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**Eastern South Dakota
Water Conference
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**STARTING A PRIVATE NEW IRRIGATION PROJECT: EVERYTHING
YOU DID NOT WANT TO KNOW BUT SHOULD KNOW ABOUT
THE LEGAL STEPS**

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INTRODUCTION TO SOUTH DAKOTA WATER LAW

A Mix of Riparian Rights and Prior Appropriation

Water rights in the United States are allocated primarily in one of two ways: a riparian rights system or a prior appropriation system. Each individual state can determine which system to use.

Riparian rights stem from the English common law and generally provide that a property owner with access to a source of water has the right to make reasonable use of that water. Though the user may make reasonable use of the water, they do not own it. Their use cannot interfere with other landowners who are also claiming riparian rights. The riparian rights system is more commonly used in the eastern part of the United States.

The doctrine of prior appropriation can be described as “first-in-time, first-in-right,” or “first-come, first-served.” In a state recognizing the prior appropriation system, the first beneficial use of water will maintain their rights to use that amount of water despite claims that are made at a later time. This system is generally used in the arid western regions of the United States.

South Dakota’s water law, reflecting its central geographic location, is in many ways a conglomeration of the two systems.

General Surface and Ground Water

There are two classifications of water: surface and groundwater. Both are wholly-owned by the people of the state. When an individual is using water, it can be categorized as a domestic use or a use requiring a permit.

Domestic use is primarily managed under a riparian system and does not require a permit. Domestic use is limited to 25 gallons per minute at any time, or a maximum average use of 18 gallons per minute over a 24 hour period. The water may be used for ordinary household purposes, irrigation of a noncommercial family garden, trees, shrubbery or orchard not larger than one acre, livestock care, or one of a few other noncommercial uses. Additionally, depending on the circumstances, certain limited riparian uses which began prior to 1955 or 1907, could remain governed by riparian principles today.

All uses not fitting the various aforementioned exceptions require a permit granted according to the doctrine of prior appropriation (first-come, first-served). However, additional priority will be given to a domestic use of water. A person or entity may obtain a permit for commercial use of the water. This permit will allow perpetual access for the specified water, but the person or entity will not have any ownership rights the water. Priority for use of permit rights is established by the date an application is filed. A permit can only be revoked if the water is not used, if more groundwater than can be recharged (refilled) is being used, or if more than was originally permitted is taken.

This is not to say that obtaining a permit will guarantee access to water. For example, South Dakota law requires that the permits for use of groundwater be capped at the amount of groundwater which may be “recharged” over that same year. The state

maintains test wells to ensure the accuracy of these measures. Seasonal fluctuations such as droughts will alter the amount of water which may be withdrawn. As such, access to water may be restricted in whole or in part to lower priority permit holders to ensure access for higher priority permits.

Finally, state law allows rural water systems priority access by permitting them to apply for water rights for future use without any present use requirement attached. The priority date given in these cases is the date the application is filed, rather than the date that the water is actually put into use.

Native American Lands

Federal law, including the Supreme Court case *Winters v. United States*, 207 U.S. 564 (1907), establishes priority for Native American water use determined by the date the reservation was established. The reservation is entitled to as much water as is necessary to irrigate any practically arable land. This priority is not lost due to non-use of the water.

Bureau of Land Management

In *Arizona v. California*, 373 U.S. 546 (1963), the Supreme Court extended federally- reserved water rights to all federally-reserved lands, not simply Indian reservations. This includes all land considered public land, such as: national parks, forests, wildlife refuges, recreation areas, reservations, military installations, and public oil shale withdrawals. The federal government has reserved the right to the minimum amount of water needed to fulfill the primary purpose of the land. For example, this is limited to timber and waterway stability in national parks or providing enough water to sustain agriculture on a Native American reservation. These rights are not lost for nonuse of the water, or for not putting the water to the “best use.” This is very different from regular water users in prior appropriation states, as they may lose rights for such reasons. The priority date of federally reserved water rights is the date that the land was withdrawn for public use. The McCarran Amendment (43 U.S.C. 666) allows for adjudication to determine the status of federally reserved water rights in state courts.

