

Cornhusker Economics

Cooperative Extension

Institute of Agriculture & Natural Resources
Department of Agricultural Economics
University of Nebraska – Lincoln

Pumpkin Creek Surface-Groundwater Dispute

Market Report	Yr Ago	4 Wks Ago	8/3/01
<u>Livestock and Products,</u>			
<u>Average Prices for Week Ending</u>			
Slaughter Steers, Ch. 204, 1100-1300 lb Omaha, cwt	\$63.98	\$71.08	\$70.34
Feeder Steers, Med. Frame, 600-650 lb Dodge City, KS, cwt	*	*	*
Feeder Steers, Med. Frame 600-650 lb, Nebraska Auction Wght. Avg	101.04	*	104.51
Carcass Price, Ch. 1-3, 550-700 lb Cent. US, Equiv. Index Value, cwt	100.39	109.72	110.15
Hogs, US 1-2, 220-230 lb Sioux Falls, SD, cwt	44.50	53.50	52.00
Feeder Pigs, US 1-2, 40-45 lb Sioux Falls, SD, hd	34.50	*	*
Vacuum Packed Pork Loins, Wholesale, 13-19 lb, 1/4" Trim, Cent. US, cwt	123.25	123.50	123.70
Slaughter Lambs, Ch. & Pr., 115-125 lb Sioux Falls, SD, cwt	87.00	58.50	48.47
Carcass Lambs, Ch. & Pr., 1-4, 55-65 lb FOB Midwest, cwt	185.00	161.71	153.36
<u>Crops,</u>			
<u>Cash Truck Prices for Date Shown</u>			
Wheat, No. 1, H.W. Omaha, bu	2.72	3.10	3.01
Corn, No. 2, Yellow Omaha, bu	1.39	1.77	1.81
Soybeans, No. 1, Yellow Omaha, bu	4.18	4.73	4.77
Grain Sorghum, No. 2, Yellow Kansas City, cwt	2.75	3.46	3.52
Oats, No. 2, Heavy **Minneapolis, MN, bu	1.18	*	1.43
<u>Hay,</u>			
<u>First Day of Week Pile Prices</u>			
Alfalfa, Sm. Square, RFV 150 or better Platte Valley, ton	115.00	102.50	102.50
Alfalfa, Lg. Round, Good Northeast Nebraska, ton	77.50	75.00	75.00
Prairie, Sm. Square, Good Northeast Nebraska, ton	75.00	105.00	105.00
* No market			
** The Sioux City portion of the report has been discontinued - we will be getting oat prices from Minneapolis, MN.			

Pumpkin Creek, a tributary of the North Platte River, historically flowed from eastern Wyoming into the Nebraska Panhandle through Banner County, and joined the North Platte River in Morrill County near Bridgeport. Over 20 years ago, Pumpkin Creek was closed to the issuance of new surface water rights by the Nebraska Department of Water Resources (now the Department of Natural Resources or DNR), due to streamflow reductions. In March 2001 the North Platte Natural Resources District (NRD) established the Pumpkin Creek Groundwater Management Subarea and closed the subarea to new well drilling. Existing wells must be metered in 2003 and quantities withdrawn reported in 2004. The Pumpkin Creek Subarea was established pursuant to a 1996 Nebraska statute authorizing NRDs to restrict groundwater uses to address conflicts between surface and groundwater users. The Pumpkin Creek Subarea was established to deal with declines in both ground water levels and streamflows.

The 1996 Nebraska integrated water management statutes authorize NRDs to control groundwater uses in response to conflicts between surface and groundwater users, and authorizes the DNR to similarly control surface water uses. The statute does not establish, however, the legal basis for resolving disputes between competing surface and groundwater users, leaving the NRD and DNR discretion in the issue of whether surface or groundwater uses should be restricted and to what extent. This crucial gap in Nebraska water law may be resolved by a lawsuit that may be filed by Pumpkin Creek surface water appropriators against groundwater users for depleting



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streamflows in Pumpkin Creek. This article discusses the legal framework for resolving such disputes in the West generally, and in Nebraska.

