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Water fee plan could make its way to South Dakota lawmakers

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WATERTOWN, S.D. -- Some water conservation districts in South Dakota are backing proposed legislation that would charge a fee to water users statewide to help raise money for projects.

"It would basically assess a 5-cent fee for every 1,000 gallons used and would apply to public water supplies and rural water systems," said Jay Gilbertson, manager for the East Dakota Water Development District.

It's estimated \$2.5 million a year would be generated from the fee to be spent on projects statewide, he said.

Currently, each county conservation district has its own funding mechanism, with some receiving money from local county commissions and others getting nothing at all, said Gilbertson.

Angela Ehlers, executive director of the South Dakota Association of Conservation Districts, said the idea of a user fee has been debated by the board in the past. But this marks the first time a proposal will be submitted to lawmakers, she said.

The organization sees the plan as essential to support needed projects, said Ehlers, of Presho.

"We know that there needs to be a statewide funding source for conservation and water quality projects," said Ehlers. "Property tax is not an option. The user fee would apply to all metered water in the state."

Private wells and agricultural irrigation systems that don't have a metering system would not be charged a fee, she said.

Ehlers said the Upper Big Sioux Water Project District was an example of how funds from a user fee could be put to good use.

"They get a lot of federal money, but there's always a local match required," she said, adding that the local match can be as much as 40 percent to 60 percent of the cost.

"The biggest use of the money would be to help (leverage) that for more federal money."

Geoff Heig, general manager for Watertown Municipal Utilities, said he sees the value of conservation projects but doesn't think a user fee is the right approach.

"We're very leery about a tax on water," said Heig. "Water is not subject to sales tax because it is considered a needed commodity and this would just be a pass through (to customers) -- so I would say it would be similar to a tax."

Heig said his department and other city and county entities already support conservation projects.

"Having a required tax is something we'd be very concerned about. We just think it would be better to find a different source of funding."

Summary of South Dakota Water Laws and Rules

Prepared by Water Rights Program Department of Environment and Natural Resources

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The following is a summary of South Dakota water laws and rules. This summary is provided as a service of the Water Rights Program, Department of Environment and Natural Resources for the purpose of introducing the public to the water rights laws of South Dakota. Please note, this summary is not a substitute for the South Dakota Codified Laws or Administrative Rules of South Dakota.

- 1) Water in South Dakota is owned by the people of the state and not by private individuals. The right to use water may be obtained under State Law.

Reference: SDCL 46-1-1, 46-1-3, and 46-5-5.
- 2) The first in time (senior priority) is the first in right, except for individual domestic use.

Reference: SDCL 46-2A-9, 46-2A-12, 46-4-1, 46-4-2, 46-5-4, 46-5-7, 46-5-8, 46-5-34, 46-5-34.1, and 46-6-3.
- 3) Domestic use of water takes precedence over appropriative rights.

Reference: SDCL 46-1-5, 46-1-6(7), and 46-1-6(14).
- 4) The seven member Water Management Board regulates water use, approves and denies permits, validates vested rights, cancels water right permits or rights, and establishes ordinary high and low water marks for lakes as well as lake outlet elevations.

Reference: SDCL 1-40-15, 43-17-21, 43-17-23 thru 43-17-25, 43-17-28, 46-2-9, 46-2-11, 46-2A-7, 46-2A-8, 46-2A-16, 46-4-2, and 46-5-8.1.
- 5) The following domestic uses do not require a water right permit:
 - a. Domestic use of water from other than a common water distribution system that does not exceed 25,920 gallons per day (gpd) or a peak diversion rate of 25 gallons per minute (gpm) for:
 1. Individual farm or ranch use including livestock water;
 2. Individual household use for drinking, washing, sanitary, culinary, and other ordinary household purposes; and

3. Irrigation of a noncommercial family garden, trees, lawn, shrubbery, or orchard that is no larger in area than one acre. Lawn, tree, and garden watering within a city, town, or from other common water distribution systems is covered by the system water right.

Note: Drip irrigation systems for noncommercial purposes and not exceeding 18 gpm do not need to be permitted even if the irrigated area exceeds one acre.

