

## CHAPTER 61-04 APPROPRIATION OF WATER

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

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

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

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

1. "Adjudicative proceeding" 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.
4. "Commission" means the state water commission.
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.
7. "Fish, wildlife, and 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.
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.
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.
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.
12. "Livestock use" means the use of water for drinking purposes by herds, flocks, or bands of animals kept for commercial purposes.
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.
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.
19. "Rural water system" means a water supply system designed to serve regional needs.
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.

#### **61-04-01.2. 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.

#### **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.

#### **61-04-02.1. Emergency or temporary authorization.**

The state engineer may authorize emergency or temporary use of water for periods not to exceed twelve months if the state engineer determines such use will not be to the detriment of existing rights. The state engineer shall establish by rule a separate procedure for the processing of applications for emergency or temporary use. No prescriptive or other rights to the use of water shall be acquired by use of water as authorized herein.

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

#### **61-04-03. Water permit application - Contents - Information to accompany.**

A permit application to make beneficial use of any waters of the state must be in the form required by the rules established by the state engineer. 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, must be retained with 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.

**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 may not be assigned a priority date and must be returned to the applicant by the state engineer. This section may not apply to water permit applications 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 within the meaning of the Internal Revenue Code [26 U.S.C. 152].

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

The date of receipt of the application provided for in section 61-04-03 in the commission shall be noted on the application. If the application is defective as to form, incomplete, or otherwise unsatisfactory, it must be returned with a statement of the corrections, amendments, or changes required, within thirty days after its receipt, and sixty days must be allowed for refiling. If the application is corrected as required and is refiled within the time allowed, it, upon being accepted, must take priority as of the date of its original filing. Any corrected application filed after the time allowed 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 61-04-06.3.

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

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

1. For municipal or public use	\$500
2. For irrigation use	\$500
3. For industrial use of one acre-foot [1233.48 cubic meters] or less	\$250
4. For industrial use in excess of one acre-foot [1233.48 cubic meters]	\$1,000
5. For recreation, livestock, or fish and wildlife	\$100
6. Water permit amendment	\$100

**61-04-04.2. Refund of water permit application fees.**

The state engineer may refund a water permit application fee, upon the request of the applicant, if the application is withdrawn by the applicant, and:

1. The state engineer has not published notice of the application; or
2. The state engineer determines other good and sufficient cause exists to refund the application fee.

**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.

**61-04-05. Notice of application - Contents - Proof - Failure to file satisfactory proof.**

When an application is filed which complies with this chapter and the rules adopted under this chapter, the state engineer shall instruct the applicant to:

1. Give notice of the application by certified mail in the form prescribed by rule, to all record title owners of real estate within a radius of one mile [1.61 kilometers] from the location of the proposed water appropriation site, except:

- a. If the one-mile [1.61-kilometer] radius extends within the geographical boundary of a city, the notice must be given to the governing body of the city and no further notice need be given to the record title owners of real estate within the geographical boundary of the city.
  - b. If the one-mile [1.61-kilometer] radius includes land within the geographical boundary of a rural subdivision where the lots are of ten acres [4.04 hectares] or less, the notice must be given to the governing body of the township or other governing authority for the rural subdivision and no further notice need be given to the record title owners of real estate within the geographical boundary of the rural subdivision.
  - c. If the one-mile [1.61-kilometer] radius includes a single tract of rural land which is owned by more than ten individuals, the notice must be given to the governing body of the township or other governing authority for that tract of land and no further notice need be given to the record title owners of that tract.
2. Give notice of the application by certified mail in the form prescribed by rule to all persons holding water permits for the appropriation of water from appropriation sites located within a radius of one mile [1.61 kilometers] from the location of the proposed water appropriation site. The state engineer shall provide a list of all persons who must be notified under this subsection to the applicant.
  3. Give notice of the application by certified mail in the form prescribed by rule to all municipal or public use permitholders 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 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 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.
  6. The applicant shall pay all costs of the publication of notice.

#### **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 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 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 make a recommended decision in writing. The recommended decision must be mailed to the applicant and any 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 party of record who would be aggrieved by the decision 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 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.

