

Groundwater - Surface Water Irrigation Conflicts/"The Supremes" Keep the Train on the Track

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statutory surface water appropriation rule to conflicts between surface and groundwater users."

- "A right to appropriate surface water is *not* an ownership of property. Because Spear T does not have a property interest in its surface water appropriation and only a right to use, it cannot state a claim for conversion or trespass."
- "We adopt the Restatement (Second) of Torts §858." (Note: Restatements address uncertainty in the law through a restatement of basic legal subjects.) "The common law should acknowledge and attempt to balance the competing equities of groundwater users and surface water appropriators; the Restatement approach best accomplishes this."
- "Specifically, we hold: (Someone) who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another unless the withdrawal of the groundwater has a *direct and substantial* effect upon a watercourse or lake *and unreasonably* causes harm to a person entitled to the use of its water."
- "Whether a groundwater user has unreasonably caused harm to a surface water user is decided *on a case-by-case basis*."
- "The test for reasonableness is provided in the Restatement. Factors that affect the determination include the following: (a) The purpose of the use, (b) the suitability of the use to the watercourse or lake, (c) the economic value of the use, (d) the social value of the use, (e) the extent and amount of harm it causes, (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other, (g) the practicality of adjusting the quantity of water used by each proprietor, (h) the protection of existing values of water uses, land, investments and enterprises, and (i) the justice of requiring the user causing harm to bear the loss."

- "Courts should be cautious when considering remedies for interference with surface water. For example, because the recharge of a stream that has dried up because of well pumping could take years, an injunction against pumping might only serve to deprive everyone in a water basin. *Such a remedy would be unreasonable and inequitable.*"

SUMMARY / OBSERVATIONS

- ✓ Although the Spear T ruling gives surface water irrigators the opportunity to sue groundwater irrigators, the burden such surface water users would bear in proving that the interference from groundwater users has been direct, substantial and unreasonable stands as a major hurdle.
- ✓ The state supreme court ruling in the Spear T Ranch case maintained the fundamental legal separation and regulation of groundwater and surface water. The natural resources districts continue to have almost exclusive regulatory control of groundwater pumping within their jurisdiction based on the doctrine of correlative rights, or share and share alike. The DNR maintains exclusive control over surface water under the prior appropriation doctrine of first-in-time, first-in-right.
- ✓ There are only 43,000 acres of irrigated cropland in the Pumpkin Creek Valley. This represents a mere 1/2 of 1% of total irrigated acres in Nebraska, which is about 8 million acres. Imagine if the supreme court veered off track and radically ruled to change groundwater irrigation rights statewide based on an extremely localized conflict involving such a small number of irrigators and irrigated land.
- ✓ Many of us feared the state supreme court might just take a giant leap away from existing law and rule that Nebraska would have to, in some manner, blend groundwater and surface water into one system to determine the priority of rights. Thank heavens the court did not take this leap that would have spelled disaster for groundwater irrigators.

ELECTIONS MATTER

On November 4, 2008, we will cast votes for candidates for open seats on our local NRDs and for twelve contested seats in the state legislature. Please study up on the candidates in these races and then cast your votes for those candidates who have some background,

understanding and appreciation of production agriculture. Electing strong pro-ag state senators and NRD directors is the key to maintaining and protecting our rights and freedoms to irrigate without excessive and oppressive regulations