

Water Trusts: Problems and Possibilities for Western Water Markets

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I. Introduction

Water trusts are a relative newcomer to the water transaction scene in the West. These largely private, non-profit organizations take advantage of changes in Western water law to benefit fish and wildlife that depend on instream flows. By utilizing market-based ideas to acquire water rights, the advent of these trusts has been viewed as salvation by some environmentalists, outdoor enthusiasts and wildlife conservationists, but signaled Armageddon to many farmers, ranchers and prior appropriation purists. The exact role these organizations will play in the future of changing Western water law, a system traditionally hostile to the ideas water trusts are based upon, remains to be seen.

Parts I, II and III of this paper will examine the background surrounding the creation of Western water trusts, and explain how they have evolved despite substantial legal, political and ideological barriers. Sections IV and V will discuss whether these Trusts signal a wider movement toward a broader market-based environmental philosophy, or whether water trusts are a unique and limited answer to a gap in Western water law. The last section concludes this is a time of change for water marketing and for water trusts, which are poised to either lead the way toward greater water marketing, or to be relegated to a limited role by insurmountable barriers.

II. Water Trusts—the Basics

To understand the significance of water trusts and the impact they have had on the Western water law system and water transactions in the West, it is important to first grasp what a water trust is, and what it does. By examining market-based tools and

methods, a clearer picture emerges of where these trusts fit into the overall system of Western water law.

A. What is a Water Trust?

A water trust is typically a private organization created in order to give greater protection to endangered species and other fish and wildlife dependant on Western streams and rivers for survival, as well as to enhance recreational uses by improving instream flows.¹ These organizations seek to apply to surface water, the lessons learned by land trusts, such as the Nature Conservancy, which purchases environmentally sensitive or significant parcels of land. The Nature Conservancy and other land trusts purchase environmentally sensitive or significant parcels of land from willing sellers to remove it from damaging uses and preserve it for wildlife. Similarly, water trusts obtain water rights from willing sellers or philanthropists to ensure that the right will remain unused for the benefit of wildlife.² The Oregon Water Trust, the first water trust in the United States, was founded in 1993. The Oregon Trust, along with subsequently formed water trusts in Washington, Montana, and Colorado, share similar goals. “The Oregon Water Trust mission is to restore surface water flows for healthier streams in Oregon by

¹ See, Oregon Water Trust website, <http://www.owt.org/> (last visited March 31, 2006); Montana Water Trust website, <http://www.montanawatertrust.org/> (last visited March 31, 2006), Washington Water Trust website, <http://www.thewatertrust.org/> (last visited March 31, 2006) (Oregon, Montana and Washington are private trusts. However, Texas has a legislatively created Water Trust, and Colorado, although it has a private water trust, only allows a State entity to hold instream rights.) See Texas Water Trust website, <http://www.twdb.state.tx.us/assistance/WaterBank/wtrust.asp> (last visited March 31, 2006); Colorado Water Trust website <http://www.coloradowatertrust.org/> (last visited March 31, 2006); Colorado Water Conservation Board website, [http://cwcb.state.co.us/isf/programs/isf1%20\(2\).htm](http://cwcb.state.co.us/isf/programs/isf1%20(2).htm) (last visited March 31, 2006).

using cooperative, free-market solutions....With our transactional approach, we focus on streams where small amounts of water provide significant ecological benefits. The result is healthier streams for fish, wildlife, and people.”³ Similarly, the Colorado Water Trust seeks to achieve conservation benefits for fisheries, streams lakes and wetlands including “the long-term restoration and protection of Colorado’s water dependent natural heritage and environmental diversity, the maintenance for ecologically beneficial open space and habitat provided by irrigated agriculture and the protection of related water-based recreation and aesthetics.”⁴ As these mission statements reflect, instream flows are important for the preservation of wildlife, especially fish. Low water flows have significantly injured fish on inland waterways in the U.S.⁵ The Oregon Water Trust has worked to improve habitat for coho, chinook, and steelhead salmon, as well as several varieties of trout throughout the state.⁶ The Montana Water trust seeks to protect stream flows for Montana’s important trout fisheries.⁷ With these goals in mind, water trusts seek to acquire instream water rights.

