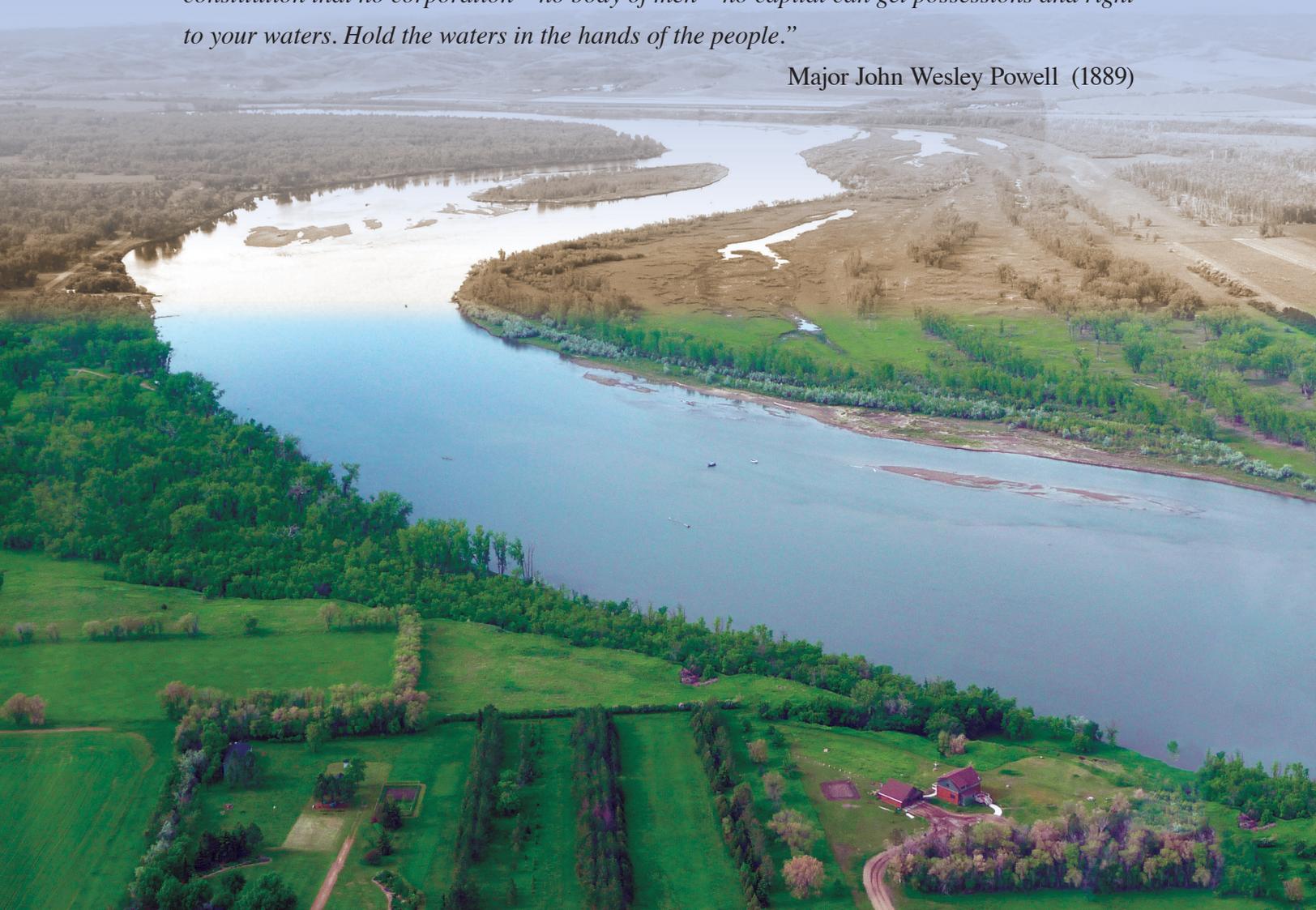




## WESTERN WATER LAW AND THE MISSOURI RIVER

*“...All other wealth falls into insignificance compared with that that which is to come from these lands from the pouring on them of the running streams of this country. Don’t let these streams get out of the possession of the people. If you fail in making a constitution in any other respect, fail not in this one. Take lessons from California and Colorado. Fix it in your constitution that no corporation – no body of men – no capital can get possessions and right to your waters. Hold the waters in the hands of the people.”*

Major John Wesley Powell (1889)



By Steve Best

During the summer of 1889, the first North Dakota Constitutional Convention members were laying the groundwork for what would officially become the State of North Dakota that same year. On August 5, 1889, Major John Wesley Powell, Director of the US Geological Survey, delivered a speech before the Constitutional Convention regarding, foremost the importance of irrigation.

