

# WATERS

## CHAPTER 507

### SENATE BILL NO. 2139

(Senators Luick, Osland, Vedaa)  
(Representatives Beadle, Mitskog, Pyle)

AN ACT to amend and reenact sections 61-02-01.4, 61-02-02, 61-02-04, 61-02-07, and 61-02-14 of the North Dakota Century Code, relating to cost-sharing and duties and membership of the state water commission.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 61-02-01.4 of the North Dakota Century Code is amended and reenacted as follows:

##### **61-02-01.4. State water commission cost-share policy.**

The state water commission shall review, gather stakeholder input on, and rewrite as necessary the commission's "Cost-share Policy, Procedure and General Requirements" and "Project Prioritization Guidance" documents. The commission's cost-share policy:

1. Must provide a water supply project is eligible for a cost-share up to seventy-five percent of the total eligible project costs.
2. May not determine program eligibility of water supply projects based on a population growth factor. However, a population growth factor may be used in prioritizing projects for that purpose.
3. Must consider all project costs potentially eligible for reimbursement, except the commission shall exclude operations expense and regular maintenance, ~~including and~~ removal of vegetative materials and sediment, for ~~water conveyance projects~~ assessment drains, and may exclude operations expense and regular maintenance for other projects. Snagging and clearing of watercourses are not regular maintenance. The commission shall require a water project sponsor to maintain a capital improvement fund from the rates charged customers for future extraordinary maintenance projects as condition of funding an extraordinary maintenance project.
4. May not determine program eligibility of water supply projects based on affordability. However, affordability may be used in prioritizing projects for that purpose.

**SECTION 2. AMENDMENT.** Section 61-02-02 of the North Dakota Century Code is amended and reenacted as follows:

##### **61-02-02. Definitions.**

In this chapter, unless the context or subject matter otherwise requires:

1. "Commission" means the state water commission.
2. "Cost of works" includes:
  - a. The cost of construction, the cost of all lands, property rights, water rights, easements, and franchises acquired which are deemed necessary for such construction;
  - b. The cost of all water rights acquired or exercised by the commission in connection with ~~such~~the works;
  - c. The cost of all machinery and equipment, financing charges, interest ~~prior to~~before and during construction and for a period not exceeding three years after the completion of construction;
  - d. The cost of engineering and legal expenses, plans, specifications, surveys, estimates of cost, and other expenses necessary or incident to determining the feasibility or practicability of ~~any~~a project;
  - e. Administrative expenses;
  - f. The construction of the works and the placing of the ~~same~~works in operation; and
  - g. ~~Such other~~Other expenses ~~as may be~~ necessary or incident to the financing authorized in this chapter, including funding of debt service, repair and replacement reserves, capitalized interest, and the payment of bond issuance costs.
3. "Cost-share" means funds appropriated by the legislative assembly or otherwise transferred by the commission to a local entity under commission policy as reimbursement for a percentage of the total approved cost of a project approved by the commission.
4. "Economic analysis" means an estimate of economic benefits and direct costs that result from the development of a project.
5. "Grant" means a one-time sum of money appropriated by the legislative assembly and transferred by the commission to a local entity for a particular purpose. A grant is not dependent on the local entity providing a particular percentage of the cost of the project.
6. "Life cycle analysis" means the summation of all costs associated with the anticipated useful life of a project, including project development, land, construction, operation, maintenance, and disposal or decommissioning.
7. "Loan" means an amount of money lent to a sponsor of a project approved by the commission to assist with funding approved project components. A loan may be stand-alone financial assistance.
8. "Owner" includes all individuals, associations, corporations, limited liability companies, districts, municipalities, and other political subdivisions of this state having any title or interest in any properties, rights, water rights, easements, or franchises to be acquired.

9. "Project" means any one of the works defined in subsection 4110, or any combination of such works, which are physically connected or jointly managed and operated as a single unit.
10. "Water conveyance project" means any ~~surface drainage works, bank assessment drain, streambank~~ stabilization, or snagging and clearing of water courses.
11. "Works" includes:
  - a. All property rights, easements, and franchises relating ~~theretoto~~ and deemed necessary or convenient for their operation;
  - b. All water rights acquired and exercised by the commission in connection with such works;
  - c. All means of conserving and distributing water, including ~~without limiting the generality of the foregoing two subdivisions,~~ reservoirs, dams, diversion canals, distributing canals, channels, lateral ditches, pumping units, mains, pipelines, treatment plants, and waterworks systems; and
  - d. All works for the conservation, control, development, storage, treatment, distribution, and utilization of water, including ~~without limiting the generality of the foregoing subdivisions,~~ works for the purpose of irrigation, flood control, watering stock, supplying water for public, domestic, industrial, and recreational use, fire protection, and the draining of lands injured or in danger of injury as a result of such water utilization.

**SECTION 3. AMENDMENT.** Section 61-02-04 of the North Dakota Century Code is amended and reenacted as follows:

**61-02-04. State water commission - Members - Terms - Qualifications.**

The state water commission consists of the governor, agriculture commissioner, and ~~seveneight~~ other members appointed by the governor who shall take into account reasonable geographic considerations in making the appointments with the intent of having each of the ~~seveneight~~ major drainage basins represented by a commissioner who resides in the basin. The major drainage basins are the upper Missouri River basin; the lower Missouri River basin; the James River basin; the upper Red River basin; the lower Red River basin; the Mouse River basin; ~~and~~ the Devils Lake basin; ~~and the Little Missouri River, upper Heart River, and upper Cannonball River basin.~~ The governor or the agriculture commissioner, or both, may appoint a representative to serve in that official's capacity at meetings that official is unable to attend. The ~~seveneight~~ appointive members of the commission must be appointed for a term of six years each with the terms of office so arranged that ~~two terms and~~ not more than ~~three~~~~four~~ terms expire on the first day of July of each odd-numbered year. Each appointive member must be a qualified elector of the state and is subject to removal by judicial procedure. In case of a vacancy, the vacancy must be filled by appointment by the governor for the remainder of the unexpired term. Before entering upon the discharge of official duties, each appointive member shall take, subscribe, and file with the secretary of state the oath prescribed for civil officers.

**SECTION 4. AMENDMENT.** Section 61-02-07 of the North Dakota Century Code is amended and reenacted as follows:

### 61-02-07. Quorum - What constitutes.

A majority of the members of the commission constitutes a quorum, and the affirmative or negative vote of ~~five~~six members is necessary to bind the commission except for adjournment.

**SECTION 5. AMENDMENT.** Section 61-02-14 of the North Dakota Century Code is amended and reenacted as follows:

### 61-02-14. Powers and duties of the commission.

The commission ~~shall have full and complete power, authority, and general jurisdiction authorized:~~

1. To investigate, plan, regulate, undertake, construct, establish, maintain, control, operate, and supervise all works, dams, and projects, public and private, which in ~~its~~the commission's judgment may be necessary or advisable:
  - a. To control the low-water flow of streams in the state.
  - b. To impound water for the improvement of municipal, industrial, and rural water supplies.
  - c. To control and regulate floodflow in the streams of the state to minimize the damage of such floodwaters.
  - d. To conserve and develop the waters within the natural watershed areas of the state and, subject to vested rights, to divert the waters within a watershed area to another watershed area and the waters of any river, lake, or stream into another river, lake, or stream.
  - e. To improve the channels of the streams for more efficient transportation of the available water in the streams.
  - f. To provide sufficient water flow for the abatement of stream pollution.
  - g. To develop, restore, and stabilize the waters of the state for domestic, agricultural, and municipal needs; irrigation; flood control; recreation; and wildlife conservation by the construction and maintenance of dams, reservoirs, and diversion canals.
  - h. To promote the maintenance of existing drainage channels in agricultural lands and to construct any needed channels.
  - i. To provide more satisfactory subsurface water supplies for the state's municipalities of the state.
  - j. To finance the construction, establishment, ~~operation,~~ and extraordinary maintenance of public and private works, dams, and irrigation projects, which in ~~its~~the commission's judgment may be necessary and advisable, ~~except the.~~ The commission may not provide a cost-share for the costs of operation of regular maintenance, including or removal of vegetative materials and sediment, of a water conveyance project for assessment drains. Snagging and clearing of watercourses are not regular maintenance.