² James D. Crammond, *Leasing Water Rights for Instream Flow Uses: A Survey of Water Transfer Policy, Practices, and Problems in the Pacific Northwest*, 26 *Envtl L.* 225, 227 (Spring, 1996).

³ Oregon Water Trust Homepage, *supra* note 1.

⁴ The Colorado Water Trust Homepage, *supra* note 1.

⁵ Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, Robert H. Abrams, *Legal Control of Water Resources*, 11, (3d. Ed. West Group, 2000). [hereinafter Sax et al., *Legal Control of Water*]

⁶ Janet C. Neuman & Cheyenne Chapman, *Wading into the Water Market: The first five years of the Oregon Water Trust*, 14 *J. Env'tl. L. & Litig.* 135, 138 (1999).

⁷The Montana Water Trust Homepage, *supra* note 1.

B. How a Water Trust Functions

These organizations utilize a panoply of market-based environmental management ideas to accomplish their goals, including buying, leasing, accepting donations of water rights, along with implementing other innovative ideas to acquire water rights, ensuring critical instream flows are maintained in many targeted Western watersheds. Each water trust functions in unique circumstances such as variations in state laws or even in local attitudes toward water trusts, thus necessitating an original approach to water rights acquisition for each trust. For example, the Oregon Trust has been able to take advantage of a change in Oregon water law allowing irrigators who implement water saving measures to lease some of the saved water to the Trust, rather than being forced to let the saved water go to the next appropriator as it would under the traditional prior appropriation laws.⁸ Montana also allows water right holders who increase their efficiency to lease water for use instream.⁹

Trusts work with irrigators to save water in other ways to lease back to the trust for conversion to instream flows. The Oregon Trust encourages modified land management where irrigators switch to crops that use less water, rotate crops or let some land go fallow.¹⁰ The Oregon Trust has also done innovative trades with irrigators such as providing alfalfa for a rancher in exchange for leaving the water in the stream he would

⁸ Ore.Rev.Stat. Ann. § 537.455 (1993); Ore.Rev.Stat. Ann. § 537.465 (2003); *See also* The Oregon Water Trust website, Water law, <http://www.owt.org/solutions.html> (last visited April 4, 2006).

⁹ Mont.Code Ann. § 85-2-419 (2005); *See* The Montana Water Trust website, About Us page, <http://www.montanawatertrust.org/about/index.html> (last visited April 3, 2006).

have otherwise used to irrigate the alfalfa crop.¹¹ The Montana Water Trust sometimes urges irrigators to change the source of irrigation water from surface water to ground water and transfer the surface water rights to instream rights.¹² In addition, the Montana and Oregon Trusts also may ask an irrigator to irrigate during the first half of the season and then lease or donate the water to the trust in the dry season when water is most needed in the stream.¹³ Although conservation easements over water are not allowed in Colorado, the Colorado Water Trust has been able to effectively work in tandem with various land trust organizations to utilize land conservation easements as a tool to protect instream flows.¹⁴ The Colorado Trust also acts as an expert on water law to help land conservation groups protect instream flows by providing information on water rights in the State.¹⁵

Water trusts have already made an impact on not only the streams and wildlife they seek to protect, but also on the face of Western water law itself. Although these new organizations have achieved some measure of success, the goals these water trusts have striven to reach and the market-based tools they have employed, have not been without significant legal, technical and ideological barriers. In fact, water trusts would not be a glimmer on the horizon today without significant changes in western water law.

¹⁰ The Oregon Water Trust website, Solutions page, <http://owt.org/solutions.html> (last visited April 4, 2006).

¹¹ *Id.*

¹² The Montana Water Trust website, Law page, <http://www.montanawatertrust.org/law/index.html> (last visited April 4, 2006).

¹³ *Id.*; Neuman & Chapman, *supra* note 6 at 174-177; The Oregon Water Trust website *supra* note 10.

¹⁴ Telephone Interview with John Carney, Executive Director, Colorado Water Trust (Dec. 2, 2004).

