their water user patrons including the individual Plaintiffs, are at risk to suffer:

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<sup>69</sup> *Neb Const* Art XV, §§ 5 & 6

<sup>70</sup> *Neb Rev Stat* §§ 46-701 *et seq.*

<sup>71</sup> At Dunnigan's direction a warning letter alerting FCID and NBID of a probable compact water call was sent in mid-December, 2012.

72.1 Irreparable harm for which there is no legal remedy.

72.2 Insufficient water to grow crops or use their land productively.

72.3 Loss of use and value of real and personal property and equipment.

72.4 Deprivation of water to which they are entitled under their extensive and highest priority permits entitling them to the use of surface waters, and to surface water flowages so this water flows into federal storage structure and from federal storage structures into FCID's canals and ditches.

73. A fairly traced, well recognized, and well established link exists between groundwater and surface water. This link is recognized in the Republican River Basin by the RRC Groundwater Model and the RRCA, the FSS, and the Supreme Court's Special Master's 2002 and 2003 Reports. These were all approved the United States Supreme Court.<sup>72</sup> This interconnection was recognized with respect to the waters of the Platte River by the Nebraska Supreme Court.<sup>73</sup>

74. It is necessary that the Court issue injunctive relief to enjoin implementation of the proposed plan to acquire land under the authority of N-CORPE on behalf of the state Defendants. The actions undertaken by N-CORPE and the N-CORPE Project cannot be justified because:<sup>74</sup>

74.1 The purposes of the projects are inconsistent with the constitutional priorities for the uses of surface water and the statutory and public policy priorities for the use of groundwater in the State. Further, the proposed use is an improper, unreasonable, and unlawful surrogate for a rational approach to limiting overall groundwater pumping across the Republican River Basin in a manner providing optimal advantage by using the smallest quantity of water to produce the greatest human and economic benefit.

74.2 While the water courses, into which the water is to be pumped, are suitable to transport surface water, they consist of soft soils and are not naturally designed to receive large quantities of piped water dumped into a specific location, artificially creating a head of water at a single location. Instead, the water courses in question, including the Republican River and its tributaries,

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<sup>72</sup> *Kansas v Nebraska*, 538 US 720 (2003).

<sup>73</sup> *Spear T Ranch, Inc. v Knaub*, 269 Neb. 177, 194, 691 N.W.2d 116, 132 (2005), discussed *infra*.

<sup>74</sup> *Spear T Ranch v. Knaub*, 269 Neb 177, 193, 691 NW2d 116, 131-32 (2005); Restatement (Second) of Torts, § 858; Leroy W. Sievers, *Nebraska Water Law Facing Dramatic Changes in our State: the Spear T Ranch Case*, Nebraska Lawyer 14 (June 2005).

natural exist to receive the gentle, persistent, nearly imperceptible transposition of groundwater to surface water, as groundwaters reach, and transfer into its surface stream.

74.3 The economic value of the pipeline projects proposed and undertaken by the Defendants does not outweigh the detriment effects. While the costs of the pipeline projects are estimated at more than \$100 million, the action proposed will rob water resources from the federal reservoirs and lakes identified above, FCID, other irrigation districts, and downstream surface and groundwater users situated east and south of Lincoln County in Nebraska where the groundwater artificially pumped and transported to the surface stream tributaries of the Republican River will no longer pass because the water has been pumped from the Aquifer, and cannot naturally flow with and through it, as groundwater slowly traverses its eastward and southeastward course in the Basin.

74.4 The social value of the Defendants' pipeline projects cannot be justified. Indeed, artificial transportation of water to augment stream flow by assailing groundwater reserves is antithetical to the natural courses of groundwater and surface water integration and interaction. These natural methods define the manner in which the environment of the Republican River Basin, its land, its land uses, and the economic alternatives of its people, can be defined. Nature cannot be cheated permanently. The Defendants propose to try to do so. There is no long-term social value in any program undertaken by humankind to attempt to cheat nature on a long-term basis. Ultimately, only devastation results.

74.5 The proposed pipeline project of the Defendants produce substantial and irreversible harm. They do so because of their interference with the natural flow and interaction of groundwater and surface water, and because they bypass and harm federal resources and lakes, inflows into FCID for irrigation purposes, and irrigators downstream to the south and east of the locations from which the pumping proposed and undertaken by the Defendants is occurring, or is expected to occur.