- k. To provide for the storage, development, diversion, delivery, and distribution of water for the irrigation of agricultural land and supply water for municipal and industrial purposes.
  - l. To provide for the drainage of lands injured by or susceptible of injury from excessive rainfall or from the utilization of irrigation water, and subject to the limitations prescribed by law, to aid and cooperate with the United States and any department, agency, or officer thereof of the United States, and with any county, township, drainage district, or irrigation district of this state, or of ~~other states~~ another state, in the construction or improvement of ~~such~~ the drains.
  - m. To provide water for stock.
  - n. To provide water for the generation of electric power and for mining and manufacturing purposes.
2. To define, declare, and establish rules and regulations:
    - a. For the sale of waters and water rights to individuals, associations, corporations, limited liability companies, municipalities, and other political subdivisions of the state and for the delivery of water to users.
    - b. For the full and complete supervision, regulation, and control of the water supplies within the state.
    - c. ~~Repealed by S.L. 1975, ch. 575, § 2.~~
    - d. Governing and providing for financing by local participants to the maximum extent deemed practical and equitable in any water development project in which the state participates in cooperation with the United States or with political subdivisions or local entities.
  3. To exercise full power and control of the construction, operation, and maintenance of works and the collection of rates, charges, and revenues realized ~~therefrom~~ from the works.
  4. To sell, lease, and otherwise distribute all waters which may be developed, impounded, and diverted by the commission under ~~the provisions of this chapter~~, for the purposes of irrigation, the development of power, and the watering of livestock, and for any other private or public use.
  5. To exercise all express and implied rights, power, and authority that may be necessary, and to do, perform, and carry out ~~all of the expressed purposes of this chapter~~ and ~~all of the purposes reasonably implied incidentally thereto~~ or lawfully connected ~~therewith~~ with the expressed purposes of this chapter.
  6. To acquire, own, and develop lands for irrigation and water conservation and to acquire, own, and develop damsites and reservoir sites and to acquire easements and rights of way for diversion and distributing systems.
  7. To cooperate with the United States and any department, agency, or officer thereof of the United States in the planning, establishment, operation, and maintenance of dams, reservoirs, diversion and distributing systems, for the utilization of the waters of the state for domestic, municipal, and industrial

needs, irrigation, flood control, water conservation, and generation of electric power and for mining, agricultural, and manufacturing purposes, ~~and in this connection the state water. The commission is hereby authorized~~ may, within the limitations prescribed by law, to acquire, convey, contribute, or grant to the United States, moneys, real and personal property, including land or easements for dams and reservoir sites and rights of way and easements for diversion and distribution systems or participate in the cost of any project.

8. To consider cost-sharing for water quality improvement projects.

Approved April 17, 2019

Filed April 18, 2019

## CHAPTER 508

### SENATE BILL NO. 2090

(Energy and Natural Resources Committee)  
(At the request of the State Engineer)

AN ACT to create and enact sections 61-04-02.2, 61-04-04.3, 61-04-07.2, 61-04-07.3, 61-04-15.2, 61-04-15.3, and 61-04-15.4 of the North Dakota Century Code, relating to permits for the appropriation of water; to amend and reenact sections 61-04-01, 61-04-01.1, 61-04-01.2, 61-04-02, 61-04-03, 61-04-03.1, 61-04-04, and 61-04-04.1, subsections 3, 4, and 5 of section 61-04-05, and sections 61-04-05.1, 61-04-06, 61-04-06.1, 61-04-06.2, 61-04-06.3, 61-04-09, 61-04-11, 61-04-14, 61-04-15, 61-04-23, 61-04-24, 61-04-25, 61-04-26, 61-04-27, 61-04-28, and 61-04-29 of the North Dakota Century Code, relating to the appropriation of water; and to repeal sections 61-04-07, 61-04-15.1, 61-04-17, and 61-04-22 of the North Dakota Century Code, relating to appeals of permit application rejections, change in point of diversion or use, surplus water delivery, and a prescriptive water right.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 61-04-01 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-01. Petitions, reports, surveys, and other documents filed ~~in office~~ with the commission.**

Any petitions, applications, surveys, reports, orders, or other documents provided for in this chapter ~~shall~~must be filed ~~in~~with the ~~office of the commission in the city of~~ Bismarck, where they ~~shall~~must be kept on file under the control of the state engineer.

**SECTION 2. AMENDMENT.** Section 61-04-01.1 of the North Dakota Century Code is amended and reenacted as follows:

#### **61-04-01.1. Definitions.**

In this chapter, unless the context or subject matter otherwise requires:

1. "Adjudicative proceeding" ~~as defined under chapter 28-32 provides for~~means an appeal under chapter 28-32 of a recommended decision prepared by the state engineer for a water permit application.
2. "Assignment" ~~means the change of a water permit from one permitholder to another permitholder.~~
3. "Beneficial use" means a use of water for a purpose consistent with the best interests of the people of the state.
- ~~3-4.~~ "Commission" means the state water commission.
- ~~4-5.~~ "Conditional water permit" ~~means a water permit that has not been perfected.~~

6. "Domestic use" means the use of water by at least one family unit or household obtaining water from the same system for personal needs and for household purposes, including heating, drinking, washing, sanitary, and culinary uses; irrigation of land not exceeding five acres [2.0 hectares] in area for each family unit or household for noncommercial gardens, orchards, lawns, trees, or shrubbery; and for household pets and domestic animals kept for household sustenance and not for sale or commercial use.
- 5-7. ~~"Fish, wildlife, and recreation~~other recreational uses" means the use of water for the purposes of propagating and sustaining fish and wildlife resources and for the development and maintenance of water areas necessary for outdoor recreation activities.
- 6-8. "Fossil byproduct water" means water obtained as a byproduct of extraction and separation from oil, gas, and other hydrocarbons, from a formation that is both not a potable aquifer at the extraction location and is situated below the deepest potable aquifer by the practically impermeable layer.
9. "Industrial use" means the use of water for the furtherance of a commercial enterprise wherever located, including manufacturing, mining, or processing.
- 7-10. "Informational hearing" means an administrative proceeding, not an adjudicative proceeding, which provides all interested persons an opportunity to present oral or written comments on a water permit application.
- 8-11. "Irrigation use" means the use of water for application to more than five acres [2.0 hectares] 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, except when the water for the facility is provided by a municipal water system.
- 9-12. "Livestock use" means the use of water for drinking purposes by herds, flocks, or bands of animals kept for commercial purposes.
- 40-13. "Municipal or public use" means the use of water by the state through its political subdivisions, institutions, facilities, and properties, and the inhabitants thereof, or by unincorporated communities, subdivision developments, rural water systems, and other entities, whether supplied by the government or by a privately owned public utility or other agency or entity, for primarily domestic purposes, as defined herein.
11. ~~"Person" includes political subdivisions, corporations, limited liability companies, partnerships, associations, the United States and its departments or agencies, the state of North Dakota and its departments or agencies, and any other legal entity.~~
14. "Party of record" means a person who filed written comments by the date specified under subsection 5 of section 61-04-05.
15. "Perfected water permit" means a water permit where the water appropriated under a conditional water permit has been applied to a beneficial use and the state engineer has inspected the works to verify all conditions have been met.
16. "Permitholder" means the name of the entity holding a water permit.

17. "Point of diversion" means the tract of land where the waters of the state are withdrawn or diverted.
18. "Priority date" means the date assigned to an application or water right.
- 12-19. "Rural water system" means a water supply system designed to serve regional needs.
- 13-20. "Water of the state" or "waters of the state" means those waters identified in section 61-01-01.
21. "Water right" means the right established under this title to appropriate or store waters of the state.

**SECTION 3. AMENDMENT.** Section 61-04-01.2 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-01.2. Right to use water – Basis Beneficial use requirement.**

A right to appropriate water can be acquired for beneficial use only as provided in this chapter. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.

