



**Dave Heineman**  
Governor

# STATE OF NEBRASKA

**DEPARTMENT OF NATURAL RESOURCES**  
Brian P. Dunnigan, P.E.  
Director

March 20, 2013

IN REPLY TO:

David Barfield, P.E.  
Kansas Commissioner, RRCA  
Kansas State Engineer  
Division of Water Resources  
109 SW 9<sup>th</sup> Street, 2nd Floor  
Topeka, KS 66612-1283

Dick Wolfe, P.E.  
Colorado Commissioner, RRCA  
Colorado State Engineer  
Colorado Division of Water Resources  
1313 Sherman Street, Room 818  
Denver, CO 80203

RE: RRCA Special Meeting for Approval of the Rock Creek Augmentation Plan

Dear Commissioners Barfield and Wolfe:

I have reviewed Chairman Barfield's March 8, 2013, letter submitted minutes before the Special Meeting of the RRCA and its vote on Nebraska's Resolution to approve the Rock Creek Augmentation Plan. Because the letter arrived so late, and Commissioner Barfield elected not to provide an oral summary during the meeting, there was no discussion of the points raised therein in the official record of the meeting. Therefore, I am responding to the letter to clarify the record on several points, and expect this response to be included as part of the official record of the meeting.

First, at the March 1, 2013, work session addressing the Rock Creek Augmentation Plan in Topeka, Nebraska answered all questions posed by Kansas and Colorado that found a basis in the Final Settlement Stipulation and Compact. Nebraska's need to expedite approval of the Plan is not indicative of intransigence, but rather reflects the urgent need for plan approval given the fact that 2013 is currently projected to be a Water-Short Year. Make no mistake: Nebraska will ensure compliance with the Compact even under these conditions. However, to the extent Nebraska is forced to constrain its uses unnecessarily by virtue of unfounded objections to the Plan, Nebraska will seek appropriate redress.

Second, Chairman Barfield's letter references a number of personal interpretations of the FSS, which do not square with its plain language. There is no basis for Chairman Barfield's view that

“augmentation plans are a compliance tool of last resort directed at offsetting over-consumption, which sets them apart from any existing water management flexibility.” The FSS does not express any preference for the manner in which a state meets its Compact obligations. Nor does the FSS incorporate provisions of Colorado water law, as Chairman Barfield apparently believes.

Third, Chairman Barfield appears to suggest that, even though it was mentioned as early as 2007, Nebraska has been silent on the issue until February 2013. However, this is incorrect. At the annual meeting of the RRCA in August 2011, Nebraska requested that the Engineering Committee receive the following assignment: “Discuss developing a framework for an application and approval process for future augmentation plans.” During subsequent Engineering Committee meetings, Nebraska provided updates on the Rock Creek project and made numerous requests for input from Kansas on such a framework. Kansas did not provide any input until September 27, 2012, when it provided a document entitled “Discussion of RRCA considerations of Nebraska Augmentation Plans.” Following this, Nebraska provided an “Outline for Augmentation Plan[s] to [the] RRCA” on December 10, 2012, for discussion during the RRCA special meeting on December 11, 2012. Nebraska considered all of this information and discussion in the development of the Rock Creek Augmentation Project.

Fourth, Nebraska will not apologize for the difficult schedule under which Kansas now labors; a schedule largely of its own making. From the time Kansas sued Nebraska, Kansas has driven the litigation schedule, and even now persists in perpetuating litigation of the Proposed 5-Run Solution to the problem presented by the current RRCA Accounting Procedures. Nebraska is complying fully with every requirement of the FSS, and the timelines Kansas finds so problematic arises from its own intransigence. Regardless, as noted above, Nebraska is entitled to exercise all available management alternatives to remain in Compact compliance, and Kansas may not block those efforts because it is inconvenienced by them.

Fifth, Chairman Barfield presents six reasons that the Nebraska proposal is deficient in the Kansas view. I respond to each below.

1. Kansas suggests there exists a contradiction concerning the use of augmentation wells. As clarified during the March 1, 2013, workshop, Section III.B.1.k is clear, and no contradiction exists.
2. As clarified during the March 1, 2013, workshop, Rock Creek is a gaining reach from the point of discharge to the Rock Creek gage located near Parks, Nebraska. Nebraska, will be measuring flow at the discharge point, at a location on Rock Creek at the Nebraska Game and Parks Commission Rock Creek Fish Hatchery, and of course at the Parks gage.
3. As clarified during the March 1, 2013, workshop, the net depletions of the Rock Creek augmentation project are fully addressed within the Accounting Procedures presented as part of the plan, and are modeled by the RRCA Groundwater Model.
4. Nebraska does not understand how ensuring Compact compliance using an augmentation plan or any other management action would injure Kansas. As

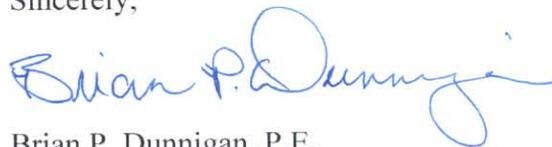
clarified during the March 1, 2013, workshop, specific operational limits (physical pumping plant limits) of the project are presented with the Plan. Any one particular year could include operations up to the operational limits of the facility (i.e., the pumping plant capacities).

5. Nebraska stands ready to operate under terms that first meet its goal of compliance and also helps to facilitate the best management of the water. Nebraska is not, however, willing to invest so heavily in projects like this, only to receive a "limited term of approval" as Commissioner Barfield desires, which approval may be arbitrarily revoked at any time and for any reason.
6. The specificity of the plan provides detail for any State to fully evaluate it. Nebraska has fully addressed all of the augmentation procedures presented in the FSS.

Chairman Barfield asserts that an augmentation project may not operate without prior RRCA approval. This is incorrect. The FSS does not preclude operation of an augmentation project; it merely recognizes that the RRCA Accounting Procedures may need to be changed to account fully for the benefit of those projects. Regardless of whether the RRCA ever approves the proposed plan or accounting changes, any water that reaches the River will increase Nebraska's allocation under the existing Accounting Procedures. Moreover, the ongoing operations in which we are engaged help us to "...gain experience with the actual operation of the Proposal" as requested by Chairman Barfield.

Finally, Kansas' professed desire for continued constructive dialogue is undermined by its actions, including the untimely provision of Chairman Barfield's letter of March 8, 2013, mere minutes before the start of the special meeting. Over the past six years, Kansas has rejected every augmentation plan proposed and has never identified a plan it would support. Thus, Kansas' offer to continue to work with Nebraska is not well received. It is clear that any proposal Nebraska pursues will be blocked, and Kansas' behavior has forced Nebraska to proceed with all due haste to arbitration.

Sincerely,



Brian P. Dunnigan, P.E.  
Director