

South Dakota Water Law: Exploring the Legislative Options for Pursuit of Instream Flows.

by

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Western states have been exploring different techniques for maintaining and restoring instream flows throughout the region. South Dakota is in the position to take the best components of these efforts and assemble a framework for ensuring that water continues to flow through the State's waterways. This comment explores the legislative solutions for creating a framework that protects instream flows and the tools necessary to ensure continued success.

I. Introduction

In his timeless novella, *A River Runs Through It*, Norman Maclean begins to conclude with “[e]ventually, all things merge into one, and a river runs through it.”¹ Although Maclean was not writing about South Dakota his words could be used to describe the state because in South Dakota most of the state’s water flows to the Missouri river and the Missouri River runs through the state.² Interest in protecting the complicated freshwater riparian environments throughout the west has led to an increase in concern over the status of instream flows.³ Instream flow protection is “the legal, physical, contractual, and/or administrative methods that have been used to ensure that enough water remains in streams to sustain instream flows.”⁴ It is time to for the South Dakota legislature to revisit the state’s law, remove the impediments to promoting instream flows, and consider laying the groundwork for implementing a water trust.⁵

¹ NORMAN MACLEAN, *A RIVER RUNS THROUGH IT*, 104 (University of Chicago Press 1976).

² See, Brian Morris, *Unanswered Prayers: The Upper Missouri River Basin States Take on the U.S. Army Corps of Engineers*, 68 N.D. L. REV. 897, 901-3 (1992).

³ See, Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 336-37 (2009).

⁴ Mary Ann King, *Getting our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVTL. L. REV. 495, 502 (2004).

⁵ See, Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 336-37 (2009).

This comment begins with an overview of South Dakota's water law before examining the current legal recognition of instream flows in the state. The focus will be on identifying the parameters and potential for protecting and expanding environmental flows in South Dakota. Next, the paper will look at the instream flow enabling legislation of several nearby states in terms of unappropriated water, before making recommendations for developing South Dakota's own enabling legislation. The paper will transition to an examination of different ways that environmental flows could be restored to South Dakota's rivers. Finally, this comment will look at how a water trust could benefit the status of instream flows through South Dakota.

II. South Dakota Geography and Topography.

South Dakota has a varied landscape due in part to the state's location which straddles the hundredth meridian.⁶ In eastern South Dakota the land is humid enough to allow dry land agriculture, but as one moves towards the state's western areas, the land transitions to semi-arid and arid land.⁷ Parts of the South Dakota along its eastern border receive enough rainfall to grow corn, oats, wheat, and hay.⁸ Other parts of the state fall within the Great Plains region and foster an agricultural economy based upon dry land farming and cattle ranching.⁹ Finally, the state's western area contains elements similar to eastern Wyoming or southeastern Montana where the raising of grains and cattle is the main agricultural activity in an area that also produces oil and minerals.¹⁰

The other dominant influence on water in South Dakota is the Missouri River which roughly bisects the state separating the grasslands in the west from the farmland in the east.¹¹

⁶ John H. Davidson, 6- SD Water and Water Rights I.

⁷ John H. Davidson, 6- SD Water and Water Rights I.

⁸ Sandra Zellmer, 6-MO-RB Water and Water Rights I.

⁹ Sandra Zellmer, 6-MO-RB Water and Water Rights I.

¹⁰ Sandra Zellmer, 6-MO-RB Water and Water Rights I.

¹¹ John P. Guhin, *The Law of the Missouri*, 30 S.D. L. REV. 347, 350 (1985).

South Dakota is located in what is considered the river's upper basin, along with Montana and North Dakota, while the lower basin is considered to include Nebraska, Iowa, Kansas, and Missouri.¹² The upper basin states view the Missouri river as a source of water for irrigation and agriculture, while the lower states view the river as a shipping lane and flood risk.¹³ The Missouri River Basin experiences the highest rate of withdrawal for irrigation uses and as a result, is susceptible to low flows and high water temperatures during dry periods.¹⁴ This dichotomy between the basins is built upon the differences in landscape, climate, and water law because the humid lower basin follows a doctrine of riparian rights while the more arid upper basin adopted the doctrine of prior appropriation.¹⁵

III. South Dakota's Mixed System- Prior Appropriation and Riparian Rights.

There are two chief means of governing water allocation, the English common law method known as the riparian doctrine or the doctrine of prior appropriation as developed in the American West.¹⁶ A riparian water right allows those landowners adjacent to a body of water to make a reasonable use of the water.¹⁷ In contrast, under the doctrine of prior appropriation, a water right holder can convey water for use on land that is not adjacent to the source.¹⁸ Since the law of water allocation is largely a matter for the states, there are different approaches to water

¹² A. Dan Tarlock, *The Missouri River: The Paradox of Conflict without Scarcity*, 2 GREAT PLAINS NAT. RESOURCES J. 1, 2 (1997).

¹³ Sandra Zellmer, 6-MO-RB Water and Water Rights I.

¹⁴ Jack R. Tuholske, *Hot Water, Dry Streams: A Tale of Two Trout*, 34 VT. L. REV. 927, 938 (2010).

¹⁵ Sandra Zellmer, 6-MO-RB Water and Water Rights I.

¹⁶ Martin L. Jackley, Comment, *Reclamation Law and the Belle Fourche Irrigation District: A Desperate Fight for a Way of Life in Times of Change*, 40 S.D. L. REV. 478, 493 (1995).

¹⁷ Black's Law Dictionary 1443 (9th ed. 2009).

¹⁸ Martin L. Jackley, Comment, *Reclamation Law and the Belle Fourche Irrigation District: A Desperate Fight for a Way of Life in Times of Change*, 40 S.D. L. REV. 478, 493 (1995).

allocation in each state.¹⁹ South Dakota has adopted a mixed system of riparian rights and prior appropriation.²⁰

The concept of riparian rights was adopted from England in the Eastern United States and as settlers moved west they carried the doctrine with them.²¹ A riparian right is the right to use a certain amount of water from a certain water source, provided that the usage does not prevent other right holders from using the water.²² Riparian rights evolved into the reasonable use of water, which ensured that all riparian owners had an equal right to use the water.²³ Coupled with the reasonableness standard, the rule of appurtenance usually limits riparian rights because it requires that water only be used on land adjacent to the water.²⁴

As settlers moved into South Dakota from the east and headed west, they brought the concept of riparian rights with them and applied it because initial settled areas of South Dakota had adequate moisture.²⁵ Thus, the concept of riparian rights was codified in 1866 and the reasonable use standard confirmed in 1913.²⁶ Although the riparian doctrine is no longer principle law in South Dakota, its vestiges remain.²⁷ In South Dakota there are five principle types of vested riparian rights.²⁸ One significant right is that the riparian can continue to use the water if the water has been applied to a beneficial use prior on March 2, 1955 or within the

¹⁹ Joseph W. Dellapenna, *Global Climate Disruption and Water Law Reform*, 15 WIDENER L. REV. 409, 413 (2010).

