



Nebraska Resources

Newsletter

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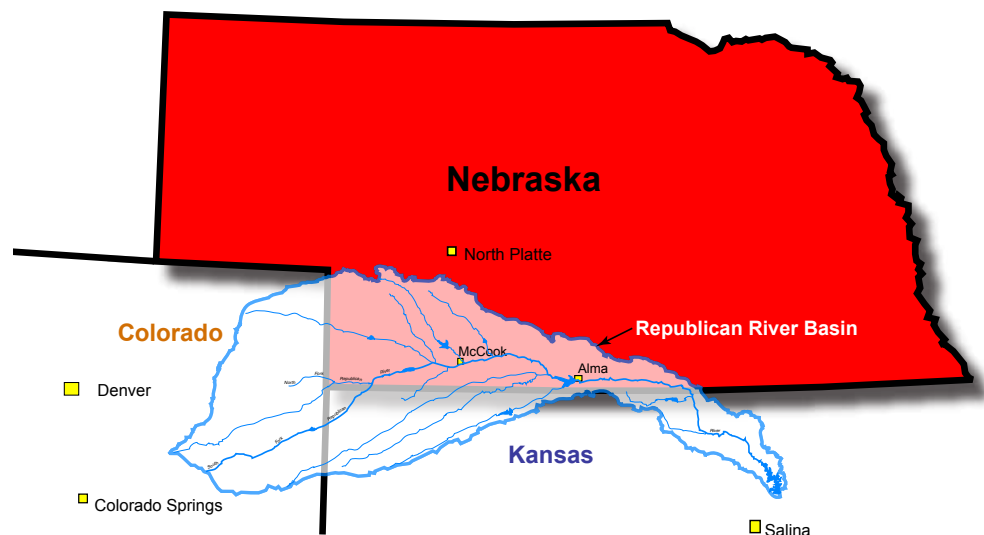
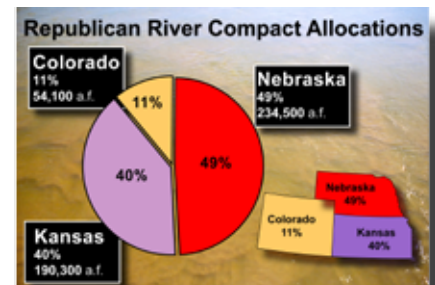
Republican River Arbitration and Litigation Summary

By James Williams

The states of **Colorado, Kansas, and Nebraska** recently completed non-binding arbitration on a number of issues related to the Republican River Compact. Kansas's primary concerns regarded damages due to overuse of water in Nebraska, and Nebraska's compliance in the future. Nebraska was concerned about a number of accounting issues. The arbitrator's decision on Legal Issues was provided on January 22, 2009, and his final decision was provided June 30, 2009.

Background

The **Republican River Compact** was adopted by the legislatures in Kansas, Nebraska, and Colorado in 1942 but was vetoed by President Roosevelt because no federal negotiator participated in the process. A federal representative was promptly appointed, a new compact was created and quickly adopted by the States and the United States Congress in 1943. The compact **established allocations of water** for use by the three states. While river depletions due to alluvial wells were included in compact accounting as early as 1959 Kansas expressed concern in the 1980s and early 1990s regarding non-alluvial wells and the potential river depletions due to these more distant wells. In 1998, Kansas filed an original action in the United States



Supreme Court against Nebraska regarding this and other issues. In December 2002, the three states signed the Final Settlement Stipulation (FSS) that **included all wells in and around the Republican River Basin and imported water in compact accounting.** In the FSS, the states agreed to a dispute resolution process that included non-binding arbitration prior to returning to the Supreme Court.

The timetable that was agreed to in the settlement specified that the first potential compliance period would be in 2006 (*if 2006 was designated a Water Short Year*). Based on Nebraska's overuse, Kansas sent a demand letter to Nebraska in December 2007. **The letter included a request for damages totaling \$72 million and a compliance plan that would have ceased irrigation on more than a half million acres in Nebraska.** Pursuant to the FSS, the states agreed to enter non-binding arbitration, which began in the fall of 2008.