GROUNDWATER ISSUES

Groundwater is one of the most precious natural resources in South Dakota. It is a term of art, as well as a term of the science of hydrology, which refers to underground water as opposed to surface water. Due to the lack of dependable sources of surface water, rural residents and 85 percent of the public water supply systems in South Dakota rely upon groundwater for their source of water. South Dakota Department of Environment & Natural Resources, Ground Water Discharge Permits, *available at* http://denr.sd.gov/des/gw/GWDischarge/GW_Discharge_Permit.aspx. Because the groundwater is so widely used, in 1989, the South Dakota Legislature declared that the

pollution of South Dakota's groundwater “a menace to public health, welfare and the environment.” *Id.* Moreover, once groundwater is polluted, it is extremely difficult and expensive to clean up. *Id.* To ensure groundwater quality for present and future beneficial uses, the state has implemented a protection strategy for ground water that “promotes pollution prevention, the correction of existing groundwater pollution, and close control of limited degradation for necessary economic and social development.” *Id.*

Should South Dakota become more active in the oil patch developments, the state will need to address water’s intrinsic value, and plan for the proper management and use of groundwater in the oil patch equation. The use of ground water may, by rights, be used in large quantities in oil and gas development, as well as, exploration. Even though groundwater can be regulated, it is still a part of the private landowner’s property, giving the landowner rights. However, in most states and under case law the owner of mineral rights, that is the oil developer, is entitled to use or take the amount of groundwater that is “reasonably necessary” for the exploration and removal of those minerals, notwithstanding the landowner’s rights. Oil exploration and development companies are further entitled not only to construct water wells and draw from underground water sources, but they also have an implied right to make use of said water without liability.

An issue of growing concern to all parties involved is the considerable increase in water use required for modern drilling techniques, such as hydraulic fracturing. Coupled with limited water supplies, these techniques could bring about a transformation in access to groundwater for surface owners or communities. Additionally, it is the fresh, or potable water that is preferred in certain fracking procedures.

Since agriculture is a primary industry in South Dakota, particular attention must be paid to the relationship between farming and groundwater quality. In the production of oil and gas, discharges of wastewater in the form of brine are disposed through injection into wells. These wells are deep formations that are “geologically isolated from overlying freshwater aquifers.” John H. Davidson, South Dakota Groundwater Protection Law, 40 S. D. L. REV. 1,10 fn. 9 (1995). Even though injection wells are constructed with casing to prevent leaks, brine disposal can cause pollution. This is due to the “surrounding abandoned and unplugged oil and gas wells, and test holes that provide vertical pathways for injected brines to rise into overlying aquifers.” *Id.* Thus, in moving forward with an irrigation project, one must be mindful of these issues, in considering both the amount of water available for appropriation, as well as the quality of water that is available both in the present and for future use.

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A WATER APPROPRIATION RIGHT

Why is it needed?

- According to South Dakota Codified Law (SDCL) 46-1-3, all water within the state is the property of the people of the state but the right to the use of water may be acquired by appropriation as provided by law.

What is it?

- A water appropriation is when the state Water Management Board grants authorization to make a private, beneficial use of the state's water resources.
- Appropriations that the Water Management Board approves authorize use of either ground water or surface water.
- A water right permit is then issued either as a new water use or as a vested water right for an existing water use (predating March 2, 1955).

Who needs it?

- A permit to appropriate water is needed for all water uses in South Dakota except for certain domestic uses of water. However, even domestic use of water requires a permit if water use exceeds either 25,920 gallons per day or a peak pump rate of 25 gallons per minute. The following types of water use require a water right permit assuming the use is from a private water supply rather than a water distribution system. If supplied by a water distribution system using more than 18 gallons per minute, the water distribution system needs to obtain a water right permit on behalf of the system water users:
 - Commercial uses such as tourist attractions, truck stops, restaurants, campgrounds, motels, or any other type of business (see General Rule 74:02:01:01).
 - Industrial uses where water is used for processing, cooling, dewatering, etc.
 - Institutional uses such as churches, correctional facilities, etc.
 - Irrigation use
 - Municipal use (in excess of 18 gallons per minute)
 - Rural water system use (in excess of 18 gallons per minute)
 - Suburban housing development use (in excess of 18 gallons per minute)
 - Recreation use
 - Fish and wildlife propagation
- Thus, if one is interested in constructing an irrigation project a water right permit is needed.