²⁰ S.D.C.L. §§ 46-1-3, 46-1-10.

²¹ William A. Garton, *South Dakota's System of Water Management and its Relation to Land Use and Economic Development*, 21 S.D. L. REV. 1, 4 (1976).

²² Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 216 (2007).

²³ Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L. J. 315, 322-23 (2009).

²⁴ Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 216 (2007).

²⁵ John H. Davidson, *South Dakota Groundwater Protection Law*, 40 S.D. L. REV. 1, 7 (1995).

²⁶ William A. Garton, *South Dakota's System of Water Management and its Relation to Land Use and Economic Development*, 21 S.D. L. REV. 1, 5 (1976)., *St. Germain Irrigating Co. v. Hawthorn Ditch Co.* 143 N.W. 124, 126-27 (1913).

²⁷ See, S.D.C.L. §46-1-9(2004).

²⁸ S.D.C.L. §46-1-9 (2004).

proceeding three years.²⁹ Vested rights remain for riparian owners if the owner was actively constructing works to put the water to beneficial use on March 2, 1955 and the work was completed in a reasonable time.³⁰ Furthermore, water use for domestic purposes is considered a vested right.³¹ Water uses granted by court decree prior to July 1, 1955 are also considered vested rights.³² The final type of vest right is the water uses by diversion or application prior to the 1907 water law.³³ Therefore in contrast to other states within the Missouri River's Upper basin, South Dakota retains some elements of the riparian doctrine.³⁴

Like the riparian rights, prior appropriation is a system of acquiring the rights to use water.³⁵ In lieu of the riparian doctrine, eighteen western states recognize a form of the doctrine of prior appropriation for allocating water.³⁶ Of these eighteen states, eight follow a system of pure prior appropriation, while the remaining ten originally recognized some riparian uses but now follow prior appropriation.³⁷ Riparian rights were found to be unsuitable for the west because the west's arid nature meant that the mining, timber, and farming economies often took place on nonriparian land and these uses required a higher level of certainty than riparian rights could provide.³⁸ For most of the states that follow the prior appropriation doctrine, the law of water allocation can be summed up in the maxim "First in time, first in right."³⁹ The idea is that

²⁹ William A. Garton, *South Dakota's System of Water Management and its Relation to Land Use and Economic Development*, 21 S.D. L. REV. 1, 13 (1976).

³⁰ S.D.C.L. §46-1-9 (2004).

³¹ S.D.C.L. §46-1-9 (2004).

³² S.D.C.L. §46-1-9 (2004).

³³ S.D.C.L. §46-1-9 (2004).

³⁴ See, Colo. Rev. Stat. Ann. § 37-82-101 (2004), Wyo. Stat. Ann. § 41-3-101 (2009).

³⁵ Martin L. Jackley, Comment, *Reclamation Law and the Belle Fourche Irrigation District: A Desperate Fight for a Way of Life in Times of Change*, 40 S.D. L. REV. 478, 493 (1995).

³⁶ Kevin J. Smith, Comment, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 99 (1996).

³⁷ Kevin J. Smith, Comment, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 99 (1996).

³⁸ Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L.J. 315, 323-24 (2009).

³⁹ Kevin J. Smith, Comment, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 99 (1996).

the first person to put the water to a beneficial use is therefore the first person to have a right to the water or the most senior right.⁴⁰ The other prior appropriation maxim is “use it or lose it” meaning that if one does not use his or her water under the water right, then he or she will lose her water right.⁴¹ Therefore, a water user has a strong incentive to continuing diverting his or her entire water allowance regardless of his or her need.⁴²

The usage of water since March 2, 1955 has fallen under the doctrine of prior appropriation.⁴³ The concept of prior appropriation appeared in South Dakota in 1881 when the territorial legislature required that water disputes be settled by the date of appropriation.⁴⁴ The South Dakota Legislature confirmed the coexistence of riparian rights and prior appropriation doctrine in 1907, but the South Dakota Supreme Court declared the law unconstitutional in 1913.⁴⁵ The state’s water law was overhauled in 1955, which provides a blueprint for the acquisition and administration of South Dakota water rights.⁴⁶ South Dakota maintains that the people’s interest in the usage of water is paramount and that the state will determine what water is allocated for public use or conservation.⁴⁷ To facilitate the allocation of water within the state and make sure that the water is put to good use, South Dakota has taken ownership of all the water in the state while allowing the acquisition of rights to use the water.⁴⁸

⁴⁰ Jack R. Tuholske, *Hot Water, Dry Streams: A Tale of Two Trout*, 34 VT. L. REV. 927, 934 (2010).

⁴¹ Reed D. Benson, *Rivers to Live By: Can Western Water Law Help Communities Embrace Their Streams?*, 27 J. LAND RESOURCES & ENVTL. L. 1, 5 (2007).

⁴² Reed D. Benson, *Rivers to Live By: Can Western Water Law Help Communities Embrace Their Streams?*, 27 J. LAND RESOURCES & ENVTL. L. 1, 5 (2007).

⁴³ S.D.C.L. §46-1-9.

⁴⁴ John H. Davidson, *South Dakota Ground Water Protection Law*, 40 S.D. L. REV. 1, 7 (1995).

⁴⁵ John H. Davidson, *South Dakota Ground Water Protection Law*, 40 S.D. L. REV. 1, 7 (1995).

⁴⁶ John H. Davidson, *South Dakota Ground Water Protection Law*, 40 S.D. L. REV. 1, 7 (1995).

⁴⁷ S.D.C.L. §46-1-1 (2004).

⁴⁸ S.D.C.L. §46-1-3 (2004).