Subflow/Tributary Groundwater Rule. Most western states apply the doctrine of prior appropriation to both surface and groundwater. This means that the *priority* rule of “first in time is first in right” would apply to both surface and groundwater uses when those uses came into conflict. If “junior” wells interfered with senior surface appropriations, the junior wells would be required to either quit pumping, or else provide makeup water to the stream. In Arizona, California, Texas and Nebraska, state law does not apply the prior appropriation doctrine to groundwater. However, in Arizona, California and Texas, if well pumping depletes streamflow, the well is treated as part of the stream and is subject to the priority rule of first in time, first in right. Nebraska is the only western state that has legally rejected the subflow or tributary groundwater rule.

Nebraska Rule. In 1966 the Nebraska Supreme Court ruled that water pumped by Omaha from wells on Platte River islands was groundwater and not surface water. This allowed the Court to avoid invalidating the movement of groundwater from the Platte River Basin to the Papio River Basin as an illegal transbasin diversion of surface water. The decision also set Nebraska water law at odds with the law of every other western state in saying that wells pumping water from a stream are not subject to surface water law in Nebraska. The 1936 prohibition against transbasin diversions of surface water, which probably was the primary reason for the court’s rejecting the subflow/tributary groundwater rule, was in turn overruled by the Nebraska Supreme Court in 1980. This provides the Nebraska Supreme Court with an opportunity to undo the legal mistake it made in rejecting the subflow/tributary groundwater rule in 1966.

Kansas v. Colorado. If the Pumpkin Creek lawsuit against groundwater users is filed, it is likely to follow a pattern established for so-called “conjunctive use” lawsuits in *Kansas v. Colorado*. In this case Kansas sued Colorado on the basis that junior wells in Colorado were depleting Arkansas River streamflows into Kansas, depriving senior Kansas surface appropriators of their water. In the first “liability” phase of the lawsuit, Kansas and Colorado respectively spent tens of millions of dollars establishing that the Colorado wells were depleting streamflows into Kansas. When Kansas won that phase of the lawsuit, the states then litigated the second

“penalty” phase to establish (1) what Colorado would be required to do to compensate Kansas for its past water shortages and (2) how Colorado would prevent future water shortages for Kansas. Colorado will be required to pay Kansas for economic losses associated with past streamflow depletions, and junior wells in Colorado will be required to either provide makeup water to the stream or else stop pumping. A successful Pumpkin Creek lawsuit against “junior” groundwater users would probably yield a similar result.

The Pumpkin Creek case does present a somewhat different twist: for the surface water users to be successful (as they were in *Kansas v. Colorado*), the plaintiff-surface water users must ultimately persuade the Nebraska Supreme Court that it made a mistake in rejecting the conjunctive use law of every other western state in 1966. The 1980 reversal of the 1936 transbasin diversion prohibition indicates that this is possible, however, and in some regards there is less law to overrule in the 1966 conjunctive use case than in the 1936 transbasin diversion case. In any event, surface water users must make a convincing case that “junior” wells are depleting Pumpkin Creek streamflows before their case can make its way to the Nebraska Supreme Court. While that showing may be possible, it will be an expensive and complicated undertaking.

In an influential 1973 law review article, UNL Law Professor Richard Harnsberger observed that if Nebraska groundwater were red, Nebraska streams would be various shades of pink. Nebraska water law is slowly beginning to recognize that inescapable hydrologic fact. Statutes enacted in 1993 and 1996 clearly recognize and acknowledge that surface water and groundwater may be physically connected, but stop short of establishing a comprehensive legal framework for resolving surface-groundwater disputes. The Pumpkin Creek lawsuit may provide a significant piece of that unsolved puzzle.

J. David Aiken, (402) 472-1848
Water & Agricultural Law Specialist
daiken@unl.edu