74.6 It is not necessary for the actions proposed by the Defendants to be undertaken to achieve Compact compliance with the Republican River Compact. The risk of noncompliance with the Compact can be remedied by adjusting the use, or method of use, of existing water proprietors by diminishing permissible pumping from the groundwaters of the Ogallala Aquifer in the upper reaches of the Republican River Basin in Nebraska, where more water is required to produce no greater quantity of crops. By using groundwaters where they have the most beneficial impact, and implementing the priority of use mandates of the Nebraska Constitution and the Nebraska *GWMPA*, the harm posed by the Defendants'



pumping project can be avoided, and compliance with the Compact can be achieved.

74.7 There is a threat to water quality posed by the Defendants' action in that the pipeline and pipeline project poses risks of disruption to landowners, potential breakage and seepage of deleterious substances into the water, and the large volume dumping of water into a narrowly-defined input point in one or more surface streams of the Republican River Basin. These methods are artificial, and because of their artificiality, they do not permit groundwater to seep and travel through its natural processes, cleansing itself as it goes, through the soils of the State until it reaches the stream where it becomes surface water.

74.8 Existing values of water uses, land, investment, and enterprises will be jeopardized, and not protected, by the proposed project. The investment of the United States of America and its people in the federal reservoirs and lakes of the Republican River Basin, and the investment of the people of the United States and the water users of FCID, NBID, and other irrigation districts, will be jeopardized or destroyed. The land acquired, or to be acquired by the Defendants, will be taken out of production. The water associated with the land will not be used for purposes related to the land under which it exists, or for agricultural purposes. Indeed, the water pumped and transported will not be used by Nebraskans for any economic purpose involving human consumption, agricultural production, or manufacturing. Instead, the water will artificially achieve short-term compliance with the Republican River Compact, but only at the expense of long-term detriment to the Ogallala Aquifer and the groundwater resources of Nebraska.

74.9 The most prominent alternative to the program outlined by the Defendants is to require existing groundwater users, who are pumping water from the Aquifer to produce crops in the Republican River Basin, and particularly in its western-most reaches, to curtail use. This curtailment should occur at a rate, and on terms, sufficient to allow groundwater to flow naturally to the Republican River and its tributaries, and to furnish adequate stream flow for compliance with the Republican River Compact. No artificial use or abuse of the waters of the River Basin should be permitted to interfere with Compact compliance. The Compact's purpose is to divide the *virgin waters* of the Republican River Basin, not to permit Nebraska, its political subdivisions, or any Compact member, to deflower the State's virgin groundwaters by pumping them from the ground, passing them through plumbing to a stream, and dumping them into the stream so they can exit Nebraska without providing a benefit to the State's people or economy. The present over-users of groundwater in the Republican River Basin should be required to abate use, with abatement occurring in a manner directly consist with an appropriateness method that will achieve the highest level of

human benefit and agricultural and economic production and value in exchange for the smallest quantity of water.

75. Defendants Heineman and Dunnigan, in their official capacities and acting on behalf of the State of Nebraska, have affirmatively recognized the risks and dangers of converting groundwater to surface water, and piping it to a discharge point for the purpose of augmenting streamflow in the Republican River Basin. They did so when, in April 2010, they caused and acquiesced to Nebraska's action to withdraw objections to Colorado's augmentation project which converts groundwater in Colorado to surface water and discharges it into the Republican River a short distance upstream from the Colorado Nebraska border. When Nebraska agreed with Colorado that it would not oppose Colorado's pipeline project, in May 2010, Defendant Dunnigan executed an agreement with the State of Colorado including this provision:

Nebraska acknowledges that the RRWCD WAE's current lease of water rights on the North Fork of the Republican River is designed to address Nebraska's concerns regarding the availability of water for diversion from the North Fork of the Republican River at Pioneer Ditch, or Canal (a/k/a Haigler Canal), by the Pioneer Irrigation District of Dundy, Nebraska; but as exemplified by Exhibits K & L, Nebraska's concerns remain unresolved pending further study of the impact of the lease on long-term flows in the North Fork of the Republican River. Nebraska will await the outcome of further analysis before pursuing its concerns, but nothing in this Agreement precludes Nebraska from raising this issue in the future.<sup>75</sup>

