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## WESTERN STATE WATER USE FEES

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by

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### Introduction

The West has changed. It is no longer what it once was, and contrary to most western movie scripts, it was won with the shovel, and not the six-gun. Settlers diverted local rivers and streams to water their stock and their fields. Later, massive water storage and diversion projects were built to carry rain and snow farther and farther from where and when it fell. While ranchers and farmers still use most of the water in the West, the people and the water are moving to the cities.

During the settlement of the West, water allocation required only the diversion and beneficial use of the resource. State water law generally sought to protect the rights of those "first in time" from infringement by subsequent water users. Decisions with respect to new consumptive uses focused almost exclusively on whether or not there was water available, and whether or not the proposed use was beneficial, as defined by custom or by statute. This approach provided social and legal stability and certainty, which was the foundation for growth and progress.

Water allocations decisions now require much more than the application of hydrologic principles and probabilities. Western state water management agencies are faced with an ever increasing array of new demands for the use of a scarce resource. Legal doctrines and federal and state statutes have also matured, changed and multiplied. The effects of water use on water quality and the environment must be considered. State engineers are now asked to weigh the public interest, and they are instructed to protect the public trust. State water management decisions are much more complex than in the past, and the opportunity costs related to different water uses are more important.

We have met our most immediate needs for drinking water, agriculture, power, and flood control. Once pioneers fought to survive; now their great-grandchildren worry more about their quality of life. Careful water management is essential to maintaining and improving our quality of life in the West. While the value of water is hard to measure, it is clear that its value is increasing, as traditional uses remain important and new uses multiply. In this light, more and more states are

considering levying fees for various water uses and related state services. Such fees may be particularly troublesome to those users who have become accustomed to the "free" use of water resources.

In December 1993, the Western States Water Council circulated among its member states a questionnaire regarding fees imposed by the states for the use of water and related services. The summary that follows presents general findings and conclusions. Also, attached is a matrix presenting various types of existing water use fees imposed by states. A more detailed report and comparison of specific fees is planned.

### **Water Use Fees**

As used herein, state water use fees are defined as fees assessed by and paid directly or indirectly to the state for the use of surface or ground water resources or any state government services related to such use (as authorized by statutes and rules, or imposed by administrative decisions). The survey addressed fees administered by state water resources planning and development agencies and state agencies handling water rights administration and adjudication.

The survey did not address state fees imposed under state water quality monitoring and protection programs, nor state drinking water protection programs. Water service fees assessed to recover capital and operation and maintenance costs incurred by the state in the financing or construction and operation of water storage and delivery projects were also excluded from the survey.

State water use fees are categorized as: (1) **actual use fees** for the diversion, withdrawal and consumptive or non-consumptive use of water that are assessed and collected on a periodic and recurring basis; (2) **administrative fees** for government services related to water use, such as one-time application, permit, license or research fees; (3) **enforcement fees and penalties** set by states to encourage compliance with state laws and administrative rules.

### **General Findings**

Few states have anything resembling an actual water use fee that is recurring and based on the quantity of water used. Among WSWC member states, only Arizona's ground water pumping fee would qualify. Arizona may collect up to \$5 per acre-foot for ground water pumped from active management areas (which cover major parts of the state). This money may be used as follows: \$1.00 to fund up to half the cost of administering the program; \$2.00 to fund various conservation assistance and augmentation programs; and after the year 2005, \$2.00 to purchase and retire agricultural lands, if necessary to meet safe yield targets. Alaska and South Dakota have unsuccessfully tried to enact legislation authorizing actual water use fees.

Though not WSWC member states, Kansas and Minnesota do have actual water use fees. Kansas charges three cents per thousand gallons of water for municipal and industrial use, as well as

stockwater for feedlots. These and other fees help fund the Kansas state water plan. Similarly, Minnesota charges a fee per thousand gallons of water used for a broad array of purposes.

A few western states have authorized annual fees for different types of water use or related services, but they are not generally based on the volume of water used. Several states assess fees to pay for watermasters or stream patrols to ensure water users comply with their conditions of use. Alaska charges an annual water right administration and use fee.

Alaska charges \$50 a year for the administration of water rights, and the fee helps fund related programs and staff positions. This fee was authorized by the legislature after a comprehensive water use fee for most purposes, based on volume, was rejected. Alaska's recent imposition of this annual administrative fee has led to the relinquishment of a number of water rights, representing a substantial amount of water, that were apparently unused or underused. Moreover, in collecting the new fee, valuable information has been gathered on current users and uses, and the state's files have been updated.