**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:
  - a. The rights of a prior appropriator will not be unduly affected.
  - b. The proposed means of diversion or construction are adequate.
  - c. The proposed use of water is beneficial.
  - d. The proposed appropriation is in the public interest. In determining the public interest, the state engineer shall consider all of the following:
    - (1) The benefit to the applicant resulting from the proposed appropriation.
    - (2) The effect of the economic activity resulting from the proposed appropriation.
    - (3) The effect on fish and game resources and public recreational opportunities.
    - (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.
    - (5) Harm to other persons resulting from the proposed appropriation.
    - (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 an adjudicative proceeding is made. If an application is approved, the state engineer shall issue a conditional water permit allowing the applicant to appropriate water. However, the commission, by resolution, may reserve unto itself final approval authority over any specific water permit in excess of five thousand acre-feet [6167409.19 cubic meters].

#### **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 recreational uses.

#### **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 permit holder.

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

Priority in time 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 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 acquire reasonably the prior appropriator's water under the changed conditions.

#### **61-04-07. Rejection of applications - Appeal to district court.**

Repealed by S.L. 2019, ch. 508, § 33.

#### **61-04-07.1. Approval of applications with conditions.**

Repealed by S.L. 1977, ch. 569, § 27.

#### **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.

#### **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.

**61-04-08. Prosecution of work - State engineer may approve another application upon failure of original applicant to complete - Exception.**

Repealed by S.L. 1965, ch. 447, § 24.

**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 permitholder.

**61-04-10. Certificate of construction issued when works found in satisfactory condition - Contents.**

Repealed by S.L. 1965, ch. 447, § 24.

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

If the state engineer, in the course of the state engineer's duties, finds any works used for the storage, diversion, or carriage of water are unsafe and a menace to life or property, the state engineer 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 inspect any alleged unsafe works. If they shall be found unsafe by the state engineer, the money deposited by the party must be refunded, and the fees for inspection must be paid by the owner of such works. If the fees are not paid by the owner of the works within thirty days after the decision of the state engineer, they must be a lien against any property of the owner and 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 the inspection must be a lien on any property of the owner and 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 may be required to pay such fees.

**61-04-12. Use of unsafe works - Penalty.**

Any person using works for the storage, diversion, or carriage of water, at any time after an inspection thereof by the state engineer and receipt of notice from the state engineer that the same are unsafe for the purpose for which they are used, and until the receipt of notice from the state engineer that in the state engineer's opinion they have been made safe, shall be guilty of a class A misdemeanor.

**61-04-13. Application of water to beneficial use - Inspection.**

Repealed by S.L. 1965, ch. 447, § 24.

**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 the time has expired, the state engineer may renew and extend the same upon application; provided, however, a

conditional water permit, or any portion of the application must be considered forfeited if no request for renewal is received by the state engineer within sixty days after the date the permit holder is informed 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 of the permit, is denied, the conditional water permit, or portion of the permit, must be considered forfeited. Sections 61-04-23 through 61-04-25 do not apply to this section.

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

Any conditional or perfected water permit may be assigned only upon approval by the state engineer. Upon reasonable proof the assignment can be made without detriment to existing rights, the state engineer shall assign the water permit without losing priority of any right previously established. The transfer of title to land in any manner whatsoever must carry with it all rights to the use of water for irrigation of the land, except any conditional or perfected water permit for irrigation purposes must be assigned in accordance with this section.

**61-04-15.1. Change in point of diversion or use.**

Repealed by S.L. 2019, ch. 508, § 33.

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

A permit holder 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.

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

A permit holder may transfer acres approved for irrigation on a conditional or perfected water permit to any tract of land owned or leased by the permit holder 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.

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

A permit holder 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.

**61-04-16. Referee or referees appointed in water suits - Duties.**

Repealed by S.L. 1977, ch. 569, § 27.

**61-04-17. Surplus water to be delivered to persons entitled to beneficial use - Charges - Compelling delivery.**

Repealed by S.L. 2019, ch. 508, § 33.

**61-04-18. Appropriation of water from minor stream for agricultural use.**

Repealed by S.L. 1963, ch. 419, § 7.

**61-04-19. Filing of location certificate - Contents.**

Repealed by S.L. 1963, ch. 419, § 7.

