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July 7, 2026

Thomas Mack
West Dakota Water Development District
402 Saint Joseph Street, Suite 6
Rapid City, SD 57701

Official Opinion 26-04

Re: Official Opinion Concerning SDCL Chapters 46A-2, -3A, and -3E.

Dear Mr. Mack:

In your capacity as Chair of West Dakota Water Development District's board of directors, you requested an official opinion from the Attorney General's Office on three questions, which are restated below as four.

Questions

1. What is the concise, operative definition of a "water resources project" relative to a water-development district's authority to fund projects under SDCL 46A-2-4(14), -3A-1.1, and -3E-7(2)?
2. Can a water-development district fund its own projects?
3. Can a water-development district fund projects (like dams, wells, and sanitation improvements) for private groups on lands not open to the general public?
4. How much are landowners required to contribute financially under SDCL 46A-3E-7(2)?

Short Answers

1. I cannot give you a definition different from the Legislature's, but I can help clarify it.
2. Yes, a water-development district can fund its own projects.
3. Yes, a district can fund projects for private groups on lands not open to the public.
4. In general, a landowner can be required to finance the part of a project that provides water for the landowner's use or that enhances the value of the landowner's property. But unless modified by contract, the cost of a project that a landowner is required to pay cannot exceed the value of the benefit received.

Facts

According to your request for an official opinion, for the last several years, the West Dakota Water Development District has engaged in dryland erosion-control projects on both public and private land. These projects consist mostly of planting ground cover and erecting sediment barriers. Projects are organized by one of the District's directors and funded principally by the District. The District also occasionally receives requests from private organizations (like homeowners associations) for water-development projects. The District's board of directors disagrees on the kind of projects it may conduct or fund. But no litigation has been commenced or contemplated at this time.

Analysis

1. **What is the concise, operative definition of a "water resources project" relative to a water-development district's authority to fund projects under SDCL 46A-2-4(14), -3A-1.1, and -3E-7(2)?**

The first question posed asks for a "concise, operative definition of 'water control project' relative to the district's authority to fund projects under SDCL 46A-3A-1.1 and 46A-3E-7[.]" Specifically, you asked about dryland erosion-control projects involving planting ground cover and erecting sediment barriers. This Office cannot provide you with a definition different from the Legislature's. However, the legislative history of that definition does help clarify its meaning.

As originally enacted in 1959, the terms “water resources projects” or “water resources development” meant “the facilities by which water is controlled, regulated or made available for use including the studies, investigations, plans, construction, operation or maintenance associated with such facilities[.]” 1959 S.D. Sess. Laws ch. 453, § 4, at 550.¹ So as originally enacted, the definition included two categories: “facilities” that control, regulate, or supply water; and studies, investigations, plans, construction, operation, or maintenance associated with such facilities.

The Legislature substantively amended this definition five times since 1959. In 1972, the Legislature added the language, “or the quality of which is protected and improved[.]” 1972 S.D. Sess. Laws ch. 241, § 2, at 293. This language expanded the “facilities” contemplated in category one to facilities that control, regulate, or supply water, or that protect or improve water quality.

The next amendment occurred in 1977, when the Legislature added the language, “contracts for the marketing of water service[.]” 1977 S.D. Sess. Laws ch. 371, § 1, at 643. This addition created a third category to the definition of “water resources project” or “water resources development.”

In 1979, the Legislature extensively amended the definition. First, the Legislature added an illustrative list with a qualifying clause to category one, specifying that “facilities” includes:

any wells, reservoirs, dams, intake structures, pumping stations, equipment, rights of way or easements, works or facilities, land and buildings or other real or personal property intended to control, regulate, drain, dispose of, pump, store, treat, purify, distribute, deliver, put into aquifers or water courses, or otherwise make available water for any beneficial use[.]

1979 S.D. Sess. Laws ch. 301, § 1, at 357.² Second, the Legislature expanded category two to include “debt service reserve funds, funds to provide capitalized interest and any costs incurred in connection with the issuance of obligations to finance any of the foregoing.” *Id.*

¹ South Dakota’s session laws from 1997 to the present can be accessed at <https://sdlegislature.gov/Session/Archived>. Session laws prior to 1997 can be accessed at https://sdsdl-montage.auto-graphics.com/#/customizeListView?listId=CustomizeEntityLists_97.

² This 1979 amendment alone accounts for roughly half the text of the statute in its current form.

Amendments in 1982 and 1984 brought final, minor additions. The 1982 amendment expanded the 1979 amendment's qualifying clause, adding to the illustrative list those facilities intended to "generate or sell hydroelectric power from projects which may include provisions for irrigation, municipal, rural, or industrial water supplies[.]" 1982 S.D. Sess. Laws ch. 313, § 2, at 547. And the 1984 amendment expanded category one to include facilities that reclaim water; expanded the illustrative list to include "water reclamation facilities" and "wastewater treatment facilities"; and expanded the qualifying clause to facilities intended to reclaim water. 1984 S.D. Sp. Sess. Laws ch. 1, § 61.

