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HOW THE NORTH DAKOTA FARMER/RANCHER ACQUIRES WATER RIGHTS

JOINT AGRICULTURAL ECONOMICS - LAW RESEARCH REPORT

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HOW THE NORTH DAKOTA FARMER/RANCHER ACQUIRES WATER RIGHTS

by

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I. Today's Legal Theory Defined

The State of North Dakota, since July 1, 1963, recognizes only the law of prior appropriation for the waters in North Dakota. North Dakota, up to 1955, recognized both riparian rights and common law doctrines, as well as prior appropriation for its waters.

The riparian rights doctrine on the use of water held that the riparian landowner (the landowner who owned land adjacent to a stream or lake) had the right to make a reasonable use of waters flowing *through, by, or standing* on his property as long as his use of the water did not adversely affect the equal right of his riparian neighbors to use the water also. The doctrine of riparian rights was severely curtailed between 1955 and 1963 when the only rights a riparian owner could acquire was for domestic and stock-watering purposes. All other water rights had to be acquired by appropriation.

The common law doctrine held that a surface owner owned the water underlying his land.

All water rights have to be obtained by appropriation since 1963. However, protection is granted water uses that were put into actual use before 1955 under the riparian rights and common law doctrines and are still in use today. No new rights could be acquired by the use of the riparian rights or common law doctrines after 1963.

The law of prior appropriation states that all waters in the state belong to the public and are subject to appropriation by private parties for beneficial use. Only two situations are exempted from public ownership: (1) diffused surface waters in contributing drainage areas and (2) privately owned waters. Diffused surface waters are waters on the surface that are not waters of a natural stream, lake, or pond and are such that they spread themselves over the surface of the ground following no definite course or channel. An example would be water resulting from rain or melting snow. In areas where they ultimately find their way into a watercourse (contributing drainage area), they do not con-

stitute public waters until they have joined the watercourse. Privately owned waters are waters that have been physically separated from their natural condition so as to become personal property. An example of this kind of water would be water held in small private tanks or basins in which there would be no natural flow or drainage.

A basic principle of the appropriation doctrine in the North Dakota law is that priority in time gives priority in right. This means that if two individuals use water out of the same stream, the one who started to use it first would have the greater protection. Thus, if there was a shortage of water, the person who acquired the first use would get to continue full use of the water. This protection of the water rights is referred to as having priority. Having priority means that if there ever is a water shortage, someone else with a later priority will have to quit using the water before you do.

The *North Dakota Century Code* provides that all waters within the state, but for the two exceptions noted above, belong to the public and are subject to appropriation for beneficial use. The right to use these waters is acquired by following the provisions of the code. Private individuals who want to protect their present use of the water or who want to acquire water rights in the future must follow these procedures. The code spells out the method to obtain the priority for appropriating the water. Sometimes a water permit is required, sometimes not.

II. When Is a Permit Required?

When is a water permit needed from the state to appropriate the water? This can be best answered by stating those water uses that can be made without the need for a permit. The *North Dakota Century Code* specifically states that a water permit is not required of a landowner or lessee to appropriate water from any source or constructed works for domestic or livestock purposes, or for fish, wildlife, and other recreational uses.

Domestic purposes means that the water can be used by an individual or by a family unit for personal needs and for household purposes, including but not limited to heating, drinking, washing, sanitation, and cooking. No permit is needed for irrigation of land not exceeding one acre in area for noncom-

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mercial gardens, orchards, lawns, trees, or shrubbery. You can water your personal lawn, trees, or garden without a permit, but if you have an orchard or garden in excess of one acre and are in the business of selling vegetables, you must obtain a permit to irrigate these areas.

Livestock use refers to water used for drinking purposes for any herds or flocks of domestic animals. A rancher or farmer can divert water for the purposes of watering his cattle without acquiring a permit. But this use refers to drinking purposes only, and does not include any use of water for sanitary purposes, such as cleaning cattle pens or feeding areas.