¹⁵ *Id.*

III. Western Water Law and Water Trusts

The Western water law system itself has proved to be the biggest barrier to the existence of water trusts. Prior appropriation traditionally left no room for the appropriation of instream flows—the very purpose and goal of water trusts. Significant changes in the prior appropriation system have led to the inception of water trusts, but some specific statutory problems in some Western states have prevented either the existence or effective functioning of these trusts.

A. Western Water Law and Its Modification to Allow Instream Flows

Prior to significant changes in the rigid system of water law in the arid west, water trusts were simply irrelevant. The traditional rules of “prior appropriation” require unappropriated water, from a natural stream be diverted from the stream and applied to a beneficial use; This would not allow for trusts to function in the “first in time, first in right” system, which rewards the first, or most senior user and each subsequent, or “junior” appropriator in turn, for making beneficial use of out-of-stream appropriations.¹⁶ In a year where the water in a stream or river cannot meet the needs of all of the appropriators, the most junior users according to priority date will be forced to forgo using their appropriation, so more senior users with older priority dates get their full allotment.

A major barrier to the protection of instream flows in traditional Western water law is that it does not recognize instream uses as “beneficial” uses, thus barring an

¹⁶ Sax et al. *Legal Control of Water*, *supra* note 5 at 98-99, 111-112.

acquisition for that purpose.¹⁷ For a use to be considered beneficial, legally speaking, water must be diverted from the stream. With this in mind, it is easy to see why non-consumptive uses have traditionally held no place in the prior appropriation system-- water is at such a premium in the West that any drop left in the stream has traditionally been viewed as wasted water.¹⁸ Indeed, a stream would not be considered fully appropriated until the use of all of the water in the stream had been assigned to a string of successive appropriators.

Other problems for the very existence of water trusts lurk in the traditional prior appropriation system; Incentives to conserve water are virtually non-existent.¹⁹ Any water not being used by an appropriator for a beneficial use for a proscribed period of years, can be considered abandoned or forfeited, and then reassigned to another appropriator. Additionally, appropriators who would like to conserve water by improving their canals, or ditches, or by cutting down water-guzzling preatophytes along a stream are not rewarded for their efforts, but rather, any water they add back to the stream is subject once again to the call of the river. Thus, without changes in the law, would-be water conservationists cannot increase the amount of water they can appropriate by implementing water-saving measures.

¹⁷ Mary Ann King, *Getting Our Feet Wet: An introduction to water trusts*, 28 Harv. Envtl. L. Rev. 495, 502-503 (2004).

¹⁸ Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. Colo. L. Rev. 257, 258 (1990). [herinafter Sax, *Future of Water Law*]

¹⁹ *Id.*

In Garrett Hardin's tragedy of the commons, he used an example of a pasture used by a village on which to graze cattle where everyone has incentive to overgraze the pasture and increase his herd to benefit himself. "Freedom in a commons brings ruin to all."²⁰ Similarly, from the perspective of a savvy western water user in this use-it-or-lose-it system, it would be foolish to do anything other than continue to use his or her full appropriation of this common resource, no matter how much is actually needed. In a sense, water is not just water—it has taken on moral significance with threads tied deeply to the way of life in the West.²¹ With this as a backdrop, one can see why the idea of simply letting water flow down a stream certainly has never been part of the system.

The hostility of the traditional prior appropriation system to the goals of water trusts is clear, but as Joseph Sax has said, "New needs have always generated new doctrines and thereby, new property rights."²² Significant changes reflecting shifting attitudes toward the importance of instream flows have been made to the water law in most Western states. Many states have passed minimum flow statutes; Alaska, Arizona, Idaho, Montana, Nebraska, Nevada, Oregon, Utah, Colorado, Wyoming and Texas all allow state agencies to appropriate water for instream flows.²³ In addition to minimum flow statutes, perhaps the most important legal change may be statutorily defining

²⁰ Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968).

²¹ Joseph L. Sax, *Looking Ahead: The Not-So-Dire Future of Western Water Law*, Keynote speech at University of Nebraska's Water Law, Policy and Science Conference March 4, 2004. [hereinafter, Sax speech]

²² Sax, *Future of Water Law*, *supra* note 17, at 269.

