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Nebraska Wins First Round in Republican River Dispute

Market Report	Yr Ago	4 Wks Ago	7/31/09
Livestock and Products, Weekly Average			
Nebraska Slaughter Steers, 35-65% Choice, Live Weight	$97.15	$82.34	$82.47
Nebraska Feeder Steers, Med. & Large Frame, 550-600 lb.	119.16	*	120.78
Nebraska Feeder Steers, Med. & Large Frame 750-800 lb.	114.69	*	105.59
Choice Boxed Beef, 600-750 lb. Carcass	158.84	138.75	142.53
Western Corn Belt Base Hog Price Carcass, Negotiated	82.02	58.74	52.71
Feeder Pigs, National Direct 50 lbs, FOB	24.14	33.68	*
Pork Carcass Cutout, 185 lb. Carcass, 51-52% Lean	87.73	54.36	60.85
Slaughter Lambs, Ch. & Pr., Heavy, Wooled, South Dakota, Direct	111.75	100.00	101.50
National Carcass Lamb Cutout, FOB	277.41	255.68	253.23
Crops, Daily Spot Prices			
Wheat, No. 1, H.W. Imperial, bu.	6.98	4.49	4.59
Corn, No. 2, Yellow Omaha, bu.	4.98	3.01	3.20
Soybeans, No. 1, Yellow Omaha, bu.	12.75	10.70	10.86
Grain Sorghum, No. 2, Yellow Dorchester, cwt.	7.82	4.80	5.45
Oats, No. 2, Heavy Minneapolis, MN , bu.	*	2.16	2.15
Feed			
Alfalfa, Large Square Bales, Good to Premium, RFV 160-185 Northeast Nebraska, ton.	190.00	*	*
Alfalfa, Large Rounds, Good Platte Valley, ton.	77.50	*	*
Grass Hay, Large Rounds, Premium Nebraska, ton.	85.00	*	*
Dried Distillers Grains, 10% Moisture, Nebraska Average.	167.50	100.50	83.50
Wet Distillers Grains, 65-70% Moisture, Nebraska Average.	60.50	39.50	32.50

*No Market

On June 30, 2009 an arbitrator recommended that Nebraska be required to pay Kansas $10,000 for violating the Republican River Settlement, after Kansas had originally requested $72 million in damages. This newsletter explores the significance of the arbitrator's decision.

What was the arbitrator ruling on? Nebraska has been out of compliance with the Republican River Compact (RRC) settlement for two years, and the arbitrator was ruling on how much Nebraska should pay Kansas for using more than its share of water under the RRC settlement agreement.

What did the arbitrator decide? Basically, the arbitrator ruled that Kansas did not prove what its money damages for lost irrigated crops were, and said Nebraska should pay $10,000 instead of Kansas' purported crop losses. The arbitrator suggested that Kansas' actual crop losses may have been in the millions of dollars, but that Kansas had not proved what those losses were with reasonable precision.

This is a good outcome for Nebraska! It certainly is – we should be very pleased with the arbitrator's decision. Congratulations to the Nebraska Attorney General and the Department of Natural Resources (DNR), for a difficult job very well done!

What did Kansas do wrong? Kansas apparently did not follow the process established in the Arkansas River litigation between Kansas and Colorado for proving irrigated crop losses. Kansas in fact, claimed lost yields that were ten percent higher than the historic maximum yield, a figure that the arbitrator did not accept.

What happens next? That is up to Kansas. The states have 30 days to accept or reject the arbitrator's recommendations. My guess is that Kansas may want to try again on their damage claim, but we will have to wait and see what they do.

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What did the arbitrator say about Nebraska's overuse? This part of the arbitrator's decision was better news for Kansas and not such good news for Nebraska. Significantly, the arbitrator said that the Natural Resource District (NRD) ground water plans in the Republican Basin were inadequate to assure Nebraska's compliance with the settlement agreement during dry years. The arbitrator recommended that a court order be issued preventing Nebraska from violating the compact in the future.

What would happen if Nebraska violated the settlement in the future? The arbitrator indicated that he would "throw the book" at Nebraska, and that Kansas would not be limited to requesting compensation for their lost crops; Kansas would also be entitled to seek punitive damages.

How much might these punitive damages be? Punitive damages could include at a minimum, Nebraska's gains from using more than its share of the water. This is essentially what Kansas' original damage claims were based on – Nebraska's irrigated crop gains rather than Kansas' irrigated crop losses.

2007 NRD and DNR Recommended Ground Water Allocations*

	URNRD	MRNRE	LRNRD
2007 NRD	13.5	13.0	12/11
DNR Average Year	8.5	8.0	6.5
DNR Dry Year	5.5	5.0	3.5

*acre inches per irrigated acre

What are the current NRD plans? Basically, the NRDS have banned new irrigation wells, and limit the pumping from current irrigation wells. The ground water allocations are 13.5 inches per irrigated acre in the Upper Republican NRD, 13 inches in the Middle Republican and 12/11 inches in the Lower Republican (depending on whether you are in the eastern or western half of the NRD). The Lower Republican has proposed reducing its ground water allocation to ten inches per acre.

And these plans won't keep Nebraska in compact compliance during dry years? The arbitrator concluded no, as has the DNR. In a 2007 study, the DNR concluded that NRD ground water allocations would need to be significantly reduced in order to comply with the RRC settlement in the long-term, as Republican River flows decline over time. The DNR recommended that NRD ground water allocations be reduced 37 to 41 percent from current levels in normal years. In dry years NRD ground water allocations would need to be reduced 62 to 68 percent from current levels. While the 2007 DNR proposal was not evaluated by the arbitrator, it provides a good indication of what types of irrigation pumping reductions might be needed to achieve RRC settlement compliance.

How could the NRD plans be changed? Under current law, ground water allocations are established by NRDs. If NRDs agree to reduce ground water allocations sufficiently to stay within settlement limits, that would be wonderful. Then Nebraska would take the proposed NRD reductions to Kansas and the states would attempt to negotiate a long-term solution to this issue.

If the NRDs are unwilling to reduce their allocations, and the DNR believes that the NRD allocations would not comply with interstate agreements, the DNR can invoke a "tie-breaker" process; under state law a committee is appointed by the Governor and decides whether to implement the NRD allocations or the DNR allocations. That process has never been implemented, but could be implemented now if the Governor so desired.

If the Governor does not invoke the tie-breaker option, than it will be up to the Governor and the 2010 Unicameral to determine how best to proceed. The DNR could, for example, be given the authority to impose ground water allocations over NRD objections when necessary to comply with interstate agreements. This would require a change in state law.

This would be pretty tough on ground water irrigators! Yes – and one important unresolved issue is whether ground water irrigators should be paid to cut their pumping so much. Clearly, we aren't out of the woods yet on the Republican.

J. David Aiken, (402) 472-1848
Professor, Water & Agricultural Law Specialist
Dept. of Agricultural Economics
University of Nebraska-Lincoln
daiken@unl.edu