HOW TO OBTAIN A PERMIT FOR AN IRRIGATION PROJECT

1. APPLICATION FOR PERMIT

- **File an Application for Permit to Appropriate Water for Irrigation** supplied by Chief Engineer of the Water Rights Program of the Department of Environment and Natural Resources, which **MUST** include:
 - Information:
 - (1) identifying the water source;
 - (2) the amount of water to be claimed;
 - (3) the diversion point locations;
 - (4) the annual period during which water may be used; and
 - (5) the type of use;
 - A map of the project showing: proposed location of diversion point, lands to be irrigated, names of the owners (if other than applicant), and other pertinent information;
 - The Application must be signed by one of the following: registered land surveyor, registered professional, or by any government employee who normally prepares maps as part of his assigned duties.
 - Application fee; and
 - Supplemental information, such as storage capacity of impoundment structures.
 - *Note:* The application process is the same whether the source is surface or ground water, except in the case of ground water the applicant may need to submit a well driller's test hole or well log.
 - The State's Chief Engineer may request that applicant complete a soil/water analysis if the Chief Engineer believes that a soil/water compatibility problem may exist.
 - *Note:* In most instances, completion of a soil/water analysis will be at the discretion of the applicant. However, the suitability of the acreage for irrigation may be raised at hearing, so completion of a soil/water analysis may also prevent unnecessary delays if your application is contested.
- The Water Rights Program also processes several other types of applications that may be necessary for particular irrigation projects, including applications to: 1) amend existing permits or rights, 2) reserve water for future use, 3) control flooding or modify watercourses and 4) claim vested water rights. The same procedure is used for processing each type of application.

- **Fees:** Fees must be paid in advance to the Department of Environmental and Natural Resources for filing and examining an application for a permit to appropriate water, to construct works and to put the water to beneficial use (including filing of proofs of publication, recording the permit to appropriate water and action on all other papers relating to the application up to and including issuance of the permit). The fees are as follows:
 - 500 dollars for the first 120 acre feet per year or fraction thereof, 250 dollars for the second 120 acre feet or fraction thereof and 100 dollars for each subsequent 120 acre feet or fraction thereof. If the water permit is denied, 75% of the fee shall be returned to the applicant.
 - For an application to appropriate 0.1 cubic feet per second or less, to change a diversion point or to add a diversion point with no new appropriation of water the fee is 100 dollars.
 - For filing and examining an application to appropriate water for future use, or maintain effectiveness of a permit for future use, is equal to 10% of the fee charged for an application to appropriate water, construct works and put the water to beneficial use.
- SDCL 46-2-13(2).

2. REVIEW OF APPLICATION

- Within 60 days of receiving a completed application, the State’s Chief Engineer must prepare, in writing, a recommended action to either: approve, deny or defer the application. SDCL 46-2A-2. It is at this time that the Chief Engineer may also schedule the application for hearing by the Water Management Board. SDCL 46-2A-2.
 - The Water Management Board is created by statute (SDCL 1-40-15) and is within the Department of Environment and Natural Resources. The Board is made of 7 members who are appointed by the Governor for a term of 4 years, with no more than 4 members allowed to be of the same political party. SDCL 1-40-15.
- The recommendation will include any “terms, conditions, restrictions, qualifications, quantifications, or limitations on perpetuity” which are deemed necessary to protect the public interest and related to matters within the jurisdiction of the Chief Engineer or the Water Management Board. SDCL 46-2A-2.
- **Criteria for Approval of Appropriation of Water:** In order for the Chief Engineer to recommend approval of the application, 4 criteria set out in SDCL 46-2A-9 must be met:
 - (1) There is reasonable probability that there is unappropriated water available for the applicant's proposed use;

- *Note:* SDCL 46-6-3.1 states, in part, that “no application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source.” SDCL 46-6-3.1 In Matter of Water Permit Application No. 7239-3, the Court determined that the Water Management Board must not only analyze existing, historic drawdown and recharge of the aquifer in question, but also must take into account how the applicant’s drawdowns will affect the recharge of the aquifer in making this determination. Matter of Water Permit Application No. 7239-3, Memorandum Decision, 13. However, as the Court pointed out “An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems.” SDCL 46-6-3.1.