²³ Sax et al., *Legal Control of Water*, *supra* note 5, at 114; Texas Water Trust website, <http://www.twdb.state.tx.us/assistance/WaterBank/wtrust.asp> (last visited March 31, 2006).

beneficial uses to include instream flows for the benefit of fish and wildlife. Without this change, no water rights could be appropriated for instream flows by state or private entities.

In addition to minimum flow and beneficial use statutes, some states have passed laws that allow either individuals or organizations to acquire instream rights. Alaska and Arizona explicitly allow individuals or organizations to hold instream rights, while under Colorado law, any private acquisitions must be dedicated to the state and administered thereafter by the Colorado Water Conservation Board.²⁴ Similarly, Texas created the Texas Water Trust within its already-established State water bank where private water-right holders can dedicate rights to for environmental purposes to be held by the State.²⁵ Though they may differ by state, these changes to the overall structure of Western prior appropriation systems have literally been the impetus for water trusts to begin functioning, and their importance cannot be overlooked.

B. Legal Changes Were Not Enough—Enter the Trusts

Despite these changes, the new state laws protecting instream uses were not always enough for states alone to truly accomplish the level of desired effectiveness. Many of these beneficial use statutes were passed after 1955, so often the water rights acquired by states pursuant to these statutes were simply too junior to matter during

²⁴ Colo.Rev.Stat. Ann. §37-83-105 (2005); *See generally*, Colorado Water Conservation Board website, <http://www.cwcb.state.co.us/> (last visited April 4, 2006); *See also*, Colorado Water Trust website, *supra* note 1.

²⁵ Tex. Water Code Ann. §15.7031 (1999) (statute establishes Texas Water Trust).

critical dry times of the year when other more senior appropriators were demanding their full allocations.²⁶ For example, in Oregon, many streams were already overappropriated before the minimum stream flow statutes were adopted. The provision for transfer and conversion of private rights to instream rights was a critical piece of Oregon's new law, because it was the only way to acquire instream rights with a valuable senior priority date.²⁷

Most Western states have a permit system in place through which applications for water right acquisitions or transfers must be made, including those for instream rights. State agencies might not always consider instream rights a top priority for adjudication when limited time and resources are being demanded for other appropriators.²⁸ Colorado actually amended its instream flow law in 2001, because its Water Conservation Board, the body charged with protecting the State's instream water rights, had been proceeding at a sluggish pace to protect instream flows by filing for only nine instream rights in 1999, 2000 and 2001 combined.²⁹ Groups attempting to apply for instream rights to deposit in the Texas Water Trust have experienced similar problems, and as of 2006 has

²⁶ Jack Sterne, *Instream Rights and Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 *Envtl. L.* 205 and 215-216 (Spring, 1997).

²⁷ Neuman & Chapman, *supra* note 6 at 138.

²⁸ George A. Kimbrell, *Private Instream Rights: Western Water Oasis or Mirage: An examination of the Legal and Practical Impediments to Private Instream Rights in Alaska*, 24 *Pub. Land & Resources L. Rev.* 75, 93-94 (Winter, 2004).

²⁹ Jesse A. Boyd, Comment, *Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean*, 43 *Nat. Resources J.* 1151, 1171-1172, (Fall, 2003).

had only one “deposit” consisting of two water rights.³⁰ Other issues for agencies include lack of funding for instream flow acquisition, a shortage of personnel, and enforcement problems.³¹

C. Statutory Problems

Statutory flaws or uncertainties can prevent trusts from acquiring water rights. This section uses examples from several states, Nebraska, Texas and Alaska, to illustrate legal problems for water trusts unique to each state’s statutory system. Although each of the three states discussed here have recognized instream flow rights, different statutes hinder the functioning of existing trusts, or effectively prohibit the functioning of water trusts within their borders.

1. Nebraska

Priority statutes in particular can present an impediment to the effective functioning of a water trust. In Nebraska, where a statute has formally recognized instream uses as beneficial,³² a priority statute favoring a hierarchy of uses for surface water could still block water rights transfers to instream uses.³³ Although unlitigated to

³⁰ Texas Water Trust website, <http://www.twdb.state.tx.us/assistance/WaterBank/wtrust.asp> (last visited March 31, 2006); San Marcos River Foundation website, <http://www.sanmarcosriver.org/WaterRight.htm> (March 31, 2006).

