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Agriculture and Natural Resources

B-1 Water Litigation

Kansas has been involved in water litigation against neighboring states for the past century. These included litigation against Colorado regarding the Arkansas River and Nebraska over water in the Republican River Basin. Longstanding litigation against Colorado resulted in Colorado paying Kansas \$34.6 million in April 2005 in damages and penalties. An additional \$1.1 million was collected in June 2006.

Arkansas River Litigation.

Headwaters of the Arkansas River are located in the Rocky Mountains above Leadville, Colorado. Fed by mountain tributaries, the River supports agriculture in Eastern Colorado before flowing into Kansas. Kansas has contended that agricultural demands for irrigation in Eastern Colorado have depleted water coming into Kansas to the extent that irreparable injury has been done, particularly to the agricultural interests in the western part of the state. The State of Kansas and Kansas ditch companies (holders of water rights) brought suit against the State of Colorado that ended up before the United States Supreme Court several times. In the first half of the last century, two actions brought before the United States Supreme Court were resolved in Colorado's favor. The two states formed the Arkansas River Compact in 1948 in an effort to resolve ongoing disputes over water, particularly after the federal construction of the John Martin Reservoir in Colorado in 1946.

The purpose of the Arkansas River Compact is to resolve water disputes between Kansas and Colorado, to divide the waters of the Arkansas

State General Fund Expenditures for Colorado Water Litigation	
FY 1984	\$ 96,032
FY 1985	70,424
FY 1986	281,324
FY 1987	651,449
FY 1988	511,045
FY 1989	746,490
FY 1990	1,655,812
FY 1991	3,213,075
FY 1992	1,313,943
FY 1993	655,060
FY 1994	354,457
FY 1995	506,250
FY 1996	1,042,688
FY 1997	921,800
FY 1998	730,715
FY 1999	950,215
FY 2000	1,523,871
FY 2001	878,172
FY 2002	815,120
FY 2003	939,835
FY 2004	695,308
FY 2005	514,208
FY 2006	915,060
FY 2007 *	0
FY 2008-FY 2013	0
TOTAL	\$ 19,982,353

*The 2006 Legislature approved \$560,000 from the Interstate Water Litigation Fund for ongoing water litigation activities against Colorado. The funding will be transferred from the Interstate Water Litigation account of the State General Fund to the special revenue fund, and so it is not considered a State General Fund expenditure. No funding has been recommended since FY 2007.

River between the states equitably, and to apportion water conservation benefits arising from the operation of the John Martin Reservoir Project. During the late 1970s and early 1980s, Kansas became increasingly dissatisfied with the Compact, partly because of specific decisions made by the Compact commissioners and because the Commission often was immobilized by the requirement that all of its decisions had to be unanimous. Committees of the Kansas Legislature considered the effectiveness of the Compact in the early 1980s, and in 1983, the Legislature made its first appropriation to the Attorney General for staff to investigate and commence litigation against Colorado regarding interstate water rights. Kansas ditch companies already had filed suit against Colorado.

The litigation begun in the 1980s extended over two decades, but this time the United States Supreme Court made decisions in Kansas' favor. The lawsuit originally asked the Court to require that the waters of the Arkansas River be delivered in accordance with the provisions of the Compact. In 1987, the Court ruled that monetary damages could be recovered in water compact enforcement cases and Kansas' motion was amended to also seek monetary damages. In 1995, the Court found that Colorado diverted water that should have gone to Kansas and had violated the Arkansas River Compact. In 2001, the Court ordered Colorado to pay Kansas for damages and prejudgment interest on the amount to be repaid. In April 2005, Colorado paid Kansas \$34.6 million. The Attorney General announced in June 2006 that an additional \$1.1 million had been collected from Colorado, representing costs associated with various experts retained by the Attorney General to support Kansas' claims that Presumptive Evapotranspiration (PET) values required an increase in replacement water flows due Kansas.

A judgment and decree was jointly developed by Kansas and Colorado. The decree contains seven appendices, such as the hydrologic-institutional model and accounting procedures, which will be used to determine if Colorado is in compliance with the Compact. It was presented to the United States Supreme Court on August 4, 2009, and brought an end to the active litigation before the Court.

Staff and technical experts from the Division of Water Resources of the Department of Agriculture continue to monitor Colorado's compliance and other issues that affect Colorado's ability to comply with the compact.

How Colorado Water Money Is To Be Used

Legislation enacted in 1996 (KSA 82a-1801) specifies how money recovered from Colorado may be spent. Under that law, an amount equal to the amount spent on the litigation (both money appropriated by the Legislature and money spent by ditch companies) would be credited to the Interstate Water Litigation Fund under the jurisdiction of the Attorney General. Money in the Fund would be used to reimburse the ditch companies (\$112,500) and to pay for:

- Preparation for or actual water litigation with another state, the federal government, or an Indian nation;
- Monitoring or enforcing compliance with an interstate water compact or water settlement; and
- Ongoing expenses connected with Colorado litigation and expenses of Kansas agencies to monitor the settlement, including expenses of a River Master or other official appointed by the United States Supreme Court.