Alaska, Colorado and Nevada have authorized, but not yet imposed, fees on the export of water out-of-basin or out-of-state. Nevada charges an annual fee for surface water storage.

Most state water use fees are one-time application or filing fees. Every state charges an application or filing fee for the appropriation of surface water, and most have similar fees to appropriate ground water. However, ground water use does not require a state-issued permit in California, Texas, or outside of active management areas in Arizona. Most states also charge a recording fee, and levy fees for extending conditional use permits (covering the period of time within which water must be put to beneficial use) or for processing applications to change the point or nature of the use of a water right. Many states also have fees for advertising applications, amending applications, reviewing proof of beneficial use, or making temporary changes in use. A few have protest filing fees and research fees. Several charge a fee for the adjudication of water right claims.

Most fees are flat fees, although some are graduated based on the amount of water to be used, or the cost and complexity of the required administrative action. In addition to the types of fees mentioned above, most western states also charge for required safety and other reviews of project plans. A number of states also assess fees for dam safety site inspections and monitoring programs. Over two-thirds of western states charge well driller registration or licensing fees. A number of other fees are assessed for state services specifically related to ground water use. Of note, five states have set fees for ground water recharge and recovery projects. A few states have also set administrative fees for hydroelectric uses, and others for permits for weather modification/ precipitation management activities.

While the cost of providing state services is increasing, opportunities to increase general funding is limited, leading to funding shortages and rationing of services (permitting backlogs). Many state water management agencies are struggling to provide traditional services as limited general funds are increasingly allocated to more high-profile needs. The state of Washington's water program is in the midst of a crisis following the failure of a fee proposal to replace general fund appropriations that were severely cut by the legislature. The resulting reduction-in-force (RIF) took

two-thirds of the state's permitting staff, which may extend by years the time required to address an already serious backlog of unprocessed permits.

Fees now fund or offset only a small portion of the overall cost of state water management activities. Usually less than 10% of the cost of overall state water management programs are covered or offset by related fee revenues. The actual percentage varies by state and by program. However, fees may fund a substantial share of the cost of specific programs (25-40%), such as dam safety reviews, watermaster services, and well driller licensing. It appears fees finance most of the cost of regulating well drillers.

Some fee revenue is earmarked for revolving funds or accounts, but most is returned to the general fund or a special fund and must be appropriated prior to use by state water management agencies. This traditional arrangement ensures legislative oversight of expenditures and may be fiscally responsible. However, it is also an obstacle to efficient resource management as there is no guarantee that the fees levied on water users will be spent for their benefit or the benefit of the resource.

Public acceptance and political feasibility are major factors in the successful establishment and application of water use fees. Water users are more likely to support the imposition of fees for water use and related services if they are clearly earmarked and provide direct benefits to those paying the fees and are not diverted to the general fund. Mandatory fees are the most objectionable, while fees for voluntary actions initiated by applicants are more acceptable.

The primary interrelated purposes for water use fees are to increase efficient resource allocation, encourage conservation and raise revenue. It is important that all users pay for the benefits they receive in order to maximize the efficient use and allocation of scarce water resources. Reasonable use fees may also be used to recover state water management costs, compensate the state for the private use of a public resource, and promote conservation and the recognition of the value of water. By ensuring users are required to pay for the water and related benefits they receive, states can encourage efficient water use and discourage waste. However, fee systems may need to use price differentials to avoid or reduce any inequities that may result from the imposition of fees.

Federal immunity granted agencies (and tribes) from most or many state fees is a serious problem that leads to inefficiency and creates inequities. In the past, federal agencies have been more likely to pay application and permit fees, while claiming immunity from fees based on actual use. To the extent there is a federal benefit from the use of state resources, fees are appropriate to recover state costs, to encourage conservation, and to promote the efficient allocation of limited water resources. Moreover, equity may require that federal interests pay use fees. For example, the U.S. Supreme Court's recent decision holding federal agencies are not subject to Idaho's filing fees in its Snake River basin general adjudication creates an inequitable burden for the remaining water users and threatens the state process.

Late fees and penalties increase compliance. While late filing and reporting fees are common, most states rely on administrative or court orders, and not monetary penalties, to ensure compliance with substantive legal requirements.

