

Lawmaker fears more Republican River lawsuits

By Kevin O'Hanlon
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As the lingering drought worsens across Nebraska, a state lawmaker says he fears the wrangling over water in the Republican River basin could result in more legal battles.



The Republican River flows through Southwest Nebraska below Harlan Co. Lake.
Courtesy Twin Valley Weed Management

The state already is mired in litigation over Republican River water. And Sen. Mark Christensen of Imperial said he was confident more lawsuits will be filed if the state, as many expect, moves to limit groundwater irrigation on land within 2 1/2 miles of rivers and streams in the Republican basin.

"It would appear pretty likely," Christensen said. "Absolutely."

Who gets to use the Republican River's water is spelled out in a compact involving Colorado, Nebraska and Kansas. The 1943 agreement allocates 49 percent of the river's water to Nebraska, 40 percent to Kansas and 11 percent to Colorado.

The Republican River, formed by the confluence of three smaller streams that originate in the high plains of northeast Colorado, flows generally eastward from Colorado into and along the southern border of Nebraska, into Kansas. There, the Republican River joins the Smoky Hill River to form the Kansas River.

Kansas has long accused Nebraska of violating the 1943 compact by allowing farmers to divert more than their legal share for private use. Kansas has said Nebraska has allowed the proliferation and use of thousands of wells hydraulically connected to the river and its tributaries, thus depleting the river's flow.

That has led to two lawsuits involving Kansas and Nebraska, including one that is pending before the U.S. Supreme Court.

Earlier this year, the Nebraska Department of Natural Resources ordered the release of water from four reservoirs in the Republican River Basin to keep the state in compliance with the Republican River Compact, a move that alarmed surface-water irrigators.

That action followed a Jan. 1 pronouncement by state Natural Resources Director Brian Dunnigan that acknowledged regional drought conditions and dictated extra conservation measures by irrigation districts using surface water and natural resources districts that manage groundwater supplies.

The federal Bureau of Reclamation owns and operates the four reservoirs covered by the state order -- Swanson, Enders, Hugh Butler and Harry Strunk.

Meanwhile, another lawsuit was filed in December by two groups of irrigators against the state of Nebraska and federal officials, challenging a plan to pump groundwater into the river to comply with the 1943 compact. It was filed in U.S. District Court by the Frenchman Cambridge Irrigation District, the Bostwick Irrigation District and three individual irrigators against Gov. Dave Heineman, the state Department of Natural Resources, the Upper Republican NRD and the U.S. Department of Interior, among others.

The irrigators' lawsuit, filed by Omaha attorney [David Domina](#), says: "Defendants threaten to disrupt groundwater supplies and natural movement to surface streams, and to cause groundwater to bypass streams with which it naturally interconnects.

"By doing so ... defendants threaten to disrupt and diminish inflows from naturally occurring groundwater ... to streams, and from streams to federal reservoirs and lakes in Nebraska, and thereby reduce, disrupt, and intermittently eliminate the availability of surface waters to flow into the irrigation canals and ditches of (the irrigation districts), which hold prior and superior water use rights and superior natural flowage easements. These rights predate pertinent water regulations."

When lawmakers convene in January for the 2014 session, they will begin second-round debate on a bill (LB522) that would compensate farmers when Nebraska limits or shuts off irrigation in the Republican River Basin.

It would direct \$10 million to pay surface-water irrigators as much as \$150 an acre per year for two years as compensation for the loss of water. Of that, \$6.6 million would come from a fund the Legislature has been paying into since 2007 -- the last time the state paid irrigators for water sent to Kansas. The other \$3.4 million would be new spending from the general fund.

The measure also would set policy so the \$150-an-acre yearly payment could be increased to \$300. The bill, by Christensen, faces two more rounds of consideration.

Sen. Tom Carlson of Holdrege voted for the measure after first-round debate last session, but he said he might change his vote on second-round debate if the lawsuit were not dropped.

"They're suing us, and it makes it a little difficult to want to help them," Carlson said.

But the lawsuit is progressing, and Domina said there had been no talk of settling the case.

"The overture would have to come from the state, as my clients have no way to open a door to discussions," Domina said. "There has been no overture."

Said Christensen: "I don't think there is any way you are going to settle that lawsuit without going to court."