

**LETTER OPINION
2006-L-29**

September 12, 2006

The Honorable Shirley Meyer
State Representative
4025 Highway 22
Dickinson, ND 58601-9509

Dear Representative Meyer:

Thank you for your letter asking about issuing temporary water permits under N.D.C.C. § 61-04-02.1. It is my opinion that a hearing is not required to issue temporary water use permits. It is further my opinion that after a temporary water permit expires, the State Engineer may issue successive temporary permits to the same person and for the same purpose.

ANALYSIS

Except for certain uses of small quantities of water, any person desiring to appropriate water must obtain a water permit from the State Engineer.¹ Water permits traditionally confer permanent water rights, but some states authorize temporary uses of water as long as the water is not needed by senior water right holders.² Specifically, in North Dakota, N.D.C.C. § 61-04-02.1 provides that “[t]he 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 Legislature directed the State Engineer to establish by rule a procedure separate from the procedure to obtain permanent water rights to process applications for temporary use.³

An applicant must provide the State Engineer with the following information:

¹ N.D.C.C. § 61-04-02.

² A. Dan Tarlock, Law of Water Rights and Resources § 5:49 (2006).

³ N.D.C.C. § 61-04-02.1.

the reason for the permit, quantity of water needed, proposed point of diversion, type of use, place of use, rate of withdrawal, source of water, dates of proposed use, and applicant's address.⁴

The State Engineer may place appropriate conditions on the temporary use of water.⁵

To obtain a permanent right to use water, an applicant must give notice to certain landowners and other entities.⁶ In addition, a hearing may be required.⁷ The "separate procedure," governing temporary use permits, however, does not require a hearing because temporary water permits do not create a water right.⁸

While N.D.C.C. § 61-04-02.1 limits the temporary use of water to a period of 12 months, the Legislature did not foreclose the State Engineer from issuing additional temporary use permits from the same source to the same applicant. A subsequent temporary permit is distinguishable from an initial application, in that the applicant must submit a form requesting a temporary use of water, and again provide the information required by N.D.A.C. § 89-03-01-10. It is my opinion that the 12-month limit for temporary use in N.D.C.C. § 61-04-02.1 applies to each temporary water permit issued by the State Engineer, and does not preclude the applicant from seeking another such permit.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.⁹

⁴ N.D.A.C. § 89-03-01-10.

⁵ Id.

⁶ N.D.C.C. § 61-04-05.

⁷ N.D.C.C. § 61-04-05.1.

⁸ N.D.C.C. § 61-04-02.1 ("[n]o prescriptive or other rights to the use of water shall be acquired by use of water as authorized herein").

⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).