Fish, wildlife, and recreation means using the water for the purposes of developing and growing fish and wildlife resources and for the development and maintenance of water areas necessary for outdoor recreational activities.

However, immediately upon completing any constructed works for domestic or livestock purposes, or for fish, wildlife, and other recreational uses, the water user must notify the state engineer of such constructed works, the location, and its acre feet capacity.

All water users have to secure a water permit prior to constructing a dam or dugout which is capable of retaining more than 12 1/2 acre feet of water. One acre foot of water is equal to 325,850 gallons, so unless you build an impoundment that holds an excess of 12 1/2 acre feet or 4,073,125 gallons, you would not need a permit. In reality you will never need a permit for domestic purposes. There could be some situations, however, in which a dam or dugout built for livestock or fish and recreational purposes would exceed 12 1/2 acre feet in capacity, for which a permit would be required. However, even though the dam or dugout does not exceed the 12 1/2 acre foot capacity, the state engineer still must be notified of its location and acre foot capacity.

Except for the three general areas noted (domestic, livestock, and recreation), all other uses of water require a permit from the state. The exceptions really mean that the focus of the permit system is on irrigation and industrial uses. Any irrigation project in excess of one acre and any industrial use requires a permit from the state before water can be appropriated.

III. How Is a Permit Obtained?

After determining that a water permit is needed, how does a North Dakota farmer or rancher go about getting this permit?

The state engineer and the State Water Commission are the two principal North Dakota agents or agencies involved in administering the appropriation system. The steps that lead to acquiring a water permit begin by asking the state engineer for the right to appropriate a specified amount of water. The state engineer, upon receiving such a request, will send copies of an "Application for a Permit to Divert and Appropriate the Water of the State of North Dakota," and a pamphlet entitled, "Circular of Instructions Relative to Appropriation and Use of Water" (hereafter referred to as the circular).

The application must be completed in prescribed form and filed with the state engineer, State Capitol, Bismarck, North Dakota. It must be accompanied by a transparency and two prints of a map indicating the county, section, township, and range designations of the area where the appropriation is to be made, plus the points of diversion and direction of water flow, as well as any canals, reservoirs, underground wells, and watercourses. The map must be prepared from an actual survey and certified by a competent surveyor. A filing fee must be included. The circular lists the filing fees required, depending upon the use of the water. The circular also provides step-by-step instructions and explanations on how to fill out the application forms. There are special instructions on how to prepare transparencies and maps, and it presents an example of a map and sample surveyor's certificate.

The state engineer will establish the priority date for the applicant upon receipt of a properly completed application form, maps, and filing fee. An application found defective as to form or unsatisfactory as to feasibility is returned to the applicant within 30 days of its receipt with a statement of corrections needed. Sixty days are allowed for refile and the original priority date is protected if the application is corrected and refiled within that time. A corrected refile received after the 60-day period will be treated as a new filing with respect to the priority date.

The state engineer, upon receiving an application that is in satisfactory form and which meets all the requirements outlined herein, will require the applicant to do two things.

First, he must give notice to all record title owners of real estate within a radius of one mile from the location of the proposed water appropriation site. If the one-mile radius extends within the boundary of any city or town, notice need only be given to the governing body of that city or town. No notice need be given to individuals who live in the town.

Second, he must publish in a newspaper of general circulation in the area in which the diversion of water is to take place a "Notice of Public Hearing" regarding the application once a week for two consecutive weeks.

Hearings on water permit applications are rarely held in the locality in which the diversion is planned; generally they are held at the State Office Building in Bismarck. The state engineer will receive testimony from all interested parties at the hearing. The state engineer will grant the application upon approval of the State Water Commission if he determines from surveys of the water supply and evidence presented at the hearing that there is a sufficient amount of water available for appropriation and the application is not against the public interest. Usually few, if any, people appear at the hearings (not even the applicant) so in reality in many cases the hearing does not actually take place. But applicants should be aware that the opportunity does exist for interested persons to oppose the application for the water permit. The applicant has 60 days to appeal the decision of the state engineer to the District Court if the application is rejected.