In its current form, the statutory definition of "water development projects" or "water resources development" means:

contracts for the marketing of water service or the facilities by which water is controlled, regulated, reclaimed, or made available for use, or the quality of which is protected and improved, including any wells, reservoirs, dams, water reclamation facilities, wastewater treatment facilities, intake structures, pumping stations, equipment, rights-of-way or easements, works or facilities, land and buildings or other real or personal property intended either to generate or sell hydroelectric power from projects which may include provisions for irrigation, municipal, rural, or industrial water supplies or to control, regulate, drain, reclaim, dispose of, pump, store, treat, purify, distribute, deliver, put into aquifers or water courses, or otherwise make available water for any beneficial use. The term includes the studies, investigations, plans, construction, operation, or maintenance associated with the facilities, and debt service reserve funds, funds to provide capitalized interest and any costs incurred in connection with the issuance of obligations to finance any of the foregoing.

SDCL 46A-2-4(14).

But considering statutory history, this definition can be summarized and organized into three categories. "[W]ater resource projects" or "water resources development" includes:

1. Facilities that control, regulate, reclaim, or supply water, or that protect or improve its quality.

2. Studies, investigations, plans, construction, operation, or maintenance associated with the facilities in category one, as well as debt service reserve funds, funds to provide capitalized interest and any costs incurred in connection with the issuance of obligations to finance any of these.
3. Contracts for the marketing of water service.

With this in mind, a dryland erosion-control project like those you mentioned could fall within this statutory definition of “water resources project” or “water resources development” if the project is of the same kind as those enumerated in SDCL 46A-2-4(14) and if it is meant to control, regulate, reclaim, or supply water, or to protect or improve water quality.

Constructing a barrier meant to restrict the flow of water, thereby reducing erosion and preventing the transmission of sediment into public water supplies is the very definition of a “dam,”³ which is among the infrastructure enumerated in SDCL 46A-2-4(14). Because such a dam is meant to control the flow of water, it easily falls within the statutory definition.

Planting vegetation to anchor soil may be a closer question. Vegetation like trees, grass, or crops are not explicitly enumerated in SDCL 46A-2-4(14). However, that list ends with a broad catch-all clause: “wells, reservoirs, dams, water reclamation facilities, wastewater treatment facilities, intake structures, pumping stations, equipment, rights-of-way or easements, works or facilities, *land and buildings or other real or personal property[.]*” *Id.* (emphasis added). Under South Dakota law, “personal property” includes “goods,” SDCL 2-14-2(19), and “goods” includes both trees and crops, SDCL 57A-9-102(a)(44). And trees, crops, and even grass must be “property” because each have been the basis for property-damage claims in this State’s courts. *See Winterton v. Elverson*, 389 N.W.2d 633, 637 (S.D. 1986) (crops); *Wang v. Bekken*, 310 N.W.2d 166, 167 (S.D. 1981) (per curiam) (trees); *O’Neal v. Diamond A Cattle Co.*, 260 N.W. 836, 837 (S.D. 1935) (grass). Assuming that the purpose of planting vegetation is to control, regulate, reclaim, or supply water, or to protect or improve its quality, planting vegetation could meet the statutory definition of “water resources project” or “water resources development.”

³ The dictionary defines “dam” as “a barrier preventing the flow of water or of loose solid materials (such as soil or snow)” or “a barrier to check the flow of liquid, gas, or air.” Merriam-Webster, <https://www.merriam-webster.com> [<https://www.merriam-webster.com/dictionary/dam>] (last visited June 23, 2026).

2. Can a water-development district fund its own projects?

A water-development district is authorized to fund its own projects. This authorization appears explicitly in SDCL chapter 46A-3E.

A water development district may *assist, sponsor, or construct* a water resources project provided:

- (1) Specific areas shall finance those phases of water resources development that provide general benefits to the people in the areas;
- (2) Direct beneficiaries shall finance those phases of water resources development that provide water for their use or that protect or enhance the value of their property; and
- (3) Administrative jurisdiction and responsibility for the various phases of water resources development are related to the variable degrees of benefits.

S.D. Codified Laws 46A-3E-7 (emphasis added). Nothing in this statute excludes projects originating from a district itself.

The legislative history of SDCL 46A-3E-7 supports this conclusion. As originally enacted, this statute stated, in part: "A water development district may assist or construct a water resources project *only if it has entered into a contract with a project sponsor.*" 1984 S.D. Sp. Sess. Laws ch. 1, § 51 (emphasis added). But in 2003, the Legislature expanded district authority, enabling a district to "assist, *sponsor*, or construct a water resource project[.]" 2003 S.D. Sess. Laws ch. 231, § 1 (emphasis added). This amendment also removed the requirement that a district partner with a project sponsor. The result of this amendment, then, is that a district can "assist, sponsor, or construct" a project even when the district is the project's sole "sponsor."

3. Can a water-development district fund projects (like dams, wells, and sanitation improvements) for private groups on lands not open to the general public?

