

# Nebraska Water Law Facing Dramatic Changes in Our State

## The Spear T Ranch Case

by LeRoy W. Sievers



### LeRoy W. Sievers



**LeRoy W. Sievers** grew up in Blair, and graduated *with honors* from Doane College in 1970. He served three years in the U.S. Army, spending two years at The White House. In 1975 he received a Masters Degree in management in computer science from The American University in Washington, D.C. Sievers

graduated from the University of Nebraska College of Law in December 1977, having been a member of the Moot Court Board. From 1978-1984, Sievers was in private practice in Lincoln. In 1984, he joined the Nebraska Attorney General's Office where he represented the State in water resources, banking and appellate litigation. In 1991, Sievers moved to the Nebraska Department of Water Resources where he worked on a variety of water related issues. A primary responsibility was his work on the *Nebraska v. Wyoming* litigation in the U.S. Supreme Court concerning the North Platte River. Sievers joined Knudsen, Berkheimer, Richardson & Endacott in January 2000. Sievers is active in the Lincoln Bar Association, including serving as president in 2000-2001.

### Introduction

Recently, the Nebraska Supreme Court issued its decision in the case of *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005), which potentially is the most significant case decided by the Nebraska Supreme Court in decades. Spear T Ranch establishes the principle that uses supplied from groundwater, which result in direct and significant reduction in stream flows can be held accountable for resulting damages to surface water irrigators. The case legally recognizes the hydraulic reality that certain surface water and groundwater are "inner-connected" and provides a recourse for surface water users whose interests are not otherwise protected. This article provides the physical and legal setting of this case, describing briefly the history of the case as it made its way through the Nebraska Supreme Court, the positions of the various parties and amici, and the court's decision and its potential implications. Additionally, the article describes other significant cases pending before the Nebraska Supreme Court.

### Background

Pumpkin Creek begins near the Nebraska/Wyoming state line in the Panhandle and flows generally east and north and enters the North Platte River near Bridgeport. In the Pumpkin Creek Basin (Basin), precipitation averages between 15 and 17 inches per year. The area of the Basin is not underlain with the type of aquifer seen elsewhere in Nebraska. Instead, the groundwater resources, other than a very thin alluvial aquifer below the stream itself, come from fractures in the parent material. From before the 1930s until the mid-1960s, Pumpkin Creek flowed between 20 and 30,000

acre feet per year at the point it entered the North Platte River. However, as the number of irrigation wells drilled in the Basin increased, the flows declined. As of 1998, the number of wells increased to 543 and the flows of Pumpkin Creek declined to less than 10,000 acre feet, substantially increasing the number of zero flow days. Additionally, groundwater declines occurred in wells throughout the Basin.

The Spear T Ranch held two surface water permits, one dated November 16, 1954, and one dated December 21, 1956. These diversions were for crop irrigation on the Spear T Ranch property located in the lower Pumpkin Creek watershed not far from where Pumpkin Creek empties into the North Platte River. In its complaint, the Spear T Ranch plaintiff alleged that for the four years preceding the filing of the complaint in 2003, it had been unable to provide water for its livestock because it could not divert any water under its surface water rights.

The Department of Natural Resources, then known as the Department of Water Resources, had not issued any new surface water rights in the Basin since 1979 and had not issued any in the North Platte River Basin since 1993. The North Platte Natural Resources District (NRD) included the area encompassed by the Basin in a groundwater management sub-area, effective March 21, 2001. As a part of the rules adopted by the NRD, a moratorium on the construction of new wells was imposed.