One of the chief elements of the prior appropriation doctrine is the requirement that the water be put to a beneficial use.⁴⁹ The use of water that is reasonable and beneficial to the appropriator and is within the public's interest is considered beneficial use.⁵⁰ The amount of water received is usually limited to that maximum amount that can be applied for a beneficial use.⁵¹ In addition, to beneficial use, the appropriation doctrine often requires that the water be diverted from the watercourse before being put to a beneficial use, which works as an incentive to dewater streams.⁵²

Like in other western states, the doctrine of prior appropriation in South Dakota has been complicated by increases in demand for water resulting in permit systems to regulate the allocation of water.⁵³ In South Dakota, the Water Management Board is responsible for reviewing water rights permits and for holding hearings that allow all interested parties to be heard.⁵⁴ In keeping with the "first in time, first in right" maxim, the priority date for appropriation is the date the application was filed.⁵⁵ Similar to the traditional elements of prior appropriation, the water rights permit must demonstrate that there is unappropriated water available, that the issuance of the permit will not interfere with existing rights, that the proposed use is beneficial, and in the public's interest.⁵⁶ The permit system has become a means of quantifying and regulating the traditional notions of prior appropriation.⁵⁷

IV. Benefits of Instream Flows

⁴⁹ William A. Garton, *South Dakota's System of Water Management and its Relation to Land Use and Economic Development*, 21 S.D. L. REV. 1, 11 (1976).

⁵⁰ S.D.C.L. §46-1-5 (2004).

⁵¹ Jack R. Tuholske, *Hot Water, Dry Streams: A Tale of Two Trout*, 34 VT. L. REV. 927, 934 (2010).

⁵² Jack R. Tuholske, *Hot Water, Dry Streams: A Tale of Two Trout*, 34 VT. L. REV. 927, 934-35 (2010).

⁵³ Jack R. Tuholske, *Hot Water, Dry Streams: A Tale of Two Trout*, 34 VT. L. REV. 927, 934 (2010), S.D.C.L. §46-1-15 (2004).

⁵⁴ John H. Davidson, *South Dakota Ground Water Protection Law*, 40 S.D. L. REV. 1, 8 (1995).

⁵⁵ S.D.C.L. § 46-5-7 (2004).

⁵⁶ S.D.C.L. § 46-2A-9 (2004).

⁵⁷ See Generally, William A. Garton, *South Dakota's System of Water Management and its Relation to Land Use and Economic Development*, 21 S.D. L. REV. 1, 16-20 (1976) (explaining the permitting process in South Dakota).

Instream and environmental flows are water rights that leave the water in the original water course and are therefore non-consumptive.⁵⁸ Under prior appropriation, water rights are consumptive because the removal of water from the water course by diversion illustrates capture, notice, and measurement.⁵⁹ Traditional water rights under the prior appropriation doctrine are consumptive, which means the water is permanently removed from the watercourse.

Each river has a natural flow that is variable depending on the season, which vital to a healthy river. High flows, often found in the spring, flush the accumulated sediments and waste while injecting nutrients into the waterway.⁶⁰ A river's low and intermediate flows are important for healthy fish population because the flows provide the necessary oxygen and habitat for the young fry to survive.⁶¹ A number of harmful effects can result when there is a failure to preserve sufficient flows in a watercourse.⁶² The detrimental effects of insufficient instream flows include higher concentrations of pollutants, reduced marine habitats, and diminished seafood production.

Preserving water levels through instream or environmental flows provides benefits beyond limiting the manipulation of the natural flow patterns.⁶³ Non-consumptive flows benefit fish and wildlife, recreation, and water quality.⁶⁴ Additionally, instream flows benefit industrial uses, transportation, and the riparian environment.⁶⁵

⁵⁸ Kevin J. Smith, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 99-100. (1996).

⁵⁹ Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 222 (2007).

⁶⁰ Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L.J. 315, 318 (2009).

⁶¹ Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L.J. 315, 318 (2009).

⁶² Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L.J. 315, 323-24 (2009).

⁶³ Donald D. MacIntyre, *The Prior Appropriation Doctrine in Montana: Rooted in Mid-Nineteenth Century Goals-Responding to Twenty-First Century Needs*, 55 MONT. L. REV. 303, 319 (1995).

⁶⁴ Deborah Moore and Zach Willey, *Water in the American West: Institutional Evolution and Environmental Restoration in the 21st Century*, 62 U. COLO. L. REV. 775, 784 (1991).

⁶⁵ Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 206 (2007).

The protection of fish and wildlife has been the biggest factor in the strengthening the movement of instream flows in South Dakota and the West in general.⁶⁶ Fresh water ecosystems contain a higher concentration of life than land or ocean systems, but the human impacts on freshwater systems has led to an extinction rate that is five times higher than land-based species.⁶⁷ Therefore, states are beginning realize the importance of protecting their watercourse and the fish and wildlife that rely on them. A growing number of states are recognizing that ecological preservation and fisheries protection is a beneficial use.⁶⁸ Healthy fisheries can stimulate a recreation based boost to local economies.⁶⁹

Fishing, kayaking, and rafting are among the strongest recreational proponents of the instream flows because of their reliance on their being water in waterways, yet they sometimes conflict concerning the amount of water.⁷⁰ Nevertheless, recreation has become a catalyst for protecting and increasing instream flows because recreation contributes significantly to the economy.⁷¹ Recreation interests are diverse, but each relies on having water in the river, thus many interests lobby for instream flows through groups like Trout Unlimited.⁷²

Maintaining instream flows improves water quality and the riparian environment.⁷³

Human altered flow regimes often have negative impacts on the water quality and riparian

⁶⁶ In re Water Right Claim No. 1927-2, 524 N.W.2d 855, 858 (1994), reh'g denied (1995) (citing State v. Morros, 766 P.2d 263, 268 (Nev. 1998); North Dakota v. United States, 460 U.S. 300, 309 (1983)).

⁶⁷ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 337 (2009).

⁶⁸ Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 231 (2007).

⁶⁹ Charlton H. Bonham, *Perspectives from the Field: A Review of Western Instream Flow Issues and Recommendations for a New Water Future*, 36 ENVTL. L. 1205, 1212 (2006).

⁷⁰ Robert Benjamin Naesar and Mark Griffin Smith, *Playing with Borrowed Water: Conflicts over Instream Flows on the Upper Arkansas River*, 25 NAT. RESOURCES J. 93, 105 (1995).

⁷¹ Charlton H. Bonham, *Perspectives from the Field: A Review of Western Instream Flow Issues and Recommendations for a New Water Future*, 36 ENVTL. L. 1205, 1212 (2006).

