

Conjunctive Use Management

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I. Introduction

This memorandum will look at two basic types of water, groundwater and surface water, and examine how they are hydrologically and legally connected. In the past, ground and surface water were considered to be separate entities for legal purposes. As technology advances, the relationship between two sources has become more apparent, rendering old water laws in some states obsolete. Part II will provide a basic overview of groundwater and surface water and the rights associated with each. Next, Part III will detail conjunctive use, including surrounding litigation. Part IV will look at the law in South Dakota. Finally, Part V will conclude by summarizing the state of conjunctive use in South Dakota, as well as the rest of the western states. The concept of conjunctive use is one way to resolve the problem of conflicting laws.

II. Conjunctive Use of Ground and Surface Water

A. A Basic Water Rights Overview

“A water right is a legally protected use of water.”¹ The National Water Commission has set out the three major categories of water usage.² These categories are:

(1) intake uses, (2) onsite uses, and (3) instream or flow uses. Intake uses include water for domestic, agricultural, and industrial purposes – uses that actually remove water from its source. Onsite uses consist mainly of water consumed by swamps, wetlands, evaporation from the surface of water bodies, natural vegetation, unirrigated crops, and wildlife. Flow uses include water for estuaries, navigation, waste dilution, hydroelectric power, and some fish and wildlife recreational uses.³

¹ William Goldfarb, *WATER LAW*, (Butterworth Publishers, 1984) page xvii.

² *Id.* at xviii.

³ *Id.* (quoting, *Water Policies for the Future*, the final report of the National Water Commission (1973)).

There are two fundamental legal classifications of water – groundwater and surface water.⁴ The following is a brief overview of these legal classes.

B. Groundwater

“Groundwater, in its broadest sense, is all of the subsurface water that is located in the saturated zone.”⁵ The Restatement (Second) of Torts defines groundwater as “water that naturally lies or flows under the surface of the earth.”⁶ Groundwater supplies well and springs and is the most extracted natural resource in the world.⁷ “It provides more than half of humanity’s freshwater for everyday uses such as drinking, cooking, and hygiene, as well as twenty percent of irrigated agriculture.”⁸

Groundwater can be separated into three subcategories – subflow of surface streams, underground streams, and percolating waters.⁹ However, states differ as to whether each of these subcategories classifies as groundwater. Subflow surface streams include “the saturated zone directly beneath and supporting a river or lake in direct contact with surface water. Where subflow can be identified, it is considered as part of the watercourse itself.”¹⁰

⁴ *Id.* at 3.

⁵ Zachary A. Smith, *GROUNDWATER IN THE WEST* (Academic Press, Inc., 1989).

⁶ *Restatement (Second) of Torts*, § 845. (Ground water refers only to water that naturally lies in or percolates through the interstices of aquifers, which are formations of sand, gravel or porous rock in the substrata of the earth. It does not include water confined in underground tanks, water mains, sewers or other containers created by man for the storage or transfer of water, or water placed in natural formations by man for storage and later withdrawal or to recharge depleted aquifers.)

⁷ Gabriel E. Eckstein, Commentary on the U.N. International Law Commission’s Draft Articles on the Law of Transboundary Aquifers, *Colorado Journal of International Environmental Law and Policy*, 18 *Colo. J. Envtl. L & Pol’y* 537 (Summer 2007).

⁸ *Id.* at 537.

⁹ Goldfarb at 5.

¹⁰ *Id.* at 5.

The second category of groundwater is underground streams. “An underground stream is defined as water that passes through or under the surface in a definite channel.”¹¹ “There is a legal presumption against groundwater being an underground stream: that is, a claimant must produce convincing evidence that underground water flows in a definite and known channel, and does not “percolate” as in an aquifer.”¹² Some state courts have explicitly held that ground water does not include water flowing in underground streams with ascertainable beds and banks.¹³

The third category of groundwater is percolating waters. Percolating waters include those waters moving through the ground, beneath the earth’s surface, without a definite channel.¹⁴ Percolating waters also include

Classifying water as groundwater is important because of the legal ramifications classification entails. Groundwater, in many states, is not subject to the doctrine of prior appropriation.¹⁵ It is, therefore, necessary to determine the classification of the water in dispute in order to apply the proper doctrine.