**SECTION 4. AMENDMENT.** Section 61-04-02 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-02. Permit for beneficial use of water required.**

Any person, before commencing any construction for the purpose of appropriating waters of the state or before taking waters of the state from any constructed works, shall first secure a water permit from the state engineer unless such construction or taking from such constructed works is for domestic or livestock purposes or for fish, wildlife, and other recreational uses or unless otherwise provided by law. However, immediately upon completing any constructed works for domestic or livestock purposes or for fish, wildlife, and other recreational uses, the water user shall notify the state engineer of the location and acre-feet [1233.48 cubic meters] capacity of such constructed works, dams, or dugouts. Regardless of proposed use, however, all water users, except those reusing fossil byproduct water, shall secure a water permit prior to constructing an impoundment capable of retaining more than twelve and one-half acre-feet [15418.52 cubic meters] of water or the construction of a well from which more than twelve and one-half acre-feet [15418.52 cubic meters] of water per year will be appropriated. If a permit is not required of a landowner or the landowner's lessee to appropriate less than twelve and one-half acre-feet [15418.52 cubic meters] of water from any source for domestic or livestock purposes or for fish, wildlife, and other recreational uses, those appropriators may apply for water permits in order to clearly establish a priority date and the state engineer may waive any fee or hearing for such applications. An applicant for a water permit to irrigate need not be the owner of the land to be irrigated.

**SECTION 5.** Section 61-04-02.2 of the North Dakota Century Code is created and enacted as follows:

**61-04-02.2. Property interest required to hold a water permit.**

A permitholder shall have a legal interest in each point of diversion identified on the permit. If the permitholder does not have a legal interest in each point of

diversion, the state engineer shall assign the permit, or portion of the permit, as provided in this chapter to the title owner.

A permit holder shall have a legal interest in each irrigated tract of land identified on the permit. If the permit holder does not have a legal interest in each irrigated tract of land, the permit holder may transfer the approved acres to other land, as provided in this chapter.

**SECTION 6. AMENDMENT.** Section 61-04-03 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-03. ~~Application for water~~Water permit application - Contents - Information to accompany.**

~~The application for a~~A permit application to make beneficial use of any waters of the state ~~shall~~must be in the form required by the rules established by the state engineer. ~~Such~~The rules shall prescribe the form and contents of, and the procedure for filing, the application. The application, along with all other information filed with it, ~~shall~~must be retained ~~in~~with the office of the commission after approval or disapproval of the application. The state engineer may require additional information not provided for in the general rules if the state engineer deems it to be necessary.

**SECTION 7. AMENDMENT.** Section 61-04-03.1 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-03.1. Limitation on amount of water.**

An individual may not apply for a permit or permits for irrigation which, if approved, would enable the individual, at any one time, to hold a conditional water permit or permits for more than seven hundred twenty acre-feet [888106.75 cubic meters] of water which has not been applied to beneficial use. Applications submitted in violation of this section ~~shall~~may not be assigned a priority date and ~~shall~~must be returned to the applicant by the state engineer. This section ~~shall~~may not apply to water permit applications ~~for water permits~~ from the Missouri River or to applications submitted by irrigation districts organized pursuant to this title. For the purposes of this section, an individual means any person, including the person's spouse, and dependents thereof within the meaning of the Internal Revenue Code [26 U.S.C. 152].

**SECTION 8. AMENDMENT.** Section 61-04-04 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-04. Filing and correction of application.**

The date of the receipt of the application provided for in section 61-04-03 in the commission office shall be noted ~~thereon~~on the application. If the application is defective as to form, incomplete, or otherwise unsatisfactory, it ~~shall~~must be returned with a statement of the corrections, amendments, or changes required, within thirty days after its receipt, and sixty days ~~shall~~must be allowed for the refiling thereof. If the application is corrected as required and is refiled within ~~such~~the time allowed, it, upon being accepted, ~~shall~~must take priority as of the date of its original filing. Any corrected application filed after the time allowed ~~shall~~must be treated in all respects as an original application received on the date of its refiling. The application may be amended by the applicant at any time prior to the commencement of administrative action by the state engineer as provided in sections 61-04-05 through ~~61-04-07~~61-04-06.3.

**SECTION 9. AMENDMENT.** Section 61-04-04.1 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-04.1. Application fees.**

The following fees must accompany ~~ana~~ conditional water permit application and must be paid by the state engineer into the water useresources trust fund of the state treasury:

1. For municipal or public use in municipalities or other entities of 2,500 population or over according to the latest federal census	\$500
1. <u>For municipal or public use</u>	<u>\$500</u>
2. For municipal or public use in municipalities or other entities of less than 2,500 population according to the latest federal census	\$250
3. For irrigation	\$200
2. <u>For irrigation use</u> \$500	
4. For industrial use of one c.f.s. or less, or seven hundred twenty-four acre-foot [893039.52 cubic meters] or less	\$250
3. <u>For industrial use of one acre-foot [1233.48 cubic meters] or less</u>	<u>\$250</u>
5. For industrial use in excess of one c.f.s., or in excess of seven hundred twenty-four acre-foot [893039.52 cubic meters]	\$750
4. <u>For industrial use in excess of one acre-foot [1233.48 cubic meters]</u>	<u>\$1,000</u>
6. For recreation, livestock, or fish and wildlife	\$400
5. <u>For recreation, livestock, or fish and wildlife</u> \$100	
7. For commercial recreation	\$200
8. Water permit amendment	\$50
6. <u>Water permit amendment</u>	<u>\$100</u>

**SECTION 10.** Section 61-04-04.3 of the North Dakota Century Code is created and enacted as follows:

**61-04-04.3. Rejection of applications.**

If the state engineer determines a conditional water permit application does not meet this chapter's requirements or the rules in North Dakota Administrative Code article 89-03, the state engineer shall reject the application and decline to order the publication of notice of application.

**SECTION 11. AMENDMENT.** Subsections 3, 4, and 5 of section 61-04-05 of the North Dakota Century Code are amended and reenacted as follows:

3. Give notice of the application by certified mail in the form prescribed by rule to all municipal or public use ~~water facilitiespermitholders~~ within a twelve-mile [19.32-kilometer] radius of the proposed water appropriation site. The state

engineer shall provide a list of all municipal or public use ~~water facilities~~permitholders that must be notified under this subsection to the applicant.

4. Provide the state engineer with an affidavit of notice by certified mail within sixty days from the date of the engineer's instructions to provide notice. If the applicant fails to file satisfactory proof of notice by certified mail within sixty days and in compliance with the applicable rules, the state engineer shall treat the application as an original application filed on the date of receipt of the affidavit of notice by certified mail in proper form. If a properly completed affidavit of notice is not submitted within one hundred twenty days, the state engineer shall consider the application withdrawn. Upon receipt of a proper affidavit of notice by certified mail, the state engineer shall publish notice of the application, in a form prescribed by rule, in the official newspaper of the county in which the proposed appropriation site is located, once a week for two consecutive weeks.
5. The notice must give all essential facts as to the proposed appropriation, including the places of appropriation and of use, amount of water, the use, the name and address of the applicant, and the date by which written comments and requests for an informational hearing regarding the proposed appropriation must be filed with the state engineer. The notice must also state that anyone who files written comments with the state engineer will be mailed ~~a copy of~~ the state engineer's recommended decision on the application. Persons filing written comments will become a party of record to the application. The comment deadline is five p.m. on the first business day thirty days after the first published notice in the official county newspaper as specified in subsection 4.

**SECTION 12. AMENDMENT.** Section 61-04-05.1 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-05.1. Comments - Hearing.**

1. Comments regarding a proposed appropriation must be in writing and filed by the date specified by the state engineer under subsection 5 of section 61-04-05. The comments must state the name and mailing address of the person filing the comments. Comment letters submitted electronically must state the name and mailing address of the person filing the comments, and must be signed by the submitter to be considered valid and part of the official record.
2. A person filing written comments may also request an informational hearing on the application by the date specified by the state engineer under subsection 5 of section 61-04-05. If a request for an informational hearing is made and if the state engineer determines an informational hearing is necessary to obtain additional information to evaluate the application or to receive public input, the state engineer shall designate a time and place for the informational hearing and ~~serve a copy of the~~ notice of hearing upon the applicant and any person who filed written comments. Service must be made in the manner allowed for service under the North Dakota Rules of Civil Procedure at least twenty days before the hearing.
3. If two or more municipal or public use ~~water facilities~~permitholders request the informational hearing to be held locally, the state engineer shall hold the

hearing in the county seat of the county in which the proposed water appropriation site is located.