⁷² Lynne Marie Paretchan, *Choreographing NGO Strategies to Protect Instream Flows*, 42 NAT. RESOURCES J. 33, 48 (2002).

⁷³ Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 206 (2007).

environment.⁷⁴ Although, providing more natural flows through environmental flows might not solve all the problems it may help stabilize the status of the water course.⁷⁵ Environmental flows can dilute pollutant and flush sediments, similar to the natural high flows.⁷⁶ Thus, instream flows contribute to the health of a water way in a variety of different ways.⁷⁷

Healthy stream flows can improve river based commerce and industry.⁷⁸ Instream flows mean that there is more water in the waterway, which facilitates improved transportation on the watercourse because transportation interests require certain flow levels.⁷⁹ There is a long history of commerce in which the transportation of goods and people occurred by waterway in the Missouri River watershed.⁸⁰ Additionally, instream flows can be used for energy production when they have historically turned a mill's waterwheel or today when they turn the generator in a hydroelectric dam.⁸¹ Thus, leaving water in watercourses can provide an additional economic boost.⁸²

V. Instream Flows in South Dakota Today

South Dakota has not passed legislation nor are there any statutes concerning instream flow provisions.⁸³ Similar to North Dakota, South Dakota has administrative regulations in place that elucidate the public's interest in watercourses and instream flows.⁸⁴ When the South Dakota Supreme Court first examined the possibility of natural flows as a beneficial use, the

⁷⁴ A. Dan Tarlock, *Putting Rivers Back in the Landscape: The Revival of Watershed Management in the United States*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1059, 1094 (2008).

⁷⁵ See, A. Dan Tarlock, *Putting Rivers Back in the Landscape: The Revival of Watershed Management in the United States*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1059, 1096 (2008).

⁷⁶ See, Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L.J. 315, 318 (2009).

⁷⁷ Ronald A. Kaiser and Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RESOURCES J. 157, 158 (1998).

⁷⁸ Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 206 (2007).

⁷⁹ John P. Guhin, *The Law of the Missouri*, 30 S.D. L. REV. 347, 417 (1985).

⁸⁰ John P. Guhin, *The Law of the Missouri*, 30 S.D. L. REV. 347, 432-33 (1985).

⁸¹ See, John P. Guhin, *The Law of the Missouri*, 30 S.D. L. REV. 347, 449 (1985).

⁸² Nicole L. Johnson, *Property without Possession*, 24 YALE J. ON REG. 205, 206 (2007).

⁸³ John H. Davidson, 6 WATER AND WATER RIGHTS VIII

⁸⁴ Kevin J. Smith, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 102. (1996).

administrative rules of the time listed three beneficial uses: irrigation, wildlife propagation, and stock watering.⁸⁵ Now, all South Dakota streams are assigned the following beneficial uses: irrigation, fish and wildlife propagation, recreation, and stock watering.⁸⁶ The addition of recreation and the change to fish and wildlife propagation illustrates an expansion of the beneficial uses concept because the traditional prior appropriation doctrine did not consider recreation to be a beneficial use.⁸⁷ In addition, the administrative rules expand on the notion of beneficial use for surface waters named in the rules.⁸⁸ Nevertheless, this expansion is focused on water quality control and not actual use patterns.⁸⁹

The South Dakota Supreme Court examined the Water Board's grant of several water rights permits to the United States Fish and Wildlife Service in *In re Water Right Claim No. 1927-2*.⁹⁰ As part of its ownership and operation of the LaCreek National Wildlife Refuge, the United States Fish and Wildlife Service sought a water rights permit for the natural flow from six nearby springs.⁹¹ The United States Fish and Wildlife Service did not plan to develop the water, but rather to ensure a constant flow from the springs to maintain wetlands acreage.⁹² Nearby landowners challenged the Water Board's grant of the permit on grounds that the permit was an impermissible future use, the permit would impair their water rights, and that the proposed use

⁸⁵ *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 858 (1994), reh'g denied (1995).

⁸⁶ S.D. ADMIN. R. 74:51:03:01 (2006)

⁸⁷ See, Rebecca Abeln, *Instream Flows, Recreation as Beneficial Use, and the Public Interest in Colorado Water Law*, 8 U. DENV. WATER L. REV. 517, 522 (2005).

⁸⁸ S.D. ADMIN. R. 74:51:01:42 (2006). This expansion includes the following beneficial uses: domestic water supply waters; cold water permanent fish life propagation waters; cold water marginal fish life propagation waters; warmwater permanent fish life propagation waters; warmwater semipermanent fish life propagation waters; warmwater marginal fish life propagation waters; immersion recreation waters; limited contact recreation waters; fish and wildlife propagation, recreation, and stock watering waters; irrigation waters; and commerce and industry waters.

⁸⁹ S.D. ADMIN. R. 74:51:01:42 (2006).

⁹⁰ Kevin J. Smith, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 99-100. (1996).

⁹¹ *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 856-7 (1994), reh'g denied (1995).

⁹² *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 857 (1994), reh'g denied (1995).

was not a beneficial use.⁹³ Thus, the crux of the case, regarding the natural flow permit, came down to whether or not a natural flow constituted a beneficial use under South Dakota law.⁹⁴ The South Dakota Supreme Court affirmed the trial court's finding that the United States Fish and Wildlife Service permit was in fact for a current use and not a future use.⁹⁵ The Court also affirmed the lower court's finding that the United States Fish and Wildlife Service's permit did not impair the rights of neighboring landowners.⁹⁶ In reaching its decision on the question of beneficial use, the Court derived a two part test for beneficial use from South Dakota Codified Law 46-2A-9, which indicates that use must be reasonable, useful, and beneficial to the appropriator and in the public interest.⁹⁷ After applying the two part test, the Court found that the United States Fish and Wildlife Service's permit was for a beneficial use and note that "beneficial use is an evolving concept, and a concept that can be expanded to reflect changes in society's recognition of the value of new uses of our resources."⁹⁸ Thus, *In re Water Right Claim No. 1927-2* appears to allow for nonenumerated and by extension private entities to obtain water rights permits for in-place use that protects wildlife habitat.⁹⁹

Since South Dakota does not expressly enumerate beneficial uses, the statutory two part test is used by the courts instead.¹⁰⁰ Expanding instream flows should not run afoul of the public interest prong of the beneficial use test because South Dakota's administrative regulations

⁹³ *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 857-8 (1994), reh'g denied (1995).

