

First In Time, First In Right

Irrigation in North Dakota and the Prior Appropriation Doctrine

By Bennett Johnson

From growing crops to raising livestock, the use of water is at the heart of all agriculture. According to the National Agricultural Law Center, the agricultural industry accounts for approximately 80 percent of the United States' consumptive water use and more than 90 percent in many western states. Due to continued losses of productive farmland to population growth and urbanization — roughly 2,000 acres are lost each day, with the pace quickening according to the American Farmland Trust — increased production on remaining productive lands through irrigation will be necessary to satisfy global food demand for the world's projected 10 billion people by 2050.

While irrigation has always been of major importance to the social and economic fabric of North Dakota, the Northern Plains, as part of the greater American West, continues to endure one of the region's worst megadroughts. Accordingly, familiarity with the prior appropriation system is more important than ever, particularly for irrigators, as demand for North Dakota's limited water resources become more and more competitive.

The phrase “first in time, first in right” is synonymous with the prior appropriation doctrine, which is a principle of law governing the use of water throughout the Western United States. The doctrine provides that the first person to put a specific quantity of water to beneficial use will secure and maintain a legal right to that water, superior to claims

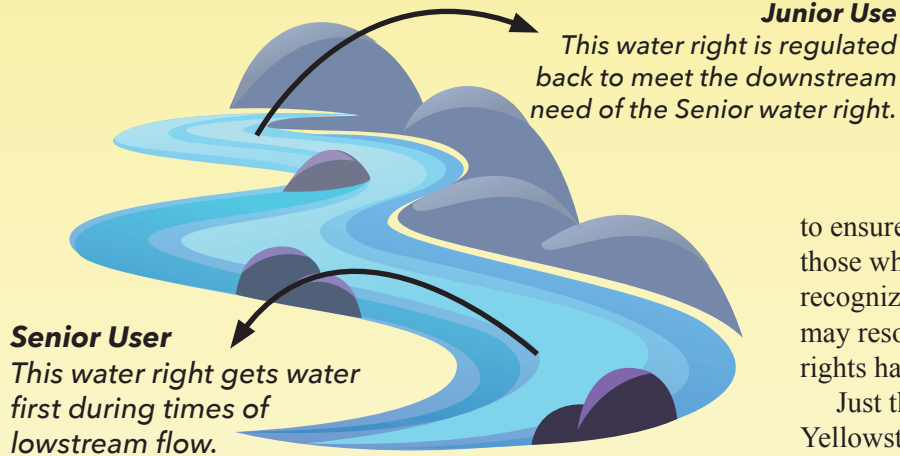
made by others at a later date or those operating without a permit, absent some limited exceptions. Additionally, pursuant to the doctrine, mere ownership of land does not carry with it any right to use water found in watercourses on or adjacent to that land. The doctrine operates on the basis of strict priority based on seniority. Therefore, if there is not enough water for all users, the more senior users will be allowed to use all of their allotted water while junior users may receive only some or none of their allotted water.

In North Dakota, the Department of Water Resources, formally known as the State Water Commission, administers and enforces the prior appropriation system through a detailed permitting process guided by statute. Before appropriating or taking any waters of the state, including for irrigation use, users are required to secure a water permit from the Department. Irrigation use is defined by law as “the use of water for application to more than five acres of land to stimulate the growth of agricultural crops, including gardens, orchards, lawns, trees, or shrubbery, or the maintenance of recreation areas such as athletic fields, golf courses, parks, and similar types of areas,” unless supplied by a municipal water supply.

Currently, there are 2,269 active permits approved for irrigation, diverting approximately 194,000 acre-feet, and 213 active permit applications in various stages of review. These permitted systems account for roughly 54 percent of all water use within the state. Additionally, there may be various unpermitted systems in existence throughout the state, due to either the perceived burdensome nature and



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duration of the permitting process, or through a general lack of knowledge of the requirements. Not only are unpermitted appropriations of water illegal and any person using water without a permit risks being subject to a class A misdemeanor, users without a permit are also liable for damages caused to valid water rights holders. Accordingly, it is necessary for irrigators to make sure their systems are permitted and in compliance with all applicable laws and regulations of the Department of Water Resources, including installing the appropriate measuring devices and filing accurate water use reports with the Department on an annual basis. This ensures the user has a legal right to the water resource, solidifies the user's priority to use the water into the future, and also protects the user from potential legal liability.

As drought conditions continue to plague North Dakota, irrigators may be faced with reduced water availability resulting in highly competitive permit applications. When evaluating applications, the Department, while ensuring the sustainability of the resource, considers various factors including the amount of the request, the size of the water

supply, source characteristics, period of use, and the proximity to senior appropriators, among others. If there is not enough water available within a watercourse for all users, senior users may make a "call on the river," a legal mechanism that forces the Department of Water Resources to order conservation actions, or even stop junior water users from taking any water

to ensure that enough water remains in the system for those who hold senior water permits. If the agency fails to recognize and respect a prior or vested water right, the user may resort to litigation to determine whether the user's rights have been damaged.

Just this spring, the state of Montana, through the Yellowstone River Compact — an interstate agreement dating back to 1950 between Montana, Wyoming and North Dakota providing for the equitable division and apportionment of the waters of the Yellowstone River and its tributaries — made a call on the Tongue River due to drought conditions over the past year. Pursuant to the call, all post-1950 water rights within the basin in Wyoming were prevented from use until Montana's call was lifted. Such disputes over water use will only continue to increase as drought conditions continue to expand throughout the western United States.

Conflicts over current and future allocations of water will continue to exist. It is vital for irrigators to familiarize themselves with the prior appropriation doctrine in addition to North Dakota's laws and regulations that govern the issuance of water permits across the State. More importantly, any irrigator operating without an established priority date or permit issued by the Department of Water Resources should quickly obtain a permit to protect their ability to use water now and into the future. Otherwise, these producers risk being cut off from the water supply they need to enhance their operations and subject themselves to liability for damages caused to senior users.