³¹ Sterne, *supra* note 25, at 203, 215-219.

³² See Neb.Rev.Stat. § 46-288(2) (1981), (“Beneficial use shall include, but not be limited to, reasonable and efficient use of water for domestic, municipal, agricultural, industrial, commercial, power production, subirrigation, **fish and wildlife**, ground water recharge, interstate compact, water quality maintenance or *recreational purposes*. *Nothing in this subdivision shall be construed to affect the preferences for use of surface water as provided in section 46-204*) (emphasis added).

³³ See Neb.Rev.Stat. § 46-204 (1984), (“Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming

this point, one can see the potential conflict between the priority statute and the interests of any water trust that might try to acquire water rights in Nebraska. Instream uses are not even mentioned on the list of priority uses in Neb.Rev.Stat. section 46-204, which ranks uses for domestic, municipal and agriculture as its top three beneficial uses. This could mean it has been relegated to the bottom of the totem pole. If this is truly the case, it would be almost impossible to for a water trust in Nebraska to acquire senior water rights from an irrigator that had any real meaning, especially in a fully appropriated stream, or in a dry year when instream flows are most critical for wildlife. All domestic, agricultural and manufacturing appropriations would have to be satisfied before the instream right would be enforced. This would render the statute recognizing instream uses as beneficial uses ineffective.

Dr. Felipe Chavez-Ramirez, Executive Director of the Platte River Whooping Crane Maintenance Trust (Whooping Crane Trust) in Nebraska which attempts to protect habitat for migratory birds, including endangered whooping cranes that nest along the Platte River, said his organization does not own any water rights at this time. The Whooping Crane Trust has not attempted to acquire instream rights, because in the Nebraska priority statute, their interests are “last on the list.”³⁴ He said the Whooping Crane Trust will not push the issue until some policy and legal changes are made. In addition, Dr. Chavez-Ramirez said public perception of instream rights would also hinder

it for any other purpose and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.”)

the acquisition, because it would be difficult for people to accept letting the water flow downstream. Resolution of the priority statute issue would be needed to determine if a water trust modeled on the Oregon Trust would be able to function in the current legal system and climate of the State, or if the laws of Nebraska would have to be modified further to allow a water trust to work effectively.

Additionally, the Nebraska Legislature has not created a state water trust, like Texas.³⁵ Only the Nebraska Game and Parks Commission (Game and Parks) or one of the twenty-three Natural Resources Districts (NRD), which regulate groundwater in the state in the state are authorized outright in Nebraska law, to apply for instream flows.³⁶ Any private organization such as a water trust attempting to acquire instream rights in Nebraska would have to approach organizations with their wishes to increase appropriations for instream purposes.³⁷ This poses another slew of problems for conservation-minded groups, whose agendas might not mesh with the political climate in a local Natural Resources District, or with the Game and Parks Commission's priorities.

If the problems above were not enough, a new statutory problem looms on the horizon in Nebraska that would further hinder the effectiveness of instream rights held by a water trust. For instream rights to be granted in Nebraska, the proposed appropriation

³⁴ Telephone Interview with Dr. Phillippe Chavez Ramirez, Director, Nebraska Whooping Crane Trust (Dec. 1, 2004).

³⁵ See discussion *infra*. C.2.

³⁶ Neb.Rev.Stat. § 46-2,110 (2000).

³⁷ Telephone Interview with Director of Nebraska Department of Natural Resources, Ann Bleed (April 3, 2006).

must be found to be in the public interest.³⁸ The current statute provides that the right will be considered in the public interest if water for the instream right is available twenty percent of the time.³⁹ Proposed legislation in the current, 99th Session would require that unappropriated water for the instream right be available to provide the approved instream flow rate at least eighty-five percent of the time, or it would not be in the public interest.⁴⁰ This instream flow portion of the bill has been removed late in the session,⁴¹ but according to Director of the Nebraska Department of Natural Resources (DNR), Ann Bleed, the issue will most likely be reintroduced next legislative session, or taken up by the Nebraska Water Policy Task Force.^{42 43}

Since this issue will likely come into play again, it is worth examining further.