- b. Domestic use of water from other than a common water distribution system that does not exceed 18 gallons per minute (gpm) for:
 1. Uses in schools, parks and other public recreation areas;
 2. Geothermal heating or cooling of a single household. Most heat pump installations for household heating and cooling should not require more than 5 to 10 gpm; and
 3. Noncommercial on-farm alcohol production.
- c. Water distribution systems (e.g. towns, rural water systems, subdivisions, and mobile home parks) that do not pump more than 18 gpm.

Reference: SDCL 46-1-6(7), 46-5-50 thru 46-5-52. Water Management Board Rules 74:02:01:01 and 74:02:01:03.

6) Dams or dugouts on dry draws and nonnavigable watercourses.

- a. Dams or dugouts storing 25 acre feet or less of water located on a dry draw or on a nonnavigable watercourse can be constructed without a water right permit provided a location notice is filed. However, the dam may not be constructed if it changes the course of the water, interferes with vested rights, or wrongfully floods land owned by others.
- b. The owner of a dam described in 6a must file a location notice with the county Register of Deeds and the Water Management Board. Filing a location notice avails the owner of the rights provided in Chapter 46-4 including establishment of a priority date. The \$10.00 filing fee is set by SDCL 46-2-13(1).

Note: Water Management Board Safety of Dams Rules Chapter 74:02:08 apply to dams that are 25 feet or more in height (top of dam) or that store more than 50 acre-feet of water (maximum storage to top of dam.)

Beaver dams - SDCL 46-5-1.2 provides that no person owning land through which a watercourse passes may prohibit the removal of obstructions built by beavers in a watercourse, if the beavers have obstructed or interfered with the flow of water through the watercourse in a manner that floods land belonging to others or impairs existing water rights.

Reference: SDCL 46-1-6(8), 46-4-1, 46-4-1.1, 46-4-3, 46-5-2, and 46-5-8. Water Management Board Rules ARSD 74:02:01:03.

7) Except those water uses described in 5 and 6, all uses of water require a water right permit pursuant to procedures in Chapter 46-2A. Water uses supplied from a water distribution system do not need a separate permit. Examples of uses which require a permit are:

- a. Cities, towns, rural water systems, mobile home parks, subdivisions, and other common water distribution systems that pump more than 18 gpm. Those systems not pumping more than 18 gpm that may expand and increase pumping above 18 gpm, should obtain a water right permit to establish a priority date.

Note: Certain water distribution systems that do not pump more than 18 gpm may still be subject to compliance with Safe Drinking Water Standards. SDCL Chapter 34A-3A. Water Management Board Rules Chapter 74:04:05.

- b. Domestic use for farm, ranch, household, and livestock use from other than a common water distribution system in excess of either 25,920 gpd (18 gpm continuously for 24 hours) or 25 gpm.
- c. Any well that is allowed to flow more than 18 gpm.
- d. Any dam or dugout on a dry draw or nonnavigable watercourse impounding more than 25 acre feet.
- e. Any dam constructed for any purpose on a stream considered navigable.
- f. Irrigation of more than one acre.
- g. Commercial use, even less than 18 gpm, when supplied from other than a common water distribution system to a truckstop, tourist attraction, eating, drinking, or lodging establishment, commercial campground and any other business. An existing business without a water right has no right to the use of water. The commercial user without a water right is not entitled to receive protection in the event of well interference by a new or future user who has a water right. The new user with a water right will have the senior priority over an existing user without a water right.
- h. Industrial, manufacturing, gravel washing and mining uses when supplied by other than a common water distribution system. Temporary water permits may be issued for temporary short term projects. See number 13.
- i. Geothermal use of any amount of water from other than a common water distribution system, for businesses, churches, schools, or any other building, except for individual homes using 18 gpm or less.
- j. Any use by a school, park, rest area or other public recreation area in excess of 18 gpm when supplied from other than a common water distribution system.
- k. Any use by a hospital, nursing home or church when supplied by other than a common water distribution system.

Fees for permit applications are set by SDCL 46-2-13(2).