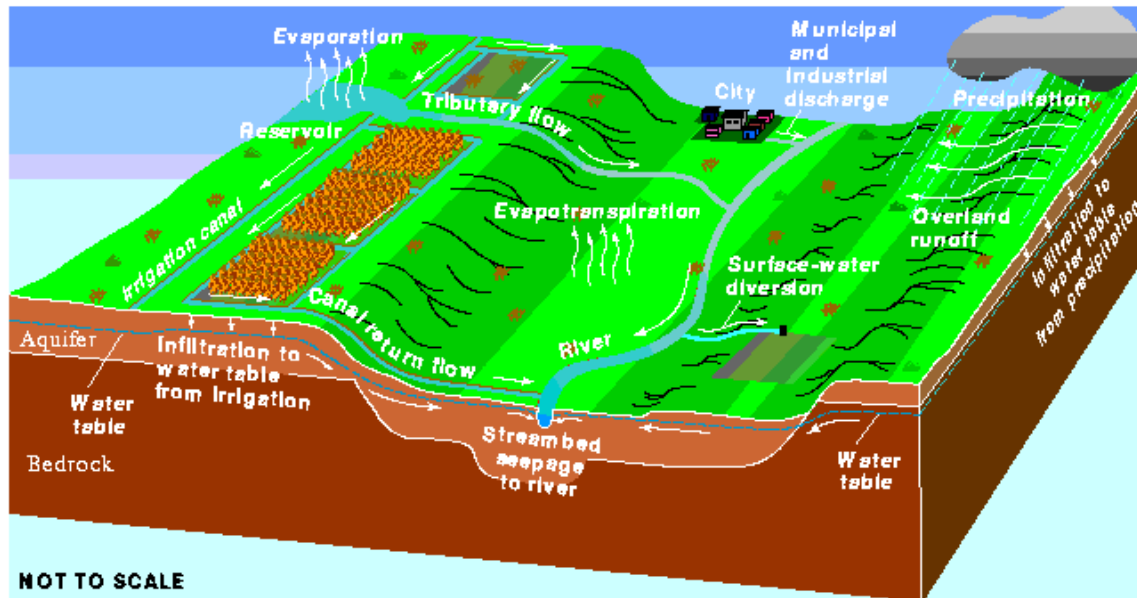
This agreement acknowledges that short term compliance with the RRC accomplished through artificial groundwater-to-stream pumping poses the grave risk of future noncompliance. Plaintiffs will suffer damages as a proximate result.<sup>76</sup>

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<sup>75</sup> Stipulation Between the State of Colorado and the State of Nebraska to Resolve Issues Regarding Arbitration executed in April 2010 with attached "Privileged and Confidential Subject to Joint Defense/Common Interest Privilege" version, subsequently released and now public.

<sup>76</sup> *Spear T Ranch, Inc. v. Knaub*, 269 Neb. 177, 194, 691 N.W.2d 116, 132 (2005) ("A proprietor of land or his [or her] grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless ... the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.") (citing Restatement (Second) of Torts § 858 (1979)).

76. Groundwater and surface water are interconnected. In the Republican River Basin, groundwater contributes an estimated twenty-five percent (25%) or more of annual streamflow to the main stem of the Republican River and to its principal tributaries. Similar hydrological facts are believed to apply to the Platte River Basin. Components of flow are shown graphically in this US Geological Survey figure:<sup>77</sup>



**Figure 3.** Components of flow in the study area.

77. The conduct of groundwater users in the Republican River Basin has significant consequences for surface water users and appropriators, including FCID, NBID and their water patrons. When groundwater is artificially drawn down, transported in pipes across distances, and contributed to streamflow through pumping and pipeline transportation, the natural flow of groundwater in a subterranean stream-like movement, is interrupted. Groundwater that would flow at a future date is accelerated, and residuary groundwater is diminished. Recharge of groundwater levels, does not occur concurrently with its artificial removal through pumping and piping as proposed and undertaken by Defendants.

<sup>77</sup> Found at <http://ks.water.usgs.gov/pubs/fact-sheets/fs.234.96.fig3.gif>

78. The actions proposed by the state Defendants involve pumping groundwater through large wells into pipes which then transport the water over long distances to the Republican River or its tributaries. This action does not constitute a reasonable, lawful use of groundwater or surface water, and it violates the mandatory priorities for water usage in *Neb Const Art XV*, §§ 4, 5 & 6, and *Neb Rev Stat* § 46-702, requiring that the water resources of Nebraska be used first for human consumption, then agriculture, then industrial purposes, for the people of Nebraska. Neither the Constitution nor Nebraska's statutes permit groundwater to be pumped, piped, and contributed to streamflow for the purpose of facilitating the State's water delivery obligations to the citizens of another state. Compliance with the Compact must be achieved by overall management of all waters in the Basin, and by reducing consumption of the Basin's water supply. Sustainable compliance cannot be achieved by artificial actions that deplete future resources to achieve current, brief compliance.

79. A declaration of Plaintiffs' water rights, priorities, and the water use rights and priorities of the parties to the waters of the Basin is necessary. The Court's judgment ordering compliance with the rights and priorities established is necessary. The state Defendants must be enjoined from abusive misuse of waters of the Basin through short term artificial means including the N-CORPSE project of pumping, piping, priming and perversion of ground water to surface water for evaporation and transport out of the State in lieu of reasonable uses of waters in the Basin in accord with state law and federal interests.

