NORTH DAKOTA WATER LAW
and the
WATER PERMIT APPLICATION PROCESS

Prepared by the Water Appropriations Division
North Dakota State Water Commission
John Wesley Powell
Second Director of the USGS
in 1889
Gave a speech to the North Dakota Constitutional Convention

* Set direction for water law in North Dakota based on the Doctrine of Prior Appropriation

* He knew from his work that water in the west was scarce and that the Concept of eastern water rights would not work.

* He proposed that ND adapt a law that water be held in Public Trust, Right to use water administered by State.
North Dakota Constitution
1889

• Article XI
• Section 3. All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes
Office of the State Engineer
Created in 1905

- Regulate, administer and allocate the water that is held in public trust
- First statutes pertaining to water allocation also passed by 1905 Legislature
- Oldest water permit in files has priority date of 1906
- Current authorities also include drainage control, dam safety, floodplain management and sovereign lands
North Dakota Century Code
Title 61
Waters
(1905)

- 61-01-01. Water of the State—Public Waters. All waters within the limits of the state from the following sources of water supply belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use must be acquired pursuant to Chapter 61-04

  - 1. Surface Water, rivers, creeks, lakes, ponds, marshes
  - 2. All ground water
  - 3. All residual waters from beneficial use and artificially drained
  - 4. All non contributating streams
Dust storm of the 1930’s
State Water Commission
Established in 1937
(in response to 1930’s drought)

• Foster water development through promotion and investment of state capital

• Nine members on commission:
  – Seven citizen members appointed by the Governor-six year overlapping terms
  – Commissioner of Agriculture
  – Governor as Chairman
  – State Engineer appointed by the State Water Commission, State Engineer serves as secretary of the Water Commission
Applying for a water use permit

Office of the State Engineer
ND State Water Commission
A water permit is required for:

- Irrigation of more than five acres
- Industrial use
- Municipal use
- Rural water system
- Storage of more than 12.5 AF behind a dam

NOT REQUIRED FOR DOMESTIC OR STOCK USE
Applying for a water permit:

- Obtain application forms and instructions - call 701-328-3441.
- Complete an application form.
- Include a map made by a registered land surveyor.
- Pay an application fee:
  - Municipal/Public Use > 2500 pop. - $500, <2500 pop. - $250
  - Irrigation - $200; Recreation, Livestock, Fish/Wildlife - $100
  - Commercial Recreation - $200; Industrial <724 ac-ft - $250, >724 ac-ft - $750
  - Water Permit Amendments - $50
Establishing a priority date:

• Once a completed application has been received, a priority date will be assigned.

• North Dakota water law is based on the prior appropriation doctrine, where an established water right is superior to any water right with a later priority date.
Giving notice of application:

• Includes information from application: type of use, acre-feet, acres, pumping rate, location.

• Send by certified letter to:
  Landowners within one mile
  Water permit holders within one mile
  Public water use facilities within 12 miles

• Publish notice in official county paper once a week for two consecutive weeks.
Once notices have been sent out and published, interested parties have 30 days to express their concerns.
Recommended decision:

Once comment period has expired, application is assigned to a hydrologist or engineer to prepare a recommended decision for SE.

- Review the physical setting
- Review the effects of ongoing water use
- Consider the expected effect of proposed project
- Address letters of concern
- Make recommendation to SE
Recommendation is based on... 

- Senior water rights not unduly affected.
- Means of diversion/construction adequate.
- Use of water is beneficial.
- The proposed use is in the public interest.
Public interest considerations:

• Benefit to the applicant
• Effect on economic activity
• Effect on game & fish and public recreation
• Alternate uses within a reasonable time
• Harm to other persons
• Intent and ability to develop proposed project
Comment period:

Recommended decision is sent to people who submitted letters of concern.

These persons of record have 30 days to further respond and may request a hearing.

• State specifically how they will be affected
• How the criteria considered have not been met
State Engineer’s decision:

- Determine if a hearing is needed.
- Grant conditional permit as applied for;
  or
  Grant permit for reduced amount;
  or
  Deny the application.
If any portion is approved, the State Engineer may attach conditions to the permit to protect prior appropriators and public interest.
Example Conditions:

- Spacing requirement
- Efficient capture system
- Check valve
- Water meter
- Application specific conditions
Beneficial use:

Water must be put to beneficial use by a prescribed date.

A beneficial use date will be included on the permit.

- If no other applications are pending:
  three years to develop
- If other applications are pending:
  one or two years to develop

Beneficial use date can be extended for good cause, if no applications are pending.
89-03-01-11. Competing applications. Applications for conditional water permits from the same source for different uses will be considered competing applications if received by the state engineer within ninety days of each other.
61-04-06.1. Preference in granting permits. When there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the state engineer shall adhere to the following order of priority:

1. Domestic use.
2. Municipal use.
3. Livestock use.
4. Irrigation use.
5. Industrial use.
6. Fish, wildlife, and other recreational uses.
Main Factors Delaying the Approval of Conditional Permits

1. Competition for very finite water resources
2. Hearing requests
## Water Permit Application Process
### Time Table

<table>
<thead>
<tr>
<th>Step #</th>
<th>Time period</th>
<th>Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
<td>Application, filing fee and map is received by State Engineer, priority date set.</td>
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<tr>
<td>2.</td>
<td>2 weeks +</td>
<td>The applicant is instructed to send a &quot;Notice of Application&quot; by certified mail to all record title owners of real property within 1 mile radius, all permit holders within 1 mile radius, and municipal and/or rural water facilities with 12 mile radius.</td>
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<td>3.</td>
<td>1 to 2 weeks</td>
<td>After the Notice of Application has been mailed, the applicant completes an affidavit of notice and returns it to the State Engineer.</td>
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<tr>
<td>4.</td>
<td>1 month from first notice in newspaper</td>
<td>Upon receipt of the completed affidavit, the State Engineer publishes a notice of the water permit application in the official county newspaper. Notice of water permit application is published once a week for two consecutive weeks. Public has 30 days to comment in writing with concerns about the application.</td>
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<tr>
<td>5.</td>
<td>1 to 6 months +</td>
<td>Hydrologist prepares a &quot;Recommended Decision&quot; to the State Engineer recommending approval or denial of the application. The criteria from which the State Engineer must base his decision to grant or deny a water permit application are in NDCC §61-04-06. If the proposed point of diversion is located in a highly complex, competitive hydrologic setting, additional hydrological data and analysis may be required to prepare a recommended decision. This could significantly extend the time required to prepare the Recommended Decision.</td>
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<tr>
<td>6.</td>
<td>1 month</td>
<td>The Recommended Decision is mailed to any person who filed written comments regarding the water permit application. Within 30 days of service of the Recommended Decision, the applicant and any person who would be aggrieved by the decision and who filed written comments may file additional written comments with the State Engineer or request a hearing on the application, or both.</td>
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<tr>
<td>7.</td>
<td>1 month +</td>
<td>If hearing is granted, 1 month or more could be added</td>
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<tr>
<td></td>
<td>Total</td>
<td>6 months to 1 year</td>
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