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Nebraska Supreme Court Decides Pumpkin Creek Case

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Market Report	Yr Ago	4 Wks Ago	3/4/05
<u>Livestock and Products,</u>			
<u>Weekly Average</u>			
Nebraska Slaughter Steers, 35-65% Choice, Live Weight	\$84.72	\$89.05	\$89.67
Nebraska Feeder Steers, Med. & Large Frame, 550-600 lb	112.07	127.56	128.55
Nebraska Feeder Steers, Med. & Large Frame 750-800 lb	92.42	106.29	106.28
Choice Boxed Beef, 600-750 lb. Carcass	139.63	142.69	141.74
Western Corn Belt Base Hog Price Carcass, Negotiated	62.55	68.73	73.47
Feeder Pigs, National Direct 45 lbs, FOB	48.40	80.76	81.72
Pork Carcass Cutout, 185 lb. Carcass, 51-52% Lean	68.37	72.37	68.74
Slaughter Lambs, Ch. & Pr., 90-160 lbs., Shorn, Midwest	101.00	109.50	111.25
National Carcass Lamb Cutout, FOB	232.22	257.94	269.69
<u>Crops,</u>			
<u>Daily Spot Prices</u>			
Wheat, No. 1, H.W. Omaha, bu	3.65	3.22	3.47
Corn, No. 2, Yellow Omaha, bu	2.81	1.75	1.89
Soybeans, No. 1, Yellow Omaha, bu	9.42	5.00	5.93
Grain Sorghum, No. 2, Yellow Columbus, cwt	4.79	2.41	2.80
Oats, No. 2, Heavy Minneapolis, MN, bu	1.74	1.85	1.83
<u>Hay</u>			
Alfalfa, Large Square Bales, Good to Premium, RFV 160-185 Northeast Nebraska, ton	115.00	115.00	115.00
Alfalfa, Large Rounds, Good Platte Valley, ton	62.50	62.50	62.50
Grass Hay, Large Rounds, Good Northeast Nebraska, ton	57.50	57.50	57.50
* No market.			

On January 21, 2005 the Nebraska Supreme Court handed down its decision in *Spear T Ranch v Knaub*, deciding for the first time how conflicts between surface water irrigators and ground water irrigators will be resolved. The case is one of the most important Nebraska Supreme Court decisions in a generation, and will have significant legal impacts for years. This article, which appeared in the March 2005 *Nebraska Farmer* magazine, provides a brief overview of the *Spear T Ranch* decision.

Who were the parties in the case? The lawsuit was brought by the Spear T Ranch, which is the plaintiff. The defendants were upstream ground water irrigators in the Pumpkin Creek drainage basin.

Why did the Ranch sue the ground water irrigators? The Spear T Ranch had surface water appropriations for irrigation, and claimed that the ground water pumping dried up the stream (and dried up the Ranch's surface water appropriations).

What happened to the lawsuit? The District Court for Morrill County dismissed the lawsuit, essentially because the district judge knew that there was no law in Nebraska to guide him in presiding over the trial. So the plaintiff Spear T Ranch appealed the dismissal, and the case was heard by the Nebraska Supreme Court.

What was the plaintiff's legal arguments? The plaintiff (and other surface water users who intervened in the appeal) argued that ground water feeding the stream should be legally treated as surface water. This would mean that conflicts between surface water users and pumpers of tributary ground water would be resolved on the basis of surface water law, or first in time is first in right.

What were the defendants' legal arguments? The ground water users argued that the Nebraska Ground Water Management and Protection Act precluded the courts from resolving disputes between surface water users and ground water users.

Were other legal arguments made? The case attracted a significant amount of legal attention – 19 parties ultimately were involved in the appeal. The most significant additional legal argument was made by the Nebraska Attorney General, who argued that applying surface water law to the Spear T Ranch case would legally undermine current Nebraska ground water management statutes, as well as Nebraska's Republican River litigation settlement with Kansas.

What did the Nebraska Supreme Court decide? The court decided that the Spear T Ranch could bring its lawsuit against the ground water pumpers, but that the conflict would be decided in essence by a correlative rights approach. The court ruled that the Nebraska surface water law of prior appropriation did not apply to ground water, although it recommended that the Unicameral adopt a ground water appropriation statute.

What does "correlative rights" mean in the Spear T Ranch case? That remains to be seen. The court ruled that in cases like the Spear T case, a ground water user is not liable for pumping ground water unless the withdrawal "has a *direct and substantial effect*" upon a river or stream and unreasonably causes harm to the surface water user.

What does "direct and substantial effect" mean? That is the legal key issue, one that the court did not directly address. So this is something that will have to be determined and explained in future court opinions.

So more lawsuits will be needed to bring things into sharper focus? That is correct. If the Spear T Ranch goes ahead with its case, a jury (or a judge sitting as the jury) will hear the Ranch's evidence about whether irrigation wells have depleted Pumpkin Creek's flow. The jury (or judge if there is no jury) will then have to decide whether any streamflow depletion constitutes a "direct and substantial effect" of the ground water pumping. The outcome of any Spear T Ranch trial is almost certainly to be appealed.

What could happen in an appeal? One issue would certainly be what "direct and substantial" means. Ground water users might argue that for streamflow depletion to be a "direct and substantial effect" of

ground water pumping, the depletion must occur within days, or weeks of the well pumping. The Ranch would likely argue that if the effect of the ground water pumping is to essentially dry up the creek, then it doesn't matter whether it took weeks, months or years for that result to occur. In any event, the facts developed in the trial would give the Nebraska Supreme Court a concrete circumstance in which to apply the new *Spear T Ranch* rule, which cannot help but add precision and clarity to it.

It sounds like we have a long way to go. That is absolutely correct. However, the mere fact that the Nebraska Supreme Court has ruled that ground water users in some circumstances can be legally liable for depleting streamflow means that this important water policy issue can no longer be ignored. Ideally, the decision will lead to changes to Nebraska ground water management statutes to address Spear T-type water user conflicts more directly.

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