80. The state Defendants must be enjoined from failing or refusing to abide by the Court's judgment concerning intrastate use of waters of the Basin through mandatory injunctive relief that contains pumping of groundwater, directions allocations of groundwater consumption within the Basin, on a sub basin or other rational basis, and protects Plaintiffs' surface water rights and priorities as well as those of the federal Defendants.

**Second Claim: Injunction; Declaratory Judgment**  
**Nebraska's Overuse of Its Allocation Due to**  
**Excess Groundwater Consumption and Improper Transfers—Rock Creek**

81. All allegations above are renewed here.

82. In 2012, URNRD publicly announced its plan to erect a \$2.142 million pipeline for a distance of 4.6 miles to pass groundwater to Rock Creek, a tributary of the Republican River. URNRD acquired land and installed pipeline with diameters of up to twenty-four (24) inches to pump up to 10,000 acre feet of water from the Ogallala Aquifer to Rock Creek, by drawing water from the aquifer with five (5) large-capacity wells located on the north end of a 4,000 acre tract of real estate in southwest Dundy County, connecting the production of the wells and passing it to the stream.

83. Water pumped from the wells will interfere with natural groundwater migration to the Republican River and its tributaries, and create a draw down and depression in groundwater supplies and available groundwater resources that will prevent future natural groundwater availability and groundwater augmentation of streamflow.

84. The 4.6 mile pipeline project is constructed to allow continuous pumping and continuous flow into the stream. Water pumped and piped to the stream will not be used in accord with the usage priorities of Nebraska's Constitution and statutes because it will not be used for human consumption, agricultural irrigation, or industrial use. Instead, the water will artificial inflate streamflow at the express of the State's natural ground storage structures, including the Ogallala Aquifer, disrupt the hydrological interconnection between groundwater and surface water, rob future groundwater and surface water users, debilitate inflows into Swanson Lake, one of the federal lakes within the Basin and a lake from which FCID receives surface water into its canals and ditches.

85. The pumping of groundwater from the aaquifer does and will upset the hydrologic connection between groundwater and surface water. It will remove groundwater from 3,300<sup>78</sup> irrigated acres, and while the water will pass through Swanson Lake, it will not be available for use to FCID and NBID and will not be permitted to constitute water available for inflows into FCID's canals and ditches and

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<sup>78</sup> [www.urnrd.org/Aug](http://www.urnrd.org/Aug)

the NBID canals and ditches, because Defendants Heineman and Dunnigan have, or from time to time will, issue orders directing all waters flowing into Swanson Reservoir bypass diversion points into FCID's canals and ditches, and pass directly to surface streams. This need will be created, or exacerbated, by the artificial interference through irrigation pumping, with the natural hydrologic connection between surface and groundwater in the Republican River Basin.

86. A fairly traced, well recognized, and well established link exists between groundwater and surface water. This link is recognized in the Republican River Basin by the RRC Groundwater Model and the RRCA, the FSS, and the Supreme Court's Special Master's 2002 and 2003 Reports. These were all approved the United States Supreme Court.<sup>79</sup> This interconnection is recognized in Nebraska law.<sup>80</sup>

87. The actions undertaken by URNRD at its Rock Creek location in Dundy County, and the N-CORPE action proposed to be taken with the acquisition of real estate in Lincoln County, cannot be justified<sup>81</sup> for the reasons set forth in ¶¶ 74.1 – 74.9 above.

88. These acts and threatened of URNRD, with the assent and approval of Defendants Heineman and Dunnigan violate the Nebraska Constitution, its *Groundwater Management & Protection Act*, and the public policy governing the use of water law announced by the decisions of the Nebraska Supreme Court. There is a grave threat of irreparable harm to the Aquifer, federal facilities, FCID, NBID and their water patrons, including Plaintiffs, if this irrigation system and process is not enjoined.

89. A declaration of Plaintiffs' water rights, priorities, and the water use rights and priorities of the parties to the waters of the Basin is necessary. The Court's judgment ordering compliance with the rights and priorities established is necessary. The state Defendants must be enjoined from abusive misuse of waters of the Basin through short term artificial means including the Rock Creek pumping, piping, priming and perversion

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<sup>79</sup> *Kansas v Nebraska*, 538 US 720 (2003).

<sup>80</sup> *Spear T Ranch, Inc. v Knaub*, 269 Neb. 177, 194, 691 N.W.2d 116, 132 (2005).