In that speech, Powell not only set the stage for North Dakota's future irrigation development, but also for all water management decisions that would evolve over the course of the state's history. In what have proven to be prophetic remarks, Powell reminded the convention delegates of the volatile nature of North Dakota's climate, and stressed the importance of water in any equation for future success. Most importantly, Powell urged the convention delegates to retain ownership of the state's water resources for the good of the people.

At Powell's urging, members of the Constitutional Convention adopted a constitutional provision for the state's water resources, which says, "All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigation, and manufacturing purposes." To date, this provision remains in the North Dakota State Constitution and is the foundation for legislative decisions in managing North Dakota's water resources.

Additionally, in the early 1900s, North Dakota adopted the fundamentals of Western Water Law, as did many other western states. Western Water Law uses the Prior Appropriation Doctrine in establishing water rights for beneficial use. Basically, the phrase

"first in time – first in right" describes how this principal works. The first person, municipality, or other entity, which applies for a water use permit along a waterway for beneficial use, has priority over less senior water users in times when water is not as plentiful. Because North Dakota is a western water law state, it is important to have the ability to appropriate water from the Missouri River without interference. The Missouri River is the state's most valuable and readily available water source and is needed for a broad spectrum of beneficial uses, such as irrigation, water supplies, and industry.

The State of North Dakota owns the rights to the natural flows of the Missouri River into and through Lake Sakakawea and Oahe. Historic flows of the Missouri River near

through the Missouri River. Thus, North Dakota's Missouri River water users do not rely on water stored behind the dams.

In spite of the fore-thought that the State Constitutional Convention had in 1889, the State of North Dakota is currently in conflict with the US Army Corps of Engineers (Corps) over their proposed Surplus Water Policy. This proposed policy is very complex, but in general, the Corps contends they have authority through the Flood Control Act of 1944 to charge fees for the use of "surplus" stored water in the mainstem reservoirs. The Corps defines surplus water as water that is available because of authorized project uses that were never fully developed. In the case of Garrison Dam / Lake Sakakawea, this is water not being utilized from