**61-04-20. Approval of state engineer - Rights of claimant - Procedure.**

Repealed by S.L. 1963, ch. 419, § 7.

**61-04-21. Amount of water allowed.**

Repealed by S.L. 1963, ch. 419, § 7.

**61-04-22. Prescriptive water right.**

Repealed by S.L. 2019, ch. 508, § 33.

**61-04-23. Cancellation 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 cancel the water permit or right. 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 reasonably may be necessary for the future water requirements of the municipality or the rural water system. The state engineer, 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 under the permit or right.

**61-04-24. Cancellation of water rights - Notice - Contents.**

1. If it appears any water appropriation or portion 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 reasonably may be necessary for the future water requirements of the municipality or the rural water system. Any permitholder using water from a common source of supply, any applicant 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 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 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 a time and at a place why the water appropriation or a portion of the appropriation should not be canceled.
2. In addition to the time and place of hearing, the notice must contain:
  - a. A description of the water appropriation.
  - b. The permit number upon the records of the commission.
  - c. The date of priority.
  - d. The point of diversion.
  - e. A description of the lands benefited by the appropriation as indicated on the water permit on file with the commission.
  - 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 of the appropriation, should not be canceled.
3. The notice must be served personally or sent by 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 water permit on file with 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 official newspaper in the county in which the point of diversion is located once each week for two consecutive weeks prior to the date of hearing.

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

At the hearing the recommended decision of the state engineer is prima facie evidence for cancellation of the water permit or portion of the permit. If no one appears at the hearing, the water permit or portion must be 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 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 permit, or a portion of the permit, must be 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 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.

**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. The order canceling a water right, or portion of a water right must be filed by the state engineer with the county recorder 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 must be listed in the index of the property affected as provided in section 11-18-07.

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

By March thirty-first of each year, permit holders shall file with the state engineer, on forms supplied by the state engineer, water use and other information as the state engineer requires. The state engineer also may require permit holders to install measuring devices conforming to the state engineer's specifications, at all points specified by the state engineer.

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

Upon proof satisfactory to the state engineer that a water permit application or water permit contains a nonmaterial error, the state engineer may, by written notice to the holder of the affected water permit or application, correct the error without publication of notice.

**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, enforce an order of the state engineer or the commission, or 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 the use is unauthorized or continued use will damage the rights of prior appropriators.

**61-04-30. Penalty.**

A person who constructs works for an appropriation, or diverts, impounds, withdraws, or uses a significant amount of water from any source without a permit specifically authorizing such action, except as otherwise provided in section 61-04-02; who violates an order of the state engineer; who fails or refuses to install meters, gauges, or other measuring devices or to control works; who violates an order establishing corrective controls for an area or for a source

of water; who violates the terms of the permit; or who knowingly makes a false or misleading statement in a declaration of existing rights is guilty of a class A misdemeanor. As used in this section, "significant amount of water" means any amount of water in excess of that allowed in a valid water permit, or any amount of water in excess of the needs for domestic and livestock purposes where no permit has been issued. The state engineer shall inform the tax commissioner of violations of industrial use permits.

**61-04-31. Reservation of waters - Public hearing - Notice.**

1. Whenever it appears necessary to the state engineer, or when directed by the commission, the state engineer may by regulation reserve and set aside waters for beneficial use in the future.
  - a. Before the adoption of a regulation under this section, the state engineer shall conduct a public hearing in each county where waters relating to the regulation are located. At least seven days before the date set for the public hearing, a notice must be published in the official county newspapers within each of the counties.
  - b. Regulations adopted hereunder are subject to chapter 28-32.
2. When sufficient information or data is lacking to allow for sound decisionmaking on a water permit application, the state engineer may withdraw various waters of the state from additional appropriations until sufficient data or information is available. Water permit applications pending from these sources will be placed in a deferred status.

**61-04-32. Damages for illegal diminishment of water supply.**

If a court of competent jurisdiction determines that a water supply has been illegally diminished in quantity or quality and that a valid water right to use that supply has been damaged as a result of the diminishment, damages awarded to the owner of the water right shall be an amount to cover the cost of making such repairs, alterations, or construction that will ensure the delivery to the surface owner of that quality and quantity of water available to the surface owner prior to the diminishment.