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RED RIVER: WATER LAW STUDY
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Introduction

In today's world, water related jurisdictional conflicts in and between the United States and Canada often end up in the courts. Courts then, by default, become the final authority, deciding who wins and who loses on crucial water issues. This course of action is becoming more evident in the Red River Basin of the North. In addition to the current conflicting water related issues, there are those that will confront the Red River basin leadership in the future. These future issues are of a magnitude and type that could easily lead to long drawn out legal struggles, ultimately settled by courtroom decisions at some level. Some of these water related issues have the potential to reach the highest levels of federal court.

A more pro-active model, one built upon discussion, process, planning and action, founded on understanding, respect, consensus and cooperation between the jurisdictions has the tantalizing potential of offering a more beneficial approach than resorting to the legal system.

In the Red River Basin, some of these potential legal conflicts relate to flooding and the long history of damages and conflict associated with spring and summer flooding. But flooding is not the only water issue confronting basin leadership. Another area of potential conflict that will challenge leadership in the future is related to *not the excess of water but the scarcity of it*. How residents of the Red River Basin prepare now to share the limited surface and ground water resources that will be extremely stressed in an extended low flow or drought situation is a major challenge that could easily lead to legal challenges and courtroom solutions. To avoid this, we need to act now to begin to address this particular area of water resource management.

Gaining a better understanding of the differences and similarities between the jurisdictions related to specific elements of water law between Manitoba, Minnesota, North Dakota, and South Dakota will be the cornerstone for developing strategies and solutions to water use, allocation, and management that seeks a basin-wide balance between jurisdictional water law, rules, licensing/permitting and policies. This report is meant to be the beginning of that deeper understanding.

The Red River Flooding: Water Law Study has been compiled by the Red River Basin Commission (RRBC), with funding from the International Joint Commission (IJC) and Manitoba Water Stewardship (MBWS). This report addresses numerous questions related to water use and allocation similarities and differences between the province of Manitoba and the states of Minnesota, North Dakota and South Dakota. These questions document processes and actions that would be followed in low water supply periods and extended drought in the Red River Basin. The report also explores policies related to the same low water supply conditions.

RRBC recognizes with gratitude the expertise provided by the technical task force who provided information and input to this report. They are: Bob Shaver, Director, Water Appropriation Division, North Dakota State Water Commission (NDSWC); Robert Matthews, Manager, Water Licensing Branch, MBWS; Bob Harrison, Acting Director, Hydrologist, Surface Water Management Section MBWS; Jim Japs, Assistant Director, Waters Division, Minnesota Department of Natural Resources (MNDNR); John Patch, Assistant Director, Water Appropriation Division, NDSWC; Ron Duvall, Natural Resource Engineer, South Dakota Department of Environment and Natural Resources (SDDENR); and Garland Erbele, Director of Water Rights Program, SDDENR.

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WATER REGULATION QUESTIONS

Question 1: How are priorities established between users in times of drought?

All four jurisdictions, Manitoba, Minnesota, North Dakota and South Dakota, require licenses or permits to use the surface and/or ground water that the people of the province or state own. These licenses/permits determine how much water the user is allowed to withdraw from surface and/or ground water sources.

The cornerstone of how priorities are established in each of the four jurisdictions is based upon the type of water law each subscribes to. In addition, each jurisdiction has developed permitting and licensing processes, rules and policies as they each have applied their interpretation of their respective water laws. All of these influence priorities and restrictions in times of drought.

Manitoba, North Dakota and South Dakota all use **prior appropriation water doctrine**, with some modifications. For the most part in these jurisdictions, water is appropriated and priorities are established by the **first in time, first in right** principle.

Minnesota, on the other hand, establishes priorities using the **riparian water doctrine** based on reasonable and beneficial use, providing the right to use water for domestic, agriculture and other purposes while **preserving the status quo of nature**.

In Manitoba, North Dakota and South Dakota, the license/permit prioritizes the order of use relative to other users by the date of the license/permit. The latest license/permit holder is the first one restricted or cut off in times of water shortage. Conflicting uses, such as when a higher beneficial use is determined, for example domestic or municipal needs over other needs, is usually addressed during the licensing/permitting phase and not during water shortages. South Dakota recognizes one narrow example of a license/permit holder having a higher use, that being domestic use within a municipality taking preference over other appropriate rights with a priority date after June 30, 1978. Aside from this one situation, South Dakota makes no distinction between appropriations in regard to type of use; it is strictly by priority date.

In Minnesota, the license/permit is issued with the understanding that water use may be restricted or stopped in times of shortage. A contingency plan for such a situation is developed as part of the licensing/permitting process.