The Bill Introducer's statement of intent by Senator Ed Shrock explains the reasoning for the large percentage change:

First, the bill requires water for instream flow to be in the public interest if the flow rate is available 85 percent of the time. This is a similar standard to water rights granted for other purposes. Changes made with LB 962 in 2004 now allow natural resource districts to manage for instream flows. Flow rights granted that are only there 20 percent of the time would be difficult, if not impossible, to manage as all other water uses could be shut down and still not make the flows available 85-100 percent of the time.⁴⁴

³⁸ *Id.*; Neb.Rev.Stat. § 46-2,112 (2004).

³⁹ Neb.Rev.Stat. § 46-2,115(1) (2000).

⁴⁰ NE L.B. 1226 99th Legislature (2005).

⁴¹ See Introduced Bill LB 1226, *available at* Nebraska Legislature Online, http://www.unicam.state.ne.us/pdf/INTRO_LB1226.pdf (last visited April 3, 2006).

⁴² Telephone Interview with Ann Bleed, *supra* note 35.

⁴³ See *generally*, Water Policy Task Force website, <http://www.dnr.ne.gov/watertaskforce/watertaskforce.html> (last visited April 3, 2006).

⁴⁴ Nebraska Unicameral, Introducer's Statement of Intent for LB 1226, *available at* http://www.unicam.state.ne.us/PDF/StatementOfIntent_LB1226.pdf (last visited March 28, 2006).

Although this reasoning could make sense superficially, using the “similar standard” for other water rights referred to in the explanation above, really attempts to equate apples with oranges. The eighty-five percent figure came from an existing DNR rule which really has little to do with instream flows; In order to help the DNR determine whether a basin is fully appropriated, (where water use roughly equals water recharge to the basin) it requires that surface water be available to meet, on average, eighty-five percent of the annual crop irrigation requirement from May through September.⁴⁵ This is not the same as eighty-five percent of stream flow.⁴⁶ In addition, new statutory barriers to instream flow appropriations such as this eighty-five percent rule are unnecessary, because prior appropriation rules already determine when junior users will be shut off. This type of statutory provision would undermine the purpose of instream flow laws in Nebraska. The importance of instream flow rights is to make water available in times of shortage, when demands on rivers are greatest—that twenty percent of the time when those flows are available may be the most crucial time for use of instream flow rights.

2. Texas

Texas has a unique situation, because it has a water trust, but it is a public, state-run entity.⁴⁷ Until recently, there were no laws expressly prohibiting private entities from acquiring instream water rights. Seeing an opening in the law, in July 2000 the San

⁴⁵ Neb. Admin. Code Title 456 Ch. 24 § 001.01 *available at* <http://www.dnr.ne.gov/LB962/Notice/FullyAppropriatedRuleFINAL.pdf> (last visited April 3, 2006).

⁴⁶ Telephone Interview with Ann Bleed, *supra* note 35 ; *See* Neb. Admin. Code Title 456 Ch. 24 § 001.01 *available at* <http://www.dnr.ne.gov/LB962/Notice/FullyAppropriatedRuleFINAL.pdf> (last visited April 4, 2006).

Marcos River Foundation decided to take advantage of this gap, and applied for a water permit for unappropriated water to protect the Guadalupe River and estuary, and the flow of the San Marcos River and San Antonio Bay and estuaries.⁴⁸ The Foundation applied for a water right permit targeting the exact amount identified in a 1998 Texas Parks and Wildlife Department freshwater inflow study.⁴⁹ The Foundation requested a total of 1.15 million acre-feet per year.⁵⁰ In the last stages of application evaluation, the group was even granted a priority date for their water right, but in March 2003, the permit was denied by the Texas Commission on Environmental Quality commissioners, against the advice of their Executive Director and staff.⁵¹ The San Marcos River Foundation filed suit in the Travis County District Court to appeal the denial of the permit.⁵²

Motions for Summary Judgment were heard January 30, 2006. The main question before the Judge was whether Texas Commission for Environmental Quality (TCEQ) had authority to grant applications of the type requested. If the San Marcos River Foundation (SMRF) won, the applications would be sent back to TCEQ for further consideration and

⁴⁷ See Texas Water Trust, *supra* note 24.

