

**By Russ Pankonin**

**The Imperial Republican**

Unsatisfied with the June, 2009 results of non-binding arbitration, Kansas wants the U.S. Supreme Court to re-address the issue of Nebraska's compliance with the 2002 compact settlement.

On Tuesday, Kansas Attorney General Steve Six filed a motion with the U.S. Supreme Court asking the Supreme Court to take up the matter.

Kansas wants the nation's high court to step in and enforce the settlement decree between the two states, which outlines the states' rights to water from the Republican River basin.

The filing also listed the State of Colorado as a defendant.

During the Upper Republican Natural Resources District regular meeting Tuesday night, legal counsel Joel Burke addressed Kansas' action.

Burke explained the motion was a request by Kansas for the U.S. Supreme Court to hear their case against Nebraska and Colorado.

Burke said the Supreme Court gets many requests annually but hears only a limited number. While Kansas has filed with the Supreme Court, Burke said the high court must accept the case first before Kansas' action can go forward.

Burke said in light of the fact the Supreme Court already appointed a special water master to hear the first suit brought in 1998 and that non-binding arbitration has been recently completed, it's not a cinch the Supreme Court will hear the case.

The settlement agreement requires the states to enter non-binding arbitration before seeking further remedy from the high court.

In a suit between states, the U.S. Supreme Court is the only court in the land that can hear the case.

### **Arbitration ended June, 2009**

In June, 2009, Nebraska won several key rulings in the findings of arbitration with Kansas over compact issues.

Arbitrator Karl Dreher ruled in favor of Nebraska on these key issues—the amount of compensation Nebraska must pay Kansas for its overuse of water in 2005 and 2006; inconsistencies in accounting for the virgin water supply in the state; and denial of Kansas' request that Nebraska idle more than a half-million groundwater acres in the basin.

Kansas went into arbitration in the fall of 2008, seeking \$72 million in damages but came away with nominal damages of only \$10,000 and no damages for indirect economic impacts.

However, Dreher left the door open for Kansas to substantiate their claims and methodology in any subsequent arbitration or before a court.

In terms of future compliance, Dreher doubted Nebraska could stay in compliance in water-short or dry years, such as those experienced from 2002-2006.

Kansas sought to reduce Nebraska's groundwater-irrigated acres by 515,000 acres to insure compliance.

Dreher sided with Nebraska, saying the compact settlement gave Kansas no authority to tell Nebraska how to stay in compliance.

### **Kansas' reasoning**

Six said Nebraska has failed to live up to the obligations under the compact, despite assurances given to the Supreme Court and attempts to resolve the conflict through arbitration.

Kansas' pleading to the Supreme Court states:

- Nebraska has violated a 2003 US Supreme Court decree.
- Nebraska exceeded its compact allocation by 78,960 acre-feet for the years 2005 and 2006, depriving Kansas of its rightful share of the Republican River.
- Nebraska's current plan for achieving compliance is inadequate.

David Barfield, chief engineer of the Kansas Department of Agriculture's division of water resources, said, "Our state's actions in this matter are, and always have been, to ensure that we get the water we are due under the compact and settlement.

"We're not trying to be litigious; we just want Nebraska to be fair," he said.

Six said after Kansas exhausted its options under the compact's dispute resolution process, their only remaining recourse is to ask the Supreme Court to direct Nebraska to comply with the compact.

Nebraska Attorney General Jon Bruning issued a statement Wednesday on Kansas' actions.

"Thanks to the hard work of Nebraska's irrigators, the state has been in compliance since 2006. We are working with local natural resource districts to ensure we stay in compliance," he said, noting his office is prepared to "vigorously defend the state."