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Priority, Preferences and Irrigator-Power Disputes on the Niobrara River

Irrigators, the Nebraska Public Power District (NPPD) and the Nebraska Department of Natural Resources (DNR) are involved in conflicts between irrigators and NPPD over Niobrara River water use. This newsletter will discuss the role of priority and preferences in Nebraska surface water law, DNR priority administration, loss of appropriations and how similar power-irrigation priority disputes have been resolved in the Loup River Basin.

Water Law Concepts. Under the Nebraska surface water law of prior appropriation, conflicts among appropriators are governed by the **priority** doctrine: “first in time is first in right.” Each appropriation is assigned a priority date, typically based on when the water right application is filed with the DNR. A **senior** appropriation has an earlier date than does a **junior** appropriation. The DNR is responsible for **administering priorities** during times of water shortage (typically during the irrigation season). Senior appropriators notify the DNR that they are not receiving their water, and the DNR requires upstream junior appropriators to reduce or stop their withdrawals.

An important exception to the priority doctrine is **preferences**. This is one of the most misunderstood aspects of Nebraska water law. Under Nebraska appropriation law, domestic surface water use is preferred over all other surface water uses, and agricultural surface water use is preferred over industrial surface water use. Power production is considered an industrial use of surface water. Domestic is considered to be **superior** to all other uses, and agriculture is **inferior** to domestic but superior to industry. When the superior use is the senior appropriation, there is no need to invoke a preference. Water preferences matter only when the superior use is the junior appropriator. The Nebraska Supreme Court has ruled that if a junior superior user takes the water from a senior inferior user, the senior must be paid for the water. If a junior domestic user takes

Market Report	Yr Ago	4 Wks Ago	10/5/07
<u>Livestock and Products,</u>			
<u>Weekly Average</u>			
Nebraska Slaughter Steers, 35-65% Choice, Live Weight.....	\$90.25	\$93.99	\$90.79
Nebraska Feeder Steers, Med. & Large Frame, 550-600 lb.....	126.93	128.76	120.93
Nebraska Feeder Steers, Med. & Large Frame 750-800 lb.....	118.70	121.49	118.39
Choice Boxed Beef, 600-750 lb. Carcass.....	142.35	148.47	146.64
Western Corn Belt Base Hog Price Carcass, Negotiated.....	65.51	62.54	56.57
Feeder Pigs, National Direct 50 lbs, FOB.....	52.84	56.39	38.36
Pork Carcass Cutout, 185 lb. Carcass, 51-52% Lean.....	67.45	68.23	60.97
Slaughter Lambs, Ch. & Pr., Heavy, Wooled, South Dakota, Direct.....	*	103.25	97.25
National Carcass Lamb Cutout, FOB.....	245.21	260.65	259.90
<u>Crops,</u>			
<u>Daily Spot Prices</u>			
Wheat, No. 1, H.W. Imperial, bu.....	4.52	7.13	8.00
Corn, No. 2, Yellow Omaha, bu.....	2.48	3.07	2.98
Soybeans, No. 1, Yellow Omaha, bu.....	5.17	8.16	8.52
Grain Sorghum, No. 2, Yellow Columbus, cwt.....	3.82	5.27	5.77
Oats, No. 2, Heavy Minneapolis, MN, bu.....	2.33	2.65	*
<u>Hay</u>			
Alfalfa, Large Square Bales, Good to Premium, RFV 160-185 Northeast Nebraska, ton.....	135.00	135.00	135.00
Alfalfa, Large Rounds, Good Platte Valley, ton.....	87.50	85.00	87.50
Grass Hay, Large Rounds, Good Northeast Nebraska, ton.....	82.50	*	*

* No market.



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senior agricultural or industrial water “out of priority,” then the domestic user must pay for the senior water even though domestic use is superior. Similarly, junior irrigators must pay senior power users if the junior irrigators are out of priority, i.e., the irrigation water is needed by the senior appropriator. Many people mistakenly believe that domestic users don’t have to pay to take surface water out of priority but this is incorrect.