⁹⁴ John H. Davison, 6 WATER AND WATER RIGHTS VIII.

⁹⁵ Kevin J. Smith, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 104. (1996).

⁹⁶ *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 858 (1994), reh'g denied (1995).

⁹⁷ Kevin J. Smith, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 108. (1996).

⁹⁸ *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 858 (1994), reh'g denied (1995) (quoting Rick A. Thompons, *Statutory Recognition of Instream Flow Preservation: A proposed Solution for Wyoming*, 17 LAND & WATER L. REV. 139, 143 (1982)).

⁹⁹ John H. Davison, 6 WATER AND WATER RIGHTS VIII.

¹⁰⁰ *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 858-59 (1994), reh'g denied (1995).

include elements that benefit from environmental flows.¹⁰¹ The other prong of the beneficial use test is that the use is reasonable, useful, and beneficial to the appropriator, is on its face more difficult to satisfy because it focuses directly on the appropriator.¹⁰² Nevertheless, the South Dakota judicial system has affirmed the Water Board's initiative concerning instream flow.¹⁰³ Since there is a basis for instream flows as a beneficial use in South Dakota and the South Dakota Supreme Court has held that physical diversions are not necessary for beneficial use, the South Dakota legislature has fewer obstacles to face in enacting environmental flow enabling legislation.¹⁰⁴ South Dakota law is unclear as to precisely what entities are authorized to appropriate instream flows, but so far state and federal agencies, a private company, and the federal government have been granted permits for instream uses.¹⁰⁵ The South Dakota legislature should make a determination on who can be granted permits for appropriating environmental flows or who can apply for transfers.¹⁰⁶

VI. Approaches for Protecting and Providing Instream Flows

When approaching different frameworks for promoting instream flows it is important to keep in mind the difference in application to unappropriated water and appropriated water.¹⁰⁷

¹⁰¹ S.D. Admin. R. 74:51:01:42 (2006).

¹⁰² S.D.C.L. § 46-2A-9 (2004).

¹⁰³ See, *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 858-59 (1994), reh'g denied (1995).

¹⁰⁴ See, Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 115-16 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

¹⁰⁵ Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 116 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

¹⁰⁶ See, Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 115-16 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

¹⁰⁷ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 338 (2009).

Issue of instream flows and unappropriated water is focused on keeping the water in the rivers.¹⁰⁸ Whereas appropriated waters and instream flows focus on restoring water to the watercourse.¹⁰⁹

A. Framework for unappropriated water

Colorado and Wyoming have followed the traditional approach in the Rocky Mountain Region for promoting instream flows within heavily appropriated watersheds.¹¹⁰ The Colorado Legislature has approved the appropriation of water for instream flows or minimum flows provided that “no person or entity” other than the Colorado Water Conservation Board holds the right.¹¹¹ In Wyoming the legislature has decreed that only the State may own an instream flow water right and the Wyoming Water Development Commission is authorized to apply for permits in the State’s name.¹¹² The Colorado and Wyoming provisions are in keeping with other nearby states which typically limited the holders of environmental flows to state agencies.¹¹³

The purposes for which a state can acquire environmental flow rights, in heavily appropriated watersheds, varies but often the protection of a fishery is the primary incentive.¹¹⁴ In keeping with this usual format, Colorado allows permits for minimum stream flows in order to “preserve the environment to a reasonable degree.”¹¹⁵ The Colorado Water Conservation Board has speculated that this includes the protection of aquatic organisms, riparian areas, and the

¹⁰⁸ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 338 (2009).

¹⁰⁹ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 340 (2009).

¹¹⁰ Reed D. Benson, “*Adequate Progress,*” or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws since 2000*, 36 ENVTL. L. 1283, 1285-86 (2006).

¹¹¹ COLO. REV. STAT. § 37-92-102(3) (2004 & supp. 2010).

¹¹² WYO. STAT. ANN. §§ 41-3-1002(e); 41-3-1003(3) (2009).

¹¹³ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 339 (2009).

¹¹⁴ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 338 (2009).

¹¹⁵ COLO. REV. STAT. § 37-92-102(3) (2004 & supp. 2010).

environment, but does not protect wildlife, recreation, or water quality.¹¹⁶ Likewise, the Wyoming Legislature has indicated that instream flows are limited to only “the minimum flow necessary” to establish, maintain, or improve fisheries.¹¹⁷ Since, Wyoming only allows instream flows for fishery reasons; it has the most restrictive statutes of the western states.¹¹⁸

Environmental flow rights usually have priority dates based on when the permit was filed, similar to other appropriations, thus instream flow rights are generally very junior priorities.¹¹⁹ Minimum streamflow rights in Colorado are junior “to the present uses or exchanges of water being made by other waters users” or to “practices in existence on the date of such appropriation” even if they have not been previously affirmed by the courts.¹²⁰ Instream flows can only be appropriated in Wyoming “if such use does not impair or diminish the rights of any other appropriator.”¹²¹ In states like Colorado and Wyoming, priority date is very important because often there is only enough water to satisfy claims that date back to the second half of the nineteenth century.¹²² Despite their junior status, instream flow rights are still protected from injury if a water right is changed and are protected if flows are reduced by later appropriations.¹²³

¹¹⁶ Reed D. Benson, “Adequate Progress,” or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws since 2000*, 36 ENTVL. L. 1283, 1287 (2006).

¹¹⁷ WYO. STAT. ANN. § 41-3-1001(b) (2009).

¹¹⁸ Reed D. Benson, “Adequate Progress,” or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws since 2000*, 36 ENTVL. L. 1283, 1287 (2006).

¹¹⁹ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 339 (2009).

¹²⁰ COLO. REV. STAT. § 37-92-102(3)(b) (2004 & supp. 2010).

¹²¹ WYO. STAT. ANN. § 41-3-1001(b) (2009).

¹²² Charles Wilkinson, *The First Half Century of Western Water Reform: Have We Kept Faith with the Rivers of the West?*, 36 ENTVL. L. 1115, 1116-17 (2006).

¹²³ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 339 (2009).