On February 26, 2003, the plaintiff filed its complaint in the District Court for Morrill County, Nebraska, against 23 defendants, including individuals, farming corporations, and partnerships. The plaintiff alleged that the defendants' groundwater wells had pumped and intercepted or withdrawn water that, but for the pumping, would have been in Pumpkin Creek and therefore available to the Spear T Ranch pursuant to its surface water permits and for watering its livestock. The defendants filed motions to dismiss pursuant to Rule 12B, alleging that the complaint failed to state a claim upon which relief could be granted, that the court lacked jurisdiction over the subject matter, and that the plaintiff failed to join necessary and indispensable parties. The district court dismissed the complaint, finding no reasonable possibility that the plaintiff could amend the complaint to cure its defects.

This case, being one of first impression, bypassed the Court of Appeals and was directly considered by the Nebraska Supreme Court. Numerous entities filed amicus briefs. Briefs generally supporting the appellees' positions came from the Nebraska Groundwater Management Coalition, the Nebraska Farm Bureau Federation, and the Nebraska Attorney General's office. Briefs generally supporting appellant Spear T Ranch's position came from the

Nebraska State Irrigation Association, the Central Nebraska Public Power and Irrigation District, and, jointly, the Farmers Irrigation District, other panhandle irrigators, and the Reban Corporation (representing an irrigator downstream of Lake McConaughy).

The court held oral argument on March 3, 2004, at the University of Nebraska College of Law before a large gathering of law students and interested persons. Subsequent to the oral argument but before the court issued a decision, some of the appellees moved to permit further argument and additional briefing. Despite the opposition of Spear T Ranch, the Court ordered the parties to brief four issues: 1) the doctrine of primary jurisdiction; 2) primary jurisdiction in light of the Groundwater Management and Protection Act, Neb. Rev. Stat. §§ 46-701 to 46-753 (Reissue 2004), and the then-recent passage of LB962; 3) the effect of LB962 on the appeal; and 4) whether the Nebraska Groundwater Management and Protection Act or LB962 abrogated any common law remedies that the appellant had or whether the statutory enactments provided an adequate remedy at law. Subsequent to the parties and amicus' submission of briefs, the Nebraska Attorney General's office moved for leave to intervene as a defendant. The court sustained the objections of Spear T Ranch and some of the appellees and denied the Attorney General's request for leave to intervene. The court heard argument on September 8, 2004, and issued its opinion on January 21, 2005.

Spear T Ranch argued that the groundwater users had damaged its right to use water out of Pumpkin Creek and that it was entitled to compensation and an injunction. Using the common law theory of conversion, Spear T Ranch argued that the defendants had converted to their own use the water that it otherwise would have received. Further, Spear T Ranch argued that if conversion did not exist, then trespass was available as a common law remedy.

In their consolidated brief, the defendants first argued that separate administrative mechanisms regulated the use of surface water and groundwater: Surface water use is administered pursuant to the prior appropriation doctrine, but groundwater is governed by the correlative use doctrine as established in Nebraska. Second, the defendants argued that because the legislature had adopted groundwater management statutes regulating the use of groundwater, the plaintiff's recourse was to bring its concerns to the local natural resources district. Third, the defendants argued that they had not engaged in any illegal act because they had registered each of their wells in accordance with the groundwater management plan adopted by the local NRD. Finally, the defendants argued that the Spear T Ranch could not successfully pursue a

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conversion claim because it did not own the water but merely had a right of use.

Attached to groundwater users' brief were the rules and regulations of the North Platte NRD establishing the Pumpkin Creek Management sub-area. For the water year 2002-2003, the NRD's plan allocated to groundwater irrigators in the sub-area 56,450 acre feet of water; no groundwater irrigator could pump more than 24 acre inches in any year. The plan allocated no water for surface water use. Apparently, Spear T Ranch was unable to divert any surface water for its use during that water year.

### Decision

Judge Connolly, writing for a unanimous court, noted that there are circumstances in which groundwater contributes to the flows of surface water streams and the flows of surface water streams contribute to the accumulation of water underground. The court acknowledged the physical reality of the inter-connected nature of the surface and groundwater systems.