Loup River Power-Irrigation Conflicts. Power-irrigation conflicts similar to those on the Niobrara were resolved decades ago in the Loup Basin. In 1940, Loup Basin irrigation districts obtained court orders preventing Bureau of Irrigation (now the DNR) officials from restricting diversions by junior irrigators for senior hydropower production. In 1941 the Unicameral adopted what is now Neb. Rev. Stat. §70-669. This statute specifies that junior irrigators may take senior power water out of priority only if irrigators pay the senior hydropower appropriator for the cost of replacing the power not generated due to the irrigation diversions. In 1942 the Nebraska Supreme Court affirmed that junior irrigators were required to compensate senior hydropower appropriators if the irrigators took water out of priority (*Loup River PPD v. North Loup River PPD*, 142 Neb. 141). This conclusion was reaffirmed in 1962 (*Hickman v. Loup River PPD*, 173 Neb. 428). Junior irrigators who have signed what the DNR refers to as a subordination agreement with the power district may take water out of priority if they pay NPPD; and junior irrigators without a subordination agreement must cease withdrawals when their diversions are out of priority (i.e., when the power district calls for DNR priority administration of junior appropriators).

Niobrara River Conflicts. There are two current Niobrara River conflicts: (1) between junior irrigators and senior hydropower appropriations, and (2) between irrigation and recreation. The NPPD Spencer Hydropower Facility has a 2,035 cubic foot per second hydropower appropriation with priority dates of 1896, 1923 and 1942. On March 2, 2007 NPPD notified the DNR of its intent to request priority administration of junior irrigation appropriators. The DNR issued closing orders to over 400 junior appropriators upstream from the Spencer Power Facility. The NPPD subordination agreement requires irrigators to pay seventy cents per acre-foot of water diverted. Irrigator attempts to negotiate a lower payment with NPPD have failed, as have irrigator efforts to stop DNR priority administration in court. In early July the DNR issued closing orders to junior Niobrara appropriators who had not signed NPPD subordination agreements.

If this conflict ends up in court, the junior irrigators have two possible legal arguments: (1) that the seventy cents per acre-foot of water is more than NPPD’s replacement cost for power, and (2) that NPPD has abandoned all or part of its Spencer hydropower

appropriation. The DNR can cancel appropriations for five consecutive years non-use. Private individuals can seek a court ruling that appropriations have been abandoned if the plaintiffs can prove ten consecutive years non-use. While the Spencer Power Plant has undergone repairs, normally this would not constitute non-use. Implicit in the DNR’s issuing closing orders to junior appropriators for NPPD is the DNR judgment that NPPD’s water rights are valid. Thus it would seem that irrigators seeking to have NPPD’s appropriations judicially invalidated as abandoned will have an uphill battle.

The second Niobrara River issue is potential conflicts between irrigation and recreation. In March 2007 the Niobrara Council recommended that the DNR close the Niobrara River to new appropriations. The Council (which is involved in managing the federally designated Niobrara recreational river with the National Park Service) expressed concern that additional surface and ground water irrigation would deplete streamflows, harming recreation. The DNR is required annually to determine whether rivers that have not already been designated as fully-appropriated (FA) or over-appropriated (OA) should be so designated. FA/OA designation closes a river to new surface water appropriations, and also to new wells in areas hydrologically connected to the stream (HC wells). In its December 2006 annual report, the DNR determined that the Lower Niobrara Basin was not fully appropriated (the Upper Niobrara Basin has been closed to new wells since 2003). However, it isn’t clear whether the DNR considered the Spencer hydropower appropriations in reaching this conclusion. If not, the DNR may reach a different conclusion in its December 2007 FA/OA report. That possibility, in addition to current high corn prices, may lead to increased irrigation well development in the Niobrara Basin.

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