Since the South Dakota Legislature has not passed legislation concerning instream flows, it can provide a comprehensive framework that allows appropriating water for instream flows.¹²⁴ In addition, South Dakota's climate is not generally as arid as other western states because the eastern part of the state receives enough rainfall to be able to grow crops that can't be grown in the more arid parts of Colorado or Wyoming.¹²⁵ Therefore, South Dakota will not be constrained by some of the concerns that have hampered the broadening of environmental flow rights in other western states.¹²⁶ One of the easiest ways for South Dakota to ensure environmental flows is to directly appropriate water for that purpose.¹²⁷ An advantage of direct appropriation is that it works within the state's existing water law.¹²⁸ Therefore, the South Dakota Legislature can tailor the enabling legislation for instream flows around the existing water law since the existing law seems to indicate the permissibility of environmental flows.¹²⁹

A common criticism of traditional western instream flow regimes is that only state agencies can hold instream flow rights and thus these agencies almost exclusively determine what level of protection a river receives.¹³⁰ Alaska, Arizona, and Nevada allow public and private parties to acquire water rights for environmental flows.¹³¹ Instream flow interests would be best served if the South Dakota Legislature allowed public and private instream flow appropriations, which would facilitate a public-private relationship for the protection of

¹²⁴ Kevin J. Smith, *Permitting a Natural Flow in a Prior Appropriation System: Dekay v. United States Fish and Wildlife Service*, 1 GREAT PLAINS NAT. RESOURCES J. 97, 102 (1996).

¹²⁵ Sandra Zellmer, 6-MO-RB Water and Water Rights I.

¹²⁶ See Generally, Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 394 (2009) (stating that more arid states have committed less water to instream uses).

¹²⁷ Ronald A. Kaiser and Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RESOURCES J. 157, 167 (1998).

¹²⁸ Ronald A. Kaiser and Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RESOURCES J. 157, 167 (1998).

¹²⁹ See, S.D.C.L. Ch. 46-2 (2004).

¹³⁰ Reed D. Benson, "Adequate Progress," or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws since 2000*, 36 ENTVL. L. 1283, 1289 (2006).

¹³¹ ALASKA STAT. § 46.15.145 (2008); ARIZ. REV. STAT. ANN. § 45-151A (2003); See, *State v. Morros*, 766 P.2d 263(Nev. 1988).

environmental flows.¹³² The two South Dakota agencies best placed to hold instream flow rights are the Department of Game, Fish, and Parks and the Department of Environment and Natural Resources.¹³³ One of the advantages of states holding instream flow rights is that, even as junior appropriators, the states have standing to challenge transfers or changes in diversion points.¹³⁴ State legislatures have been reluctant to grant private permits for instream flows because they have feared that such permits would hinder the development of water resources.¹³⁵ South Dakota should seek a compromise between public and private ownership of instream flow rights because such a system would allow the state to continue promoting water development while simultaneously allowing interested private parties to assume much of the responsibility for determining which stream segments are most in need of protection. A compromise for South Dakota could be found by limiting private ownership of instream flows to not for profit conservation organizations. Conservation organizations, such as Trout Unlimited or The Nature Conservancy, have a strong track record of protecting environmental flow rights, while recognizing other interest's water rights.¹³⁶

B. Framework for Appropriated Flows

Improving or protecting environmental flows in watercourses that are dewatered is focused on restoring water to the waterway.¹³⁷ The primary way to restore stream flows in watercourses where there is little or no unappropriated water available is to transferring or

¹³² Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177, 193 (1998).

¹³³ See, Ronald A. Kaiser and Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RESOURCES J. 157, 168 (1998).

¹³⁴ See, Ronald A. Kaiser and Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RESOURCES J. 157, 167 (1998).

¹³⁵ Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177, 193 (1998).

¹³⁶ See, S.R. Kinsella, *The Western Water Project: A Decade of Accomplishments*, TROUT, Summer 2008, at 21.

¹³⁷ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 340 (2009).

changing the use of existing water rights to allow instream uses.¹³⁸ Among the positives of allowing existing water rights to be used for environmental flows are to improve and not just maintaining the existing flows, to protect flows with more senior rights, and to focus the flows on areas that are most in need.¹³⁹ The principle challenges to using existing rights for instream uses are the limited number of rights available, the cost, and the difficult and time consuming processes involved for changing uses.¹⁴⁰ Despite these difficulties, Colorado, Montana, and Utah have begun changing their laws in order to facilitate environmental flow transactions.¹⁴¹

In Colorado, water rights holders can make their water available for instream use only if the right is transferred to the Colorado Water Conservation Board and the rights proceed through the formal water transfer process.¹⁴² The Colorado Water Conservation Board is permitted to obtain water rights from or in contractual agreement with anyone.¹⁴³ Additionally, a Colorado statute allows the Colorado Water Conservation Board to use funds available to it for the acquisition of water rights and their subsequent conversion to instream use.¹⁴⁴ Thus, Colorado has continued to adapt its water law in a manner that promotes environmental flows.¹⁴⁵

¹³⁸ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 340 (2009).

¹³⁹ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 340 (2009).

¹⁴⁰ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 340 (2009).

¹⁴¹ COLO. REV. STAT. § 37-92-102 (3) (2004); MONT. CODE ANN. §§ 85-2-320, 402, 408, 436 (2009 & supp. 2009), UTAH CODE ANN. § 73-3-3 (1989 & supp. 2010).

¹⁴² Reed D. Benson, "Adequate Progress," or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws since 2000*, 36 ENTVL. L. 1283, 1289 (2006).

¹⁴³ Reed D. Benson, "Adequate Progress," or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws since 2000*, 36 ENTVL. L. 1283, 1289 (2006).

¹⁴⁴ COLO. REV. STAT. § 37-92-102(3) (2004).

¹⁴⁵ See, Reed D. Benson, "Adequate Progress," or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws since 2000*, 36 ENTVL. L. 1283, 1303 (2006).

In Utah, unappropriated water cannot be used for instream uses therefore instream flows have relied on the conversion of existing rights.¹⁴⁶ The transfer of consumptive rights to nonconsumptive rights must be performed by the Utah Division of Water Resources or the Division of Parks and Recreation.¹⁴⁷ Beginning in 2008, the Utah legislature has allowed “fishing groups” to file for change of use in order to protect native trout habitat, thus Utah has begun to expand instream flow protection through change of use.¹⁴⁸

Montana allows any person to lease an existing water right for environmental flows, but these actions are typically good for up to thirty years and government agencies have limited oversight.¹⁴⁹ Only the Montana Department of Fish, Wildlife, and Parks and the Forest Service may permanently change the use of their rights to environmental flows because the ten year terms can be renewed indefinitely.¹⁵⁰ Montana’s development of instream flows through transferring water rights is noteworthy because it began cautiously, but eventually gained widespread support because of positive experiences and a broad coalition of interests, including agriculture, supported the changes.¹⁵¹

Colorado, Utah, and Montana illustrate the diversity of ways that existing uses can be transferred to environmental flows.¹⁵² Establishing the transferability of water is essential for

¹⁴⁶ See, Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177, 188 (1998).