4. The state engineer shall consider all written comments received and testimony presented at an informational hearing, if held, and shall ~~recommend~~make a recommended decision in writing approval or disapproval of the application or that the application be held in abeyance. ~~A copy of the~~ The recommended decision must be mailed to the applicant and any person who filed written comments party of record and may constitute:
  - a. Approval of all or a portion of the application, with the remainder held in abeyance or denied;
  - b. Denial of the application; or
  - c. Deferral of the application.
5. ~~Within thirty days of service of the recommended decision, the applicant and any person party of record who would be aggrieved by the decision and who filed written comments by the date specified under subsection 5 of section 61-04-05 may file additional written comments with the state engineer or request an adjudicative proceeding on the application, or both. A request for an adjudicative proceeding must be made in writing and must state with particularity how the person would be aggrieved by the decision and the issues and facts to be presented at the proceeding. If a request for an adjudicative proceeding is not made, the state engineer shall consider the additional comments, if any are submitted, and issue a final decision. If a request for an adjudicative proceeding is made, and if the state engineer determines an adjudicative proceeding is necessary, the state engineer shall designate a time and place for the adjudicative proceeding and serve a copy of the notice of adjudicative proceeding upon the applicant and any person who filed written comments. Service must be made in the manner allowed for service under the North Dakota Rules of Civil Procedure at least twenty days before the hearing.~~

**SECTION 13. AMENDMENT.** Section 61-04-06 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-06. Criteria for issuance of permit.**

1. The state engineer shall issue a permit if the state engineer finds all of the following:
  1. a. The rights of a prior appropriator will not be unduly affected.
  2. b. The proposed means of diversion or construction are adequate.
  3. c. The proposed use of water is beneficial.
  4. d. The proposed appropriation is in the public interest. In determining the public interest, the state engineer shall consider all of the following:
    - a. (1) The benefit to the applicant resulting from the proposed appropriation.
    - b. (2) The effect of the economic activity resulting from the proposed appropriation.

- e. (3) The effect on fish and game resources and public recreational opportunities.
  - d. (4) The effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation.
  - e. (5) Harm to other persons resulting from the proposed appropriation.
  - f. (6) The intent and ability of the applicant to complete the appropriation.
2. Subsection 1 of section 28-32-38 does not apply to water permit application proceedings unless a request for a ~~hearing~~ adjudicative proceeding is made. If an application is approved, the state engineer shall issue a conditional water permit allowing the applicant to appropriate water. ~~Provided, however,~~ However, the commission ~~may,~~ may reserve unto itself final approval authority over any specific water permit in excess of five thousand acre-feet [6167409.19 cubic meters]. ~~The state engineer may cause a certified transcript to be prepared for any hearing conducted pursuant to this section. The costs for the original and up to nine copies of the transcript must be paid by the applicant.~~

**SECTION 14. AMENDMENT.** Section 61-04-06.1 of the North Dakota Century Code is amended and reenacted as follows:

**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 or public use.
3. Livestock use.
4. Irrigation use.
5. Industrial use.
6. Fish, wildlife, and other ~~outdoor~~ recreational uses.

**SECTION 15. AMENDMENT.** Section 61-04-06.2 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-06.2. Terms of permit.**

The state engineer may issue a conditional water permit for less than the amount of water requested. Except for water permits for incorporated municipalities or rural water systems, the state engineer may not issue a permit for more water than can be beneficially used for the purposes stated in the application. Water permits for incorporated municipalities or rural water systems may contain water in excess of present needs based upon what may reasonably be necessary for the future water requirements of the municipality or the rural water system. The state engineer may require modification of the plans and specifications for the appropriation. The state

engineer may issue a permit subject to fees for water use and conditions the state engineer considers necessary to protect the rights of others and the public interest. Conditions must be related to matters within the state engineer's jurisdiction. All conditions attached to any permit issued before July 1, 1975, are binding upon the permitteepermitholder.

**SECTION 16. AMENDMENT.** Section 61-04-06.3 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-06.3. Priority.**

Priority in time ~~shall give~~ gives the superior water right. Priority of a water right acquired under this chapter dates from the filing of an application with the state engineer, except for water applied to domestic; or livestock purposes, or fish, wildlife, and other recreational uses in which case the priority date ~~shall~~ must relate back to the date when the quantity of water in question was first appropriated, unless otherwise provided by law.

Priority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as the increase or decrease of streamflow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire reasonably the prior appropriator's water under the changed conditions.

**SECTION 17.** Section 61-04-07.2 of the North Dakota Century Code is created and enacted as follows:

**61-04-07.2. Conditional water permit application denial.**

If the state engineer determines an application or any portion of an application does not meet the criteria prescribed in section 61-04-06 for any reason other than sufficient information or data is lacking to allow for sound decisionmaking of the impacts of the proposed diversion on the prior appropriators, the resource, or the public interest, the application or portion must be denied.

**SECTION 18.** Section 61-04-07.3 of the North Dakota Century Code is created and enacted as follows:

**61-04-07.3. Conditional water permit application deferral.**

If the state engineer determines an application or any portion of an application does not meet the criteria prescribed in section 61-04-06 because sufficient information or data is lacking to allow for sound decisionmaking of the impacts of the proposed diversion on the prior appropriators, the resource, or the public interest, the conditional water permit application must be placed in a deferred status. The applicant must be notified by mail the application has been placed in deferred status.

**SECTION 19. AMENDMENT.** Section 61-04-09 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-09. Application to beneficial use - Inspection - Perfected water permit.**

After the permit's beneficial use date, or upon notice from the permitholder that water has been applied to a beneficial use, the state engineer shall notify the conditional water permitholder and inspect the works. The inspection must determine the safety, efficiency, and actual capacity of the works. If the works are not properly and safely constructed, the state engineer may require the necessary changes to be

made within a reasonable time. Failure to make the changes within the time prescribed by the state engineer shall cause postponement of the permit's priority date to the date the changes are made to the satisfaction of the state engineer. Any intervening application submitted before the date the changes are made will have the benefit of the postponement of priority. When the works are properly and safely constructed and inspected, the state engineer shall issue the perfected water permit, setting forth the actual capacity of the works and the limitations or conditions upon the water permit as stated in the conditional water permit authorized by section 61-04-06.2. All conditions attached to any permit issued before July 1, 1975, are binding upon the ~~permittee~~permitholder.

**SECTION 20. AMENDMENT.** Section 61-04-11 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-11. Inspection of works.**

If the state engineer, in the course of the state engineer's duties, ~~shall find~~that finds any works used for the storage, diversion, or carriage of water are unsafe and a menace to life or property, the state engineer ~~at once~~ shall notify the owner or the owner's agent, specifying the changes necessary and allowing a reasonable time for putting the works in safe condition. Upon the request of any party, accompanied by the estimated cost of inspection, the state engineer shall ~~cause inspect~~inspect any alleged unsafe works ~~to be inspected~~. If they shall be found unsafe by the state engineer, the money deposited by ~~such the~~the party shall ~~must~~must be refunded, and the fees for inspection shall ~~must~~must be paid by the owner of such works. If ~~such the~~the fees are not paid by the owner of ~~such the~~the works within thirty days after the decision of the state engineer, they shall ~~must~~must be a lien against any property of ~~such the~~the owner and shall ~~must~~must be recovered by a suit instituted by the state's attorney of the county at the request of the state engineer. The state engineer, when in the state engineer's opinion it is necessary, may inspect any works under construction for the storage, diversion, or carriage of water and may require any changes necessary to secure their safety. The fees for ~~such the~~the inspection shall ~~must~~must be a lien on any property of the owner and shall ~~must~~must be subject to collection as provided in this chapter but neither the United States nor the state of North Dakota nor any government agency thereof shall ~~may~~may be required to pay such fees.

**SECTION 21. AMENDMENT.** Section 61-04-14 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-14. Extending time for application to beneficial use.**

The state engineer may extend the time for the application of water to the beneficial use cited in the conditional water permit for good cause shown. When ~~such the~~the time has expired, the state engineer may renew and extend the same upon application; provided, however, a conditional water permit, or any portion thereof, shall ~~of the application must~~of the application must be considered forfeited, ~~abandoned, and void~~ if no request for renewal is received by the state engineer within sixty days after the date the ~~permittee~~permitholder is informed by ~~certified mail that~~ the period for applying water to the beneficial use cited in the conditional water permit has expired. If a request to extend the time for application to beneficial use for any conditional water permit, or portion thereof ~~of the permit, is denied, such the conditional water permit, or portion thereof, shall of the permit, must~~ be considered forfeited, ~~abandoned, and void~~. Sections 61-04-23 through 61-04-25 shall ~~do~~do not apply to this section.