A person who applied water to a beneficial use for works constructed prior to or under construction as of March 2, 1955 (surface water) or February 28, 1955 (ground water), may qualify for a vested right pursuant to SDCL 46-1-9 or 46-6-1, if that vested water right has not been forfeited or abandoned. Vested water right claims may be filed or the chief engineer may require vested water right claims to be filed pursuant to SDCL 46-5-49 or 46-6-2.

Reference: SDCL 46-1-3, 46-1-6(3), 46-1-9, 46-1-15, 46-5-1.1, 46-5-6.2 thru 46-5-6.8, 46-5-8.2 46-5-9, 46-5-10, 46-5-49 and 46-6-2. Water Management Board Rules ARSD 74:02:01:03.

- 8) After approval of a water right permit, the permit owner has five years to complete any construction. The owner then has an additional four years to put the water to beneficial use.

A water right permit may be amended to extend the time for completion of construction or the time to put the water to beneficial use. The extension may be granted on account of delays due to physical or engineering difficulties, due to operation of law, or due to exigent circumstances identified by the Water Management Board. An application to amend a permit to extend the time for construction or the time to put the water to use needs to be made prior to expiration of the time period to be extended.

Reference: SDCL 46-2A-1(2), 46-2A-8, and 46-5-26.

- 9) An existing water right permit or right may be amended. Amendment examples are: to change the use of water, to change place of use, to extend time for construction beyond five years, to change diversion points or to add diversion points. An amendment can not be granted to increase the rate of diversion or volume of water appropriated under the original permit or if an existing water right will be impaired. An application to increase the rate of diversion or volume of water will be treated as a new application and will be assigned a new priority date. The location of an existing diversion point may be moved or additional diversion points may be added without application or publication, if:

- a. The water source remains unchanged;
- b. No additional water is appropriated;
- c. If for irrigation purposes, no new land is irrigated; and
- d. The Chief Engineer makes a finding that the potential for interference with existing diversions is not increased.

Reference: SDCL 46-2A-1(2), 46-2A-12, 46-5-13.1, 46-5-30.4, 46-5-31, and 46-5-35.

- 10) Notice of any sale, grant, lease, conveyance or other transfer of a water right permit or right must be filed with the Chief Engineer of the Water Rights Program within 90 days. No assignment of a permit or right is binding, except upon the parties thereto, unless filed for record in the Water Rights Program.

Reference: SDCL 46-5-30.3 and 46-5-32.

- 11) The following entities may reserve water for expected future needs pursuant to procedures in SDCL 46-2A:

- a. State institution;
- b. Municipality as defined in SDCL 9-1-1;
- c. The South Dakota conservancy district or water development districts as defined in SDCL 46A-2-4;
- d. Water user district as defined in SDCL 46A-9-2;
- e. Nonprofit rural water supply company as defined in SDCL 10-36A-1;
- f. Sanitary district as defined in SDCL Chapter 34A-5;
- g. Irrigation district as defined in SDCL 46A-4; or
- h. Water project district as defined in SDCL Chapter 46A-18.

Approval of an application to appropriate water for future use is a reservation of a definite amount of water with a specific priority date. A future use permit does not grant authority to construct works or put the water to beneficial use. An additional application is required to construct works and put reserved water to beneficial use. The fee for a future use application is 10% of the usual fee for an application to construct works and put water to beneficial use.

Future use permits are subject to review by the Water Management Board every seven years. If the future use permit is allowed to remain in effect after the seven year review, an additional 10% fee is required.

Reference: SDCL 46-2-13(2), 46-5-38, and 46-5-38.1.

- 12) Flood control permits are required pursuant to SDCL 46-2A for facilities constructed on a watercourse to control flooding. Emergency facilities may be constructed without a permit. However, the Chief Engineer of the Water Rights Program must be promptly notified. Flood control permits are not required for flood control facilities constructed on dry draws.

Reference: SDCL 46-2A-11, 46-5-47, and 46-5-48.

- 13) Temporary water permits may be issued by the Chief Engineer when limited amounts of public water are needed on a temporary basis. For example, permission may be granted to use water for highway and other construction projects and exploration drilling. A temporary permit is not valid after December 31 of the year in which the permit was issued and, under certain circumstances, a temporary permit may be rescinded. In addition, a temporary permit is temporary permission to use public water and does not grant any water rights for the temporary use.

