

Another expensive lawsuit



As recently reported, Frenchman Cambridge Irrigation District (FCID) is again taking the state and natural resources districts (NRDs) to court, having recently filed their fourth suit in three years. FCID's legal bills from its Omaha attorney, David Domina, are likely piling up for the irrigation district. Unfortunately, the NRDs and state are also paying significant legal defense bills due to FCID's growing list of lawsuits.

The first of FCID's recent spate of lawsuits, filed in 2012, sought to shut down the Rock Creek and NCORPE augmentation projects. The lawsuit was dismissed in fairly short order and only succeeded in delaying implementation of the NCORPE project.

Oddly, the project actually benefits FCID water users by lessening, and at times essentially eliminating, the amount of time that FCID water users have their water administered by the state in years when action is needed to maintain compliance with the Republican River Compact.

FCID water users went to the courthouse again in August 2014. They filed a lawsuit seeking compensation for surface water that was administered by the state in 2013 to maintain compliance with the Republican River Compact. Two months ago, yet another lawsuit was filed by FCID water users. It demands more money for water that helped keep Nebraska in compliance with the compact in 2014.

Taxpayers all across Nebraska will have the pleasure of paying to defend the state against those two suits: In December, the press reported that the Nebraska Attorney General's Office was requesting \$1.2 million to defend the state. That tax-dollar asking will only go up with the most recent lawsuit.

The FCID water users are seeking a reported \$219 million from the state for 2013 and 2014 water losses. Applied to every acre in the FCID system, that is more than \$5,300 per acre.

Using very rough figures, irrigated land planted to corn in the Basin produces about 100 bushels more per acre than dryland. There are about 41,000 acres within FCID.

Assuming every acre is involved in the class action suits against the state, corn would have to have been priced at more than \$26 per bushel in both 2013 and 2014 for losses associated with not having surface water to equal \$219 million. I remember corn prices being relatively high in 2013 and somewhat higher in 2014 than they are now—but not \$26 per bushel.

There are two other factors that make their demand for damages unusually high: About half the FCID acres also have groundwater wells, meaning that about half the FCID acres actually weren't without water in 2013 and 2014. Additionally, many surface water users received preventive planting insurance payments when surface water wasn't available.

Preventive planting indemnities averaged about \$178 per acre in 2013 and much of the nearly \$4 million in total payments in the Republican Basin went to counties that contain FCID operations.

A surface water user who received preventive planting payments and planted a dryland crop could have made more money than if he had been able to irrigate.

In the latest lawsuit, FCID makes a series of misguided claims related to the NRDs' recent adoption of revised Integrated Management Plans. FCID argues that the changes will make complying with the Compact nearly impossible.

The argument ignores changes to the IMPs that expand the rapid response areas in each of the NRDs. More importantly, the argument ignores augmentation projects that prevent rapid-response area shutdowns and that have kept the state in compliance with the Compact for three years in a row and will do so again in 2016.

Rock Creek and NCORPE have prevented the NRDs and state from imposing an irrigation shutdown on more than 300,000 acres that would have been an enormous blow to the economy of the area.

As the lawsuits keep coming, it's important to be reminded of what the leadership of FCID ultimately wants and will continue to seek as long as it and its constituents are willing to keep paying their attorney to file expensive lawsuits. Their intentions are spelled out in court documents.

In early 2012, the FCID Board authorized Manager Brad Edgerton to be a non-expert witness for Kansas in the *Kansas v. Nebraska* case before the U.S. Supreme Court.

When deposed in April 2012, Edgerton was asked what he thought of Kansas' proposed remedy of permanently shutting down irrigation on 300,000 acres in the Nebraska portion of the Basin. Edgerton called it "a step in the right direction" and that his board's interests are "in line with Kansas' interests" of a large irrigation shutdown. He also stated that a Kansas victory in the case would be viewed favorably by his irrigation district.

In its February 2015 ruling the U.S. Supreme Court didn't give Mr. Edgerton what he wanted. So now, we all pay as he and FCID try again, and again, and again.

Nate Jenkins, Upper Republican NRD