Question 2: What legal recourse do users have when supplies are short?

In times of low flow in the Red River or its tributaries, or if ground water supplies become low, water users will be restricted and/or cut off. This will begin by restricting and/or cutting off the latest permit holders in Manitoba, North Dakota and South Dakota and by following the contingency plans in Minnesota.

Users in some of the jurisdictions have recourse if their needs are not met. In each jurisdiction, there is some type of appeal process. This process however, may be at the licensing/permitting stage and not during actual water shortage situations.

Minnesota users have no legal recourse in times of low flow and/or drought, since contingency plans lay out strategies to be followed during shortages and/or droughts.

In Manitoba, North Dakota and South Dakota, users have an appeal process: in North Dakota, to the State Engineer; in South Dakota, to the Chief Engineer and the Water Management Board, as needed and, in Manitoba, to the Minister of Water Stewardship. Most of the appeals, however, relate to the licensing/permitting process and not to water shortages.

In all three of these prior appropriation doctrine jurisdictions, the priority date of the original license/permit is used to determine whose water use is restricted or cut off first. The only exception to this, as a rule, relates to domestic uses.

Question 3: Is there an ability to ration water to users and among users?

Manitoba, North Dakota and South Dakota do not ration water in times of drought or low flow, rather, they limit and then cut off use by later (more recent) users to protect the rights of earlier (prior) users. There are some exceptions that Manitoba and South Dakota have used to protect domestic users, although when possible these are linked to the licensing/permitting process.

Minnesota has the ability to ration water to users based on the allocation plans previously developed and according to Minnesota statutes that seek to protect higher (best) uses and the integrity of natural systems. However, as the Red River system is shared with three prior appropriation doctrine jurisdictions, Minnesota has indicated they would likely not ration surface water using their shared approach based on the allocation plans, but rather follow the lead of other jurisdictions and seek to ultimately protect domestic supplies.

Question 4: Do entitlements change with changing water supply conditions?

In the Red River system, entitlements have the potential of being changed for later users in the prior appropriation doctrine jurisdictions of Manitoba, North Dakota and South Dakota, as users are restricted or cut off by priority date to protect the first users. This is, however, acknowledged in their license/permit and is not something that the user would not be aware of prior to low flow conditions. In an extended drought, the restrictions would increase and additional users would be cut off, and the potential for changes in normal expected entitlements would affect more license/permit holders. However, the basic license/permit entitlements still exist.

In Manitoba, if an earlier user is restricted from their allocation, for example by a later use license/permit holder which has a higher beneficial use (such as domestic or municipal), compensation may be required.

In Minnesota, under riparian water doctrine, water entitlements do change with changing water conditions, as water permits are permissive only and subject to modification based on water supply conditions and the contingency plan that was developed as part of the license/permit.

Question 5: What is the ability to allocate water to in-stream flow need within a jurisdiction?

Of the four jurisdictions, only Minnesota has statutory language to protect in-stream flows on the Red River. Manitoba, in its revised Water Rights Act, recognizes certain situations where in-stream flow protection might be necessary for the protection of domestic and municipal supplies, but has nothing related to the Red River in statute. South Dakota will protect low flows for domestic use. In addition, South Dakota allows appropriation of water for in-stream flow purposes using the same "prior appropriation" system as used for permitting other types of uses. North Dakota does not. Only Minnesota will protect in-stream flows for the protection of the stream habitat, but only on rivers within Minnesota where there are no outside jurisdictional competing interests.

Question 6: For in-stream flow: where is it the same; where is it different; what is the relationship to TMDL's, etc.; what is the role of water quality?

In the Red River Basin, there is no common thread to protecting in-stream flows of the Red River and its tributaries.

Manitoba, North Dakota and South Dakota, under prior appropriation water doctrine, will use stream flows to their maximum amounts to provide water to their respective license/permit holders. Manitoba and South Dakota, however, will protect domestic use.

Minnesota has some flexibility within their statutes and has indicated they will operate the Red River, a shared water resource, in a practical manner consistent with what the other jurisdictions are doing. Since Manitoba, North Dakota and South Dakota will basically use the water as it is needed for the license/permit holders (with some considerations for domestic and municipal supplies), Minnesota would operate under the same principles in times of drought, since it has no other alternative if the other jurisdictions are going to take whatever water they need.

Because of these facts, no consideration is currently given to flows in the Red River (in-stream) as they relate to TMDL's and other water quality considerations. The recent Devils Lake outlet discharge permit links flows and quality. For example, during low flows, the operation of the outlet would likely exceed quality requirements and be shut down.

