NORTH DAKOTA WATER LAW and the WATER PERMIT APPLICATION PROCESS

Prepared by the Water Appropriations Division
North Dakota State Water Commission

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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 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**

The 100-Year Anniversary of the Office of State Engineer

A Tour Through

By Patrick Fridgen

Major John Wesley Powell

"…All other wealth falls into insignificance compared with that which is to come from these lands from the pouring on them of the running streams of this country. Don't let these streams get out of the possession of the people. If you fail in making a constitution in any other respect, fail not in this one. Take lessons from California and Colorado. Fix it in your constitution that no corporation – no body of men – no capital can get possession and right to your waters. Hold the waters in the hands of the people. Think of a condition of affairs in which your agriculture – which you will have to depend on largely – depending on irrigation, is at the mercy of twenty companies who own all the water. They would laugh at the ownership of land. What is the ownership of land when the value is in the water? You should provide in this constitution that you are making that the water which falls from the heavens and rolls to the sea, down your great rivers – that water should be under the control of the people subject always to the will of the people; that property in water should be impossible for individuals to possess. You should forbid the right to acquire property in water. The property should be in the land, and the right to the water should inhere in the land, and no company or individual should have property in the running streams. Such a provision will prevent your great agricultural resources from falling into the hands of the few."

August 5, 1889

The Foundation of the Office

Before the North Dakota Office of State Engineer was officially established in 1905, a series of events set the stage for what still makes the Office much of what it is today. Those events shaped the way people thought about water, and developed a mindset that recognized the importance of water for North Dakotans then, and generations to come.

In the summer of 1889, the first North Dakota Constitutional Convention was in session, laying the foundation for what would officially become the State of North Dakota later that fall. On the minds of the delegates in attendance was the future of a fledgling state that would undoubtedly rely heavily on agriculture if it were to prosper. As such, it was also apparent that the long-term success of agriculture in a northern plains state could only be achieved with certain safeguards in place – particularly irrigation.

On August 5, 1889, Major John Wesley Powell, Director of the United States Geological Survey, delivered a speech before the Constitutional