(2) The proposed diversion can be developed without unlawful impairment of any existing rights;

(3) The proposed use is a beneficial use; and

(4) The proposed use is in the public interest.

- *Note:* The term “public interest” as it is used in this context is not defined by South Dakota law.

- *Note:* The review criteria for this permit process remains the same even if it has been a drought year, similar to the situation we are in now ((Watertown (S.D.) Public Opinion: Gov. Dennis Daugaard recently activated his drought taskforce in the wake of the drought that has gripped a large portion of our state. The latest U.S. Drought Monitor Map shows about 61 percent of South Dakota is in severe or extreme drought. The hardest-hit areas in South Dakota are in the southwest and the southeast). The number of applications have increased with the drought (and also due to corn/soybean prices). From January 1, 2012 through October 4, 2012 there have been 189 applications have been received.¹ Eric Gronlund, Water Rights Program, DENR.

¹ The following is the number of applications received for the past few years. This is based on the fiscal year which begins July 1st and ends June 30th and includes applications for all uses but the vast majority of applications to appropriate water have been for irrigation: FY 2010 – 89 applications; FY 2011 – 84 applications; FY 2012 – 151 applications; FY 2012 (July 1 through Oct. 4) – 97 applications. Eric Gronlund, Water Rights Program, DENR.

- *Note:* The DENR has issued orders to shut off more junior surface rights permits (based on date or priority) in roughly 3 or 4 basins,² including for Battle Creek, Keya Paha River, Whitewood Creek and a partial shut-off on the Big Sioux River. However, generally this is temporary and, in these instances, the DENR is usually able to contact these permit holders and allow them to start pumping again in 3 or 4 days. DENR understands the importance of these water rights permits to many of the applicants. As such, they are constantly monitoring levels (ARSD 74:02:05:07), while also continuously keeping in contact with the basins that have shut off orders to let them know when they can start pumping again. This is true as well for some of the more junior permits (issued in the 1980s), which have automatic shut off orders for August 10th of each year. On August 10th, the DENR will do an assessment to determine if there is enough water to allow junior permit holders to continue to pump should their need still be present. Often, because there is still a need, so the DENR will inform the permit holders who had to stop pumping water, that they may begin pumping again. (Eric Gronlund, Water Rights Program, DENR).

3. NOTICE PROCESS

- **Notice:** Following the Chief Engineer’s recommendation, a copy of the report and recommendation is mailed to the applicant. SDCL 46-2A-3. A copy of the same will be provided to anyone else upon request.
 - **Recommendation to Deny:** If the recommendation is to deny the application, the applicant must submit in writing to the Chief Engineer a statement of intent to oppose the recommendation at a hearing before the Water Management Board within 20 days of the date the recommendation was mailed. SDCL 46-2A-3.
 - If the applicant fails to submit a statement of intent to oppose the recommendation, it constitutes a withdrawal of the application. SDCL 46-2A-3.
 - If the applicant chooses to oppose the recommendation, the Chief Engineer will provide the applicant notice of the hearing to be published pursuant to the provisions of SDCL 46-2A-4.
 - *Note:* Between 2008 and July of 2012 only 1 application for a water rights permit was denied. Another application was withdrawn by the applicant upon receiving a recommendation for denial. On the other hand, in 2007 there were 27 applications that were denied. However, this was due to a deferred list of applications that were received from 2002 – 2007. During this

² A “basin” is “a natural or artificial land surface depression with or without perceptibly defined beds and banks to which surface runoff gravitates and collectively forms a flow of water continuously or intermittently in a definite direction.” SDCL 46A-10B-1(5)).

time, the DENR assessed the level of development in the aquifer in question. Ultimately, it was determined that the aquifer was deemed fully appropriated at that time and, as a result, the deferred applications were denied. Usually if the DENR is going to recommend a denial of the application, they will call the applicant and inform them of the likelihood of denial. Usually that person will just withdraw their application. Despite the above-described situation in 2007, recommendations for denial are rare (1 to 2% of the applications received). (Eric Gronlund, Water Rights Program, DENR)