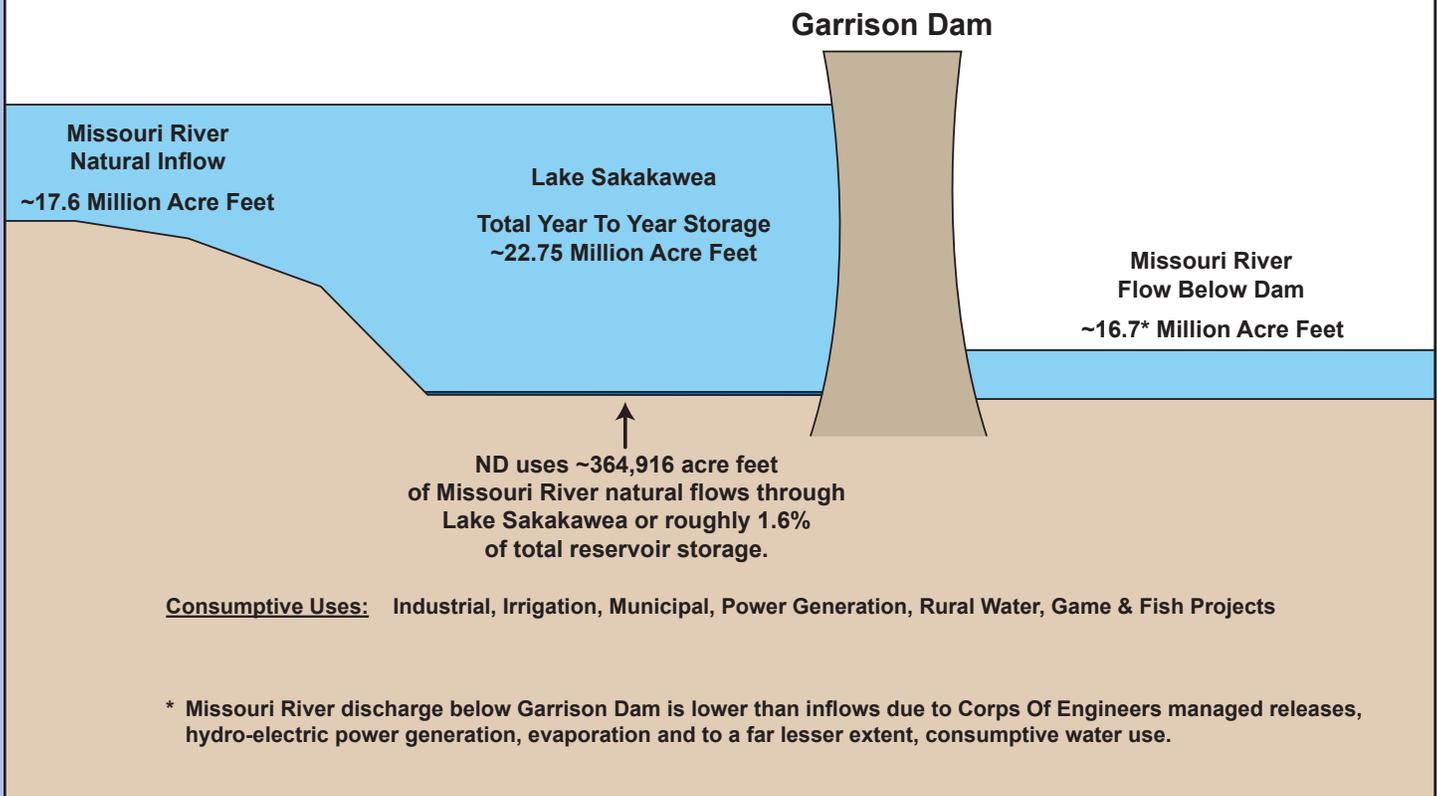
Lake Sakakawea near Garrison Dam in 2011

Williston are approximately 17.6 million acre-feet annually. Only 570,000 acre-feet were permitted by the state for beneficial use in 2010. Approximately 81% of the permitted acre-feet of water is used for power generation and returned to the river. By evaluating the inflows and permitted acre-feet for beneficial use it is clear that the people of North Dakota use only a small portion of water that flows

unfinished irrigation projects, including those associated with the Garrison Diversion project.

The ongoing development of this policy has included many public meetings between the Corps and North Dakota residents, yet it seems that the Corps does not recognize that the flows of the Missouri River belong to the state.

# Water Balance In Lake Sakakawea



Through the ND Constitution, the State of ND owns the natural flow of water in the Missouri River. ND only uses a small fraction of this water, and it should not be considered as surplus water.

In February 2013, the Corps lifted its moratorium, which had been in place since 2010 on new real estate easements around Lake Sakakawea, which had blocked access to new water withdrawals around the lake. They have also recently announced that two industrial companies have entered into surplus water agreements. Fees are not yet being mandated on these agreements until a rule or national policy is developed.

The fathers of North Dakota's Constitution were prudent and had the foresight to protect the state's water resources for beneficial use by its people. Yesterday, today, and for years to come, the natural flows of the Missouri River rightfully belong

to the people of North Dakota, and all citizens should work hard to preserve these rights that are being jeopardized in the proposed water surplus policy fees being considered by the Corps. Understanding this new policy and the potential impact on water users in North Dakota is paramount. While fees are not currently being charged for water use, if this policy passes, it has the potential to increase the cost of water to not only industrial users, but also municipalities and rural water suppliers who have to cross

Corps of Engineers property to access their water supply from the Missouri River.

If Major John Wesley Powell were here today to see this most recent dispute over Missouri River Water, he would most certainly advise the state and its citizens to stand their ground. North Dakota's water resources should indeed remain the property of the state. This concept – since the Constitutional Convention, is not new, nor is it negotiable.



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