**SECTION 22. AMENDMENT.** Section 61-04-15 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-15. Assignment or transfer of conditional or perfected water permit.**

Any conditional or perfected water permit may be assigned only upon approval by the state engineer. Any conditional or perfected water permit may also be transferred, with the approval of the state engineer, to any parcel of land owned or leased by the holder of such water permit. Upon reasonable proof that such the assignment or transfer can be made without detriment to existing rights, the state engineer shall cause assign the water permit involved to be assigned or simultaneously severed and transferred from such land without losing priority of any right previously established. The decision of the state engineer shall be final unless some party interested in the same source of water supply shall, within sixty days, bring appropriate action in the district court of the county in which the land is located appealing such decision. Applications for assignment and transfer shall be in the form required by regulation. The transfer of title to land in any manner whatsoever shall must carry with it all rights to the use of water for irrigation of such the land, except that any conditional or perfected water permit for irrigation purposes must be assigned in accordance with this section.

**SECTION 23.** Section 61-04-15.2 of the North Dakota Century Code is created and enacted as follows:

**61-04-15.2. Add a point of diversion.**

A permitholder may add a point of diversion to a conditional or perfected permit without affecting the priority date, if approved by the state engineer. Applications to add a point of diversion must be processed and evaluated in the same manner as a conditional water permit application. The state engineer may approve the additional point of diversion if the proposed addition will not adversely affect the rights of other appropriators.

**SECTION 24.** Section 61-04-15.3 of the North Dakota Century Code is created and enacted as follows:

**61-04-15.3. Transfer of approved irrigated acreage.**

A permitholder may transfer acres approved for irrigation on a conditional or perfected water permit to any tract of land owned or leased by the permitholder without affecting the priority date, if approved by the state engineer. The state engineer shall cause the water permit involved to be simultaneously severed and transferred from such land.

**SECTION 25.** Section 61-04-15.4 of the North Dakota Century Code is created and enacted as follows:

**61-04-15.4. Change in purpose of use.**

A permitholder may change the purpose of use of a conditional or perfected water permit without affecting the priority date, if approved by the state engineer. Applications for a change in the purpose of use must be processed and evaluated in the same manner as a conditional water permit application. A change in the purpose of use may be authorized only for a superior use as determined by the order of priority in section 61-04-06.1. The state engineer may approve the proposed change if the proposed change will not adversely affect the rights of other appropriators.

**SECTION 26. AMENDMENT.** Section 61-04-23 of the North Dakota Century Code is amended and reenacted as follows:

### **61-04-23. ForfeitureCancellation of water rights - Inspection of works.**

Any appropriation of water must be for a beneficial use, and when the appropriator fails to apply it to the beneficial use cited in the permit or ceases to use it for the beneficial use cited in the permit for three successive years, unless the failure or cessation of use has been due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause, the state engineer may ~~declare~~cancel the water permit or right ~~forfeited~~. For purposes of this chapter, an incorporated municipality or rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit ~~may~~ reasonably may be necessary for the future water requirements of the municipality or the rural water system. The state engineer shall, as often as necessary, ~~shall~~ examine the condition of all works constructed or partially constructed within the state and compile information concerning the condition of every water permit or right and all ditches and other works constructed or partially constructed ~~thereunder~~under the permit or right.

**SECTION 27. AMENDMENT.** Section 61-04-24 of the North Dakota Century Code is amended and reenacted as follows:

### **61-04-24. ForfeitureCancellation of water rights - Notice - Contents.**

1. If it appears that any water appropriation or portion thereof ~~of an appropriation~~ has not been used for a beneficial use, or having been so used at one time has ceased to be used for that purpose for more than three successive years, unless the failure or cessation of use is due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause, the state engineer shall set a place and time for a hearing. For purposes of this chapter, an incorporated municipality or a rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit ~~may~~ reasonably may be necessary for the future water requirements of the municipality or the rural water system. Any ~~holder of a water permit~~permitholder using water from a common source of supply, any applicant ~~therefor~~for a permit to use water from a common source of supply, or any interested party may request the state engineer to conduct a hearing, ~~the purpose of which is the cancellation of to cancel~~ any unused water rights to the common source of supply. Any decision of the state engineer in denying a request for a hearing may be appealed in the ~~manner prescribed by section 61-04-07~~accordance with chapter 28-32. Prior to the hearings, the state engineer shall serve notice upon the permitholder and upon the owners of land benefited by the appropriation or works, except where the lands benefited are within the geographical boundaries of a city, in which case notice must be given to the governing body of the city, to show cause by ~~such~~such time and at ~~such~~such a place why the water appropriation or a portion thereof ~~of the appropriation~~ should not be declared ~~forfeited and canceled~~.
2. In addition to the time and place of hearing, the notice must contain:
  1. a. A description of the water appropriation.
  2. b. The permit number upon the records of the commission.
  3. c. The date of priority.
  4. d. The point of diversion.

5. ~~e.~~ A description of the lands benefited by the appropriation as indicated on the application for a water permit on file ~~in~~with the office of the commission.
6. ~~f.~~ Notice that the permitholder, the owners of land benefited by the appropriation or works, and other interested parties whose right to use water may be affected by a cancellation of the appropriation are to show cause why the appropriation, or a portion ~~thereof~~of the appropriation, should not be canceled.
3. The notice must be served personally or sent by ~~registered~~ or certified mail at least thirty days before the date of hearing to the permitholder and to the owners of land benefited by the appropriation as indicated on the application for a water permit on file ~~in~~with the office of the commission, or to persons having an interest in works as they appear from the records of the county treasurer or the recorder. In addition, the notice must be published in ~~the~~an official newspaper of general circulation in the county in which the point of diversion is located once each week for two consecutive weeks prior to the date of hearing.

**SECTION 28. AMENDMENT.** Section 61-04-25 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-25. Forfeiture Cancellation of water rights - Hearing - Appeal.**

At the hearing the ~~verified report~~recommended decision of the state engineer or engineers of the state water commission is prima facie evidence for the forfeiture and cancellation of the water permit or portion ~~thereof~~of the permit. If no one appears at the hearing, the water permit or portion thereof must be declared forfeited and canceled. If interested parties appear and contest the cancellation, the state engineer shall hear the evidence and, if it appears that the water has not been put to a beneficial use, or, having been so used at one time, has ceased to be used for ~~such~~the purpose for more than three successive years, unless the failure or cessation of use is due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause, the ~~same~~permit, or a portion thereof of the permit, must be declared forfeited and canceled. For purposes of this chapter, an incorporated municipality or a rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit may reasonably may be necessary for the future water requirements of the municipality or the rural water system. An appeal may be taken from the decision of the state engineer in accordance with chapter 28-32.

**SECTION 29. AMENDMENT.** Section 61-04-26 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-26. Recorder to record water permit or order affecting water right.**

A water permit may be recorded as any other instrument affecting the title to real property without acknowledgment or further proof. ~~A copy of any~~The order declaring any canceling a water right, or portion thereof, forfeited, canceled, or abandoned ~~shall of a water right must~~ be filed by the state engineer in the office of ~~with~~the county recorder in the county or counties where the affected land is located, and it shall be recorded as any other instrument affecting the title to real property without acknowledgment or further proof. Any document filed under this section shall ~~must~~ be listed in the index of the property affected as provided in section 11-18-07.

**SECTION 30. AMENDMENT.** Section 61-04-27 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-27. Information filed with state engineer - Installation of measuring devices.**

~~On or before the~~ By March thirty-first day of March of each year all persons holding a water permit, permitholders shall file with the state engineer, on forms supplied by the state engineer, ~~topographic, mapping, foundation test borings, design, water use,~~ and such other information as the state engineer ~~shall require~~ requires. The state engineer may also ~~may~~ require ~~any such persons~~ permitholders to install measuring devices, ~~which must conform~~ conforming to the state engineer's specifications, at all points specified by the state engineer.

**SECTION 31. AMENDMENT.** Section 61-04-28 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-28. Correction of application or water right by state engineer.**

Upon proof satisfactory to the state engineer that ~~an application for a water permit~~ application or any water permit contains ~~an~~ nonmaterial error relative to the point of diversion, ~~the legal description of the land to which the water is to be applied, or the quantity of water,~~ the state engineer may, by written notice to the holder of the affected water permit ~~or application~~, correct the error without publication of notice.

