



## Surface Water/Ground Water Conflicts

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How will the Nebraska Supreme Court Respond?

On September 8, 2004, the Nebraska Supreme Court heard the re-argument of the case of Spear T Ranch, Inc. v. Knaub, et al. This is a case pitting a surface water irrigator, Spear T Ranch, against a number of upstream ground water users regarding the issue of who has the right to use waters of the state of Nebraska. In this case, Spear T Ranch had a surface water permit issued by the State in the 1950's to divert water from Pumpkin Creek. It alleged in the District Court of Morrill County that the upstream ground water users, through their later in time pumping activity, had taken the water that had historically flowed to the Spear T Ranch. A large number of ground water wells have been placed in the Pumpkin Creek Basin by irrigators and the water table has declined as those wells have been in operation. The lawsuit brought by the Spear T Ranch has raised for the Court the question of whether or not a surface water irrigator is entitled to any relief against ground water irrigators who allegedly have taken water that otherwise would be available to the surface water irrigator and whose use preceded the ground water irrigators.

For the re-argument, the Court had asked the parties to address the questions of primary jurisdiction; the question of primary jurisdiction in light of the adoption of the Ground Water Management and Protection Act and LB 962; the effect, if any, of the adoption of LB 962 on Spear T's appeal; and whether the Ground Water Management and Protection Act or LB 962 abrogated any common law remedies that the appellant might have or whether they provided an adequate remedy at law. Briefs were submitted on those questions by the parties as well as a number of amici. In this reargument, the court asked the parties quite a few questions.

At one point, the Chief Justice asked whether or not the Restatement of Torts Second § 858(1)(C) provided a methodology for addressing the issues raised in this case. Specifically, the Court noted that the Legislature, although given numerous opportunities and requests for guidance by the courts, had not actually addressed the question of how to resolve direct conflicts between ground water and surface water irrigators. Other members of the Court noted that the responsibility for resolving these conflicts had not actually been delegated to any specific agency. It was noted that the Ground Water Management and Protection Act and LB 962 provide a means for planning and implementing proposals which in the long term may reduce or eliminate conflicts but do not seem to resolve existing conflicts. In the Spear T case, for example, the plaintiff is not seeking a remedy for future problems but instead is seeking payment for damages that have already occurred.

How the Court decides this case will have a dramatic effect on understanding how conflicts between surface and ground water users can be resolved, the entity to which such conflicts will be brought, and the value of surface water rights.

