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Water ruling lacks motive to curb use

BY LESLIE REED

LINCOLN -- Nebraska irrigators may have received a green light to keep their spigots open along the Republican River in violation of the state's water agreement with Kansas.

In canceling \$67 million in potential damages that Nebraska taxpayers faced for taking more water than allowed, the arbitrator may have given a financial incentive to continue pumping water pledged to Kansas, a leading water law expert told The World-Herald.

In a preliminary decision announced earlier this week, arbitrator Karl Dreher concluded that Kansas could seek damages only for the injuries it actually suffered when Nebraska violated the Republican River agreement in 2005 and 2006. Kansas is not entitled to payment for Nebraska's economic gains, Dreher found.

That leaves Kansas with little muscle to force Nebraska to scale back its irrigation practices, said David Aiken, an agricultural economics professor at the University of Nebraska-Lincoln. He said it could allow groundwater irrigators to keep pumping with impunity in the Republican River Valley basin.

Aiken called the decision a "big win" for Nebraska irrigators and for Nebraska taxpayers. But, he said, it only forestalls a long-term solution to the water dispute between the two states. Nebraska taxpayers could be looking at only \$5 million in damages, as compared with the \$72 million total amount Kansas water czar David Barfield had demanded.

"Frankly, if I'd been the arbitrator, I'd have done what Kansas asked for," he said. "Because if I can make a million dollars by cheating and only have to pay \$50,000 if I get caught, I'm going to cheat. I'm going to write them a check and say 'thank you very much' and keep cheating."

Nebraska Attorney General Jon Bruning, however, disagreed that Nebraska would continue the irrigation practices that led to violation of the water agreement.

"Nebraska takes the compact with Colorado and Kansas very serious; we plan to be in compliance every year," Bruning said. "Our producers have done more with less and are getting better every year. The Legislature has been proactive in reducing vegetation that depleted river flows.

"I'm very proud of our natural resources districts and our producers who have worked so very hard to reduce their use of water. I think we've taken great strides in the last six years."

Kansas officials would not discuss the substance of the arbitrator's ruling, citing a confidentiality provision in the arbitration agreement.

"Kansas continues to abide by the terms of the arbitration agreement, which forbids statements to the press until the states agree to a joint statement," said Ashley P. Anstaett, spokeswoman for Kansas Attorney General Steve Six.

"I'd just like to clarify that this is only a preliminary decision in nonbinding arbitration. It is just one step in a long process.

"Our goal has always been to get Kansans the water they deserve," she added.

Bruning made no apologies for discussing the ruling, despite the confidentiality provision cited by Kansas authorities.

"This is the public's business, the public has a right to know," he said. "It's not possible to keep this or other decisions of the arbitrator secret. It's a public document ~ this is very important to many, many Nebraskans and Kansans and Coloradans."

The arbitrator is not scheduled to make a final decision in the case until June. After that, Kansas could take the case to the U.S. Supreme Court.

Aiken said that because the violations occur only during extreme drought and because Nebraska's cost of shutting down irrigators could be 10 to 15 times greater than the financial harm to Kansas, the most politically expeditious action could be to allow irrigators to continue to irrigate while paying damages to Kansas in years when Nebraska uses too much water.

Eventually ~ perhaps in another generation ~ Republican River authorities would say "enough is enough" and force Nebraska to make a long-term rollback in irrigation, to keep the states in balance at all times, Aiken said.