Arbitration

The three states chose to hire Karl Dreher as arbitrator. Mr. Dreher is the former director of the

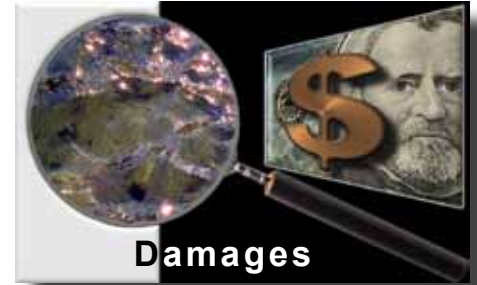
Idaho Department of Water Resources and has degrees in civil engineering.

The arbitration process included a discovery period, and a series of legal briefs, technical reports, and responses. A two-week hearing was held in Denver in March 2009, with an additional day in April for final testimony and closing arguments. After a summary brief was submitted by each of the three states, the arbitrator provided his decision on June 30, 2009.

Damages

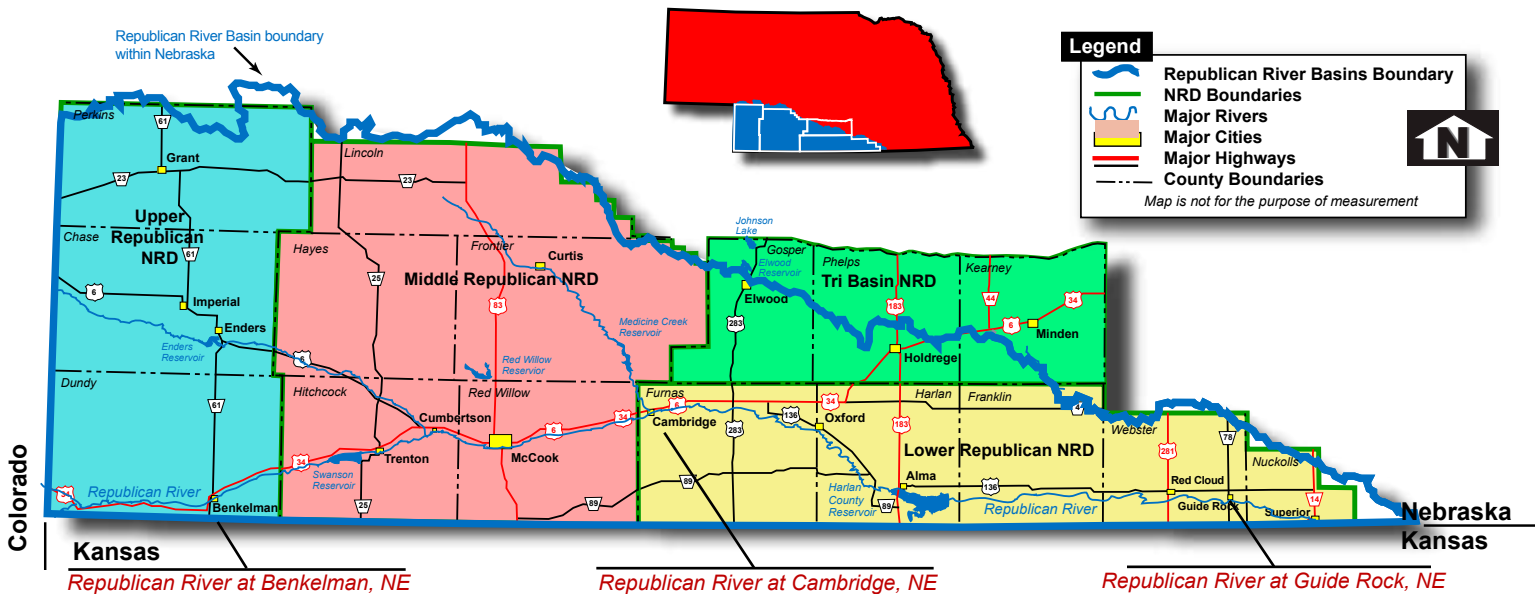
Kansas's original demand letter specified damages based on profits generated in Nebraska as a result of Nebraska's overuse of water.