### **Advantages of State Water Use Fees**

Use fees promote more efficient resource allocation. Use fees are an incentive for water conservation. Moreover, fees may help encourage water marketing opportunities or the relinquishment of unused rights (as in Alaska). Use fee financing may also promote the design of economically efficient state water investment programs and services. Fees and related revenues may also be used to encourage conjunctive use and/or other objectives related to efficient resource use. Moreover, user fees may help redress inequities caused by negative externalities (i.e., when and where some of the costs of an individual's use of water fall on other users or on the public). Some negative externalities might include pollution from agricultural runoff, fish and wildlife losses due to stream diversions, increased pumping lifts as ground water aquifers are mined and water tables decline, and negative impacts on recreation related to unstable reservoir levels and releases.

Use fees may provide more funding for state programs with greater flexibility than legislative appropriations. Fees may be used to supplement or replace general funds, eliminating competition for scarce state monies. Further, state water use fees may give administrators greater flexibility to design and implement more effective programs. Use fees can help determine project and program priorities. Use fees may also be used to capitalize revolving development funds.

Important information may be gathered as a product of the collection of use fees. Information on water uses and water users may be very valuable in understanding existing patterns of use, planning for future development, and designing appropriate public policies.

### **Disadvantages of State Water Use Fees**

The authority and/or political support to levy water use fees at the state level may not exist. The state may not have the statutory authority or political support to levy fees. Further, constitutional restrictions sometimes limit a state's ability to require fees. The public may well view fees as just another tax, and oppose their imposition. Taxpayers may believe that they are already paying for state water-related services through existing taxes. Another concern may be any lack of accountability should revenues be available for expenditure without some type of legislative or other oversight and control.

Administrative costs may make the use of fees impractical. Data on existing water use that may be necessary to evaluate the feasibility of a state fee system may not be available or may be expensive to gather. Start-up costs (such as metering) and monitoring costs may also be high. Moreover, users may fear metering and monitoring of their water use will lead to regulation or the relinquishment of unused water rights. Collection and enforcement of fees are necessary program costs, and may increase unacceptably to the extent water users refuse to comply and cooperate. The

overall costs imposed on users and state agencies must be considered and may make the use of fees impractical.

Fees may create unacceptable inequities among some users. Water use fees, particularly the cumulative impact of a number of fees, may impose an inequitable burden on lower income "consumers." Fees may perhaps be levied and duplicated at various levels of government. Fees that are considered to be inequitable may also discourage compliance and lead to increased illegal activity. Moreover, some types of fees may discourage water users from seeking protection of their rights, such as when a fee is charged to protest a proposed permit that may harm an existing water user. Fees may also create a competitive disadvantage among users of water for conflicting purposes (e.g. agricultural versus municipal use) or between water users in different states.

Revenues tied to water use may vary widely from year to year. State agencies that rely on use fees may face the same problems as utilities that finance operations from water sales. Revenues may fluctuate unacceptably with changing demands due to the weather or other unpredictable factors. Maintaining program stability, given staffing and other fixed costs, may make it impractical to rely on undependable fee revenues (though adjusting fees may be possible).

### **Conclusions**

The 1994 WGA work plan, approved last June, called for the preparation of "recommendations for developing self-generated financing for water management." The following conclusions, together with the above findings, were derived from the experience and responses of many state water management agencies. They provide a guide for the consideration of water use fee proposals, but are not necessarily an exhaustive list of every important factor. Hopefully, these conclusions will be useful as western governors review water management program financing.

Water rights administration and other costs incurred by state government in managing the use of public resources, for private gain, may be appropriately offset by targeted user fees. However, state agencies need clear delegations of legislative authority and more flexibility to impose fees for their services.

Before imposing fees, state agencies should rigorously review the nature of their work, the services they provide, related base-line and incremental costs, and then set appropriate fees. Use fees should be based on the cost of service and the benefits provided (not profit or market prices). Fees should generally be in proportion to use, and collected in a manner that encourages compliance. Fees should be sufficient to accomplish the intended purpose and cover administrative costs. Fees should also be indexed for inflation.

To facilitate public acceptance, a User Fee Advisory Council could be established to help direct the use of fee revenues in order to increase public acceptance and support. Moreover, fee proposals should be subjected to some type of public review. Public hearings and or information meetings may be critical to public acceptance of fee proposals. Mandatory fees are most objectionable and would likely need to be set low initially. Higher fees are more acceptable for

discretionary or voluntary actions initiated by water users. Any fee system should probably be phased in over time, to allow water users to make adjustments.

The application of state water use fees to federal agencies and Indian tribes, as well as the interstate imposition of user fees (where water is diverted in one state for use in another) are issues that need further consideration.

### **Recommendation**

Western states should carefully examine the advantages and disadvantages of existing and potential water use fees and consider appropriate measures to authorize the use of fees to encourage the most efficient and equitable use of state water resources.