¹⁴⁷ Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 122-23 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

¹⁴⁸ UTAH CODE ANN. § 73-3-30(3) (1989 & supp. 2010).

¹⁴⁹ Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 91 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

¹⁵⁰ MONT. CODE ANN. §§ 85-2-320, 436 (2009).

¹⁵¹ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 363 (2009).

¹⁵² Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335 (2009).

ensuring that water rights can change to meet society's most valuable uses.¹⁵³ The first issue South Dakota must address in order to fully promote the transfer of existing water rights from consumptive uses to non consumptive uses is the appurtenance of irrigation rights to the land.¹⁵⁴ An exception to this principle is that if it becomes "impractical to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right may be severed from the land" and transferred to other uses while maintain priority date if existing rights are not harmed.¹⁵⁵ This exception may provide a way for water traditionally used for agriculture to be transferred to instream rights, but this exception is likely to narrow to maximize the potential transfers to instream uses.¹⁵⁶ A better crafted exception would be to allow irrigators to take advantage of efficiency increases in irrigation equipment and techniques by converting the saved water into instream flows.¹⁵⁷ Average efficiency in the agricultural industry is still only between fifty and sixty percent, which means that there is room for improvement.¹⁵⁸ This exception could come in the form of a conserved water program, similar to Oregon's.¹⁵⁹ Oregon's conserved water program allows water rights holders to keep the portion of water that is saved by implementing more efficient water uses.¹⁶⁰ A conserved water program in South Dakota would maintain a stable amount of irrigated

¹⁵³ Donald D. MacIntyre, *The Prior Appropriation Doctrine in Montana: Rooted in Mid-Nineteenth Century Goals-Responding to Twenty-First Century Needs*, 55 MONT. L. REV. 303, 313 (1994).

¹⁵⁴ S.D.C.L. § 46-5-34 (2004).

¹⁵⁵ S.D.C.L. § 46-5-34 (2004).

¹⁵⁶ See, Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 116 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCCompStudyFinalRpt.pdf>

¹⁵⁷ See, Ronald A. Kaiser and Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RESOURCES J. 157, 169 (1998).

¹⁵⁸ Janet C. Neuman, *The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432, 439 (2004).

¹⁵⁹ Janet C. Neuman, *The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432, 439 (2004).

¹⁶⁰ OR. REV. STAT. § 537.470 (2003).

farmland and prevent the increase in irrigation acreage sought by the statute, while simultaneously promoting instream flows.¹⁶¹

Even if the South Dakota legislature does not address the appurtenance of irrigation rights, the transfer of water rights can benefit water rights. Subjecting water transfers to the no harm rule should mean that there are fewer obstacles to the change in use to environmental flows because in many cases environmental flows would not harm existing rights.¹⁶² In keeping with the no harm rule, the South Dakota legislature should consider permanent water transfers for environmental flows because these transfers would ensure the permanent restoration of flows in dewatered rivers.¹⁶³ In lieu of such action, South Dakota should follow Montana's example and allow temporary transfers of water rights to instream uses subject to unlimited renewal.¹⁶⁴ In addition, these temporary transfers or leases allow the original water right holder to maintain title to the leased right while it is being put to instream use.¹⁶⁵ An additional benefit of leasing is that it provides a trial period for assessing the transaction's benefits.¹⁶⁶ A final solution may take the form of an agreement not to divert.¹⁶⁷ Used in Idaho, these agreements last from one year to thirty years and are not subject to a change of use review.¹⁶⁸ Implementing one these solutions

¹⁶¹ See, S.D.C.L. § 46-5-34 (2004).

¹⁶² John H. Davidson, 6-SD Water and Water Rights VII.

¹⁶³ Ronald A. Kaiser and Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RESOURCES J. 157, 170 (1998).

¹⁶⁴ MONT. CODE ANN. § 85-2-436 (2009).

¹⁶⁵ John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 6 (2006).

¹⁶⁶ Janet Neuman, Anne Squier, and Gail Achterman, *Sometimes a Great Notion: Oregon's Instream Flow Experiments*, 36 ENVTL. L. 1125, 1151 (2006).

¹⁶⁷ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 356 (2009).

¹⁶⁸ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 356 (2009).

establishes a system that would allow South Dakota to gradually move into environmental flow legislation and would not constrain the State's water development in the future.¹⁶⁹

C. Water Trusts

An additional option available to South Dakota that would facilitate instream flows is the formation of water trust.¹⁷⁰ A water trust is a private, nonprofit entity involved in water rights transactions for conservation purposes and to improve the instream water quality and quantity for the benefit of the riparian habitat.¹⁷¹ In other words, water trusts assist water transfers by identifying and pairing willing buyers with willing sellers.¹⁷² Water trusts are similar to the land trusts that protect interests in land for land conservation and promote land stewardship, but water trust must negotiate the different laws and regulations of water.¹⁷³ Water trusts serve as link between the private sector and state agencies because they hire skilled individuals who coordinate the work between agencies and private parties.¹⁷⁴ Oregon was the first state to develop a water trust and was later followed by Washington, Montana, and Colorado.¹⁷⁵

¹⁶⁹ John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 6 (2006).

¹⁷⁰ See, John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 8 (2006).

¹⁷¹ Arlene J. Kwasniak, *Quenching Instream Thirst: A Role for Water Trusts in the Prairie Provinces*, 16 J. ENV. L. & PRAC. 211, 212 (2006).

¹⁷² Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 32 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

¹⁷³ Lynn Marie Paretcham, *Choreographing NGO Strategies to Protect Instream Flows*, 42 NAT. RESOURCES J. 33, 49 (2002).