Early in the arbitration process, Nebraska argued and the arbitrator determined that damages should instead be based on actual damage suffered by Kansas due to lack of water for irrigation. Kansas presented evidence that the actual damages exceeded \$9 million dollars. Nebraska presented



Damages

Republican River Basin Within Nebraska



evidence which illustrated that Kansas' damages would fall within a range of \$0 to \$1.2 million dollars. Colorado presented evidence estimating the damages at \$2.3 million dollars. The arbitrator ultimately awarded \$10,000 in nominal damages from Nebraska to Kansas on the basis that Kansas did not carry its burden of providing a reliable methodology for estimating actual losses incurred by Kansas. The arbitrator wrote that if Kansas could fix its flawed methodology in an additional arbitration or subsequent litigation, the final damages may be one to several million dollars.

Compliance

To ensure Nebraska's future compliance, Kansas had requested that Nebraska stop irrigating approximately 515,000 acres, scale back irrigated acreage added after



2000, and asked the arbitrator to recommend that a river master be appointed to oversee compliance. The arbitrator found that the remedy proposed by Kansas had not established that these actions needed to be applied. As a result, the arbitrator's decision upheld Nebraska's right to choose its own administrative and regulatory actions to comply with the Compact and found that a river master was not necessary at this time. Therefore, the arbitrator concluded Nebraska could continue to manage groundwater resources locally through its natural resources districts (NRDs) and their integrated management plans (IMPs) developed in conjunction with the Department of Natural Resources.

The original IMPs in the three primary Republican River Basin NRDs were in effect from 2005 through 2007, and had goals of reducing pumping to an average of 5% below volumes pumped during the baseline period of 1998 through 2002. The current IMPs will be

in effect presumptively from 2008 through 2012. The revised IMPs have goals of reducing pumping by 20% compared with the baseline period. Given average rainfall, it is believed

that each NRD is to remain within its specified share of the state's overall allocation. While the arbitrator expressed concerns about the IMPs' abilities to deal with drought situations, Nebraska may make up shortfalls during dry years by leasing the rights to surface water, augmenting stream flow by pumping imported groundwater to the river, or employing a number of other methods. Even prior to the arbitrator's decision, the Department of Natural Resources performed an extensive review of additional measures which may be taken based on the annual forecast of allowable depletions, in the event any of the above options become infeasible. The Department will continue with these efforts.

The arbitrator made clear, however, that whatever measures Nebraska imposed would have to ensure Compact compliance and that, in his view, additional damages and injunctive relief would be warranted if Nebraska failed to comply in the future.

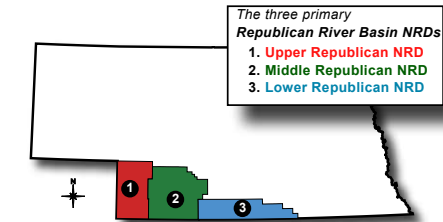
Accounting

Nebraska's primary issue seeks to address an error in the groundwater model accounting and determination of consumptive use and imported water supply. Fixing these errors will result in a **more accurate accounting of water in the Basin and result in an accounting benefit to Nebraska of approximately 10,000 acre feet per year on average**, with a greater benefit realized

during dry years. The arbitrator recognized that a problem in the accounting materializes during certain steam drying conditions and agreed that the current accounting procedures are not sufficient. He also acknowledged that Nebraska's proposed solution was more consistent with Compact accounting, but was unwilling to recommend implementation of that solution due to what he deemed equitable considerations. He recommended reconvening the Technical Modeling Committee which developed the groundwater model to engage in further discussion to find an equitable solution to the problem.