In the United States, there are four major doctrines applied to groundwater.¹⁶ Those doctrines are the English or common law rule of absolute ownership, the American rule of reasonable use, the correlative rights doctrine, and the doctrine of prior appropriation.¹⁷

¹¹ Goldfarb at 5.

¹² *Id.* at 5.

¹³ *See, Arizona Public Service Co v. Long*, 773 P.2d 988, 1000 (Ariz. 1989) (In Banc).

¹⁴ Goldfarb at 5.

¹⁵ *See, Arizona Public Service Co*, at 1000.

¹⁶ Goldfarb at 8.

¹⁷ *Id.*

The English rule of absolute states that the water beneath the surface of one's land is the property of the landowner and may be withdrawn, without malice, with no regard to the effect that withdrawals have on any other landowner.¹⁸ This doctrine developed in England, where it is largely still the law.¹⁹ In theory, under absolute ownership, landowners can pump at will the water beneath their lands as well as beneath their neighbors' land.²⁰ Absolute ownership works well in England, where the water sources are more plentiful. However, in the United States, absolute ownership is unworkable because of the more limited availability of water.

The American rule, or reasonable use doctrine, on the other hand essentially limits a landowner's right to the water beneath his land to the amount necessary for some reasonable and beneficial purpose on the land above the water.²¹ In addition to the requirement that the use be reasonable and beneficial, the key under this rule is that the groundwater must be used on the ground above its source. Thus, when applying the reasonable use doctrine, waste of water or the transportation of water off the land is not considered a reasonable beneficial use if such use interferes with the right of adjacent landowners to use the water beneath their own lands for the beneficial use of those lands.²²

The third body of law is the correlative rights doctrine. This doctrine recognizes the landowner's right to use the water beneath his or her lands. However, it limits that right somewhat by providing that landowners overlying a common source of groundwater have equal,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 9.

or correlative, rights to a reasonable beneficial use on the land overlying the groundwater basin.²³ The correlative rights doctrine is seen as an alternative to the rule of absolute ownership.

Finally, under the doctrine of prior appropriation, the first appropriator of water, by putting that water to beneficial use without waste, has a right to continue that use. Such rights are superior to the rights of people who appropriate water at a later date.²⁴ The doctrine of prior appropriation is utilized to regulate use of groundwater in most western states.²⁵ In states that follow this doctrine, water rights are usually administered by a state official or state office.

C. Surface Water

Surface water, on the other hand, is “used in the law of waters in reference to a distinct form or class of water which is generally defined as that which is derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground, while it remains in such diffused state or condition.”²⁶ American Jurisprudence describes surface water as:

The term “surface water” is used in the law of waters in reference to a distinct form or class of water which is generally defined as that which is derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground, while it remains in such diffused state or condition. Another definition is that surface waters are waters on the surface of the ground of a casual or vagrant character, following no definite

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Eric Surett, et al., American Jurisprudence, Second Edition, 78 Am. Jur. § 174 (May 2009), (citing, City of Globe v. Moreno, 23 Ariz. 124, 202 P. 230, 27 A.L.R. 965 (1921)).

course, of a more or less temporary existence, and which spread at random over the ground and are lost or disappear by percolation into the soil, by evaporation, or by flowing into a natural watercourse. The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in a natural watercourse, or collected into and forming a definite and identifiable body, such as a lake or pond. However, what starts out as surface water may become a natural watercourse at the point where it begins to flow in a reasonably well defined channel with a bed and banks. When surface waters reach and become part of a natural watercourse, they lose their character as surface waters and come under the rules governing watercourses. Surface water may also lose its character as such by the collection thereof into a definite body, such as a lake or pool. However the diversion of surface water from its natural course by artificial means or conditions does not necessarily deprive it of its character or status as such.²⁷

The South Dakota Supreme Court has adopted the following definition of surface water:

“Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake.”²⁸ Laws throughout the United States differ as to the classification of water in watercourses as surface water.

