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HOW THE NORTH DAKOTA FARMER/RANCHER ACQUIRES WATER RIGHTS

By Jerome E Johnson
and
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Joint Agricultural Economics / Law Research Program Report

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CONTENTS

Today's Legal Theory Defined	1
When is a Water Permit Required?	1
How is a Permit Obtained?	2
How Does a Permit Terminate?	4
Can a Permit be Transferred or the Use or Point of Diversion Changed?.....	4
Construction of a Water Well	4

FOREWORD

The Agricultural Economics/Law Research program is a cooperative venture between the School of Law at the University of North Dakota and the Department of Agricultural Economics at North Dakota State University. The program has been in operation since 1960, with funds provided by North Dakota State University Agricultural Experiment Station Project Number ND3319. The joint research program is designed to research various aspects of North Dakota law and to report the findings in published form readily available to all North Dakotans.

The authors appreciate the support of the staff at the School of Law in continuing this program. The staff of the Department of Agricultural Economics also is asked to edit the reports, which is appreciated because it helps in the clarity of the reports.

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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 recognized both riparian rights and common law doctrines up to 1955, 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 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 rights of his riparian neighbors to also use the water. 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-water 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 riparian rights and common law doctrines and are still in use today. No new rights could be acquired by the use of 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. "Beneficial use" means a use of water for a purpose consistent with the best interests of the people of the state. Only two situations are exempt 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 constitute 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 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 were 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 reduce or quit using the water before you do. Where a later appropriation has changed the condition of water occurrence, such as increasing or decreasing stream flow or lowering of a water table, artesian pressure or water level, and the prior appropriator can "reasonably" acquire his water under the changed condition, the prior appropriator does not have a right to manipulate the condition of water occurrence caused by the latter appropriator's actions.

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 specifies the method for obtaining a priority for appropriating 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 water? This can be best answered by stating those water uses which do not need a permit. The NORTH DAKOTA CENTURY CODE says 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 water can be used by an individual or by a family 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 less than one acre in area for noncommercial gardens, orchards, lawns, trees, or shrubbery. You can water your personal lawn, trees, or garden without a permit, but you

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need a permit to irrigate an orchard or garden in excess of one acre if you are in the business of selling the produce.

Livestock use means use of water for drinking purposes by herds, flocks, or bands of animals kept for commercial purposes. A rancher or farmer can divert waters for watering his cattle without acquiring a permit. But this refers to drinking purposes only, and does not include any use of water for sanitary purposes, such as cleaning cattle pens or feeding areas. It is not necessary, however, to acquire a water permit in order to divert water for the drinking or sanitary purposes of household pets or domestic animals for sale or commercial use.

Fish, wildlife, and recreation means using water for propagating and sustaining fish and wildlife resources and for the development and maintenance of water areas necessary for outdoor recreation.

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 the location and acre feet capacity of such constructed works.

Emergency or temporary use of water for up to 12 months without a permit may be authorized by the state engineer if he determines that the use will not cause detriment to existing rights. A separate procedure for the processing of applications for emergency and temporary use will be established by the engineer when an emergency arises. Use of water authorized in this manner will not lead to the acquisition of prescriptive or other rights to use the water.

All water users have to secure a water permit prior to constructing a dam or dugout which is capable of retaining more than 12½ 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 12½ 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 12½ acre feet in capacity, for which a permit is required. However, even though a dam or dugout does not exceed 12½ acre foot capacity, the state engineer still must be notified of its location and acre foot capacity.

Except for the general uses of domestic, livestock, fish, wildlife, and recreation, all other uses of water require a permit from the state. The exceptions suggest that the focus of the permit system is on irrigation, industrial, and municipal uses. Any irrigation project in excess of one acre and any industrial or municipal use requires a permit from the state before water can be appropriated.

III. How is a Permit Obtained?

Upon determining that a water permit is needed, how does a North Dakota farmer or rancher go about getting a 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 a "State of North Dakota Application for Conditional Water Permit" and a pamphlet entitled, "Instructions For Completion of Application For Conditional Water Permit" (hereinafter referred to as the instructions).

The application must be completed on the prescribed form and filed with the State Engineer, State Office Building, 900 East Blvd., Bismarck, North Dakota 58505. Attach a transparency and two prints of a map indicating section, township, range, and county designations of the area where the appropriation will occur, plus the points of diversion and direction of water flow, as well as any canals, reservoirs, underground wells, and watercourses. Prepare the map from an actual survey and have it certified by a competent surveyor. A filing fee must be included. The instructions list the filing fees required depending upon the use of the water. The instructions also provide detailed directions and explanations on how to prepare the application forms. There are special instructions on how to prepare transparencies and maps, and an example of a map and sample surveyor's certificate.

The date of receipt of the application in the State Water Commission office is marked on the application. An application found defective as to incomplete form, or otherwise unsatisfactory, is returned to the applicant within 30 days of its receipt with a statement of corrections needed. Sixty days are allowed for refiling and the original priority date is protected if the application is corrected and refiled within that time. A corrected refiling received after the 60-day period will be treated as a new filing with respect to the priority date. However, an application may be amended by the applicant at any time prior to the commencement of administrative action by the state engineer. Administrative actions include (1) instructing the applicant to give notice by certified mail, and publication to local landowners; (2) conducting a hearing on the application; (3) accepting or rejecting the application based on the hearing.

