

## Arbitrator rules for Nebraska on two key disputes with Kansas

Written by Russ Pankonin, The Imperial Republican

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Talk about a Christmas gift!

That's what irrigators in the Republican River Basin got with the preliminary decisions from the arbitrator on compact disputes between Nebraska and Kansas.

In preliminary rulings by arbitrator Karl J. Dreher, Nebraska and its irrigators got two key rulings in their favor.

The two rulings addressed damages due Kansas by Nebraska's non-compliance with the compact in 2005 and 2006, and the accounting methods used to determine compliance.

Attorney General Jon Bruning, who released the findings late Monday, Dec. 22, said the ruling on damages due Kansas represents the most important decision by the arbitrator.

Kansas wanted damages based on the gain Nebraska got from its alleged overuse of water. Estimates as high as \$75 million have been tossed out by Kansas.

What Dreher ruled is that Kansas is limited only to actual damages it suffered.

He said the 2003 compact settlement, like the 1943 compact itself, is a contract between the two states. As a result, damage awards are limited to actual damage suffered by Kansas.

Bruning said Kansas was putting forth a theory of unjust enrichment to Nebraska by having water that, in Kansas' opinion, should have been sent to them.

"Our contention the whole time is that Kansas had enough water to grow a crop," Bruning said.

Any excess water they didn't use would have just flowed downstream to New Orleans, Bruning said.

Bruning said actual damages versus unjust enrichment is what the state believes to be fair.

"We've asked Kansas for their actual damages for some time and they've never responded," Bruning said. "The reason for that is because they're going to be significantly smaller in terms of dollars than unjust enrichment would have been."

To receive damages for water-short years 2006 and the preceding year of 2005, Kansas will have to show actual damages, the arbitrator said.

Dave Cookson, chief deputy attorney general, said the damages the state may face for those two years will be much less.

Estimates in the \$5-10 million range have been previously discussed.

Cookson said he hopes the decisions will bring Kansas back to the discussion table and "we can work something out."

Arbitration is non-binding

While this can be considered a victory for the state and its irrigators in the Republican Basin, it still remains just one win in a long battle.

The compact settlement specified that if Nebraska, Kansas or Colorado had disputes, they must first bring them before the compact administration.

If the disputes are not resolved to all states' satisfaction, any state can call for non-binding arbitration.

Kansas filed the official notice for arbitration on October, 2008. Nebraska then added issues that it felt needed to be addressed by arbitration.

The arbitrator's decision is non-binding upon the three states, which means any state can file suit with the U.S. Supreme Court over the disputes.

Cookson didn't speculate whether Kansas would seek further remedy in the Supreme Court.

While the arbitration is non-binding, Cookson felt the rulings in Nebraska's favor should carry some significant weight if Kansas decides to pursue the matter at a higher level.

However, he said there's still no way to tell how a special master for the Supreme Court

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would rule.

### Ruling on accounting dispute

Bruning said Dreher's ruling allowing the compact accounting methods to be corrected if errors are found is another key win for the state.

The Department of Natural Resources has indicated they have found flaws in the computer groundwater models used to determine compliance.

WaterClaim founder Steve Smith of Imperial, Neb. has long contended the models used by the states to be inaccurate and that changes need to be made.

Dreher said the compact can't be adequately enforced without accurate accounting. As a result, he said any errors found are open for resolution by the compact members.

Dreher found in favor of both states on several issues, clarifying such things as accounting for reservoir evaporation and proposed remedies.

Two of the disputed issues dealt with evaporation in Harlan County Dam and non-federal dams below Harlan.

Dreher said that even when Nebraska Bostwick Irrigation District sells their water to the state instead of taking delivery, the state must share in the evaporation loss.

He also said the evaporation loss in dams below Harlan must be shared by both states in figuring compliance.

In a letter from Kansas in December, 2007, they issued a list of demands that Nebraska comply to. These included shutting down all irrigation wells within 2.5 miles of any stream or tributary as well as wells drilled after 2000.

While Dreher said these proposed remedies by Kansas can be part of the arbitration process, he said Kansas can't mandate those remedies.

He said further hearings on Nebraska's alleged compact violations and proposed methods for future compliance could be held.

After those hearings, only then would the arbitrator recommend actions necessary for future compliance.

A full PDF version of the preliminary decisions by Dreher will accompany this story at [www.holyokeenterprise.com](http://www.holyokeenterprise.com) this week.