William Goldfarb, Professor of Environmental Law at Rutgers University, describes two subcategories of surface water – diffused surface water and water in watercourses.²⁹ Goldfarb explains diffused surface water as “the uncollected flow from falling rain or melting snow, or is spring water that spreads over the earth’s surface.”³⁰ This classification is consistent with the definition of surface water adopted by the South Dakota Supreme Court.³¹

²⁷ *Id.* (internal citations omitted).

²⁸ First Lady, LLC v. JMF Properties, LLC, 2004 SD 69, ¶ 8, 681 N.W.2d 94, 98, (quoting Knodel v. Kassel Twnshp., 1998 SD 73, 581 N.W.2d 504, n. 2).

²⁹ Goldfarb at 4.

³⁰ *Id.*

³¹ First Lady, LLC, supra note 11.

Diffused surface water does not flow in a defined course.³² Furthermore, it “forms no more definite body of water than a bog or marsh.”³³ This type of water loses its character if it reaches a well-defined channel.³⁴ At this point, surface water becomes water in a watercourse, the second classification of surface water.

Watercourses generally include “all surface waters contained within definite banks.”³⁵ Examples of watercourses include rivers, creeks, lakes, and ponds. The most distinguishable characteristics of watercourses are their defined channels and regular flow.³⁶ When determining whether to classify surface water as a watercourse, the most reliable test utilized by courts has been the “defined channel” test.³⁷

It is important to note that naturally-occurring watercourses are governed by different legal principles than those which are man-made.³⁸

Not all surface water is easily classifiable. States differ as to considering floodwaters which have become permanently severed from the main current when waters recede as diffused surface water or water in watercourses.³⁹

III. Conjunctive Use of Ground and Surface Water

A. History

³² Goldfarb at 3.

³³ *Id.*

³⁴ *Id.* at 4.

³⁵ *Id.* at 4.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

Historically, ground and surface water have been thought of as separate entities. Therefore, as legislation developed in the area of water law, the two were regulated under different principles, and the law treated each as a separate resource.⁴⁰ The Rocky Mountain Mineral Law Foundation offers two explanations for the distinction.⁴¹ First, the relationship between groundwater and surface water was not well understood at the outset of regulation.⁴² Second, “limitations in pump technology made it impractical to withdraw large volumes of groundwater, which in turn meant that conflicts between users of surface water and groundwater were relatively rare.”⁴³ Unfortunately, this led to development of different legal regimes and little effort on the part of states to coordinate use.

From 1945 until 1980, the use of groundwater more than quadrupled, increasing from 21 billion to 88 billion gallons a day.⁴⁴ In the mid 1980s, approximately one-half of all the people in the United States used groundwater as a primary source of drinking water.⁴⁵ In the nineteen western states, 38% of the total water used comes from groundwater.⁴⁶ One method devised to remedy the legal dilemma created from this vast shift to reliance on groundwater is conjunctive use.

⁴⁰ George A. Gould, *Nebraska Supreme Court Struggles with Groundwater/Surface Water conflicts*, Rocky Mountain Mineral Law Foundation, Volume XXXVIII, Number 2, 2005.

⁴¹ Goldfarb at 4.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Smith at 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

Conjunctive use is the coordinated appropriation of ground and surface waters that are hydrologically connected.⁴⁷ The basic principle of conjunctive use is that the same law should be applied to both sources if the surface water and ground water are so closely connected that diversion of one affects the other.⁴⁸

B. Conjunctive Use Litigation

1. Nebraska Case

The Nebraska Supreme Court addressed the issue of conjunctive use in *Spear T Ranch, Inc. v. Knaub*.⁴⁹ In that case, the surface water user brought an action against groundwater users to recover for interference with rights to creek water.⁵⁰ The surface water user alleged prior appropriation, conversion, and trespass.⁵¹ The facts of the case are as follows:

Spear T filed a complaint alleging that it has surface water appropriations on Pumpkin Creek, which runs through Banner and Morrill Counties. The appellees own real property in the Pumpkin Creek basin and have irrigation wells within the boundaries of the basin. The complaint alleged that the groundwater irrigation wells are hydrologically connected to Pumpkin Creek. According to Spear T, the appellees' pumping of ground water over the four years preceding the complaint drained water from Pumpkin Creek and deprived Spear T of its surface water appropriations; the complaint alleged that the appellees have continued to pump ground water and that Spear T has been unable to irrigate crops and provide water for livestock. Spear T alleged that the appellees converted its surface water rights to their own use without compensating Spear T and that it would be irreparably harmed if the appellees continued to use their ground water irrigation wells. The complaint sought compensation for the value of the surface water appropriations taken by the

⁴⁷ Linda A Malone, "Environmental Regulation of Land Use Current through the September 2009 Update," 1 *Envtl. Reg. of Land Use* § 9:4 (2009).

⁴⁸ *Id.*

⁴⁹ *Spear T Ranch, Inc. v. Knaub*, 691 N.W.2d 116 (2005).

⁵⁰ *Id.*

⁵¹ *Id.*

appellees or, in the alternative, special damages for the value of the water rights and other damages; it also sought an injunction.⁵²

The issue before the Nebraska Supreme Court was whether a surface water appropriator has a claim against a ground water user for interference with a surface water users' appropriation.⁵³ The State of Nebraska happens to be a mixed doctrine jurisdiction, meaning that groundwater and surface water are subject to regulation under different doctrines.⁵⁴ On appeal, the Nebraska Supreme Court noted that the state's laws ignore the interrelationship of ground and surface water.⁵⁵ The doctrine of prior appropriation was used to allocate water rights in surface streams.⁵⁶ Meanwhile, groundwater rights are governed by both the common law rule of reasonableness and the Ground Water Management and Protection Act.⁵⁷ Moreover, ground and surface water in Nebraska are regulated by separate agencies.⁵⁸

In evaluating the plaintiff's claim, the court began by addressing the argument that the plaintiff had rights to the water from Pumpkin Creek based on either the statutory rule of prior appropriation or the tort of conversion.⁵⁹ The claim of prior appropriation was rejected for three reasons.

First, [the court] said that application of the prior appropriation doctrine to groundwater would require the court to agree with a legal fiction that considers groundwater to be an 'underground stream.' ...The court said that adherence to such a view ignores reality. Second, the court said that no

⁵² *Id.*

⁵³ *Id.*

⁵⁴ George A. Gould, "Nebraska Supreme Court Struggles with Groundwater/Surface Water Conflicts," Rocky Mountain Mineral Law Foundation, V. 38, No. 2, page 1 (November 2, 2005).

⁵⁵ *Id.*

⁵⁶ *Id.* at 2.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

statutory or case law authority supports applying surface water appropriation rules to groundwater. It noted that the Nebraska legislature, unlike most other western legislatures, had not developed a comprehensive appropriation system that addressed conflicts between users of hydrologically connected groundwater and surface water. Third, the court observed that applying prior appropriation principles could have the effect of shutting down all wells drawing on hydrologically connected groundwater because of the earlier priority of the surface appropriators. Thus, the court would ‘unreasonably deprive’ many groundwater users of water.⁶⁰

Next, the court addressed the claim of conversion. The court defined conversion as a “wrongful act of dominion over another’s property.”⁶¹ Because the right to appropriate water is not equivalent to ownership of property, the court found no action for conversion.⁶²

Although the Nebraska Supreme Court ruled against the plaintiff, Spear T Ranch, on both of its claims, it did leave hope for future plaintiffs in the area of conjunctive use. The court stated that it would reject any rule that would bar a surface appropriator from recovery in all situations.⁶³ The court went on to adopt an application of the *Restatement (Second) of Torts* § 858(1).⁶⁴ This rule places liability on groundwater users whose withdrawal of water “has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.”⁶⁵ The court reversed and remanded Spear T’s case in order to allow the plaintiff to amend his complaint to include a claim under the *Restatement (Second)*.