<sup>81</sup> *Spear T Ranch v. Knaub*, 269 Neb 177, 193, 691 NW2d 116, 131-32 (2005); Restatement (Second) of Torts, § 858; Leroy W. Sievers, *Nebraska Water Law Facing Dramatic Changes in our State: the Spear T Ranch Case*, Nebraska Lawyer 14 (June 2005).

of ground water to surface water for evaporation and transport out of the State in lieu of reasonable uses of waters in the Basin in accord with state law and federal interests.

90. The state Defendants must be enjoined from failing or refusing to abide by the Court's judgment concerning intrastate use of waters of the Basin through mandatory injunctive relief that contains pumping of groundwater, directions allocations of groundwater consumption within the Basin, on a sub basin or other rational basis, and protects Plaintiffs' surface water rights and priorities as well as those of the federal Defendants.

### **Third Claim: Over Pumping Ground Water**

91. All allegations above are renewed here.

92. The state Defendants have continued to over pump groundwater and sanction such conduct. In 2012 alone URNRD over pumped its target maximum annual beneficial consumption level by approximately 68%, the most dramatic year of over pumping known to Plaintiffs. This occurred with the assent of all state Defendants though Nebraska was actively engaged at the time in significant litigation against Kansas in Orig No. 126, Supreme Court of the United States. It occurred at a time when Nebraska faced, and faces, claims that it so mismanaged its water resources as to have committed contempt against the United States Supreme Court for significantly lower levels of over pumping groundwater in 2005 and 2006.

93. The threat of contempt of the Supreme Court has not proven to be sufficient deterrent to cause the state Defendants to engage in meaningful actions to manage the waters of the Basin. Instead, they have resorted to short-term, short-sighted emergency measures involving a process of "rapid response well" shut-downs primarily in the eastern reaches of the Basin where the least water is required to produce the best crop yields, and the artificial "augmentation" projects which involve efforts to steal, now, from the supply of groundwater laid aside by nature for future use through pumping, piping, priming, and perverting the groundwater-surface water connectivity of the Basin's waters. The state Defendants have immediate plans to continue to do so and to thereby starve stream flows past the inflow points of the canals and ditches from



which Plaintiffs hold rights to draw surface waters and from which federal lakes, reservoirs canals and ditches are entitled to inflows.

94. The state Defendants' immediate plans pose a grave threat of irreparable harm for which Plaintiffs have no adequate remedy at law. Injunctive relief is required to compel compliance with the Republican River Compact on terms consistent with State law, and with water law priorities and rights of Plaintiffs and the federal Defendants. This requires a systematic method of apportioning waters of the Basin using a sub basin by sub basin compliance method as the Compact contemplates, or otherwise doing so while engaging in reasonable practices to maximize the use of ground and surface water to meet domestic, then agricultural, then manufacturing needs and to honor Plaintiffs' surface water inflow rights.

95. A declaration of Plaintiffs' water rights, priorities, and the water use rights and priorities of the parties to the waters of the Basin is necessary. The Court's judgment ordering compliance with the rights and priorities established is necessary. The state Defendants must be enjoined from abusive misuse of waters of the Basin through short term artificial means of compliance and must abide by the Court's judgment concerning intrastate use of waters of the Basin through mandatory injunctive relief that contains pumping of groundwater, directions allocations of groundwater consumption within the Basin, on a sub basin or other rational basis, and protects Plaintiffs' surface water rights and priorities as well as those of the federal Defendants. Plaintiffs have no other adequate remedy at law or in equity.

**Fourth Claim:  
Federal Defendants: FCID Claim**

96. All allegations above are renewed here.

**FCID - BOR Contracts**

97. FCID contracted with the United States Department of the Interior, Bureau of Reclamation, for irrigation water. Its contract entitled "Repayment Contract Between the United States and the Frenchman-Cambridge Irrigation District Providing for a Project Water Supply and for Repayment and Operation and Maintenance of the

Project Water Supply and Distribution System” is dated July 25, 2000. The contract was made by the United States, acting through the Secretary of the Interior, pursuant to the Reclamation Laws.<sup>82</sup> The July 25, 2000 contract was the subject of these amendments:

- 97.1 Amendment No. 1 dated September 23, 2004—payment deferral for 2004.
- 97.2 Amendment No. 2 dated June 8, 2007—equalize annual total repayment obligation.
- 97.3 Amendment No. 3 dated August 9, 2011—defines irrigation season from April 15 to October 15.