During low flow or drought conditions when water is used to the maximum to provide license/permit holder rights and to safeguard domestic and municipal use, it is quite conceivable that the flows at the international border, where the water quality of the Red River is monitored, would exceed normal acceptable goals, due to concentrations, or be entirely irrelevant due to lack of flow.

POLICY ISSUES

Policy 1: What are the policies related to how much supply must be available to justify allocation?

Each jurisdiction has established a minimum volume use above which formal application must be made for a license/permit. The process includes feedback from other users, especially in the prior appropriation doctrine jurisdictions.

The license/permit process in each jurisdiction also includes some type of analysis by the provincial or state authority regarding whether enough water is available to meet the demands of the license/permit request before issuing the license/permit. This begins by having established uses/users that are allowed to withdraw water and some system of prioritization. Manitoba, North Dakota and South Dakota follow the first in time, first in use principle. In Minnesota, the riparian doctrine jurisdiction, consideration is given more evenly to all uses. Sometimes the supply availability is established by flow numbers and aquifer recharge abilities, but more often it is based on experience and a sense of what the surface or ground water system is capable of providing. This analysis however, is usually based on water availability and normal flow conditions, and does not take into consideration extended low flows or droughts.

In addition, in low flows and extended drought conditions, allocation is restricted based on the license/permit date in Manitoba, North Dakota and South Dakota, with some focus on protecting domestic use. Even though their statutes dictate otherwise, Minnesota will probably follow suit and protect domestic use over all other uses.

Manitoba, North Dakota and South Dakota have not set specific target flows for low flow conditions below which users are restricted and/or cut off as Minnesota has. Allocation during low flow or drought is dealt with by either cutting off users (the latest license/permit holder) in Manitoba, North Dakota or South Dakota, or by following some type of low flow or restriction plan that was developed at the time of licensing/permitting, in Minnesota.

It is entirely possible that, in times of extremely low flow conditions in the Red River Basin, more water could be allocated to users than would be available.

In essence, the policies that relate to water allocation in the Red River Basin are designed to deal with what is available under normal conditions and not what might be available in extended low flow conditions.

Policy 2: What are possible scenarios for taking action, and what are threshold volumes or flows, or possible target levels for actions associated with scenario?

Each jurisdiction reacts to low flow and drought conditions within the framework of their respective water law doctrine. This complicates the sharing of Red River Basin water resources, especially of surface water as the water flows downstream, north into Canada. Since there are four water law doctrine approaches in the Red River Basin with no consensus as to who gets how much water, or when, or where, related to the basin overall, an extended low flow condition or drought will create enormous competition for the limited surface water supplies, with each jurisdiction taking what it can while the water is in their jurisdiction, with little regard for other, downstream interests.

In each jurisdiction, the policies related to taking action are based primarily on their particular water law approach. At this time, there are basically no threshold volumes of flows on the Red River where actions will be taken to change any uses by license/permit holders.

In North Dakota, changing conditions is a recognized phenomenon by the state, and since water is a competitive resource, priority of appropriation does not include the right by the state to change the user's right to take what their permit allows just because the water supply is decreased. Therefore, users will be allowed to access their full rights as long as the supply and their license/permit order affords that right. To guarantee the right of first users, later users will be restricted and/or cut off.

South Dakota essentially follows the same procedure for surface water. In regard to ground water, in most cases the amount of water appropriated to license/permit holders

may not exceed the estimated average annual recharge. In addition, water use control areas may be created in South Dakota to equitably apportion available water supplies for use among the license/permit holders.

Manitoba and Minnesota are in the same basic position of being dependent to a large degree on what is happening elsewhere: Manitoba is affected by upstream users and Minnesota is affected by prior appropriation doctrine water users on the west side of the Red River. Therefore, both Manitoba and Minnesota react to threshold volumes or flows based on their realities. Manitoba, for example has an IFN (in stream flow) process that relates to the licensing/permitting process as well as actions that might be followed during low flows or droughts. This process, however, does not apply to the Red River, since Manitoba is constrained by the upstream jurisdictions and their allocation and use policies and procedures.

Additionally, Minnesota, by statute, follows procedures related to flows regarding use and restrictions. However, these will not be applied to the Red River, since it is a water resource shared with other jurisdictions with water doctrines that are incompatible with Minnesota's approach in times of low flow or extended drought.

Policy discussion at the provincial, state and federal levels, based on the above information to address these possible future conflicts, is the next step. It is hoped that this report will be the catalyst and cornerstone for this next step.