

Republican Basin irrigation districts' lawsuit challenges augmentation projects, overall water management

By LORI POTTER Hub Staff Writer | Posted: Thursday, January 3, 2013 1:30 pm

KEARNEY — Surface water irrigators in the Republican Basin have filed a lawsuit that could halt two multimillion dollar projects to pump groundwater into river tributaries to help Nebraska comply with the 1943 Republican River Compact.

The lawsuit filed Friday in U.S. District Court in Lincoln includes state and federal officials as defendants for not having done enough to protect the irrigation districts' water rights, specifically not controlling overuse of groundwater.

“The surface water irrigators are at a point where they realize if they don't do anything, they're out of business,” said Omaha attorney [David Domina](#), who filed the lawsuit on behalf of the Frenchman Cambridge and Nebraska Bostwick districts and of three Frenchman Cambridge irrigators.

State defendants have 30 days to reply, and federal defendants have 60 days. Domina said he'd be surprised to see a trial date in 2013.

Bostwick, based in Red Cloud, is downstream from Harlan County Lake and provides water to approximately 22,455 acres of farmland along Franklin, Naponee, Superior and Courtland canals. Cambridge-based Frenchman Cambridge is upstream of the lake and serves more than 45,600 acres on four canal systems.

The lawsuit focuses on two streamflow augmentation projects through which natural resources districts plan to retire cropland from irrigation and use new or existing wells and pipelines to put groundwater into tributaries.

The Imperial-based Upper Republican NRD plans to build a 4.6-mile pipeline to transport groundwater from a southwest Dundy County wellfield into Rock Creek.

The Upper, Middle and Lower Republican and Twin Platte NRDs purchased a 19,300-acre Lincoln County farm — about 16,000 are irrigated — for \$83 million. Three-fourths of the groundwater from that property could be added to Medicine Creek.

Domina said the projects would bypass the irrigation districts and federal reservoirs in which their water is stored. Even the water going into Harlan County Lake would pass through on its way to Kansas for compact compliance without benefiting Nebraska Bostwick irrigators, he said.

A major lawsuit argument is that transporting groundwater to benefit streamflows into another state is not one of the three uses of aquifer water — human consumption by Nebraskans, irrigation for agricultural purposes or industrial uses — authorized by the Nebraska Constitution or Groundwater Management & Protection Act.

“Instead, the sole purpose of the project is to transport the water to a stream where it can flow out of Nebraska,” the lawsuit says.

An additional problem with the Rock Creek project is its location. Domina said it’s in the part of southwest Nebraska with the greatest amount of groundwater overuse.

“Groundwater overpumping cannot be cured with more pumping, just like you can’t borrow your way out of debt,” he said.

A lawsuit goal is to ensure that the Nebraska Department of Natural Resources won’t approve the augmentation projects if they hurt the reservoirs and irrigation districts. “That means they probably couldn’t be done,” Domina acknowledged.

Another goal is to get DNR to do more to reduce overuse of groundwater that is hydrologically connected to streamflows. That overuse reduces the irrigation districts’ surface water supplies, he said.

Although augmentation is used to describe the two water projects of concern, Domina and the irrigation districts’ managers said water isn’t being created.

“We’re re-timing water,” said Frenchman Cambridge Manager Brad Edgerton. “We’re not really adding water.”

“It doesn’t really change, holistically, what’s going on,” said Nebraska Bostwick Manager Mike Delka. Both said the projects would have short-term benefits while depleting groundwater needed to enhance streamflows over the long term.

Federal agencies and officials with whom the irrigation districts have water supply contracts are listed as defendants for not meeting their responsibilities to protect the districts’ water rights, the lawsuit says.

The lawsuit also says “Nebraska is engaged in reckless indifference toward the RRC (Republican River Compact) and Nebraska’s obligations due to the decisions, indecisions, actions and inertia of Defendants (Gov. Dave) Heineman and (DNR Director Brian) Dunnigan.”

It says Nebraska has not curtailed groundwater irrigation use and has permitted greater abuse of supplies in the most arid region in the western part of the basin. “They’re allowing too much pumping too far west,” Domina told the Hub.

In the lawsuit’s claims about overpumping, shutting down rapid-response wells nearest the river and artificial augmentation projects are called short-term, short-sighted emergency measures “which involve efforts to steal, now, from the supply of groundwater laid aside by nature for future use.”

Edgerton raised a fairness issue. With 2013 expected to be another dry year, Frenchman Cambridge officials are looking at an irrigation supply that will allow only 4 inches of water per acre.

Meanwhile, upstream groundwater irrigators may be allowed to apply four or more times that amount. “Clearly the compliance issue is put on our backs,” Edgerton said.

Domina said the lawsuit seeks a comprehensive adjudication of water rights basin by basin, and even the compact looks at conditions narrowed down to subbasins.

He describes Nebraska’s two water rights systems, priority rights for surface water and correlative (share-and-share alike) rights for groundwater, as “doctrines of uncertainty” that are in play within the lawsuit.

“The state needs to have a comprehensive water policy. If the Legislature won’t do it, it often takes the judiciary,” Domina said.

Delka said the lawsuit is a way for surface water users to be involved. “We haven’t been in the past. We kind of stood by,” he said. “... We just feel we can’t stand by anymore.”

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