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Brian P. Dunnigan, P.E.
Nebraska Commissioner
Republican River Compact Administration
Nebraska Department of Natural Resources
301 Centennial Mall South
PO Box 94676
Lincoln NE 68509-4676

February 20, 2013

Dick Wolfe, P.E.
Colorado Commissioner
Republican River Compact Administration
Colorado Division of Water Resources
1313 Sherman Street
Suite 818
Denver CO 80203

RE: Nebraska's proposed Alternative Water Short Year Administration Plan

Dear Commissioner Dunnigan and Commissioner Wolfe,

I am in receipt of Commissioner Dunnigan's February 8, 2013 letter invoking non-binding arbitration regarding Nebraska's proposed Alternative Water Short Year Administration Plan ("Plan").

As I stated in my October 4, 2012 letter (Attachment A), and repeated at the work session and annual meeting of the Republican River Compact Administration ("RRCA") in October, I do not believe that the Plan meets the requirements of Appendix M. But equally importantly, I do believe that Nebraska could formulate a plan or plans in a manner that would meet those requirements, working through the RRCA.

Commissioner Dunnigan has stated that it has submitted the Plan to the RRCA, and that the Plan has been addressed by the RRCA "within the meaning of the FSS." While Nebraska certainly did submit the plan to the RRCA, it did so at a time that effectively precluded the RRCA from considering it. Over the summer and fall of 2012, the three states were fully occupied with the trial in *Kansas v. Nebraska & Colorado*, No. 126 Orig., and post-trial matters. Furthermore, this is the first such proposal under Appendix M that has been submitted to the RRCA for consideration and the RRCA has never discussed Appendix M and its substantive technical requirements. As a result, Kansas believes that the RRCA has not truly attempted to resolve the substantive technical and engineering issues involved in this dispute; and Kansas also believes that these issues can be resolved. Therefore, Kansas believes that invoking arbitration on the Plan at this time is premature under the FSS and unnecessarily litigious.

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Yet on the specific legal question for which Nebraska has invoked arbitration-- whether the June 30, 2012 Plan is consistent with Appendix M of the FSS-- there appears to be little value in additional RRCA consideration of the matter. Assuming Nebraska wishes to move forward with its invocation of arbitration, Kansas does not see a need to amend the scope of the dispute. As Nebraska requested, we plan to provide our list of potential arbitrators to the States by Friday.

In closing, I would urge Nebraska to initiate resolution of the issues raised by the Plan through the RRCA, so that the RRCA can discuss the requirements of Appendix M and how Nebraska may formulate a plan or plans that are consistent with those requirements. I believe through cooperative work of the States, Nebraska could reformulate its plan into one or more plans for RRCA consideration by this summer or fall—and in a more timely and far less expensive fashion than that provided for by arbitration.

Brian, feel free to give me a call if you wish to discuss this.

Sincerely,



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

Enclosure
DWB:spf



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October 4, 2012

Brian P. Dunnigan, P.E.
Nebraska Commissioner
Republican River Compact Administration
Nebraska Department of Natural Resources
301 Centennial Mall South
PO Box 94676
Lincoln NE 68509-4676

RE: The State of Nebraska's July 30, 2012 Submittal of an Alternative Water-Short Year Administration Plan to the Republican River Compact Administration

Dear Commissioner Dunnigan:

Kansas has received your letter of July 30, 2012 enclosing the State of Nebraska's submission to the Republican River Compact Administration ("RRCA") of Nebraska's Plan for Reduction of Computed Beneficial Consumptive Uses ("CBCU") under Alternative Water-Short Year Administration ("Plan").

The Plan is submitted pursuant to Appendix M of the Final Settlement Stipulation ("FSS") as approved by the U.S. Supreme Court. Appendix M states:

Each Plan shall indicate the actions which Nebraska would undertake to reduce its Computed Beneficial Consumptive Uses from the base condition and the amount of reduction expected from those actions. A Plan's designed reductions in Computed Beneficial Consumptive Uses shall be evaluated by the RRCA using methods consistent with the RRCA Accounting Procedures and the RRCA Groundwater Model.

FSS, App. M, § 2 (emphasis added).

Section 3 of Appendix M makes clear, and your letter correctly recognizes, that RRCA approval is required of a Plan submitted under Appendix M before Nebraska can elect to implement the Plan.

The actions indicated by Nebraska in its proposed Plan, directly and by reference, may, but do not necessarily, include some or all of the following:

1. Retirement of irrigated acreage
2. Leasing of surface water CBCU
3. Adjustment of allocations for groundwater pumping
4. Augmentation of stream flows
5. Groundwater leasing
6. Curtailment of groundwater pumping within the Rapid Response Regions of the Upper Republican, Middle Republican and Lower Republican NRDs
7. Closure of junior surface water diversions
8. Requirement of compliance with senior surface water diversions
9. Protection of storage water releases from Harlan County Lake for delivery at Guide Rock
10. Efforts to minimize bypass flows at Superior-Courtland Diversion Dam
11. Closure of all natural surface water flow and storage permits in the Basin
12. Other alternative management actions

Plan, ¶ II.A, at 1 (incorporating Nebraska’s Integrated Management Planning process).

Nebraska’s Plan begins its discussion of the expected reductions by stating, “Nebraska will seek to maximize the utilization of its Compact allocation while ensuring that the planned reductions in CBCU will be sufficient to ensure compliance with the Compact in each year that this Plan is implemented.” *Id.*, ¶ II.B at 2. Nebraska also indicates that its actions under the Plan “will vary for each time that it is implemented,” and “[f]or each occasion . . . it will be necessary to calculate the expected reduction in CBCU.” *Id.*, at 3. Nebraska further states that it will indicate in its April 1 notice to the RRCA “the expected CBCU reduction required for that year (this value will fall within the ranges specified above).” *Ibid.*

Nebraska’s Plan is based on its IMPs, and potentially incorporates all of the potential actions under the Compact Call Year provisions of the IMPs. The Plan proposes that the CBCU reduction to be achieved could be as low as zero and as high as 38,515 acre-feet per year. No specific quantifications of CBCU reduction are provided.

The Nebraska Plan diverges widely from the requirements of Appendix M. No commitment to any particular action is made in the Plan. Rather, the Plan refers directly or indirectly to an exceedingly great range of actions suggested by the list set out above. Nebraska merely commits that it “will indicate in its notice to the RRCA (due by April 1) if any alternative management actions will be taken in lieu of groundwater curtailment,” *id.*, at 2, and “the expected CBCU reduction required for that year,” *id.*, at 3. It is notable that Nebraska does not even commit to provide by August 1, as required by Section 2 of Appendix M, the amount of expected CBCU reduction, but, rather, commits only to provide on April 1 the expected CBCU reduction “required” for that year.

The Nebraska Plan is thus unacceptable at both a substantive and a literal level. If the RRCA does not know the specific actions proposed by Nebraska as of the time of the submittal of its proposal, which must be received no later than August 1, it is impossible for the RRCA to assess the adequacy of the proposed actions or for Nebraska to quantify the CBCU reduction or for the RRCA to check the validity of such quantification.

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Although the current proposal cannot be approved, Kansas is willing to work with the State of Nebraska in the future if Nebraska wishes to develop a plan which conforms to the requirements of Appendix M. I look forward to our discussion at the RRCA Work Session. I suggest we plan to take action on the Plan at the Annual Meeting.

Sincerely,



David W. Barfield, P.E.
Kansas Commissioner
Republican River Compact Administration

cc: Colorado Commissioner Dick Wolfe, P.E.