**SECTION 32. AMENDMENT.** Section 61-04-29 of the North Dakota Century Code is amended and reenacted as follows:

**61-04-29. Enforcement.**

The state engineer has full power and authority to institute, maintain, and prosecute to determination in an administrative proceeding or any of the courts of this state, or in any of the federal courts, any and all actions, suits, and special proceedings that may be necessary to enjoin unauthorized use of water, ~~to enforce an order of the state engineer or the state water commission, or to otherwise administer the provisions of this chapter.~~ Notwithstanding any other provision of law, the state engineer may issue administrative orders requiring the immediate cessation of water use when the state engineer has a reasonable belief ~~that such~~ the use is unauthorized or continued use will damage the rights of prior appropriators.

**SECTION 33. REPEAL.** Sections 61-04-07, 61-04-15.1, 61-04-17, and 61-04-22 of the North Dakota Century Code are repealed.

Approved April 23, 2019

Filed April 24, 2019

## CHAPTER 509

### SENATE BILL NO. 2295

(Senator Dotzenrod)

AN ACT to create and enact a new section to chapter 61-05 of the North Dakota Century Code, relating to limitations on the creation and jurisdiction of irrigation districts; and to amend and reenact sections 61-09-01 and 61-09-03 of the North Dakota Century Code, relating to permitting an irrigation district to assess lands requiring drainage as a result of irrigation works.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1.** A new section to chapter 61-05 of the North Dakota Century Code is created and enacted as follows:

##### Creation and jurisdiction of irrigation district - Limitations.

Notwithstanding section 61-05-02, an irrigation district may not be created if the primary purpose of the district is to provide drainage benefits to residents of the district. A drainage project proposed, undertaken, approved, or subject to assessment by an irrigation district also is subject to the permit requirements under chapter 61-32. Drainage benefits provided by an irrigation district may not impact the authority of a water resource board to assess for drainage projects under chapter 61-16.1 or 61-21.

**SECTION 2. AMENDMENT.** Section 61-09-01 of the North Dakota Century Code is amended and reenacted as follows:

##### **61-09-01. District assessor to examine tracts of land to fix annual assessments levied thereon.**

Between the first Monday in March and the first Monday in June of each year, the district assessor shall examine each tract of land or legal subdivision of land in the district, including entered and unentered public lands of the United States, subject ~~thereto~~ to entry under any act of Congress, and all other lands publicly or privately owned. In determining irrigation or drainage benefits, the district assessor shall first ascertain the number of irrigable or drained acres [hectares] within each tract or subdivision, as determined by the board of directors, and this ~~shall~~ must form the primary basis for determining the benefits accruing ~~on account of the~~ due to construction, acquisition, or operation of irrigation or drainage works. In addition, the district assessor shall include such factors as methods of irrigation, power consumption, water conservation, and whether or not irrigable acres [hectares] are actually being irrigated. ~~Thereafter, the~~ The amount of benefits ~~so~~ apportioned or distributed to each tract of land as ~~finally~~ determined and equalized ~~shall~~ must be ~~and remain~~ the basis for fixing the annual assessments levied during that year against ~~such~~ the tracts or subdivisions in carrying out the provisions of this chapter.

**SECTION 3. AMENDMENT.** Section 61-09-03 of the North Dakota Century Code is amended and reenacted as follows:

##### **61-09-03. Assessments spread in proportion to benefits received - Property subject to assessment for deficiency.**

Whenever any assessment is made within an irrigation district it ~~shall~~must be apportioned to and spread upon each unit or tract of land in the district in proportion to the benefits received, as determined by the assessor in accordance with section 61-09-01. Bonds, district improvement warrants, and other obligations incurred by the district ~~shall~~must be the obligations of the district. Only lands within the district benefited by irrigation or drainage provided by the district and subject to assessment for irrigation or drainage benefits ~~shall bear~~ subject to assessment for any fund created for the payment of bonds, district improvement warrants, and other district obligations. All assessments approved and levied by an irrigation district for any fund or purpose under the authority of this title ~~shall~~must be in the form of special assessments and ~~shall be~~ levied against both privately and publicly owned lands.

Approved March 19, 2019

Filed March 20, 2019

## CHAPTER 510

### HOUSE BILL NO. 1087

(Agriculture Committee)  
(At the request of the State Engineer)

AN ACT to amend and reenact section 61-16.1-38 of the North Dakota Century Code, relating to a permit to construct or modify a dam, dike, or other device.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 61-16.1-38 of the North Dakota Century Code is amended and reenacted as follows:

**61-16.1-38. Permit to construct or modify dam, dike, or other device required - Penalty - Emergency.**

No dikes, dams, or other devices for water conservation, flood control regulation, watershed improvement, or storage of water which are capable of retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-feet [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam, may be constructed within any district except in accordance with the provisions of this chapter. An application for the construction of any dike, dam, or other device, along with complete plans and specifications, must be presented first to the state engineer. Except for low-hazard dams less than ten feet [3.05 meters] in height or agricultural dikes less than two feet [0.61 meters] in height, the plans and specifications must be completed by a professional engineer registered in this state. After receipt, the state engineer shall consider the application in such detail as the state engineer deems necessary and proper. The state engineer shall refuse to allow the construction of any unsafe or improper dike, dam, or other device which would interfere with the orderly control of the water resources of the district, or may order such changes, conditions, or modifications as in the judgment of the state engineer may be necessary for safety or the protection of property. Within forty-five days after receipt of the application, except in unique or complex situations, the state engineer shall complete the state engineer's initial review of the application and forward the application, along with any changes, conditions, or modifications, to the water resource board of the district within which the contemplated project is located. The board thereupon shall consider, within forty-five days, the application, and suggest any changes, conditions, or modifications to the state engineer. If the application meets with the board's approval, the board shall forward the approved application to the state engineer. If the board fails to respond within forty-five days, it shall be determined the board has no changes, conditions, or modifications. The state engineer shall make the final decision on the application and forward that decision to the applicant and the local water resource board. The state engineer may issue temporary permits for dikes, dams, or other devices in cases of an emergency. Any person constructing a dam, dike, or other device, which is capable of retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-feet [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam, without first securing a permit to do so, as required by this section, is liable for all damages proximately caused by the dam, dike, or other device, and is guilty of a class B misdemeanor.

Approved March 8, 2019

Filed March 8, 2019

## CHAPTER 511

### SENATE BILL NO. 2091

(Energy and Natural Resources Committee)  
(At the request of the State Engineer)

AN ACT to amend and reenact section 61-16.2-08 of the North Dakota Century Code, relating to floodplain management community standards for permissible uses within the flood fringe.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 61-16.2-08 of the North Dakota Century Code is amended and reenacted as follows:

#### **61-16.2-08. Community standards - Permissible uses within flood fringe.**

Upon delineation of the floodplain or floodway under the national flood insurance program [42 U.S.C. 4001 et seq.], the following uses shall be permitted within the flood fringe to the extent that they are not prohibited by any other ordinance, regulation, or statute:

1. Any use permitted in the regulatory floodway pursuant to section 61-16.2-06.
2. Structures, including residential and nonresidential structures; provided, that:
  - a. Residential structures are constructed on fill such that the lowest floor, including basements, is elevated to at least one foot [30.48 centimeters] above the base flood elevation unless granted a residential basement floodproof exception under the national flood insurance program.
  - b. Nonresidential structures are either constructed on fill as specified in subdivision a elevated to at least one foot [30.48 centimeters] above the base flood elevation or are adequately floodproofed up to an elevation no lower than two feet [.61 meter] above the base flood elevation. Such floodproofing shall be in accordance with the standards either adopted by the community under the national flood insurance program [42 U.S.C. 4001 et seq.] or under this chapter, whichever are more restrictive.