The applicant will get a conditional water permit if the state engineer approves the application. It is conditional in that the applicant will be given a certain length of time within which to complete construction for the diversion of water and to put the water to beneficial use. The conditional permit expires if the construction is not completed and the water not put to beneficial use within the time limit.

The state engineer inspects when the construction is completed and the water is in use. A perfected water permit will be issued for the amount of water actually being used if the project is found to be satisfactory. Currently the perfected water permit carries no expiration date and remains in effect as long as the water is being used for a beneficial purpose. The date for purposes of priority is the date of the original application and not the date of the perfection. The applicant can further protect his use by recording this permit with the Register of Deeds of the county in which the water is used.

The state engineer may reject the permit application for one or two reasons: (1) insufficient water and (2) contrary to the "public interest."

The question of the sufficiency of water is for the most part a technical one. However, there may be outstanding permits covering all the water in a particular source and still have sufficient water since

some of the permittees may have abandoned their use. The Code gives the state engineer the power to declare forfeit water permits where, subject to certain exceptions, the water has not been used for a three-year period.

Only recently did the Code define public interest, and this provision had appeared to give the state engineer a substantial amount of discretion. The 1975 Legislative Assembly, however, stated that, "In determining the public interest, the state engineer shall be limited to those considerations within his jurisdiction." Apparently all this means is that the public interest question has to relate to water.

The acquiring of a water permit appears to be a very complicated process, but if the applicant follows the circular with its instructions as provided by the state engineer, it is by no means an impossible task.

IV. How Does a Permit Terminate?

The only reason for terminating an approved and perfected permit is failure to put the water to a beneficial use for three successive years. Even then there will be no forfeiture if the nonuse was caused by a shortage of water. Since beneficial use of the water is the standard by which the water permit is granted and maintained, the question arises, what is a beneficial use? The concept has been given a broad interpretation, and allows the use of water for domestic, livestock, irrigation, industry, fish, wildlife, or other recreational uses.

V. Can a Permit Be Transferred or the Use Changed?

Once a permit is granted, can the rancher or farmer transfer it to a third party or can he change from one use to another? The answer is a qualified "yes." If the land is sold, the water permit goes with the land unless the seller reserves the water rights, in which case they may terminate. Any other transfer or change in use requires the approval of the state engineer. It also requires the state engineer's approval to transfer the water from one area of farmland to another.

VI. Rules, Regulations, and Amendments

The state engineer and State Water Commission have the power to create and enforce rules and regulations. They have not done so to date, but they are now preparing draft rules and regulations. Until their final promulgation, these drafts are being used as policy guidelines.

Furthermore, the 1975 Legislative Assembly authorized an interim study (now underway) of water laws by the Legislative Council with a view to introducing legislation in the 1977 Assembly.

Applicants for water permits should be aware that changes in the law as to substance and procedure may be forthcoming.

VII. Construction of a Water Well

Another water problem arises if the North Dakota farmer or rancher wants to construct a water well. The *North Dakota Century Code* states that the business of constructing water wells affects the public welfare, health, and safety of all the people of North Dakota, and should be under the supervision of the State Board of Water Well Contractors (hereafter referred to as the board). The board consists of the state engineer and the state health officer, plus two water well contractors appointed by the governor. The board is to administer the law as it applies to the construction of water wells

to protect the health and safety of the people of North Dakota.

Since January 1, 1972, no person, partnership, or corporation can engage in the business of constructing water wells, unless certified to do so by the State Board of Water Well Contractors. A prospective contractor must pass an examination given by the board, to become certified, as well as deposit a \$1,000 Bond with the board as a condition that he will faithfully perform all contracts under strict compliance with the law.

However, this section of the Code does not apply to any person who is constructing a water well on his own property for his own use. It only applies to those contractors who are in the business of constructing water wells for hire.

The construction of *all* wells has to comply with the rules and regulations of the State Health Department. As the rules refer to possible sources of contamination and well site locations, one interested in constructing a water well should write to the State Health Department for a complete set of their rules and regulations.