The following fees must accompany an application:

1. For municipal use in municipalities of 2,500 population or over according to the latest federal census \$250.00
2. For municipal use in municipalities of less than 2,500 population according to the latest federal census \$150.00
3. For irrigation \$100.00
4. For industrial use of one C.F.S. or less ... \$150.00
5. For industrial use in excess of one C.F.S. \$500.00
6. For recreation \$ 50.00
7. For commercial recreation \$100.00

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

First, the applicant must give notice by certified mail 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. Such notice must give all essential facts concerning the proposed appropriation including the places of appropriation and of use, amount of water, purpose for which it is to be used, name and address of the applicant, and time and place of a hearing on the application by the state engineer. Proof of publication must be filed with the state engineer within 60 days from the date of his notice to publish. Failure to file satisfactory proof within the time required will result in a change in the original filing date of the application to the date of receipt of satisfactory proof of publication.

Hearings on water 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 must conduct a hearing on the application upon receipt of proof of publication. The state engineer will receive testimony from all interested parties at the hearing. However, few if any people appear at the hearing, not even the applicant. The state engineer will grant a permit if he finds all of the following:

1. The rights of any prior appropriator will not be unduly affected.
2. The proposed means of diversion or construction are adequate.
3. The proposed use of water is beneficial.
4. The proposed appropriation is in the public interest; which means that the state engineer must consider all of the following:
 - a. Benefit to the applicant resulting from the proposed appropriation.
 - b. Effect of the economic activity resulting from the proposed appropriation.
 - c. Effect on fish and game resources and public recreational opportunities.
 - d. Effect of loss of alternate uses of water that might occur within a reasonable time if not precluded or hindered by the proposed legislation.

- e. Harm to other persons resulting from the proposed appropriation.
- f. Intent and ability of the applicant to complete the appropriation.

If approved the state engineer must issue a conditional water permit allowing the applicant to appropriate water. However, the State Water Commission may reserve final approval over any water permit in excess of 5,000 acre feet.

Should the state engineer determine that an application does not meet the criteria above, he must reject the application. He must not order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations of the State Water Commission. However, any applicant, within 60 days from the date of rejection, may appeal the decision to the district court. Failure to appeal within 60 days finalizes the state engineer's decision.

The state engineer must adhere to the following order of priority when there are competing applicants for water from the same sources and the source is insufficient to supply all applicants:

1. Domestic use.
2. Municipal use.
3. Livestock use.
4. Irrigation use.
5. Industrial use.
6. Fish, wildlife, and other outdoor recreational uses.

The state engineer may issue a conditional permit for less than the amount of water requested, but in no case may he issue a permit for more water than can be beneficially used for the purposes stated in the application. He may issue a permit subject to fees for water use, conditions, limitations, and termination dates he considers necessary to protect the rights of others and the public interest.

The applicant receiving a conditional permit is allowed a specified length of time within which to complete construction for 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. However, the state engineer may extend the time for the application to beneficial use for "good cause" shown. Where the conditional permit has expired, the state engineer may renew the time limit upon application. However, a conditional water permit is considered forfeited, abandoned, and void if no request for renewal is received by the state engineer within 60 days after the person holding the permit has been informed by certified mail that the period for applying water to the beneficial use cited in the conditional permit has expired.

The state engineer may deny a request to extend the time for application to beneficial use for a conditional permit. If the request is denied the conditional permit is considered forfeited, abandoned and void. In the case of conditional permits, no hearing need be held before the state engineer declares a forfeiture.

The state engineer must have the works inspected on or before the date set for the beneficial use of water or upon notice from the owner that water has been beneficially used. Inspection is necessary in order to determine the actual capacity, safety, and efficiency of the works. The state engineer may require changes and must not issue a perfected water permit until changes are made if the project is not properly and safely constructed. Failure to make the changes will result in a postponement of the priority date until the changes are actually made. When the works are found satisfactory the state engineer must issue the perfected water permit specifying the actual capacity and limitations or conditions as stated in the conditional water permit. All conditions attached to any permit issued are binding upon the person to whom the permit has been issued. Currently, a 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 perfection. The applicant can further protect his use by recording his permit with the Register of Deeds of the county in which the water is used.

Acquiring 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 not a difficult task.

IV. How does a Permit Terminate?

The only reason for terminating an approved and perfected water permit is failure to put the water to a beneficial use for three successive years. However, it will not be forfeited if the nonuse was caused by a shortage of water. The state engineer sets a time and place for a public hearing when it appears that the appropriated water has not been put to beneficial use for three successive years. Any interested person may request such a hearing, the purpose of which is cancellation of the unused water rights. Notice of the hearing is given by certified mail to the holder of the water permit and owners of the land benefitted; and by newspaper to local people. The water permit is declared forfeited or cancelled, if no one appears at the hearing. Interested persons may appear, contest, and testify about the cancellation. The permit will be declared forfeited unless the nonuse has been due to unavailability of water or other good cause. However, one may appeal the state engineer's decision to the district court where the land is located.

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

Any water permit may be assigned or transferred to any parcel of land owned by the holder of the permit only upon approval by the state engineer. If the assignment or transfer can be shown not to be detrimental to existing water rights, then the state engineer must allow the assignment or transfer without the loss of priority previously established. This decision is final unless interested parties in the same source of water supply bring an action within 60 days of the decision in a district court where the land is located. Transfer of title to land carries with it all rights to the use of water attached to the land for irrigation purposes. If approved by the state engineer, a permit holder may change the point of diversion or purpose of use without affecting the priority date. However, an application for such changes must be processed in the same manner as an application for a water permit. Also, a change in purpose may be authorized only for a superior use as indicated in the order of priorities listed above.

VI. Construction of a Water Well

Another water problem arises if a 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 (hereinafter 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 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. Since the rules refer to possible sources of contamination and well site locations, anyone interested in constructing a water well should write to the State Department of Health for a complete set of their rules and regulations.