Any money recovered from Colorado in excess of amounts spent on the litigation with Colorado would be allocated as follows:

- One-third would go to the State Water Plan Fund for water conservation projects; and
- Two-thirds would go to the Water Conservation Projects Fund for projects in the Upper Arkansas River Basin affected by the Arkansas River Compact.

How Colorado Water Money Has Been Used

The 2008 Legislature approved expenditures using money recovered from litigation with Colorado. Of

the \$1.1 million received from Colorado in June 2006, the Legislature approved expenditures of \$584,217 in FY 2008 and \$525,729 in FY 2009 for the Interstate Water Issues program, which monitors interstate compact compliance on both the Arkansas River and the Republican River. The program also receives funding from the State Water Plan Fund and resides in the Department of Agriculture - Division of Water Resources.

In addition, the Legislature approved the transfer of any remaining funds in the Water Conservation Projects Fund in FY 2008 to a new fund named the Western Water Conservation Projects Fund, with guidelines for establishing a board under the authority of the Groundwater Management District #3 (GMD#3) that will approve projects and disperse funding in the basin most affected by the Arkansas River Compact litigation. The Legislature also approved a transfer of \$739,964 from the State Water Plan Fund to the Western Water Conservation Projects Fund in FY 2008. The total amount transferred to the Western Water Conservation Projects Fund in FY 2008 was \$9,134,446.

Interstate Water Litigation Reserve Account of the State General Fund

After receipt of \$34.6 million from Colorado in April 2005, the 2005 Legislature created the Interstate Water Litigation Reserve Account in the State General Fund and \$20.1 million was deposited into the account, with a \$0 expenditure limitation, to maintain the full balance in the account. The funding was to be set aside for use in future water litigation, while helping to maintain a positive ending balance in the State General Fund.

The 2006 Legislature approved, for FY 2006, funding of \$1.0 million from the account for a loan to a groundwater management district. The funding was not utilized in FY 2006 and reappropriated to FY 2007. The Legislature approved the lapse of the \$1.0 million in funding at the end of FY 2007. The language in the appropriations bill, although it was intended to lapse only the \$1.0 million in expenditures, was written too broadly and resulted in the entire balance in the account being lapsed at the end of FY 2007 and returned to the State

General Fund, completely depleting the Interstate Water Litigation Reserve Account. This erroneous lapse in funding was not discovered until the 2010 Legislative session, when the Attorney General requested funding be transferred from the account to the agency's special revenue Interstate Water Litigation Fund.

The 2010 Legislature authorized water litigation expenditures of \$1.2 million in FY 2010 and \$1.1 million in FY 2011, from the Attorney General's special revenue Interstate Water Litigation Fund. To provide this funding, the Legislature authorized a transfer of \$686,998 from the agency's Medicaid Fraud Prosecution Revolving Fund to supplement existing balances in the Interstate Water Litigation Fund in FY 2010. For FY 2011, the 2010 Legislature authorized the transfer of \$578,605 from the Medicaid Fraud Prosecution Revolving Fund and \$578,605 from the agency's Court Cost Fund to fund the expenditure.

No funding was approved for water litigation activities for FY 2013.

Republican River Litigation

The states negotiated a settlement, which the United States Supreme Court approved in a decree entered in May 2003. The settlement provides the basis for the annual water accounting and establishes a mandatory non-binding dispute resolution process. From 2003 through 2007, Nebraska overused its annual Compact allocations of water, depriving Kansas of its full annual allocation. Kansas raised the concern that excessive groundwater pumping allowed by Nebraska's local water districts had caused these violations and would cause future violations as well. In 2008, Kansas triggered the dispute resolution process for these violations. That process concluded in late 2009, with Nebraska refusing to cut back on its groundwater pumping. In May 2010, Kansas filed a petition with the Supreme Court asking the Court to enforce the 2003 decree by imposing groundwater pumping restrictions on Nebraska, setting penalties for future violations, requiring Nebraska to pay damages for the water that it deprived Kansas from receiving, and granting other remedies. The Supreme Court has asked the

Solicitor General of the United States to file a brief expressing the federal government’s views on the situation, and Kansas’ petition remains pending at this time.

Ongoing monitoring of compliance with the Republican River Compact and settlement is the

responsibility of the Water Resources Division of the Department of Agriculture. Expenditures by the Attorney General are largely for outside counsel and experts who work under contract with the Attorney General’s Office. Currently, the Interstate Water Litigation account of the State General Fund has a zero balance.

