

CORNHUSKER ECONOMICS

July 9, 2008

University of Nebraska–Lincoln Extension

Institute of Agriculture & Natural Resources
Department of Agricultural Economics
<http://www.agecon.unl.edu/Cornhuskereconomics.html>

The Republican River: Negotiation, Arbitration and a Federal Water Master

Market Report	Yr Ago	4 Wks Ago	7/4/08
<u>Livestock and Products,</u>			
<u>Weekly Average</u>			
Nebraska Slaughter Steers, 35-65% Choice, Live Weight.....	\$88.34	\$93.76	\$101.16
Nebraska Feeder Steers, Med. & Large Frame, 550-600 lb.....	132.80	125.58	*
Nebraska Feeder Steers, Med. & Large Frame 750-800 lb.....	111.12	114.62	*
Choice Boxed Beef, 600-750 lb. Carcass.....	139.89	156.90	170.60
Western Corn Belt Base Hog Price Carcass, Negotiated.....	67.86	71.85	70.06
Feeder Pigs, National Direct 50 lbs, FOB.....	47.57	36.86	24.92
Pork Carcass Cutout, 185 lb. Carcass, 51-52% Lean.....	71.84	77.89	79.25
Slaughter Lambs, Ch. & Pr., Heavy, Woolled, South Dakota, Direct.....	*	116.75	115.00
National Carcass Lamb Cutout, FOB.....	258.21	264.84	275.13
<u>Crops,</u>			
<u>Daily Spot Prices</u>			
Wheat, No. 1, H.W. Imperial, bu.....	5.37	7.85	8.14
Corn, No. 2, Yellow Omaha, bu.....	3.28	6.19	7.05
Soybeans, No. 1, Yellow Omaha, bu.....	7.89	13.55	15.92
Grain Sorghum, No. 2, Yellow Dorchester, cwt.....	5.39	10.46	11.95
Oats, No. 2, Heavy Minneapolis, MN, bu.....	2.76	3.92	*
<u>Hay</u>			
Alfalfa, Large Square Bales, Good to Premium, RFV 160-185 Northeast Nebraska, ton.....	135.00	195.00	190.00
Alfalfa, Large Rounds, Good Platte Valley, ton.....	92.50	77.50	77.50
Grass Hay, Large Rounds, Premium Nebraska, ton.....	*	*	85.00

* No market.

Nebraska is in violation of the Republican River Compact Settlement for 2006 by an estimated 41,430 acre-feet (AF) of water. Kansas has claimed damages of \$72 million for Nebraska's settlement violations, has demanded irrigation cutbacks of nearly 50 percent, and has initiated formal arbitration proceedings under the settlement for resolving compliance disagreements. If Nebraska and Kansas are unable to negotiate a compromise on the water overuse, it is possible that a Federal Water Master would be appointed to ensure that future Nebraska water use stayed within settlement limits.

Settlement Violations. Under the settlement each year's water use compliance is determined on either a five-year average or the "dry year" two-year average. Settlement water use compliance accounting began in 2003, so the first year that a five-year average (and compact compliance) could be computed was 2007. The years 2005 and 2006 were dry years, so a dry year two-year average (and compact compliance) could be computed for 2006. Kansas (incorrectly in my opinion), determined that Nebraska was out of compliance for both years, 2005 and 2006, by 82,870 AF, and claimed damages of \$62 million based on the two years of non-compliance. In fact, it would appear that Nebraska was legally out of compliance only for 2006 (and not 2005) by 41,430 AF, with associated damages of \$31 million as calculated by Kansas.

Kansas Proposed Remedies. Kansas concluded that it was impractical for Nebraska to replace the 82,870 AF that Kansas determined Nebraska had overused. In fact, if only 2006 counts for compliance purposes, replacing the 41,430 water from that year would appear to be at least possible, given that upwards of 40,000 AF in Harlan County Reservoir have been available for use this spring. If Nebraska could repay Kansas with water, Kansas could not also claim monetary damages.

To prevent future non-compliance by Nebraska, Kansas proposes that all wells within 2.5 miles of the Republican River and tributaries be permanently retired, along with all irrigation wells installed after 1990, or 515,000 irrigated acres. This would be nearly a 50 percent reduction in Nebraska ground water pumping. The Nebraska Department of Natural Resources (DNR) has estimated that water consumption will need to be reduced 15-18 percent for Nebraska to be in long-term settlement compliance. To accomplish this, the DNR has also recommended reducing ground water allocations by 27 percent for the Lower Republican Natural Resources District (NRD) (from 9 inches to 6.5 inches/year), 33 percent for the Middle Republican NRD (from 12 to 8 inches/year) and 35 percent for the Upper Republican NRD (from 13 to 8.5 inches/year), around 32 percent overall. Further reductions would be required during dry years of 61 percent, 62 percent and 58 percent, respectively, or around 60 percent overall. The 46 percent average of the reductions in the normal year and dry year allocations is very close to the Kansas irrigation rollback figure, suggesting some agreement on this point at least might be possible.

The difficulty is that NRDs (and ground water irrigators) are understandably reluctant to significantly reduce ground water allocations from present levels without monetary payment. One interpretation of 2007's LB701 is that NRDs agreed to reduce ground water use over time by buying ground water rights from irrigators, using the expanded LB701 NRD taxing authorities to pay for them. Assuming that LB701 can be modified in 2009 to meet constitutional challenges (by extending the taxing authorities to all NRDs, to all fully-appropriated basins, etc.), this might be a viable policy, particularly if Kansas agrees to allow Nebraska to reduce irrigated acres over time through a buyout policy. Whether Kansas, the DNR and the NRDs can come up with a plan agreeable to all remains to be seen. It is possible that state funds may be needed in addition to NRD funds to make this work – an as yet unresolved Nebraska water policy issue.

Arbitration Process. The settlement provides that if compact violations are not resolved through negotiation, they can be submitted to non-binding arbitration and then to the U.S. Supreme Court. Arbitration is a trial process where Kansas would have the legal advantage (aside from its claiming two years of violation instead of one).

Federal Water Master Appointment. One risk facing Nebraska is that if a compromise is not negotiated, Kansas may seek appointment of a Federal Water Master by the Supreme Court to administer the compact and settlement. This would mean, for example, that NRD ground water allocations would need to be approved by the Water Master, and if the Water Master did not like the NRD ground water allocations, he/she would establish their own allocations. Given this possibility (and Kansas would be foolish not to pursue this option), it would seem that Nebraska has strong incentives to negotiate the current compact compliance issues with Kansas, rather than litigate. If ground water cutbacks are mandated by a Federal Water Master, rather than resulting from a voluntary buy-out, some will argue that ground water users are not entitled to compensation. It will be very interesting to see how this all plays out, both legally and politically.

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