⁶⁰ *Id.*

⁶¹ *Spear T Ranch*, 691 N.W.2d at 126 (citing, *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000)).

⁶² *Id.*

⁶³ George A. Gould, at 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

2. Idaho Case

Since March of 2007, a series of cases have been decided by the Idaho courts and the Idaho Department of Water Resources that will have a great impact on that administration of water rights throughout the State of Idaho. The majority of the cases have centered around conflicts between groundwater and surface water users drawing water from the Eastern Snake Plain Aquifer. This aquifer stretches across most of southern Idaho and is thought to contain as much as a billion acre-feet of water in its upper 500 feet.⁶⁶

The amount of water in the Eastern Snake Plain Aquifer increased dramatically in the late 1800s and the approximately ninety years following due to recharge from surface water irrigation.⁶⁷ During this time, all farm irrigation relied on flood techniques, resulting in an enormous amount of recharge to the aquifer.⁶⁸ However, around 1950, the advent of groundwater pumping and more efficient irrigation techniques led to a decrease in the amount of storage and recharge to the aquifer.⁶⁹ This has led to a decrease in aquifer contributions to the Snake River since 1950.

In 2005, the Surface Water Coalition and other surface water users filed a report with the Idaho Department of Water Resources (Department), believing that groundwater pumping had injured their water rights.⁷⁰ The report sought orders to shut off hundreds of junior groundwater

⁶⁶ Jeffery C. Fereday, "Idaho Decisions Address Ground Water-Surface Water Conflicts in Snake River Basin," Rocky Mountain Mineral Law Foundation, V. 41, No. 2, page 1 (November 2, 2008).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

irrigation wells in the Eastern Snake Plain Aquifer.⁷¹ The surface water users urged that the traditional principles of water law should be narrowed in order to protect their water rights.

The Idaho Supreme Court held in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources* that the Department did not act unconstitutionally when it set up rules and guidelines for conjunctive use management.⁷² This was a landmark decision for Idaho and conjunctive use in the western states. The Department has ordered, and the Idaho courts have affirmed, that the doctrine of “first in time, first in right” should be applied to both users of groundwater and surface water in light of public interest.⁷³ Furthermore, the Director has the discretion to consider factors that may outweigh a water user’s priority, including the senior water user’s need and beneficial use of the water, acres irrigated, and whether the irrigator is using reasonable means in applying and diverting the water.⁷⁴

3. Colorado Case

The Confined Aquifer lies in south-central Colorado in the Rio Grande Basin. It is an artesian aquifer that underlies a significant portion of the San Luis Valley. Administration of water rights in the Upper Rio Grande Basin are governed by both the state laws of Colorado and by the Rio Grande Compact. The Compact establishes Colorado’s obligation to ensure deliveries of water at the New Mexico state line and New Mexico’s obligation to assure

⁷¹ *Id.*

⁷² *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources* (143 Idaho 862, 154 P.3d 433 (Idaho 2007))

⁷³ Jeffery C. Fereday, at 3.

⁷⁴ *Id.*

deliveries of water at the Elephant Butte Reservoir.⁷⁵ The terms of the Compact are administered by a Commission in El Paso, Texas.⁷⁶

“The Upper Rio Grande has a longer history of water shortages and disputes, and of treaties and decrees and compacts to settle those disputes, than any other river in the Southwest.”⁷⁷ In the 1890s, water-users began tapping the Confined Aquifer with small capacity wells.⁷⁸ By the 1950s, several high capacity wells were drawing water out of the aquifer.⁷⁹ In reaction to lawsuits from Texas and New Mexico, Colorado enacted the Water Rights Determination and Administration Act of 1969, beginning efforts to regulate groundwater uses that depleted stream flows.⁸⁰

