MEMORANDUM

TO: Members, CWCB
FROM: Bill McDonald
DATE: April 29, 1986
SUBJECT: Agenda Item 11, May 9, 1986, Board Meeting--Proposed Missouri River Interstate Agreement or Compact

Introduction

Kansas Governor John Carlin proposed the negotiation of “a limited compact for management of the Missouri River” last year. He initiated a two-stage approach to the proposed negotiations, with the first step being the preparation by representatives of the governors of Nebraska, Iowa, Missouri, and Kansas of a statement responding to concerns of South Dakota. That statement was prepared and forwarded to South Dakota Governor Janklow with an invitation to join in the proposed negotiations. Governor Janklow has indicated that South Dakota will entertain this suggestion.

In light of the positive response from South Dakota, Governor Carlin has now suggested that the actual negotiations begin. He has asked all 10 governors of the Missouri Basin states, which includes Colorado, to name a negotiator to the discussions.

Background

In 1981, a dispute arose over a proposal to take groundwater from the Madison Formation, an aquifer in Wyoming, South Dakota, and Nebraska, for use in a coal slurry system. The state of Wyoming had issued a permit to Energy Transportation Systems, Inc. (ETSI) for groundwater to slurry coal from mines in eastern Wyoming to power plants in Oklahoma, Arkansas, and Louisiana. The project would have involved pumping 20,000 acre-feet per year from the Madison Formation. Nebraska and South Dakota opposed the project because they feared that pumping would decrease the water level in the aquifer within an area in northwestern Nebraska and southwestern South Dakota.

Because of opposition to this proposal, ETSI subsequently sought to use Oahe Reservoir, which is a Missouri River
mainstem reservoir constructed by the Corps of Engineers in South Dakota, as the source of water for its proposed coal slurry project. ETSI ultimately purchased from South Dakota, through an agreement sanctioned by the South Dakota legislature, 50,000 acre-feet of water annually for its operations.

Under this contract, water would have been carried by pipeline from Oahe Reservoir across South Dakota to a point near Gillette, Wyoming. Numerous rural communities were to get water from the pipeline along the way. At Gillette, the water would have been mixed with pulverized coal for a slurry pipeline.

Following execution of the agreement between ETSI and South Dakota, the lower mainstem states of Iowa, Missouri, and Nebraska expressed opposition to the sale of water from Oahe Reservoir. They feared it would open the door to attempts for similar diversions of Missouri River water to other states to the detriment of their interests in navigation on the mainstem. These three states filed suit in federal district court in Nebraska against the Corps of Engineers and the Bureau of Reclamation, the agencies responsible for approving the sale. The suit sought to have federal approval of the water sale overturned. The district court subsequently ruled favorably on the plaintiff states' motions for summary judgment. The federal defendants appealed to the 8th Circuit which has uphold the judgment below.

In August, 1985, in the midst of this appeal, the State of South Dakota filed a motion for leave to file a complaint against the states of Nebraska, Iowa, and Missouri pursuant to the original jurisdiction of the U.S. Supreme Court. The complaint asked the court to:

adjudicate and declare, in the nature of a quiet title action, the right, power, and authority of South Dakota to use or allocate for reclamation purposes the waters of the Missouri River stored for reclamation and irrigation purposes behind mainstem dams within its territorial boundaries, such right, power and authority to be exercised in accord with the provisions, intent and history of the controlling federal legislation...."

The complaint further prayed that the states of Nebraska, Iowa, and Missouri be enjoined from further interference with the exercise of the right, power and authority of the state of South Dakota over its share of Missouri River water. The Supreme Court denied the motion to file a complaint without prejudice on March 31st.
Discussion

It is against this background that Kansas Governor Carlin took the initiatives described in the introduction to this memo. Colorado's response to Governor Carlin and, indeed, our prior position throughout the many discussions of this matter by the ten state Missouri Basin States Association has consistently been that our entitlements to the North Platte, South Platte, and Republican Rivers are established by interstate compact and decree of the U.S. Supreme Court and cannot be affected by any subsequent compact or agreement among the mainstem Missouri River states.

Governor Lamm has responded to Governor Carlin's most recent request to name a negotiator with a letter (enclosed) which reaffirms Colorado's position and states that Colorado probably will not wish to enter into negotiations for a potential compact. The Governor's letter did, however, name me to participate in the discussions, although not as a formal compact negotiator. This is because:

(1) Colorado probably should not be a party to such a compact,

(2) It is premature to call these discussions compact negotiations since Congress must first give its consent to such negotiations, and

(3) Appointments of compact negotiators require, by statute, the consent of the Board.

The first meeting of the 10 states was held on April 24-25. All states were in attendance except Colorado, I having had a schedule conflict. It has been reported to me that the following things happened at the meeting:

(1) procedural ground rules for the conduct of meetings were established,

(2) a goal of completing discussions and reaching agreement by December 31, 1986, was set,

(3) it was agreed that discussions should proceed in three stages:

(a) definition of the issue(s) in dispute, (b) reaching agreement on solutions, and (c) determining what vehicle(s) is available to implement the agreed upon solutions,

(4) tentative agreement was reached on the definition of the dispute which needs to be addressed, and
(5) the next meeting was set for May 22-23.

It is noteworthy that at least some of the other states are of the opinion that an agreement short of a compact can be entered into among states without the consent of Congress. It is apparently the preference of some at this point in time that such an agreement, rather than a formal compact, be the result of the negotiations. Apparently, discussions will proceed for the moment without this matter being resolved.

Recommendation

This matter is brought before the Board in order to insure that the position which I have been taking and which I have recommended to the Governor is in conformity with the Board's views. If the Board agrees with the position set forth in Governor Lamm's letter, no further action is needed at this time.

JWM/gl