A water-development district has authority to fund water-development projects for private groups on land not open to the general public. The South Dakota Legislature has determined that "[t]he general health, welfare, and safety of the people of the State of South Dakota are dependent upon the conservation, development, management, and optimum use of *all* this state's water resources." SDCL 46A-1-1 (emphasis added). And "*all* waters within

South Dakota ... are held in trust by the State for the public.” *Parks v. Cooper*, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838. This is true regardless of whether the lands over which waters accumulate or flow are privately owned or open to the public. *Id.* Therefore, as political subdivisions of the State, water-development districts are entrusted with the conservation, development, management and optimum use of *all* waters within their boundaries—wherever those waters may be.

Additionally, the powers and duties of a water-development district clearly contemplate projects that result in special benefits to private landowners. As noted above, SDCL 46A-3E-7 requires that “[d]irect beneficiaries shall finance those phases of water resources development that provide water for *their* use or that protect or enhance the value of *their* property[.]” (Emphasis added.) And SDCL chapter 46A-3E empowers a district to specially assess landowners for special benefits they receive from projects. By definition, a special assessment can be imposed only for benefits specific to an individual landowner and different from benefits enjoyed by the general public. *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 14, 784 N.W.2d 499, 505-06. If the Legislature intended that a district could fund projects that benefit only the public generally, there would have been no reason to give the district the power to specially assess.

4. How much are landowners required to contribute financially under SDCL 46A-3E-7(2)?

Determining how to allocate the cost of a water-development project involves both statutory and constitutional requirements and limitations. As a starting point, the Legislature’s intended allocation of project costs is stated in SDCL chapter 46A-2:

It is the intent of this chapter and chapters 46A-3A to 46A-3E, inclusive, to relate, reasonably and equitably, the financing of water resources projects to the degree of benefits received from such water resources projects by:

- (1) Provisions whereby statewide financing will be forthcoming for those phases of water resources development which concern the general welfare of the people in the state and result in statewide benefits;
- (2) Provisions whereby specific areas will finance those phases of water resources development which provide general benefits to the people in such areas;

- (3) Provisions whereby water users or direct beneficiaries of water control and regulation will finance those phases of water resources development which provide water for use or which protect or enhance the value of property;
- (4) Provisions whereby assignment of administrative jurisdiction and responsibility for the various phases of water resources development are related to such variable degrees of benefits.

SDCL 46A-2-3. This intended cost allocation is repeated in chapter 46A-3E:

A water development district may assist, sponsor, or construct a water resources project provided:

- (1) Specific areas shall finance those phases of water resources development that provide general benefits to the people in the areas;
- (2) Direct beneficiaries shall finance those phases of water resources development that provide water for their use or that protect or enhance the value of their property; and
- (3) Administrative jurisdiction and responsibility for the various phases of water resources development are related to the variable degrees of benefits.

SDCL 46A-3E-7. These provisions establish a graduated allocation of costs based on the benefits received: individual users or beneficiaries must pay the costs of their individual benefits; local communities bear the costs of local benefits, and the general public bears the cost of benefits enjoyed by the general public.

However, there are constitutional limitations on what an individual property owner can be forced to contribute to a project by special assessment. The U.S. Constitution and the South Dakota Constitution prohibit the taking of private property for public use without just compensation. U.S. Const. amend. V; S.D. Const. art. VI, § 13. This constitutional requirement limits the amount of a special assessment to the value of the special benefit conferred on the assessed property. *Hubbard*, 2010 S.D. 55, ¶ 13, 784 N.W.2d at 505. If a project does not confer measurable value to the property, then the property cannot be specially assessed—regardless of the project's cost. *See id.* But if a beneficiary agrees by contract to pay a higher amount, *see* SDCL 46A-3E-3, this restriction would not apply to the extent of that agreement.

It is up to the water-development district to reasonably and fairly determine the value of a special benefit conferred by a project on individual property owners. The South Dakota Supreme Court's opinions involving special assessments may provide some guidance.

Whether a property receives a special benefit above and beyond or differing from the general public is often driven by opinion and conjecture of the property owner on the one hand and the city on the other. This Court has said that the special benefits must be actual, physical and material and not merely speculative or conjectural. Even so, this Court has recognized that an exact and actual monetary benefit to property may be difficult to measure and at most can only be estimated with a fair degree of exactness. One obvious indicator that property receives a special benefit is if the public project enhances its market value. Future prospects and reasonable expectations of the future use may be another indicator. Other courts have found a special benefit when the property realizes aesthetic enhancement.

Hubbard, 2010 S.D. 55, ¶ 15, 784 N.W.2d at 506 (citation modified). Whatever valuation method the district uses—whether market value or otherwise—the valuation must be fair and reasonable. SDCL 46A-2-3.

Conclusion

The statutory definition of “water resources project” is broad enough to include erecting sediment barriers and even planting ground cover if the purpose is to control, regulate, reclaim, or supply water, or to protect or improve its quality. A water-development district is free to sponsor its own qualifying projects and those of private organizations. But in general, the direct beneficiaries of any project must pay for the benefits they receive.

Sincerely,



Marty J. Jackley
Attorney General

MJJ/CAD/dd