The remaining accounting issues addressed errors in the placement of certain groundwater model accounting points to match sub-basin definitions given in the FSS, as well as procedures for accounting water that flows through Haigler Canal. As with the primary accounting issue above, fixing these errors further enhances the accuracy of the accounting procedures and improves Nebraska's bottom line by approximately 2,000 acre-feet per year.



that this reduction in pumping will keep the state in compliance during the IMP period. In addition, the IMPs state

The arbitrator agreed that the groundwater model accounting point for the North Fork Republican should be moved to the state line between Colorado and Nebraska. While he did not agree that other groundwater accounting points should be moved, he did specify that water should not be counted twice, which occurs when it is measured by passing a stream gage, then again as a groundwater depletion after recharging the aquifer.

The arbitrator determined that he did not have enough information to recommend Nebraska's proposed modifications to accounting related to the Haigler Canal (also known as the Nebraska portion of the Pioneer Ditch).

Harlan County Lake Evaporation

Current Republican River accounting states that evaporation from Harlan County Lake is to be charged to Kansas and Nebraska in proportion to the volume used by the irrigation districts located in each state. In his January decision on legal matters, the arbitrator determined that the current accounting procedures should apply for 2006 accounting, but recommended that the charge for evaporation from Harlan County Lake should be renegotiated.



In his final decision, the arbitrator reversed his earlier legal opinion, and determined that Nebraska should be charged a portion of the 2006 Harlan County Lake evaporation. This issue was not discussed during the hearing, and Nebraska did not have an opportunity for rebuttal.

Future Issues for Arbitration

There are **two issues** that are likely to move forward for arbitration in the near future:

1. Colorado has proposed a plan to augment stream flow on the North Fork Republican River by pumping groundwater several miles north of the river and piping it to the river at the state line. Colorado has stated that it is going to request that the Republican River Compact

Administration (RRCA) vote on the augmentation proposal. If rejected by the RRCA, it is likely that they will begin the dispute resolution process. Nebraska's concerns include protection of surface water users on the North Fork Republican River, the long-term depletion of ground water in the upper basin, and the effects on Republican River Compact accounting.

2. Nebraska requested the RRCA to consider whether a damage payment for a two-year period of noncompliance should result in a modification to the accounting to reflect that such payment mitigated any violation by making a state whole for that period. This "crediting issue" could apply in future two and five year compliance periods that overlap any noncompliance period where a damage payment has been made.

Future Litigation

It is likely that one or more states will be dissatisfied with the arbitrator's conclusions and recommendations. In that case, the recourse specified in the FSS would be for the states to seek leave to file a bill of complaint for an original action in the United States Supreme Court. If the Supreme Court accepts jurisdiction over one or more issues specified in the bill of complaint, the Supreme Court would nominate a special master to hear the issues and ultimately make recommendations to be adopted by the full court. The time frame for this litigation is unknown, but may take several years.

Republican River Basin

The **Republican River Basin** within Nebraska covers approximately one-eighth of Nebraska's land area. The water of the basin is shared with both Kansas, and Colorado. The Republican River enters Nebraska at the southwestern corner from Kansas and Colorado and flows eastward through Nebraska for about 215 miles before it reenters Kansas near Superior, Nebraska. Major tributaries of the Republican River include the Frenchman Creek, Driftwood Creek, Red Willow Creek, Medicine Creek, and Sappa Creek. The River's thirteen sub-basins within Nebraska fall over seventeen counties.

Within the Republican River Basin, there are approximately six million acres of agricultural land. Precipitation within the area varies between 17 and 25 inches per-year. A significant portion of the water resources of the Basin have been developed or controlled by storage reservoirs on the Republican or its tributaries. Among the reservoirs, the largest include Harlan County Dam, with a surface area of 12,577 acres; Enders Dam (surface area, 1,707 acres); Medicine Creek Dam (surface area, 1,768 acres); Red Willow Dam (surface area, 1,628 acres); and Trenton Dam (surface area, 4,974 acres).