98. The July 25, 2000 contract, No. 009D6B0122, acknowledges the United States constructed the Frenchman-Cambridge division of the Pick-Sloan Contract, pursuant to the Reclamation Laws, “to provide benefits for irrigation, flood control, sediment control, fish and wildlife enhancement, and recreation....”<sup>83</sup> The agreement acknowledges the 1951 contract between FCID and the United States, and acknowledges that the 1951 agreement was extended, and has agreed to further contract with FCID in the 2000 agreement.<sup>84</sup> The contract defines the phrase “District’s water supply repayment obligation” as “the portion of the remaining unpaid water supply costs of the Frenchman-Cambridge division... allocated to irrigation (\$51,763,871 as of September 30, 1999) which the District [FCID] shall repay under the terms of Article 5 of this Contract”.<sup>85</sup>

99. The United States contracted with FCID (FCID- BOR contracts) in the 2000 contract as follows:

- 3.a. The United States has constructed the water supply works to supply the District with the District water supply. For each irrigation season, the United States shall deliver to the District the District water supply, and the District shall pay for such water supply pursuant to the provisions of Article 5 herein. Water delivery shall be made at such times during

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<sup>82</sup> The July 25, 2000 contract bears federal No. 009D6B0122. It replaces a predecessor contract No. 2-07-70-W0033, dated July 19, 1951.

<sup>83</sup> Contract No. 009D6B0122, dated 7/25/2000 Recitals ¶¶ a

<sup>84</sup> *Id.* Recitals ¶¶ b-g

<sup>85</sup> *Id.* at ¶ 1.g.

the irrigation season and in such quantities, within the capacity of the system, as provided herein.<sup>86</sup>

100. The FCID - BOR contract specifically provides for a “40-year water supply repayment period”, and the District and FCID, in consideration for the contact, “agrees to continue its ongoing water conservation program and to establish and fund a water conservation fund to finance ongoing and planned water conservatorship related activities”.<sup>87</sup> The contract provides for amounts of irrigation water as follows:

- (1) For each irrigation season, the amount of irrigation water released shall be restricted to no more than the waters available above an established reservoir shut-off elevation at Swanson, Hugh Butler, and Harry Strunk Lakes.
- (2) The amount of irrigation water for release, shut-off elevations, and other reservoir operating provisions for the Water Supply Works shall be established by the parties annually in accordance with a document developed in a manner and form as the initial “District Operating Plan....”<sup>88</sup>

The District Operating Plan is an attachment to the FCID - BOR contract.

101. The FCID - BOR contract requires the District to make a base annual payment of \$22,586,<sup>89</sup> as well as additional sums. The Water Supply Works are transferred by the agreement to FCID for operating purposes.<sup>90</sup> The District undertook, in the 2000 agreement, to operate, maintain, and pay for the operation, maintenance, and replacement of assets of the water works, and to pay administrative costs and related federal costs.<sup>91</sup> Specific points of delivery are established on the contract, and these are the obligation of the United States.<sup>92</sup> In this connection the agreement provides:

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<sup>86</sup> *Id.* at ¶ 3.a.

<sup>87</sup> *Id.* at ¶ 3.d.

<sup>88</sup> *Id.* at ¶ 3.c.

<sup>89</sup> *Id.* at ¶ 5.b. Pursuant to Attachment A to the agreement, an annual distribution works construction charge obligation payment was required of FCID from 2001 through 2010. The annual amount, until the final year, was \$136

<sup>90</sup> *Id.* at ¶¶ 13 & 14.

<sup>91</sup> *Id.* at ¶¶ 9, *et seq.*

<sup>92</sup> *Id.* at ¶ 10.

10.a. Water to be delivered to the District pursuant to this contract shall be delivered at the canal headgates in the Meeker-Upper Meeker Canal, the Red Willow Canal, the Cambridge Canal, and the Bartley Canal. For the purpose of computing the amount of water furnished to the District, such water shall be measured by the United States at or near the headgates of each of the above-named canals with equipment owned, installed, operating and maintained by the United States. The Contracting Officer's determination as to such measurements shall be final.<sup>93</sup>

102. The FCID - BOR contract provides that:

Rights to the beneficial use of the District water supply shall be governed by the Federal Reclamation laws, and other applicable Federal laws, and the laws of the state of Nebraska as the same may at any time apply to this Contract... Provided, That the right to delivery of water under this Contract shall not be abrogated so long as the District is not in violation of any of the provisions of this Contract, or in violation of applicable Federal or state laws, rules, or regulations.

- b. Rights to the beneficial use of the water provided hereunder shall be subject to the provisions and requirements of the Republican River Compact, including any changes, revisions, or additions thereto, as well as any order issued by the United States Supreme Court in *Kansas v. Nebraska*, No. 126, Org.
- c. No rights or interests in or to the District Water Supply other than to receive water annually... shall accrue to the District or to anyone claiming by, through, or under the District, by reason of any provisions of this Contract.
- d. Rights to the beneficial use of the water provided hereunder shall not be diminished because of the conservation activities, reductions in annual deliveries or other water management practices to provide for carry-over storage in accordance with Attachment B of this Contract.<sup>94</sup>

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<sup>93</sup> *Id.* at ¶ 10.a.

