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March 8, 2013

Dick Wolfe, P.E.
Colorado Commissioner
Republican River Compact Administration
Colorado Division of Water Resources
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RE: Deficiencies of Rock Creek Augmentation Proposal and process

Dear Commissioner Dunnigan and Commissioner Wolfe,

This letter is in response to the letter I received from Commissioner Dunnigan dated March 5, 2013, that referred to Nebraska's Rock Creek Augmentation Proposal ("the Proposal") and provided a draft resolution for the Republican River Compact Administration (RRCA) that approves the Proposal without insufficient terms or conditions. Subject to any further discussion of the matter that occurs during this morning's Special Meeting of the RRCA, I anticipate that Kansas will be unable to approve the Proposal in its current form. As you know, Kansas has repeatedly explained that it is willing to discuss the matter to attempt to find a proposal that is mutually agreeable to all of the States. The purpose of this letter is to memorialize Kansas' concerns with Nebraska's approach to this matter and with the Proposal.

The Final Settlement Stipulation (FSS) requires that augmentation plans and their related accounting procedures be agreed upon by the States prior to implementation. This requirement is clearly reflected in the testimony of both former Nebraska Director Roger Patterson and former Colorado State Engineer Hal Simpson at the hearing before Special Master McKusick in January 2003. Both testified that the RRCA's review and approval of any plan and accounting procedures would be done before any project was developed. Augmentation plans are not a continuation of the existing flexibility regarding allocations and consumptive use that the States agreed to provide to each other under the Republican River Compact ("Compact") and FSS.

Instead, augmentation plans are a compliance tool of last resort directed at offsetting over-consumption, which sets them apart from any existing water management flexibility.

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As we understand it, in Colorado, augmentation plans are intended to enable junior ground water users to pump in return for protecting senior water users from any injury that may result from such pumping. Such plans are carefully crafted with terms and conditions to ensure that the interests of other water users are not compromised. The plans also include provisions to resolve any future problems that may arise. These plans require Water Court approval and retained jurisdiction. Kansas agreed to the augmentation provisions of the FSS based on the assurances of the other States that unanimous agreement was required and that any plans and accounting procedures would be worked out well ahead of time, with terms and conditions protecting all of the States' interests.

This critical review has not occurred in this case. As early as the 2007 RRCA annual meeting, Kansas became aware that Nebraska was exploring options for augmentation. Since then, I have continued to encourage Nebraska to bring information and tentative plans to the RRCA for discussion. Yet it was not until February 8, 2013 that Nebraska provided its plan to seek augmentation credit for its Rock Creek Augmentation Project, even as the project was being completed and starting operations.

On the eve of the December 11, 2012 RRCA Special Meeting, Nebraska submitted a general outline of elements related to augmentation plans, but did not provide the Rock Creek Augmentation Proposal at that time. At the December 11 meeting, Nebraska requested feedback by the end of December from Colorado and Kansas. Kansas worked hard to review the submitted material during the holiday period, and provided initial comments on January 14, 2013. In that letter, Kansas explained that "any specific augmentation plan will need to include sufficient detail to allow identification of all relevant issues and concerns and a thorough review by the technical staff of each state." (See my letter of January 14, 2013 attached) Kansas also explained that the purpose of that request was to help Kansas "ensure that [the augmentation plan] will not reduce the usability of Kansas' allocation under the Compact in quantity, timing, or location." Another important consideration was that "given the lack of experience the states have with augmentation plans under the FSS and the complexity of operations, periodic review and a limited term of approval would be appropriate." Given those considerations, Kansas provided specific items that Kansas views as appropriate components of an augmentation plan. This listing included items provided by Colorado in its 2009 proposed augmentation plan and items determined to be reasonable requests by Arbitrator Martha Pagel, who issued a decision regarding Colorado's 2009 proposed augmentation plan.

The first time that Nebraska provided to Kansas a specific augmentation proposal was 28 days ago, on February 8, 2013. Nebraska failed to address many of the elements recommended by Kansas, and requested that a vote on the proposal be scheduled within 30 days. As chairman of the RRCA, I attempted to facilitate discussion of the matter by the states' technical representatives by scheduling a Work Session of the RRCA for March 1. I recommended that the Work Session include discussions of Kansas' concerns. (See my letter of February 27, 2013 with draft work session agenda attached) In advance of that Work Session, I received a letter dated February 28, 2013, from Commissioner Dunnigan explaining that while Nebraska was "willing to listen to Kansas' concerns . . . Nebraska does not believe that the 'requested items' form a legitimate foundation for 'continued discussions' or 'amendment to the [P]lan.'" (See Commissioner Dunnigan's Letter of February 28, 2013, attached) Based on this letter, it appears that Nebraska rejected outright the possibility of revising the proposal even before the Work Session occurred, which frustrates one of the main purposes of the RRCA, which is to facilitate productive dialogue among the States.

Based on Kansas' expedited review, the Proposal is materially deficient for at least six reasons. First, it allows for the expansion of use of existing wells, in contravention to the FSS' requirement for augmentation wells. Second, it makes no provision for transit losses below the project's outlet. Third, it ignores the effect of augmentation flows on Compact accounting (particularly groundwater consumptive beneficial use). Fourth, it has no stated operational limits or other terms and conditions that would ensure that Kansas would not be injured by the operation of the plan. Fifth, it makes no provision for periodic review and evaluation of the project. Finally, it suffers from a lack of specificity in many details of project operations. When combined with the Proposal's assumption that 100% of the pumped augmentation water be credited against Nebraska's depletions, the Proposal would inflate the appropriate augmentation credit and underestimate Nebraska's water use. Because of these concerns, and because Nebraska has deprived Kansas and the RRCA of a meaningful opportunity to address them, Kansas cannot be reasonably confident that the Proposal will not cause harm to Kansas. Consequently, Kansas cannot approve the Proposal in its current form.

I would also note that although the FSS requires prior approval by the RRCA for augmentation plans, Nebraska has already begun pumping from new wells and delivering water into Rock Creek.

Kansas is disappointed with this result but remains willing to engage in discussions over appropriate terms and conditions for an augmentation plan involving Rock Creek. In view of the current water-short conditions, the need for more time to address appropriate elements of a long-term plan, and to gain experience with the actual operation of the Proposal, with time and willing parties, one approach would have been a temporary plan to allow for Rock Creek deliveries and credit with the appropriate terms and conditions, such as those previously identified by Arbitrator Pagel. It is possible that discussions of the matter might have produced a mutually agreeable proposal that addressed the interests and concerns of all the States.

In sum, Nebraska's procedural approach to the Proposal has undermined both the letter and the intent of the FSS, and foreclosed any opportunity for constructive dialogue that might have resolved the dispute.

Attachments:

- Kansas January 14, 2013 letter
- my letter of February 27, 2013 with draft work session agenda
- Nebraska February 28, 2013 letter

Sincerely,



David W. Barfield, P.E.
Kansas Chief Engineer
Chairman, RRCA