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**

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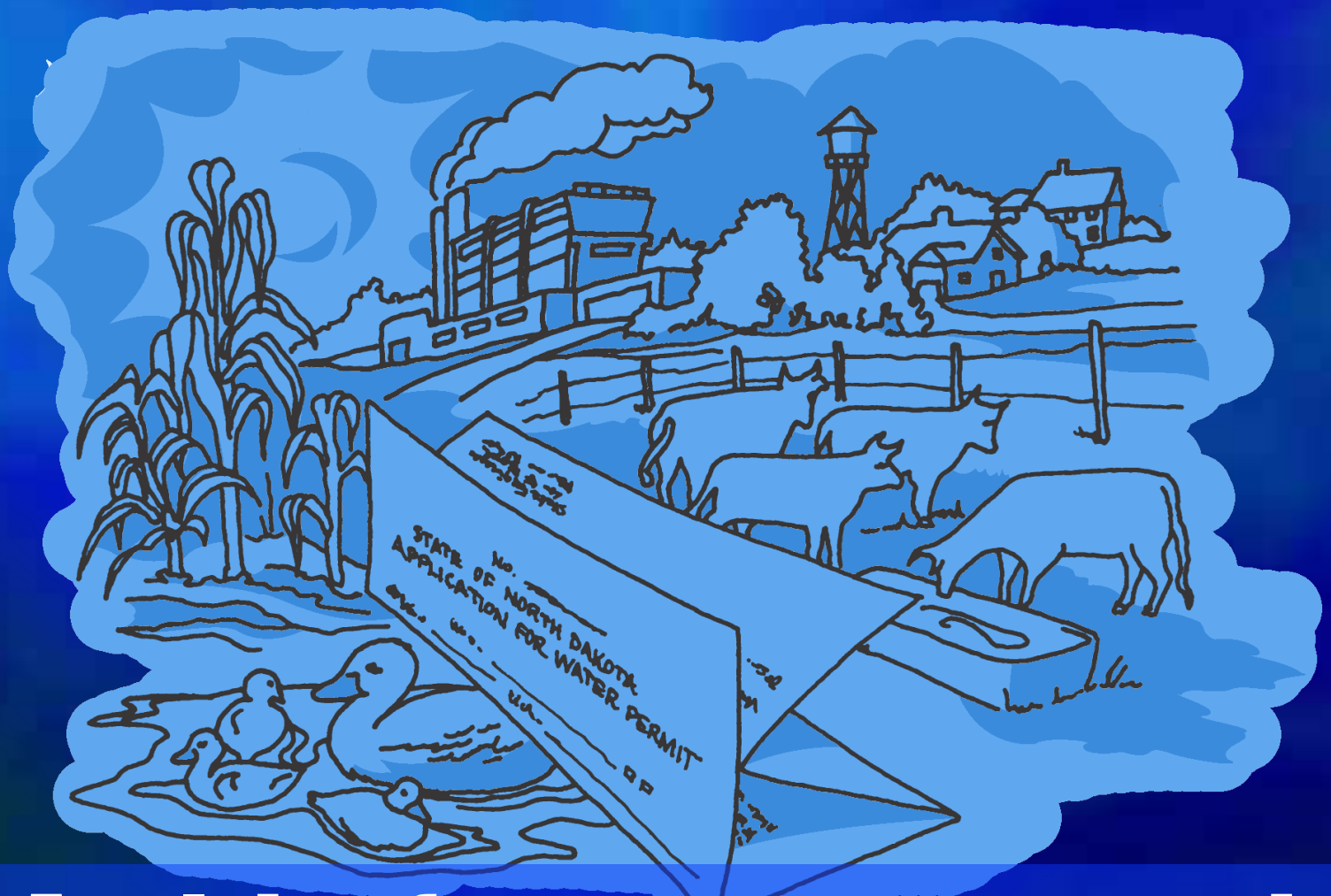
Dust storm of the 1930's

[redacted]

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.

Comment period: 30 days

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.

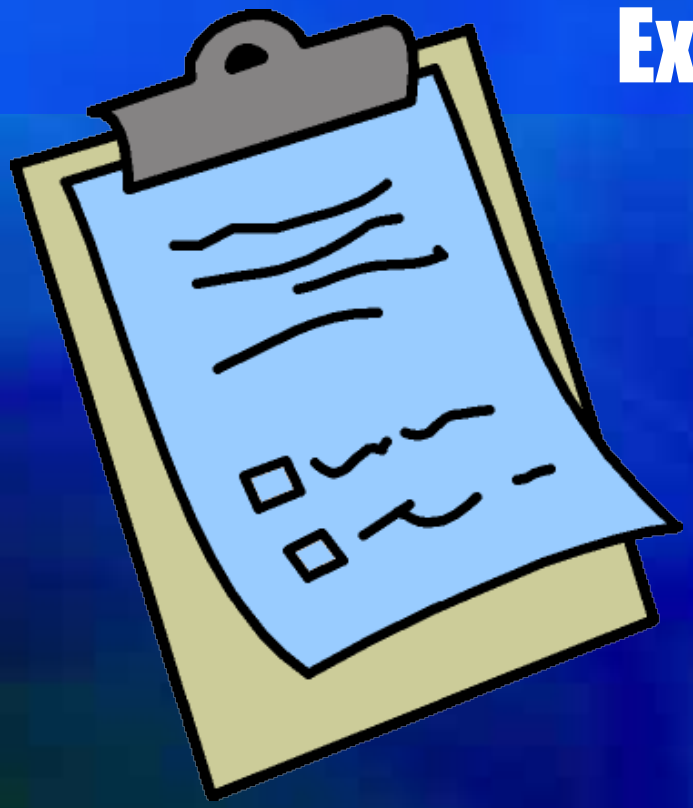
- State specifically how they will be affected
- How the criteria considered have not been met

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.

State Engineer's decision:

- 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