<sup>94</sup> *Id.* at ¶ 12.

103. The FCID - BOR contract exempts the United States from liability for water shortages “[o]n account of drought, hostile diversion, or any other causes beyond the control of the parties....”<sup>95</sup>

104. Execution of the FCID - BOR contract by FCID was approved by a Decree of a Court of competent jurisdiction in the State of Nebraska.<sup>96</sup> FCID has fully complied, and is in full compliance currently, with all its obligations under all its contracts with the United States. No notices of default by FCID have been received. FCID has also complied with the Reclamation Laws of the United States.<sup>97</sup>

105. Despite the United States obligations to FCID under its contracts, including its water delivery obligations and its obligation to protect FCID’s water supply, the United States has failed to take affirmative action to protect its resources and assets, and FCID’s contractual rights and rights to water supply, except when interrupted by reasons of drought or hostile diversion beyond the control of the parties. The United States has breached its contractual obligations by its failures. These breaches have proximately caused harm to FCID which has been deprived of an adequate water supply during past years and faces the immediate threat of an additional disruption of its water supply by reason of the hostile actions threatened by Defendants, Heineman, Dunnigan, and the other state Defendants. FCID requires protection to assure its rights are not impaired and to prevent loss of its ability to perform its contractual obligations

### **Red Willow Contract**

106. In addition, FCID is a party to a contract with the United States Department of Interior, Bureau of Reclamation, bearing federal contract No. 11SD6B0084, entitled “Contract Between the United States of America and the Frenchman-Cambridge Irrigation District for Repayment of Safety of Dams Costs Association with Red Willow Dam, Pick-Sloan Missouri Basin Program, Nebraska.” This contract was executed September 14, 2011 by the United States through the

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<sup>95</sup> *Id.* at ¶ 12.

<sup>96</sup> *Id.* at ¶ 18.

<sup>97</sup> This is required by ¶ 25 of the 2000 Agreement.

Secretary and Department of the Interior, Bureau of Reclamation, pursuant to the Reclamation Laws.<sup>98</sup>

107. Contract No. 11SD6B0084 concerning the Red Willow Dam acknowledges and recognizes the existence of the July 25, 2000 contract, No. 009D6B0122. Under the two (2) contracts, FCID is obligated to pay, or repay, certain construction obligation costs associated with irrigation Project (as defined by the 2000 agreement): water supply works, distribution works, and operation, maintenance, and replacement (“OM&R”) of the Project water supply and distribution works. It is also required to pay, pursuant to the 2011 contract, remediation costs for deficiencies in the Red Willow Dam, a structure constructed by the United States for the benefit, and in support of, the irrigation Project.

108. The contracts recite that FCID “is the beneficiary of the irrigation purpose provided by Red Willow”.<sup>99</sup> The Red Willow Project has a term expected to continue until at least December 2014. It involves repayment obligations of \$7,290,000, plus additional potential sums which may be incurred during construction. The contract requires repayment of FCID’s obligations “over a 50-year period once construction is deemed Substantially Completed as defined... and shall be repaid up to the District’s ability to pay”.<sup>100</sup> At a minimum, however, annual payments are required in a sum of no less than \$81,347.<sup>101</sup> Charges are provided for delinquent payment.<sup>102</sup>

109. The federal Defendants’ breaches of their contracts with FCID have caused FCID to suffer harm and threaten it with more, and continuing, harm. The federal government breached its obligations because it failed to:

109.1 Procure and assure a supply of water..

109.2 Actually supply allwater to which FCID and NBID are entitled

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<sup>98</sup> The federal contracts and amendments are not appended to the Complaint but are available upon request of Plaintiffs’ counsel by any party.

<sup>99</sup> Contract No. 11SD6B0084 recitals (g).

<sup>100</sup> *Id.* at ¶ 6(a)

<sup>101</sup> *Id.* at ¶ 6(b)

<sup>102</sup> *Id.* at ¶ 9

109.3 Protect and assure recognition and fulfillment of FCID's priority surface water rights.

110. As a proximate result, FCID was unable to supply its individual users, including the individual Plaintiffs, and the threat of continued disruption is present. FCID has asked repeatedly that the federal Defendants protect and to enforce its water rights, but it has failed to do so. FCID's demands for action by the federal Defendants was made in letters written in 2010, 2011, and 2012, which were not answered or heeded.

111. A declaration of the claims of FCID under its contracts with the federal Defendants is necessary and a judgment directing performance of the contracts as the rights of the parties are declared is necessary and is requested. FCID has no other remedy at law or in equity.