Temporary permits may be granted to use water from public lakes, dams, and streams or privately owned dams, dugouts, and wells. Approval of a temporary permit does not grant access to the water. Water may be obtained from municipalities and other water distribution systems without a temporary permit.

Reference: SDCL 46-5-40.1. Water Management Board Rules ARSD 74:02:01:32 thru 74:02:01:34.02.

- 14) All flowing wells must be controlled by the owner to produce only the amount of water needed and to prevent waste of water.

Reference: SDCL 46-2-18, 46-6-10, 46-6-14, 46-6-20, 46-6-21, 46-6-29, and 46-6-30. Water Management Board Rules ARSD 74:02:02:11.

- 15) When the owner of an existing well constructs a replacement well and does not plan to use the old well, the old well is considered abandoned and must be plugged. Other abandoned wells must also be plugged. If an old well is not to be abandoned or will be used, the well must still be valved and controlled, if flowing, or sealed and capped so that no leaking occurs either underground or at the surface.

Reference: SDCL 46-6-18 and 46-6-27.

- 16) A well driller must be licensed to drill water wells in South Dakota. The driller is required by law to file a copy of a well construction report with the Water Rights Program within 30 days of completion of each well.

Reference: 46-2A-13, 46-6-9, and 46-6-11.

- 17) Any person who performs work for compensation in the repair of wells or as a well pump installer must obtain either a well driller's license or a well pump installer's license.

Reference: 46-2A-13 and 46-6-9.2.

- 18) South Dakota Water Laws do not allow the "mining" of ground water. "Mining" occurs when the quantity of water pumped annually from a ground water aquifer exceeds the estimated annual recharge to the aquifer. There are a few areas in South Dakota where additional ground water right permits are not being approved for this reason. A limited exception to "no mining" is made by SDCL 46-6-3.1 for water distribution systems. The Water Rights Program maintains more than 1,600 observation wells to monitor ground water levels.

Reference: SDCL 46-2-14 and 46-6-3.1.

- 19) Water right permits can be cancelled for nonconstruction. However, the Board may reinstate any water right permit with a priority date after March 31, 1977, within three years after expiration of the original construction period if unappropriated water is available. A new priority date is assigned to a reinstated permit. A water right permit or right can be lost for any of the following three reasons:

- a. Abandonment - The water right permit or right owner has no intent to use water and abandons its use. Once a water right permit or right is abandoned, it can not be reclaimed under the original permit or right.
- b. Forfeiture - Occurs by operation of law if water is not used for a three year period without legal excuse. A "legal excuse" would include, generally, the lack of water, but may include other reasons. Once a water right permit or right is forfeited, it can not be reclaimed under the original permit or right.
- c. A third violation of a condition of a water right permit or right.

Reference: SDCL 46-1-12, 46-2A-8.1, 46-5-36, 46-5-37, and 46-5-37.1. Water Management Board rules ARSD 74:02:01:36 thru 74:02:01:41.

- 20) The Water Management Board establishes ordinary high water marks (OHWM), ordinary low water marks (OLWM) and lake outlet elevations for public lakes.

State law provides that all navigable rivers and lakes are public highways within 50 feet landward from the water's nearest edge, provided that the outer boundary of such public highway may not expand beyond the OHWM and may not contract within the OLWM. Thus, the public has the right to use a strip of land up to 50 feet wide below the OHWM beginning at the water's edge or the OLWM. Further, while the public may use the 50 foot strip of land for only "public" purposes, the private adjoining landowner may use the land for any purpose not inconsistent with the rights of the public.

The meander line is a survey line and is usually not a property line nor is the title of an adjacent landowner limited to the meander line, except when the land title conveyance clearly states that the meander line is the property line. Subject to the preceding exception, the meander line defines neither the boundary of a lake or stream nor the extent of land area owned by the adjacent landowner. The meander line was established during early government surveys and used to determine the acres of land subject to sale.

Reference: SDCL 43-17-1 thru 43-17-4, and 43-17-20 thru 43-17-30.