¹⁷⁴ Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 32 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

¹⁷⁵ Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 32 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

Water trusts function within the existing water law structure, therefore there must be sufficient legislation or case law to explicitly or implicitly allow their activities.¹⁷⁶ There should be ample law allowing instream uses, water transfers or assignments, changes in use from consumptive to nonconsumptive, and instream enhancements.¹⁷⁷ If the South Dakota legislature decides to implement enabling legislation for environmental flows, it would be prudent ensure that South Dakota law allows for the formation of a water trust because trusts' contributions to instream flows have been growing.¹⁷⁸ Establishing a water trust for South Dakota would place the state and its watercourses in the position reap the benefits of water trusts, which include: fund raising ability for purchasing or leasing water rights; marketing experience for generating and sustaining interest in environmental flows; experienced individuals who can assist in the negotiations of transferring water; and can minimize the cost and time commitment to water rights donors.¹⁷⁹ An additional benefit of water trusts is that they provide another level of enforcement in every transaction, which partially removes a financial burden from the state and helps regulate the activities of downstream users.¹⁸⁰ Thus, a South Dakota water bank could provide the state with numerous benefits while allowing the private sector to fund the majority of the work.¹⁸¹

¹⁷⁶ Arlene J. Kwasniak, *Quenching Instream Thirst: A Role for Water Trusts in the Prairie Provinces*, 16 J. ENV. L. & PRAC. 211, 222 (2006).

¹⁷⁷ Arlene J. Kwasniak, *Quenching Instream Thirst: A Role for Water Trusts in the Prairie Provinces*, 16 J. ENV. L. & PRAC. 211, 222 (2006).

¹⁷⁸ See, Janet Neuman, Anne Squier, and Gail Achterman, *Sometimes a Great Notion: Oregon's Instream Flow Experiments*, 36 ENVTL. L. 1125, 1152-54 (2006).

¹⁷⁹ See, Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 32 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>

¹⁸⁰ Mary Ann King, *Getting our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVTL. L. REV. 495, 534 (2004).

¹⁸¹ See *Generally*, Steven Malloch, Trout Unlimited, *Liquid Assets: Protecting and Restoring the West's Rivers and Wetlands through Environmental Water Transactions*, (2005) available at <http://www.tu.org/sites/www.tu.org/files/documents/Malloch.LiquidAssets.2005.pdf> (last visited November 20, 2010) (describing the cost involved in transactions performed by water trusts).

The experiences of the Montana Water Trust and the Oregon Water Trust are instructive because the trusts are now firmly established and have proven that water trusts can be successful.¹⁸² Growth in the number of states employing water trusts indicates that the water trust model is exportable to other states.¹⁸³ A South Dakota Water Trust would do well to fall the Oregon Water Trust's example and include agricultural, environmental, legal, and tribal perspectives because many of these interests are present within state.¹⁸⁴ Oregon created the first water trust for the purpose acquiring water from consumptive users and transferring that water to instream uses, which would restore or improve the waterways status.¹⁸⁵ Initially, the Oregon Water Trust focused small intrabasin transactions; the South Dakota Water Trust should follow this example because doing this would allow the state to protect those areas that are in critical need of environmental flows.¹⁸⁶ The Montana Water Trust is focused on restoring streamflows through the State's private water leasing laws by compensating owners for not diverting all or a portion of their water allocation.¹⁸⁷

¹⁸² John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 8-11 (2006); Mary Ann King, *Getting our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVTL. L. REV. 495, 496 (2004).

¹⁸³ Mary Ann King, *Getting our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVTL. L. REV. 495, 533 (2004).

¹⁸⁴ Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 48 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCCompStudyFinalRpt.pdf>

¹⁸⁵ Janet C. Neuman, *The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432, 437 (2004).

¹⁸⁶ Janet C. Neuman, *The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432, 436 (2004).

¹⁸⁷ John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 8 (2006). The Montana Water Trust provides water rights holders with financial compensation, tax benefits, technical assistance, or irrigation improvements. *Id.*

A potential South Dakota Water Trust could use a number of the acquisition methods and approaches used by the Montana Water Trust.¹⁸⁸ Short-term are an excellent way to convert water to instream uses for less than three years because they allow each party a trial period to see how the agreements affects them and the short leases build trust between the parties.¹⁸⁹ Leases longer than three years are considered long-term and may be more affordable because landowners have time to make any necessary capital adjustments.¹⁹⁰ Leases are an attractive option, in part because water rights holders are generally more interested in leasing their rights than in selling them.¹⁹¹ Split-season leases are usually less expensive than a full year lease and allow some of the water to be used for irrigation early in the year while the remainder is used for environmental flows.¹⁹² Dry-year options are agreements made ahead of time that provide the opportunity to lease water during times of drought, but do not interfere with water use in wet years.¹⁹³ Source switching involves changing the source from surface water to groundwater and transferring the surface rights for instream use, but one must be cognizant of the connection between groundwater and surface water.¹⁹⁴ Changing the point of diversion to a place below a

¹⁸⁸ John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 9 (2006).

¹⁸⁹ John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 9 (2006).

¹⁹⁰ John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 9 (2006).

¹⁹¹ Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 381 (2009).

¹⁹² John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 9 (2006).

¹⁹³ Ronald A. Kaiser and Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RESOURCES J. 157, 171 (1998).

¹⁹⁴ See, S.R. Kinsella, *The Western Water Project: A Decade of Accomplishments*, TROUT, Summer 2008, at 21.

critical segment might provide more environmental flows for that reach.¹⁹⁵ Providing a South Dakota water trust with a variety of tools will help facilitate the protection of instream flows and allow the state to join Oregon, Colorado, Montana, and Washington in witnessing the success of water trusts.¹⁹⁶

V. Conclusion

With the first decade of the twenty-first century nearing completion, the South Dakota legislature should examine South Dakota's water law in terms of providing instream flows. The South Dakota Supreme Court and Water Management Board have found the building blocks for using instream flows as a beneficial use in the existing South Dakota water law framework. Going forward the legislature should remove the encumbrances to instream flows by providing a means to keeping unappropriated water in the rivers and restoring water to those segments that are dewatered. Water trusts present an emerging toolbox for promoting and restoring environmental flows. The success of water trusts in Oregon, Washington, Colorado, and Montana is encouraging because it indicates their potential success in South Dakota. More than fifty years have passed since the legislature overhauled the state's water law and now is the time to revisit it before embarking on the next fifty years.

¹⁹⁵ John J. Ferguson, Barbara Chillcott Hall, and Brianna Randall, *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 9 (2006).

¹⁹⁶ Sasha Charney, *Decades down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 48-49 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>