- **Recommendation to Approve or Defer:** If the recommendation is to approve or defer the application, a copy of the notice to be published and the times when it is to be published are provided to the applicant along with the copy of the Chief Engineer's report and recommendation. SDCL 46-2A-3.
 - o Just as when the applicant files a petition opposing the states' denial recommendation, if the application is recommended for approval or deferral the applicant must publish the notice of the application pursuant to the provisions of SDCL 46-2A-4.
- **Publish of Notice:** The applicant is responsible for publishing the notice of application provided by the Chief Engineer. The applicant also must pay for the costs of publication. The notice is to be published in one official newspaper in each county where the water is to be diverted or used or where the project works will be located. SDCL 46-2A-4.
 - o The official newspaper is selected by the Chief Engineer.
 - o Notice of the application is also posted on the Department of Environment and Natural Resources website until final action is taken on the application.
 - o The publication must be made at least 20 days before the first day of the Water Management Board meeting at which the application is to be heard.
 - o No application can be considered and approved by the Board until proof of all required publications has been filed with the Chief Engineer.
 - o The publication must be published once a week for two consecutive weeks, and contains a brief description of the project, the recommendation of the chief engineer, and how to file a petition and participate in a hearing on the application should someone be interested in supporting or opposing.
 - **If the Application Is Not Opposed:** the Chief Engineer

can issue the permit without need for a hearing. SDCL 46-2A-23.

- It's about 2 months for the application to be processed.
- *Note:* Even if the application is not opposed, the Chief Engineer may still schedule a hearing if he believes the application presents important issues of public policy or public interest.
- **If the Application Is Opposed:** there will be a contested case hearing is scheduled for the state Water Management Board to consider the application and the petitioner's concerns.
 - To participate in a hearing on an application a written petition needs to be filed with the Chief Engineer and the applicant by the date specified in the published notice. An applicant does not need to file a petition. A petition to support or oppose an application may be informal but must include the following information:
 - (1) A statement describing your interest in the application;
 - (2) The reasons for opposing or supporting the application; and
 - (3) Your signature and mailing address or that of your legal counsel.
 - If a petition to contest the recommendation or to oppose the application is timely filed, the State's Chief Engineer shall provide notice of a board hearing pursuant to SDCL 1-26-17. SDCL 46-2A-23.
- **Service and Filing of Pleadings, Petitions and Motions:** Originals of all pleadings, including petitions to contest, petitions to intervene, and motions, must be filed with the Chief Engineer and served upon other parties, either personally or by mail. Service and filing by mail is deemed complete on mailing. SDCL 46-2A-6.
- *Note:* In Matter of Water Permit Application No. 7239-3, the Court determined that, while the Water Management Board must strictly comply with the method of serving notice, it need only "substantially" comply with the intent of the statute in the language used in the notice. Matter of Water Permit Application No. 7239-3, Memorandum Decision, 7-9.

4. HEARING PROCESS

- If an application for a water rights permit is opposed or if the Chief Engineer determines the application presents important issues of public policy or public interest, then a hearing before the Water Management Board will be scheduled.
 - The applicant or any person who has filed a petition to oppose or support the application may postpone the date of the hearing by submitting a written notice to the Chief Engineer requesting such postponement. Once the Chief Engineer receives the written notice he will reschedule the hearing for a date no more than 20 days after the original date scheduled. The notice must be filed at least 10 days before the published date for hearing. SDCL 46-2A-5.
 - The board is quasi-judicial in nature and will consider the evidence presented by all interested parties and by the Department of Environment and Natural Resources staff.
 - Contested case hearing may be very formal or informal.
 - Individuals may represent themselves or parties may be represented by legal counsel, present testimony and evidence to the board, call witnesses to testify, and cross-examine other parties or their witnesses.
 - The Board will consider all the evidence presented during any hearing, and then it will either: approve, modify, or deny an application. Alternatively, the Board may choose to delay making a final decision until receiving further information.
 - Following the decision, the Board's attorney will prepare "findings of fact, conclusions of law, and a final decision" for the Board and all parties to review. After a comment period on the proposed "findings, conclusions, and final decision," the Board conducts a hearing to adopt the findings, conclusions, and final decision. These "findings" provide a written record of the issues considered by the Board, the Board's responses and the reasons for the final decision.
 - Decisions of the Board may be appealed to Circuit Court and the State Supreme Court.
 - The "findings" adopted by the Board serve as a record of the issues the Board considered, as well as its responses and reasons for its final decision.