State General Fund Expenditures for Nebraska Water Litigation	
FY 1998	\$ 173,570
FY 1999	277,571
FY 2000	177,448
FY 2001	606,483
FY 2002	1,222,057
FY 2003	527,390
FY 2004	450,718
FY 2005	50,828
FY 2006	99,267
FY 2007-FY 2013*	0
TOTAL	\$ 3,585,332
<p>*The 2007 Legislature approved \$100,000 in FY 2007 and \$1,000,000 in FY 2008 from the Interstate Water Litigation Fund for ongoing water litigation activities against Nebraska. The funding was to be transferred from the Interstate Water Litigation account of the State General Fund to the special revenue fund, and so is not considered a State General Fund expenditure. A total of \$1.2 million in FY 2010, and \$1.1 million in FY 2011 was approved from the Interstate Water Litigation Fund.</p>	

A Special Master appointed by the United States Supreme Court negotiated a settlement in 2003. Currently, the states are compiling and analyzing data concerning the Republican River Basin, which will provide the basis for enforcement of the settlement and future operation of the Compact. One of Kansas’ concerns is that local water districts in Nebraska, which are not regulated by the state, will not comply with terms of the settlement. Once the settlement is reached, ongoing monitoring will become the responsibility of the Water Resources Division of the Department of Agriculture, which has been heavily involved in the litigation against both Nebraska and Colorado. Expenditures by the

Attorney General in both cases largely have been for outside counsel and experts who have worked under contract to the Attorney General’s Office.

Disposition of Republican River Compact Settlement Moneys—2008 Sub. for SB 89

Because of Nebraska’s failure to comply with the Supreme Court settlement with respect to the amount of water coming to Kansas and in anticipation of water settlement moneys from Nebraska, the 2008 Legislature enacted legislation which establishes the procedure for the distribution

of any moneys recovered from disputes relating to the Republican River Compact from either Colorado or Nebraska. In addition, the legislation creates the Republican River Water Conservation Projects-Nebraska Moneys Fund and the Republican River Water Conservation Projects-Colorado Moneys Fund. The bill's provisions can be found in KSA 82a-1804 and 82a-1805.

Out of the first moneys received from any dispute in any litigation from both Nebraska and Colorado involving the Republican River Compact, 100 percent will be credited to the Interstate Water Litigation Fund created by KSA 82a-1802. When those moneys are credited to the Interstate Water Litigation Fund, the Director of Accounts and Reports will transfer moneys from the Fund to the Interstate Water Litigation Reserve Account of the State General Fund until the account balance reaches \$20 million. The Attorney General is to certify to the Director of Accounts and Reports expenses incurred in any litigation to resolve disputes with Nebraska and Colorado on the Republican River Compact. After the amount required to be placed in the Interstate Water Litigation Fund Reserve Account is satisfied, any remaining moneys from the State of Nebraska are to be deposited in the Republican River Water Conservation Projects-Nebraska Moneys Fund. Likewise, any remaining moneys from the State of Colorado are to be credited to the Republican River Water Conservation Projects-Colorado Moneys Fund.

Moneys in the Republican River Water Conservation Projects-Nebraska Moneys Fund will be allocated as follows:

- One-third to the State Water Plan Fund to be used for water conservation projects with priority given to those projects which will ensure the State of Kansas will remain in compliance with the Republican River Compact; and
- Two-thirds to be used for conservation projects in the Lower Republican River Basin.

Of the moneys credited to the Republican River Water Conservation Projects-Colorado Moneys Fund:

- One-third of the money credited to the State Water Plan Fund to be used for water conservation projects; and
- Two-thirds of the money to be expended only for conservation projects in those areas of the state in the Upper Republican River Basin in Northwest Kansas.

Republican River Water Conservation Projects

The legislation lists the types of projects that may be funded by the moneys in the Republican River Water Conservation Projects-Nebraska Moneys Fund and the Republican River Water Conservation Projects-Colorado Moneys Fund. These project types include the following:

- Efficiency improvements to canals or laterals managed and paid for by an irrigation district;
- Water use efficiency upgrades;
- Implementation of water conservation of irrigation and other types of water uses;
- Implementation of water management plans or actions by water right holders;
- Water measurement devices and monitoring equipment and upgrades;
- Artificial recharge, funding the water transition assistance program, purchase of water rights and cost share for state or federal conservation programs that save water;
- Maintenance of the channel and the tributaries of the Republican River;
- Reservoir maintenance or purchase, lease, construction, or other acquisition of existing or new storage space in reservoirs;
- Purchase, lease, or other acquisition of a water right; and
- Expenses incurred to construct and operate off-stream storage.

Further, the bill permits any person or entity to apply to the Director of the Kansas Water Office for expenditure of moneys from either the Colorado Moneys Fund or Nebraska Moneys Fund. The Director and the Chief Engineer of the Division of Water Resources will review and approve each

proposed project for which moneys would be expended. Interest from those two funds is to be credited to the State General Fund.

Under the bill, priority will be given to those projects needed to achieve or maintain compliance with the Republican River Compact, those that achieve

greatest water conservation efficiency for the general good, and those that have been required by the Division of Water Resources. Any project greater than \$10,000 will be required to be a line item in an appropriation bill of the Legislature.

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