In its review of the administrative systems established under Nebraska law for water resources, the court noted that the legislature authorized the Department of Natural Resources and its predecessors to regulate surface water through the prior appropriation system. The court analyzed the statutes authorizing the 23 local NRDs to adopt rules and regulations regarding the use of groundwater.

In determining what steps it would take, the court first determined what steps it would not take. First, it held that it would not apply the prior appropriation doctrine to groundwater uses. Second, it determined that it would not allow a common law right of recovery for conversion or trespass: "Because Spear T does not have a property interest in its surface water appropriation and only has a right to use, it cannot state a claim for conversion or trespass." 269 Neb. at 186. The court then analyzed the common law used to resolve disputes among groundwater users, looking at the English rule, the American rule, the Correlative Use Doctrine, and the Restatement (Second) of Torts.

The heart of the court's decision is its use of the Restatement of Torts as a means of resolving disputes between surface water users and hydrologically connected groundwater users. The court stated:

Accordingly, we adopt the Restatement to govern conflicts between users of hydrologically connected surface water and groundwater. Specifically, we hold: A proprietor of land or his [or her] grantee 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. Restatement (Second) of Torts Section 858 (1)(c) at 258 (1979). Whether a ground water user has unreasonably caused harm to a surface water user is decided on a case-by-case basis. In making the reasonableness determination, the Restatement . . . provides a valuable guide, but we emphasize that the test is flexible and that a trial court should consider any factors it deems relevant. *Id.* at 194.

Thus the factors set forth in the Restatement are to be considered in making the determination. The factors include the purpose of use; the suitability of the use to the water course or lake; the economic value of the use; the social value of the use; the extent and amount of harm the use causes; the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other; the practicality of adjusting the quantity of water used by each proprietor; the protection of existing values of water uses, land, investments, and enterprises; and the justice of requiring the water user causing harm to bear the loss.

The court went on to review the Groundwater Management and Protection Act and the then-recently adopted LB962. The court noted that these statutes contain general regulations but are not designed to resolve individual disputes and do not result in any type of administrative adjudication. Under the statutes, a local NRD may be asked to make rules and adopt management plans. However, the statutes do not permit the local NRD to remedy past harm. The plans created are prospective in their operation and thus, do not provide for an adequate remedy. The court also ruled that the concept of primary jurisdiction does not apply because a remedy is not assured through actions of the local NRD. Further, the court determined that the district court erred in finding that the necessary parties were not included. The court noted that the plaintiff could sue any groundwater users that allegedly caused it damage; it was not required to join all groundwater users that allegedly caused the damage.

The case was reversed and remanded to the lower court for additional proceedings.


The most significant immediate implication of Spear T Ranch is that surface water users who believe they can establish that groundwater users have unreasonably interfered with their use of surface water can seek redress for that harm in state district court. To prove that harm has occurred, the plaintiff will need to present evidence on the factors listed above from the Restatement (Second) of Torts. Local NRDs may continue to use the Groundwater and Protection Act to manage interrelated resources, as well as the prior appropriation system to regulate surface water rights. Whether the Spear T Ranch provides a means for surface

water users to obtain compensation for their losses and whether it provides additional incentive to develop comprehensive and effective groundwater management plans remains to be seen.

### Related Pending Cases

Spear T Ranch also brought a tort claim against the State of Nebraska for over \$4 million. The State Tort Claims Board rejected the claim and the Morrill County State District Court dismissed a subsequent complaint. Spear T Ranch has appealed that dismissal and the case is presently pending before the Nebraska Supreme Court. *Spear T Ranch v. Department of Nat. Resources*, S-04-0639.

Additionally, the Central Nebraska Public Power and Irrigation District has requested the Department of Natural Resources to regulate unpermitted diversions upstream from Lake McConaughy. As a part of its request, Central alleged that hydrologically connected groundwater users amounted to unpermitted diversions that should be regulated.

The Department rejected that petition and Central has appealed to the Nebraska Supreme Court. 

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