5. ISSUE OF PERMIT

- Upon approval, a water right permit is issued by the Chief Engineer on behalf of the Water Management Board.
- The permit includes information supplied on the application, any qualifications,

meaning operating conditions, attached or required by the Chief Engineer or Water Management Board, and the time periods during which the project must be constructed and water placed to beneficial use.

- **Time for Construction and Use:** SDCL 46-2A-8 provides the length of time allowed for construction of works necessary to put the water to beneficial use is 5 years from the date the permit is approved and an additional 4 years to actually place the water to beneficial use. SDCL 46-2A-8.
 - o The Board has discretion to approve any application for a lesser amount of water than requested by the applicant or vary the periods of annual use. SDCL 46-2A-8.
- A water right permit may be amended to extend construction period or the time period to place water to beneficial use, for a reasonable time, but only due to: 1) delays caused by physical or engineering difficulties, 2) operation of law, or 3) other exigent circumstances identified by the board. An application to extend the construction period should be filed prior to expiration of the current construction period.
- Priority date is also assigned to the permit based on when application was received.

6. LICENSE

- This licensing process is the final step in obtaining a water right.
- Notice of Completion of Works” form is also provided with permit, which must be filed with the Chief Engineer when the project is completed.
 - This form informs the Water Rights Program that your project is ready for an on-site inspection to determine if the works are safely constructed and comply with the requirements of the permit. After the investigation a license will be issued for your water use, and the water permit will become a water right.
 - If a "Notice of Completion of Works" is not filed, an on-site investigation will be completed following expiration of the 5 year construction period.

7. AMENDMENT

- An application may be filed to amend an existing permit or license. An existing permit or license may be amended for a change in use, a change in point of diversion or for other changes if the change does not: (1) unlawfully impair existing rights; (2) is for a beneficial use; and (3) is in the public interest. SDCL 46-2A-12.
 - A diversion point may be relocated from the permitted diversion point without publication if:

- (1) the water source remains unchanged;
- (2) no additional water is appropriated; and
- (3) no new land is irrigated
- An irrigation water right permit or right may only be transferred from an irrigation use to a domestic use or to a use within a water distribution system.
- An application to increase the rate of diversion or volume of water will be treated as a new application rather than an amendment to the original permit, and will be assigned a new priority date
- The procedure for processing an application to amend an existing permit or right is the same procedure used for new applications.

8. CANCELLATION AND SUSPENSION

- A water right permit may be cancelled for the following reasons:
 - (1) The project is not constructed within the authorized construction period;
 - (2) Failure to place water to beneficial use may result in cancellation due to either forfeiture or abandonment, or both;
 - Water must be placed to beneficial use at least once every 3 years. If not, all or any part of the water that is not used is subject to cancellation;
 - Legal excuses exist for not using water which suspend the period of nonuse of water. They are: 1) unavailability of water to satisfy a permit or right, 2) legal proceedings which prevent the use of water, 3) use of water under existing climatic conditions would result in a waste of water, and 4) participation in an in an acreage reserve or other federal production quota program.
 - (3) Violation of permit requirements;
 - In order for a permit or right to be cancelled, a hearing must be held by the Water Management Board.
 - The Water Management Board may, by order, suspend or cancel a water license or permit after a hearing finding that an individual licensee or permittee, or the agent or employee thereof, has violated any term of the license or permit. The Board may suspend the license or permit for a period of up to 1 year for the first violation; for up to 3 years for the second violation; and may cancel the license or permit for a third violation. SDCL 46-1-12.
- Any forfeited water reverts to the public and becomes unappropriated water, unless the source is fully appropriated.