Approved March 6, 2019

Filed March 7, 2019

## CHAPTER 512

### SENATE BILL NO. 2358

(Senators Wanzek, Dotzenrod, Luick)  
(Representative Pollert)

AN ACT to amend and reenact section 40-33-16, subsections 11 and 27 of section 61-24-08, subdivision b of subsection 2 of section 61-32-03.1, and subsection 8 of section 61-39-05 of the North Dakota Century Code, relating to Red River valley water supply project contract terms, elimination of voter approval requirements, and notice of proposed subsurface water management systems.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 40-33-16 of the North Dakota Century Code is amended and reenacted as follows:

#### **40-33-16. Municipality may purchase water for distribution.**

1. Any city owning a system for the distribution of water for fire protection and other public purposes and for selling water to its inhabitants and industries, but for which the water supply is unsuitable or inadequate, may contract to purchase water at wholesale for ~~such~~those purposes from any person, firm, public or private corporation, or limited liability company able and willing to furnish the same, upon ~~such~~the terms and during ~~such~~the period, not exceeding forty years, as the city governing body ~~shall~~deem~~deems~~ appropriate. ~~Any such~~The contract ~~shall~~must be authorized by an ordinance submitted to the voters for approval by a majority of those voting on the proposition before it takes effect. ~~In and by such~~Pursuant to the ordinance and contract, the city may bind itself:
  - 1- a. To establish and maintain rates and charges for supplying water by it to its inhabitants and industries, either according to a prescribed schedule agreed upon or sufficient to produce net stated amounts for specified periods during the life of the contract, or both, and to appropriate and use the same for payments to become due under the contract, and, if the contract so provides, the city ~~shall be~~ obligated to pay for ~~such~~the water solely out of ~~such~~the net revenues;
  - 2- b. To pay, at an agreed rate or rates, for all water taken by the city under ~~such~~the contract and not resold by it; and
  - 3- c. To do and perform any other acts or things ~~which, in the discretion of the governing body, are deemed~~ deems reasonable and appropriate for the procurement of ~~such~~the water on the most efficient and economical basis.
2. Notwithstanding subsection 1, contracts to purchase water from the water supply system created by the Red River valley water supply project may have a term exceeding forty years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval.

3. If any payments under any contract are to be made solely out of net revenues, the contract may fix and prescribe the method or basis on which net revenues are to be computed.

**SECTION 2. AMENDMENT.** Subsection 11 of section 61-24-08 of the North Dakota Century Code is amended and reenacted as follows:

11. To operate and maintain or to contract for the operation and maintenance of water supply and irrigation works serving lands and uses within or outside the district, and in connection therewith, to maintain a reserve fund to meet major unforeseen costs of operation and maintenance. The acquisition, construction, operation, and maintenance of dams, reservoirs, ground water storage areas, canals, conduits, pipelines, tunnels, and any other plants, works, facilities, improvements, or property necessary to operate or maintain water supply or irrigation works under this section are exempt from any requirements for voter approval.

**SECTION 3. AMENDMENT.** Subsection 27 of section 61-24-08 of the North Dakota Century Code is amended and reenacted as follows:

27. To enter water service contracts with municipalities, water districts, or other political subdivisions in this state and public utilities in Minnesota as part of the Red River valley water supply project, regardless of whether the acquisition, construction, or reconstruction of any Red River valley water supply project is actually completed and whether water actually is delivered under the contracts. These contracts with cities and water districts are authorized to be executed without limitation on term of years ~~notwithstanding any limitation to the contrary and, if the contracts are executed in relation to the initial construction of the system, without voter approval.~~

**SECTION 4. AMENDMENT.** Subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

- b. Upon submission of a completed application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map, assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection.

**SECTION 5. AMENDMENT.** Subsection 8 of section 61-39-05 of the North Dakota Century Code is amended and reenacted as follows:

8. Enter ~~a contract or contracts~~ to provide for a supply of bulk water from the Garrison Diversion Conservancy District which ~~contract or contracts~~ may provide for payments to fund some or all of the Garrison Diversion Conservancy District's costs of acquiring, designing, constructing, or reconstructing one or more features of a Red River valley water supply project, ~~which project the~~ that the Garrison Diversion Conservancy District

may acquire, design, construct, improve, and own, as well as the Garrison Diversion Conservancy District's costs of operating and maintaining one or more Red River valley water supply projects, whether the acquisition, construction, or reconstruction of any Red River valley water supply project actually is completed and whether water actually is delivered pursuant to the ~~contract or contracts, and which contract or contracts the Garrison Diversion Conservancy District may execute.~~ Contracts executed under this subsection may be executed without limitation on the term of years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval.

Approved April 23, 2019

Filed April 24, 2019

## CHAPTER 513

### HOUSE BILL NO. 1202

(Representatives Delzer, Porter, Zubke)  
(Senator Schaible)

AN ACT to create and enact a new section to chapter 61-33 of the North Dakota Century Code, relating to determinations of navigability; to amend and reenact section 61-33-01 and subdivision e of subsection 3 of section 61-33.1-03 of the North Dakota Century Code, relating to sovereign land management definitions; and to provide for a state engineer review of determinations of navigability.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>251</sup> **SECTION 1. AMENDMENT.** Section 61-33-01 of the North Dakota Century Code is amended and reenacted as follows:

##### **61-33-01. Definitions.**

As used in this chapter, unless the context otherwise requires:

1. "Board" means the sovereign lands advisory board.
2. "Board of university and school lands" means that entity created by section 15-01-01.
3. "Navigable waters" means waters that were in fact navigable at the time of statehood, and that are used, were used, or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.
4. "Sovereign lands" means those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams. Lands established to be riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be above the ordinary high water mark and are not sovereign lands.
- 4-5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

**SECTION 2.** A new section to chapter 61-33 of the North Dakota Century Code is created and enacted as follows:

##### **Navigability determinations.**

1. Before making a determination that a body of water or portion of a body of water is navigable, the state engineer shall:

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<sup>251</sup> Section 61-33-01 was also amended by section 1 of Senate Bill No. 2211, chapter 514.

- a. Develop and deliver to the state water commission a preliminary finding regarding the navigability of the body of water or portion of a body of water and the legal rationale for the preliminary finding; and
  - b. Consult with the state water commission in an open meeting and demonstrate the public need and purpose for the determination to be made.
2. After completing the requirements of subsection 1, the state engineer may proceed with making a final determination of navigability by:
- a. Providing reasonable public notice of the preliminary finding, legal rationale for the preliminary finding, and opportunity for the public to provide comments for no less than sixty days. The notice must:
    - (1) Include the address and electronic mail address to which public comments may be sent and the deadline by which public comments must be received;
    - (2) Clearly identify the specific body of water or portion of a body of water for which the finding of navigability is sought;
    - (3) State the state engineer will hold a public hearing regarding the preliminary finding before a final determination of navigability is made, and provide the date, time, and location of the public hearing;
    - (4) Be provided to the governing body of each soil conservation district, water resource district, and county adjacent to the body of water or portion of a body of water for which the preliminary finding was made;
    - (5) Be published in the official county newspaper for each county adjacent to the body of water or portion of a body of water for which the preliminary finding was made; and
    - (6) Briefly state the purpose of the hearing and describe the impact or effect a determination of navigability will have on the property rights of persons who own property adjacent to the body of water or portion of a body of water for which the determination of navigability may be made; and
  - b. Holding a public hearing regarding the preliminary finding.
3. After completing the requirements of subsection 2 and making a determination of navigability, the state engineer shall prepare a report regarding the determination, including summaries of the information provided to the state water commission, the public hearings held, and the public comments received. The state engineer shall provide the report to the state water commission, send the report by certified mail to any person that appeared at the public hearing required under subsection 2 or provided written comments by the deadline, make the report available to the public, including on the website for the office of the secretary of state, and provide public notice of the report's availability. The report is final on the date it is provided to the state water commission.

4. A determination of navigability may be appealed directly to a court of competent jurisdiction in accordance with sections 28-32-42 through 28-32-46 and sections 28-32-50 and 28-32-51.

<sup>252</sup> **SECTION 3. AMENDMENT.** Subdivision e of subsection 3 of section 61-33.1-03 of the North Dakota Century Code is amended and reenacted as follows:

- e. ~~Subsection 3 of section~~Section 61-33-01 and section 47-06-05, which provide all accretions are presumed to be above the ordinary high water mark and are not sovereign lands. Accreted lands may be determined to be within the ordinary high water mark of the historical Missouri riverbed channel based on clear and convincing evidence. Areas of low-lying and flat lands where the ordinary high water mark may be impracticable to determine due to inconclusive aerial photography or inconclusive vegetation analysis must be presumed to be above the ordinary high water mark and owned by the riparian landowner.