Resources Development Fund Obligations for Fiscal Year 2010



By Kent Zimmerman

Work on approved **Nebraska Resources Development Fund (NRDF)** projects continued to progress more rapidly than the funding appropriations. As a result, the gap between project sponsors' current and projected reimbursable expenditures and available NRDF funds continued to widen. **Requests for FY 2010 funding totaled nearly \$14 million, compared against the budget appropriation of \$3,373,066** that the Commission had available to obligate. The sponsors worked in collaboration with DNR staff to reach a consensus for the FY 2010 funding recommendation.

At the meeting on May 14, the Commission took several actions related to the Resources Development Fund including the following:

- Allocation increases requested to cover cost overruns associated with increased construction and land costs were approved for **three projects** - Lake Wanahoo, Lower Turkey, and Western Sarpy/Clear Creek.
- Funding previously obligated to the Western Sarpy/Clear Creek project was transferred within project components to allow the sponsor (Papio-Missouri River NRD) to use those funds in satisfying the US Army Corps of Engineers requirement for "up front" payment of the local share of estimated contract costs. This project received approximately \$9.36 million in American Reinvestment and Recovery Act stimulus funding for federal fiscal years 2009 and 2010.
- Obligations against the FY 2010 appropriation were as follows: **Maple Creek Recreation Area Project (Leigh Dam) - \$656,978; Lower Turkey Creek Watershed Project - \$436,002; Sand Creek Environmental Restoration Project (Lake Wanahoo) - \$1,381,268; and Upper Prairie/Silver/Moores Creek Project - \$898,752.**

Interrelated Water Management Plan Program

By Rex Gittins

At its May 14, 2009, meeting, the Nebraska Natural Resources Commission **awarded FY 2010 funding for sixteen projects** for the purpose of facilitating and funding the duties of natural resource districts arising under the Nebraska Ground Water Management and Protection Act. Awards included funding for **13 new projects** and for **continuing three previously approved** multi-year studies. **This program helps offset costs incurred by natural resources districts in research and implementation of interrelated water management plans and actions.**

FY 2010 Funding Summary

Project Number	Project Name	FY 2010 Funding	Lead Sponsor
18	Water Management Simulation & Optimization Analysis	\$ 90,240	NPNRD
19	Recharge Estimation Across the Central Platte River Basin	\$180,000	CPNRD
30	Republican River Augmentation Engineering Study	\$220,500	URNRD
31	Characterization of Near Surface Lithologies under Selected Irrigation Canals	\$466,338	NPNRD
32	Western Water Use Model	\$169,200	NPNRD
33	Conjunctive Water Use Model of the Upper Niobrara River Basin	\$ 48,000	UNWNRD
34	Development of a Conjunctive Water Management Plan for the Platte Valley	\$170,000	CPNRD
35	Dedicated Observation Well and Geologic Data Network	\$ 50,700	LBNRD
36	Elkhorn Loup Modeling Study Phase III	\$289,166	LLNRD
37	Eastern Nebraska Water Resources Assessment 1(Study)	\$169,500	LPNNRD
39	Republican River Basin Water Balance Study	\$ 55,000	LRNRD
40	Aquifer Study	\$ 50,000	LCNRD
41	Measuring Components of the Hydrologic Water Budget on Different Landscapes	\$ 97,000	CPNRD
42	Water Accounting GIS	\$ 96,000	SPNRD
43	Platte River Riparian Evapotranspiration Comparison	\$ 67,900	CPNRD
Total		\$2,219,544	

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The *Nebraska Resources* is a quarterly publication of the Nebraska Department of Natural Resources. Your comments and suggestions are welcomed.

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....dedicated to the sustainable use and proper management of the State's natural resources.