In the 1970s, the State Engineer proposed groundwater regulations that, with some exceptions, curtailed all groundwater use for Water Division No. 3 on the Confined Aquifer.⁸¹ Water Division No. 3 is the approximately 8,000 square miles that make up the portion of the Rio Grande Basin within Colorado. Exceptions to the State Engineer’s proposal required a groundwater user to have a judicially approved plan that prevented injury to senior water users

⁷⁵ Water Watch Alliance, “Rio Grande Basin and San Luis Valley Aquifer,” (<http://sites.google.com/site/waterwatchalliance/riograndebasinandsanluisvalleyaquifer>).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ William A. Paddock, “Colorado Supreme Court Upholds Conjunctive Use Regulations for Rio Grande Basin,” Rocky Mountain Mineral Law Foundation, V. 41, No. 2, page 1 (November 2, 2008).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

from groundwater use.⁸² These regulations were struck down by the Colorado Supreme Court in 1984.⁸³

Presently, the State of Colorado owns the majority of the water rights to the Confined Aquifer.⁸⁴ However, two recent court cases could have a large effect on how and to whom groundwater in the San Luis Valley is appropriated. In Water Court Case #04CW24 (1972), the Colorado State Engineer determined that the Confined Aquifer is now fully appropriated and placed a moratorium on new water appropriations from non-exempt confined aquifer wells after 1972 and on non-exempt unconfined aquifer wells after 1982.⁸⁵ In Water Court Case 04CW35, the Great Sand Dunes National Park and Preserve was granted rights over all unallocated water under the National Park.⁸⁶

IV. South Dakota Law

A. Water Sources and Usage in South Dakota

The State of South Dakota enjoys an interior continental climate, with hot summers and extremely cold winters.⁸⁷ Annual precipitation in the state averages approximately 18 inches per year, ranging from approximately 14 inches in the northwest to 25 inches in the southeast.⁸⁸

⁸² *Id.*

⁸³ See, *Alamosa – La Jara v. Gould*, 674 P.2d 914 (Colo. 1984).

⁸⁴ Water Watch Alliance, (<http://sites.google.com/site/waterwatchalliance/riograndebasinandsanluisvalleyaquifer>

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ South Dakota – Climate, <http://www.southdakotadiary.us/Climate.asp>, 2008. (South Dakota has an interior continental climate, with hot summers, and extremely cold winters. The normal January

People in the State of South Dakota rely heavily on groundwater. There are around 600,000 privately operated wells in South Dakota.⁸⁹ The main reason for the heavy dependence on groundwater is the fact that flow from rivers in South Dakota is generally too undependable for continued withdrawal for major uses.⁹⁰ Two major rivers flow through the state, the Missouri and the James. However, the Missouri is the only river in South Dakota capable of sustaining year-round large flows.⁹¹

Forty-eight percent of the water use in South Dakota comes from groundwater, while fifty-two percent comes from surface water.⁹² In the neighboring state of Nebraska, which lies largely on the Ogallala Aquifer and accounts for nearly two-thirds of the volume of the aquifer,⁹³ groundwater accounts for some sixty percent of the state's water consumption.⁹⁴ However, it is important to note that, although surface water provides for slightly more than half of the water used in South Dakota, much of the surface water in the state is actually fed by groundwater, making the numbers somewhat misleading. In fact, the flow of groundwater into surface water sources contributes in excess of 85% of the total volume of stream-flow throughout South Dakota.⁹⁵

temperature is 12°F (−11°C) and the normal July temperature, 74°F (23°C). Sioux Falls receives an average of 41 inches (104 cm) of snow per year.).

⁸⁸ Smith, *supra* note 5 at 215.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Water Encyclopedia: Science and Issues, <http://www.waterencyclopedia.com/Oc-Po/Ogallala-Aquifer.html>, 2010. (...the state accounts for two-thirds of the volume of Ogallala groundwater, followed by Texas and Kansas, each with about 10 percent.).

⁹⁴ Smith at 131.