**SECTION 4. REVIEWS OF NAVIGABILITY DETERMINATIONS DURING 2019-20 INTERIM.** During the 2019-20 interim, the state engineer may review any determinations of navigability of a body of water or portion of a body of water made solely by the state engineer before the effective date of this Act. However, if a court of competent jurisdiction has determined a body of water or portion of a body of water is navigable or non-navigable, the state engineer does not need to review any state agency determination regarding the body of water or portion of a body of water. If the state engineer elects not to begin review of any determination of navigability of a body of water or portion of a body of water made solely by the state engineer before the effective date of this Act during the 2019-20 interim, the determination must be vacated without prejudice to a subsequent determination of navigability under section 2 of this Act. In conducting the reviews under this section, the state engineer shall comply with the requirements in section 2 of this Act.

Approved April 25, 2019

Filed April 26, 2019

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<sup>252</sup> Section 61-33.1-03 was also amended by section 4 of Senate Bill No. 2211, chapter 514.

## CHAPTER 514

### SENATE BILL NO. 2211

(Senators Bekkedahl, Dwyer, Unruh)  
(Representatives Keiser, Porter)

AN ACT to create and enact section 61-33-01.1 and a new subsection to section 61-33.1-03 of the North Dakota Century Code, relating to the determination of the ordinary high water mark; to amend and reenact sections 61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections 61-33.1-04, 61-33.1-05, and 61-33.1-07 of the North Dakota Century Code, relating to sovereign lands, determining the ordinary high water mark, and the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide for application; and to declare an emergency.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>253</sup> **SECTION 1. AMENDMENT.** Section 61-33-01 of the North Dakota Century Code is amended and reenacted as follows:

##### **61-33-01. Definitions.**

As used in this chapter, unless the context otherwise requires:

1. "Board" means the sovereign lands advisory board.
2. "Board of university and school lands" means that entity created by section 15-01-01.
3. "Ordinary high water mark" means that line below which the presence and action of the water upon the land is continuous enough so as to prevent the growth of terrestrial vegetation, destroy its value for agricultural purposes by preventing the growth of what may be termed an ordinary agricultural crop, including hay, or restrict its growth to predominantly aquatic species.
4. "Sovereign lands" means those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams. Lands established to be riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be above the ordinary high water mark and are not sovereign lands.
- 4.5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

**SECTION 2.** Section 61-33-01.1 of the North Dakota Century Code is created and enacted as follows:

##### **61-33-01.1. Ordinary high water mark determination - Factors to be considered.**

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<sup>253</sup> Section 61-33-01 was also amended by section 1 of House Bill No. 1202, chapter 513.

The state engineer shall maintain ordinary high water mark delineation guidelines consistent with this section.

1. When determining the ordinary high water mark for delineating the boundary of sovereign lands, vegetation and soils analysis must be considered the primary physical indicators. When considering vegetation, the ordinary high water mark is the line below which the presence and action of the water is frequent enough to prevent the growth of terrestrial vegetation or restrict vegetation growth to predominately aquatic species. Generally, land, including hay land, where the high and continuous presence of water has destroyed the value of the land for agricultural purposes must be deemed within the ordinary high water mark.
2. When feasible, direct hydrological and hydraulic measurements from stream gauge data, elevation data, historic records of water flow, high resolution light detection and ranging systems, prior elevation and survey maps, and statistical hydrological evidence must be considered when determining the ordinary high water mark. The state engineer shall establish appropriate guidelines, technical standards, and other criteria, including use of light detection and ranging systems or other future technological advancements, as necessary, for conducting hydrologic and hydraulic modeling required by this section.
3. Secondary physical indicators, including litter, debris, or staining, may be considered to supplement the analysis of the ordinary high water mark investigation but may not supersede primary physical indicators unless primary physical indicators are deemed inadequate or inconclusive. Physical indicators directly affected by influent non-navigable tributaries, adjoining water bodies, or wetlands may not be used to delineate the sovereign land boundary of a navigable body of water.

**SECTION 3. AMENDMENT.** Section 61-33.1-02 of the North Dakota Century Code is amended and reenacted as follows:

**61-33.1-02. Mineral ownership of land ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams. (Retroactive application - [See note](#))**

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

<sup>254</sup> **SECTION 4. AMENDMENT.** Subdivision e of subsection 3 of section 61-33.1-03 of the North Dakota Century Code is amended and reenacted as follows:

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<sup>254</sup> Section 61-33.1-03 was also amended by section 3 of House Bill No. 1202, chapter 513.

- e. Subsection 34 of section 61-33-01 and section 47-06-05, which provide all accretions are presumed to be above the ordinary high water mark and are not sovereign lands. Accreted lands may be determined to be within the ordinary high water mark of the historical Missouri riverbed channel based on clear and convincing evidence. Areas of low-lying and flat lands where the ordinary high water mark may be impracticable to determine due to inconclusive aerial photography or inconclusive vegetation analysis must be presumed to be above the ordinary high water mark and owned by the riparian landowner.

**SECTION 5.** A new subsection to section 61-33.1-03 of the North Dakota Century Code is created and enacted as follows:

Upon adoption of the final review findings by the industrial commission, the board of university and school lands may contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage on a quarter-quarter basis or government lot basis above and below the ordinary high water mark as delineated by the final review findings of the industrial commission. The acreage determination is final upon approval by the board.

**SECTION 6. AMENDMENT.** Section 61-33.1-04 of the North Dakota Century Code is amended and reenacted as follows:

**61-33.1-04. Implementation. (Retroactive application - [See note](#))**

1. Within six months after the adoption of the final review findings acreage determination by the industrial commission board of university and school lands:
  - a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and
  - b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.
2. Upon adoption of the final review findings acreage determination by the industrial commission board of university and school lands:
  - a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings approving the acreage determination.
  - b. Operators of oil and gas wells affected by the final review findings final acreage determination immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil

and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings the board approves the acreage determination. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding or final acreage determination.

**SECTION 7. AMENDMENT.** Section 61-33.1-05 of the North Dakota Century Code is amended and reenacted as follows:

**61-33.1-05. Actions challenging review findings or final acreage determinations. (Retroactive application - See note)**

1. An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03.
2. An interested party seeking to bring an action challenging the final acreage determination under this chapter shall commence an action in district court within two years of the date the acreage determinations were approved by the board of university and school lands. The plaintiff bringing an action under this section may challenge only the acreage determination for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the final acreage determination challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a determination of the acreage above or below the historical Missouri riverbed channel which varies from the final acreage determination under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm contracted by the board of university and school lands under subsection 2 of section 61-33.1-04.
3. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high water mark, and final acreage determination under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

**SECTION 8. AMENDMENT.** Section 61-33.1-07 of the North Dakota Century Code is amended and reenacted as follows:

**61-33.1-07. State engineer regulatory jurisdiction. (Retroactive application - [See note](#))**

This chapter does not affect the authority of the state engineer to regulate the historical Missouri riverbed channel, minerals other than oil and gas, or the waters of the state, provided the regulation does not affect ownership of oil and gas minerals in and under the riverbed or lands above the ordinary high water mark of the historical Missouri riverbed channel ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams.

**SECTION 9. APPLICATION.** Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

**SECTION 10. EMERGENCY.** This Act is declared to be an emergency measure.

Approved May 1, 2019

Filed May 2, 2019

## CHAPTER 515

### HOUSE BILL NO. 1085

(Agriculture Committee)  
(At the request of the State Water Commission)

AN ACT to amend and reenact section 61-34-04 of the North Dakota Century Code, relating to the drought disaster livestock water assistance program; and to declare an emergency.

#### **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 61-34-04 of the North Dakota Century Code is amended and reenacted as follows:

#### **61-34-04. Eligibility - Application for assistance.**

Applicants with livestock water supply problems caused by drought may apply for assistance from the program. An applicant must first apply for water cost-share assistance from the United States department of agriculture farm service agency. If cost-share assistance is denied by the agency, the applicant may forward the application to the commission for consideration. An application forwarded to the commission must include a document from the United States department of agriculture farm service agency stating the reason for denial of cost-share assistance. The state engineer shall review all applications received by the commission. Notwithstanding any other provision of law, a water supply project commenced after application for funding is made but without prior approval of the state engineer is eligible for funding consideration from the program. ~~If the state engineer approves an application, the applicant may receive up to fifty percent of the cost but in no event more than three thousand five hundred dollars per project with a limit of three projects per applicant.~~ The state engineer shall provide funds for approved applications in accordance with rules and criteria for eligibility and only to the extent that funding is available. A drought disaster livestock water assistance program project located on Indian land is eligible for the program.

**SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure.

Approved March 8, 2019

Filed March 8, 2019