

REPRESENTING THE AGRICULTURAL WATER RIGHT OWNER

BY JOHN R. ZIMMERMAN, ESQ. AND ROSS E. de LIPKAU, ESQ.

Water is the “blood of our land, the nourishment of our forest and crops, the blue and shining beauty at the heart of our landscape...”¹ Because water is critical to the survival of agricultural operations throughout this state, this article discusses the challenges that must be understood by practitioners in order to effectively represent their agricultural clients.

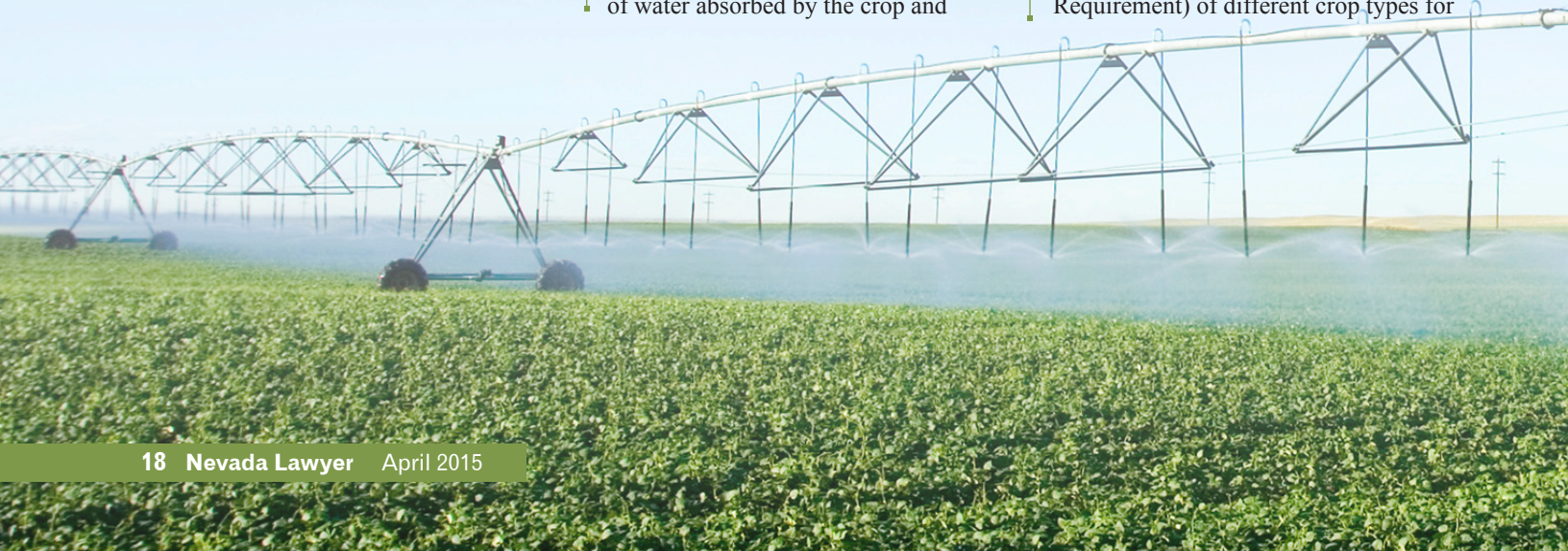
Consumptive Use

All water rights are limited to the quantity of water reasonably required for the beneficial use to be served. NRS 533.070. That quantity is the so-called duty of a water right. For irrigation water rights, duty has been described as the “measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce

the maximum amount of such crops as ordinarily are grown thereon.” *Farmers Highline Canal & Reservoir Co. v. Golden* 272 P.2d 629 (Colo. 1954). In Nevada, the duty of an irrigation water right is generally four acre-feet per acre annually² (afa) for land situated north of Tonopah and five afa per acre for land situated south of Tonopah.³ The duty of water includes both the consumptive and non-consumptive uses of the water. Consumptive use, in the irrigation context, is the quantity of water absorbed by the crop and

transpired, evaporated or used directly in the building of plant tissue. Non-consumptive use includes the water that infiltrates past the root zone into the ground or is lost through evaporation.

Determining the consumptive use of a water right matters, because it affects how much of the water right may be changed to another manner of use. For instance, if an application is filed to change an irrigation water right to a fully-consumptive industrial use, then the state engineer is allowed to consider the consumptive use of the irrigation water right under NRS 533.3703 and limit the change to that consumptive use. Additionally, consumptive use may be considered even where an irrigator is simply changing to a more efficient irrigation practice such as to a lower water use crop. The state engineer has studied and estimated the consumptive use (called the Net Irrigation Water Requirement) of different crop types for



each of the 256 groundwater basins in the state and generally uses that estimate when considering change applications of irrigation water rights. Practitioners should review the state engineer's estimated consumptive use for the basin in which their client's water rights are located to estimate their consumptive use. They should also carefully review any state engineer decisions in the applicable basin to determine if there are any unique circumstances that may affect the estimate.