⁹⁵ *Id.*

Groundwater has a wide variety of uses in South Dakota. The majority of groundwater, forty-five percent, is used for irrigation. Rural domestic and live stock purposes account for an additional thirty percent. This means that, when irrigation and domestic and livestock purposes are combined, agricultural uses make up three-quarters of the groundwater usage in the state.⁹⁶ The remaining groundwater usage is distributed between public supply and industrial purposes at sixteen and seven percent, respectively.⁹⁷

South Dakota's system is made more complex by the fact that the western and eastern halves of the state differ significantly from one another. Eastriver, due to glaciation, has more shallow aquifers.⁹⁸ There, groundwater is more easily accessible and accounts for seventy-six percent of the water used.⁹⁹ Westriver, on the other hand, gets only twenty-seven percent of its water from groundwater and derives seventy-three percent from surface water.¹⁰⁰ Interestingly, Westriver, eighty-nine percent of water usage can be attributed to agriculture.¹⁰¹

B. Regulating Water in South Dakota

Water in South Dakota is owned by the people of the state and not by private individuals. The right to use water may be obtained under State Law.¹⁰² In addition, the South Dakota

⁹⁶ Smith at 215-216.

⁹⁷ *Id.*

⁹⁸ *Id.* at 216.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² SDCL 46-1-1, 46-1-3, and 46-5-5.

Legislature has mandated that “domestic use of water takes precedence over appropriative rights.”¹⁰³

The State of South Dakota employs a mixed system of the prior appropriation and correlative rights doctrines for governing the use of groundwater.¹⁰⁴ The state requires one to obtain a permit for the appropriation of water rights.¹⁰⁵ The system in this state works similar to that in other prior appropriation states.¹⁰⁶

In South Dakota, surface water is regulated by the doctrine of prior appropriation, as well.¹⁰⁷ The important caveats to the appropriation of water in the state are that the use of the water must be for a beneficial purpose and must not be unreasonable.¹⁰⁸ These requirements are common throughout the Western states and, in fact, throughout most of Water Law.

The laws in South Dakota seem to be the same whether one is dealing with ground or surface water. In fact, the South Dakota Supreme Court has held that the same law that is applied to groundwater should be applied to surface water.¹⁰⁹

The regulation of water rights in South Dakota are set forth in Chapter 46 of the South Dakota Codified Laws, which provides:

South Dakota water rights are administered by a system commonly called the “Doctrine of Prior Appropriation.” This means the first in time (senior priority) is the first in right, except for individual domestic use. Priority is established based on the date of filing the application. Uses of water

¹⁰³ SDCL 46-1-5, 46-1-6(7), and 46-1-6(14).

¹⁰⁴ Smith at 220.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Belle Fourche Irrigation District v. Smiley*, 87 SD 151, 204 N.W.2d 105, 155 (1973).

¹⁰⁸ *Id.*

¹⁰⁹ *Parks v. Cooper*, 2004 SD 27

developed prior to or under development as of March 2, 1955 (surface water) or February 28, 1955 (ground water) may qualify for a vested water right depending on the type of use involved.¹¹⁰

V. Conclusion

Although litigation has arisen in surrounding jurisdictions, South Dakota is not likely to see similar lawsuits arise, creating a need for conjunctive use management within the state. The laws regulating appropriation of water rights in South Dakota are relatively consistent, unlike the laws in those states where conjunctive use litigation has arisen. Therefore, conflicts in this state can be easily settled in court, without requiring change in legislation or major litigation in the area of conjunctive use.

States with conflicting laws, on the other hand, should look to the State of Nebraska and the *Spear T Ranch* case as an example of the discord outdated laws can create. The Supreme Court of Nebraska, in applying the *Restatement (Second) of Torts*, provides an excellent standard by which these other states could follow. However, the best way to deal with conflicting, outdated laws in the area of conjunctive use is to change those laws either legislatively or administratively before lawsuits even arise.

¹¹⁰ SDCL 46-1-9, 46-2A-9, 46-2A-12, 46-4-1, 46-4-2, 46-5-4, 46-5-7, 46-5-8, 46-5-34, 46-5-34.1, and 46-6-3.