

Special Water Master's report on Republican River favors Nebraska

Written by Wauneta Breeze
Wednesday, 20 November 2013 18:26 -

Kansas' claim for \$80 million

in damages reduced to

\$5.5 million

By Russ Pankonin

The Imperial Republican

Last Friday's report by Special Water Master William Kayatta, Jr. gave Nebraska the upper hand in a dispute between Kansas and Nebraska that dates back to 2010.

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"The decision could have only been \$5.5 million better," said Upper Republican Manager Jasper Fanning. Kayatta said Kansas was entitled to damages of \$5.5 million versus the \$80 million they had sought.

Fanning said the only way the report could have been more favorable for Nebraska was if Kansas hadn't gotten any damages at all, he noted.

Fanning said the reduction in damages was important. But even bigger was a change in the accounting process that ultimately determines how much water is available to Nebraska, he added.

That will be worth many times more over the years than the \$5.5 million Nebraska will have to pay Kansas, Fanning said.

In addition to the accounting change, Kayatta said Nebraska should not be charged for evaporation that occurred from Harlan County reservoir in 2006.

These two rulings will gain the basin from 16,000 to 18,000 acre feet towards water use calculations for 2007.

In addition, the accounting change will result in additional water supply annually, Fanning said.

That additional water will be a boost in helping Nebraska stay in compliance with the 2002 settlement agreement reached with Kansas over basin water supplies, he added.

Accounting change for mound

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Each year, the Republican River Basin's water supply is boosted by imported water from the Platte River Basin.

This water comes into the basin from the seepage of water from Platte River irrigation canals at the edge of the Republican Basin.

This "imported water" accumulates annually in an area referred to as the "mound" because the water "mounds" up underground.

Fanning said the amount of water in the mound ranges anywhere from 6,000 to 10,000 acre-feet.

The 2002 settlement stipulated use of imported water use would not be charged against Nebraska's consumption.

But since 2006, Nebraska has contended the groundwater accounting model incorrectly charged this use against Nebraska. Kayatta agreed and said all accounting from 2007 to present must be re-figured.

Fanning said Nebraska will pick up an extra 8,000 acre feet from 2006, relating to the evaporation from Harlan County Reservoir.

That year, the state of Nebraska purchased the water the Nebraska Bostwick Irrigation District was holding in Harlan. As a result, the water was never released into their canals.

Since the water wasn't used, Nebraska contended it should not be charged for the evaporation use. Again, Kayatta agreed with Nebraska.

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Fanning said the basin has overused its allocation in the past two years. But the additional water from the 2006 evaporation credit and accounting changes will reduce the amount of deficit the basin will need to make up next year.

The Rock Creek and Lincoln County augmentation projects will be key in offsetting the deficit.

Other recommendations

Kayatta made several other recommendations in his report, which will be forwarded to the U.S. Supreme Court for their consideration.

In addition, Special Master Kayatta made the following recommendations:

—Kansas' demand of damages for \$80,187,021 should be rejected.

In his report, Kayatta said Kansas failed to prove it was entitled to an award based on unjust enrichment because it could show no bad faith by Nebraska.

—Kansas' claim of actual damage in the amount of \$6,577,165 should also be rejected.

Instead, Kayatta recommended Nebraska should only have to pay \$5.5 million.

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Of that amount, he attributed \$3.8 million as the actual damages Kansas suffered by Nebraska's overuse in 2006.

In addition, he said Nebraska should also pay \$1.7 million to Kansas for the gain it received by pumping extra water in 2006.

—Kansas' demand that Nebraska permanently shut down 302,000 irrigated acres should be rejected.

—Kansas' demand for appointment of an independent River Master to dictate compliance terms should be rejected.

—Kansas' request that Nebraska be found in contempt should be denied.

—All remaining requests by Kansas, including injunctive relief and sanctions, should be denied.

When Kansas filed their suit for relief in May, 2010 they sought an injunction to shut down wells irrigating more than 300,000 acres in the basin.

In addition, they said the integrated management plans adopted by Nebraska natural resource districts in the basin could not insure compliance.

Kayatta said the injunction Kansas sought “runs the gamut from an order enjoining further violations, to an order shutting down 302,000 acres of groundwater pumping, to the appointment of a so-called ‘river master,’ and to the setting of ‘preset sanctions.’ ”

He told Kansas they sought to place the burden of disproving the need for injunctive relief on Nebraska.

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"That reliance is misplaced," he wrote. ". . . Kansas has not carried its burden of establishing a cognizable danger of recurrent violation."

As a result, he denied these injunctive requests.

U.S. Supreme Court must act

Before Kayatta's final report settles the dispute, it will be reviewed by the United States Supreme Court.

In a dispute between states, the case goes directly to the U.S. Supreme Court.

In this case, the court appointed Kayatta as a special master to build the record and make recommendations in a final report to the high court.

Fanning said it's possible the U.S. Supreme Court will allow the two states to make oral arguments on the final report.

The Court's final ruling is not anticipated until sometime in 2014.

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Their ruling will then mark the end of this dispute between Kansas and Nebraska.

However, Nebraska and Colorado remain in non-binding arbitration with Kansas over the crediting of augmentation water released into the Republican River.

Colorado has an augmentation project that has yet to operate while the crediting issue remains in question.

The Upper Republican NRD continues to operate its Rock Creek augmentation project. The district only receives 69 percent credit for the water pumped.

The NRDs that will operate the Lincoln County augmentation project will only receive 54 percent credit for each acre foot pumped.

Both states are seeking 100 percent credit for their augmentation pumping.

Without Kansas' agreement, these crediting issues could also land before a U.S. Supreme Court-appointed special master.