Supplemental Use

Another important aspect of an irrigation water right is determining whether it is supplemental to another water right with the same place of use. As the name implies, a supplemental water right is one that is obtained to supplement an existing water source. For example, irrigators who have surface water sources may obtain supplemental groundwater rights to augment their surface water supply in times of drought. Additionally, irrigators may obtain supplemental groundwater rights if their existing well is not adequate to supply their crop's water demands. Determining if an irrigation water right is supplemental is critical, because it usually cannot be changed to a different use unless the water rights it supplements are changed as well. In other words, the benefit of a supplemental water right is intertwined with the water right it supplements, and generally they cannot be separated by changing and thereby doubling the duty. Additionally, supplemental rights may

be restricted before other groundwater rights during droughts. For example, the state engineer recently curtailed the use of groundwater under supplemental irrigation water rights in the Smith and Mason hydrographic basins by 50 percent due to drought and impacts to surface water.

Other Factors

Other important factors when assessing an irrigation water right are: the priority date, season of use and restrictive conditions. The priority date of a water right is the most important aspect of a water right because it determines whether, and in what order, an irrigator is allowed to take water during water shortages. The state engineer has the express statutory authority, pursuant to NRS 534.110(6), to regulate groundwater rights based upon priority. The priority date is the date an application to appropriate was filed with the state engineer (for statutory appropriations) or water was diverted for beneficial use (for common law appropriations). Historically, priority has been more important for surface water rights because such sources are more drastically affected by droughts, however, many groundwater basins in the state are being lowered at fairly steep rates, and therefore, priority ultimately will come into play with groundwater rights too. Irrigation water rights may be limited to a certain season of use. Similar to consumptive use, the season of use may affect the quantity of water that is allowed to be changed to a different manner of use. Lastly, the state engineer may impose certain conditions

on irrigation water rights that affect how they may be used or changed. For this reason, the practitioner should carefully review the terms and conditions of their clients' irrigation water rights, from the first appropriation to the current permit.

Protecting Irrigation Water Rights

Similar to other water rights, irrigation water rights must be used, meaning placed to beneficial use, or may be canceled, forfeited or abandoned. The risk of loss depends on the type of water right and whether it is for surface water or groundwater. There are essentially four types of water rights in Nevada: permits, certificates, vested rights (decreed or unadjudicated) and Federal reserved water rights. They arise as follows: under the statutory appropriation system, the state engineer first issues permits to appropriate and, if the water right holder perfects their appropriation by placing the water to beneficial use, then issues certificates of appropriation. Vested water rights are those that assert the right to use water was established by diversion and beneficial use, prior to enactment of the state's statutory appropriation system (March 1905 for surface water, March 1913 for artesian groundwater and March 1939 for all other groundwater sources). Permits can be canceled by failing to divert the water or place it to beneficial use within the time required by the state engineer or by failing to comply with other permit terms. If canceled, permits can be reinstated, but there is a penalty. The original

continued on page 20



REPRESENTING THE AGRICULTURAL WATER RIGHT OWNER

priority date is replaced with the date of the request for the reinstatement of the permit. Nevada law provides that certificated or vested groundwater rights may be forfeited, in whole or in part, if unused for five consecutive years. NRS 534.090(1).⁴ Certificated and vested surface water rights cannot be forfeited, but may be lost by abandonment.⁵

Because irrigation water rights may be lost through non-use or by failing to comply with the state engineer's requirements, a practitioner should first identify all of their client's water rights and then determine if any are subject to the above-described risks. The Office of the State Engineer contains all records regarding water rights allocated under the statutory water law system and decrees the state engineer has been

ordered to administer. These records should be searched to identify and review all of the client's water rights. The practitioner should ensure the client is listed as the owner of record in the state engineer's records of any water rights owned by the client. Because water rights are treated as real property for conveyancing purposes, however, the state engineer's records are not determinative of title and title should be reviewed by searching the records of the county recorder in which the water rights are placed to use (i.e. the land to which they are appurtenant). Lastly, the practitioner should assess whether each water right is being used in accordance with its terms. Confirm that the clients are using the water rights from the correct diversion point, within

the correct place of use, and in the correct manner of use. The practitioner should then advise clients regarding how to protect their water rights from cancelation, forfeiture, abandonment or adverse impacts from other appropriators. The clients or their lawyer should monitor all water right filings, through the newspaper and the state engineer's website, within the client's hydrologic basin, so that they can assess whether any new appropriation or change application may impact their use of water. If so, the clients may want to file a protest with the Office of the State Engineer, to preserve their ability to present their case and, if necessary, appeal any decision rendered by the state engineer. **NL**

1. *National Geographic* Special Edition, Nov. 1993.
2. Equal to 325,851 gallons of water, which is enough to fill one acre of land with one foot of water (hence an "acre-foot").
3. This is not an absolute rule and must be considered on a case-by-case basis.
4. *But See, Anderson Family Assocs. v. State Engineer*, 124 Nev. 182, (2008) (statutory water law may not impair vested rights in existence prior to the water law enacted in 1913) (citing *Ormsby Cty. v. Kearney*, 37 Nev. 314 (1914)).
5. "[R]elinquishment of the right by the owner with the intention to forsake and desert it." *In re Manse Spring*, 60 Nev. 280 (1940).

JOHN R. ZIMMERMAN'S BIOGRAPHY ON PAGE 6.

ROSS E. DE LIPKAU started as a hydrologic engineer at the Office of the State Engineer. After law school he returned to that agency as its deputy attorney general. He has practiced water law his entire career.