**Fifth Claim:  
Federal Defendants. NBID Contract**

112. All allegations above are renewed here.

113. NBID has similar contracts with BOR (exclusive of the Red Willow Contract). The threats of noncompliance and breach of NBID's contract are substantially identical to those alleged by FCID in the Fourth Claim above.

114. As a proximate result, NBID was unable to supply its individual users, including the individual Plaintiffs, and the threat of continued disruption is present. NBID has asked repeatedly that the federal Defendants protect and to enforce its water rights, but it has failed to do so. NBID's demands for action by the federal Defendants was made in letters written in 2010, 2011, and 2012, which were not answered or heeded.

115. A declaration of the claims of NBID under its contracts with the federal Defendants is necessary and a judgment directing performance of the contracts as the rights of the parties are declared is necessary and is requested. NBID has no other remedy at law or in equity.



### **Sixth Claim: NBID Surface Water Rights**

116. All allegations above are renewed here.

117. NBID's water rights include 35 surface water rights and natural flowage permits for water to enter its canals from the Republican River and its surface water tributaries. NBID's rights are prior in time to the FSS and its approval in 2003. The federal defendants owed NBID a duty to protect these surface water rights and it failed to do so. It failed to do so by agreeing that these surface water rights can be interrupted if the level of Harlan County Lake falls below 130,000 ac feet, without regard to the amount of inflow into the Lake.

118. As a proximate result, NBID is at risk to suffer an ongoing loss of flow of approximately 27 of the 35 surface water rights permit flowage below Harlan County Lake and Dam, below the Guide Rock Diversion Dam east of Harlan County Lake. Defendants Heineman and Dunnigan directed the Nebraska DNR to terminate for a time, any water flowage to these water rights and thereby interfered with NBID's water rights. It is necessary that NBID's rights in these surface rights be protected as they are natural flowage easements and not dependent on lake reservoir storage levels, but on natural stream flow.

### **Requests for Relief**

For the foregoing reasons, Plaintiffs request judgment as follows:

119. On their First Claim, Plaintiffs seek declaratory judgment determining the rights to the waters of the Basin within Nebraska, mandatory injunctive relief against the state Defendants, injunctive relief against the N-CORPE project, costs, and attorneys' fees to the extent permitted by law.

120. On their Second Claim, Plaintiffs seek declaratory judgment determining the rights to the waters of the Basin within Nebraska, mandatory injunctive relief against the state Defendants, injunctive relief against the Rock Creek project, costs, and attorneys' fees to the extent permitted by law.

121. On their Third Claim, Plaintiffs seek declaratory judgment determining the rights to the waters of the Basin within Nebraska, mandatory injunctive relief against

the state Defendants and their program of continued unreasonable groundwater pumping, their failure to prioritize water use within the Basin in accord with Nebraska law, injunctive relief against water short year water call program of the current IMPs and regulatory tools, and all other actions that cause bypass of inflows to federal reservoirs, lakes, canals and ditches, including those on which Plaintiffs rely when sufficient natural flow would exist to support such flows but for the artificial and wrongful acts and omissions of the state Defendants, costs, and attorneys' fees to the extent permitted by law.

122. On the Fourth Claim Plaintiff FCID seeks a declaration of rights and duties under its contracts with the federal Defendants and mandatory injunctive relief compelling the federal Defendants to protect FCID's surface water rights and the dependent rights of its water patrons against mismanagement or improper interference by the state Defendants and for attorneys' fees to the extent permitted by law, and costs.

123. On the Fifth Claim Plaintiff NBID seeks a declaration of rights and duties under its contracts with the federal Defendants and mandatory injunctive relief compelling the federal Defendants to protect NBID's surface water rights and the dependent rights of its water patrons against mismanagement or improper interference by the state Defendants and for attorneys' fees to the extent permitted by law, and costs.

124. On the Sixth Claim Plaintiff NBID seeks a declaration of rights and duties under its 27 or more surface water rights and mandatory injunctive relief against all state and federal Defendants compelling them to respect, and refrain from interfering with those rights or preventing inflows of water under those rights when natural conditions would or do permit it to occur but for wrongful interference by one or more of the Defendants. NBID also seeks attorneys' fees to the extent permitted by law, and costs on this Claim.

125. Plaintiffs seek other relief on each and all claims to the extent required by the evidence.

**Jury Demand**

126. The Plaintiffs demand trial by jury on any and all issues so triable including, but not limited to, the issues described in paragraph 54 above.

Frenchman Cambridge Irrigation  
District, Bostwick Irrigation District in  
Nebraska, Dale Cramer, Jay Schilling,  
and Steve Henry, Plaintiffs,



By: \_\_\_\_\_

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