⁴⁸ San Marcos River Foundation website, <http://www.sanmarcosriver.org/WaterRight.htm> (last visited March 28, 2006).

⁴⁹ *Id.*

⁵⁰ Email Dianne Wassenich (March 31, 2006) ("We actually applied for 1.15 million a/f which is what the state's study said that San Antonio Bay required to remain healthy. The two measuring points we asked for, ended up being counted as two amounts of water added together to get 1.3 million. We believe it is the same water, just passing two points for measurement purposes, left in the stream, so it is really only 1.15 million acre feet, not 1.3 million as many referred to it in their objections to the "huge" amount of water.")

⁵¹ Telephone Interview with Dianne Wassenich, Executive Director, San Marcos River Foundation, (Dec. 9, 2004).

⁵² *Id.*

a hearing.⁵³ On February 7, 2006, SMRF's motion for summary judgment was decided in favor of the Foundation. The Judge ruled that instream water rights applications are provided for in the state laws, and the SMRF's water application for instream flow should now get an administrative hearing.⁵⁴ As of the posting of this paper, there is no final order in the case, so the administrative hearing will not be set until after the appeals process, which could go all the way to the Texas Supreme Court, has been completed.⁵⁵ The Executive Director of SMRF expects it will not be for a year.⁵⁶

Additionally, even though the Foundation intended to convey the requested water rights to the Texas Water Trust, the Foundation met strong opposition from the legislature. In response to the Foundation's application, at the end of the 2003 legislative session, Senate Bill 1639 imposed a moratorium on permitting for instream water rights until September 1, 2005;⁵⁷ however, studies on instream flows were also authorized by the bill.⁵⁸ Dianne Wassenich, Executive Director of the San Marcos River Foundation, said the moratorium on instream permits sparked a "gold rush" on appropriative water

⁵³ San Marcos River Foundation website Projects: Water Right page, <http://www.sanmarcosriver.org/DistrictCourt.htm> (last visited March 31, 2006).

⁵⁴ Feb. 7, 2006, Order on Pl. San Marcos River Foundation's Am. Mot. for Summ. J.

⁵⁵ Email Dianne Wassenich, March 31, 2006 ("No hearing set, in fact the final order is not even out yet from the judge. Once that happens, it will take even longer to go to hearing. In fact, once the order is written, we expect an appeal to be filed, so it could be a year or so before we get finished with all the appeals that we expect. Just this one motion for summary judgment, that the court decision came out about, on Feb. 7, will probably be appealed by our opponents all the way to the Texas Supreme Court. No telling how long all this will take.") (on file with author).

⁵⁶ *Id.*

⁵⁷ Telephone Interview with Dianne Wassenich *supra* note 52; *See* Texas S. 78(R) SB 1639 (2005).

⁵⁸ Texas S. 78(R) SB 1639 (2005); *See generally*, Joint Committee on the Study Commission on Water for Environmental Flows Interim Report, *available at* http://www.senate.state.tx.us/75r/senate/Commit/c890/downloads/rpt_c890_feb2005.pdf (last visited April 3, 2006).

permits, and the state agency that grants water rights did not feel it had the power from the legislature to declare streams or rivers fully appropriated, despite low instream flows.⁵⁹ During this time when permits were still being granted because of this statutory ambiguity, it made it difficult to convince willing sellers or donators to assign their rights to instream flows, even if there were no moratorium in place.⁶⁰

The Texas Legislature took up instream flow rights again in 2005 in the 79th legislative session, and debated a comprehensive environmental flows bill which could create an all-encompassing instream flow scheme for Texas, and set up groups for each river basin to determine needed instream flows for rivers and inflows for estuaries based on scientific evidence.⁶¹ The bill did not pass during the regular session,⁶² and seems far from passing in the spring special session.⁶³ SMRF believes that its instream application, which is nearly six years old, will be safe from any new legislation, and Dianne Wassenich said, they will continue to litigate that issue as long as necessary to make sure the bays and river basin survive.⁶⁴

⁵⁹ Telephone Interview with Dianne Wassenich, *supra* note 52.

⁶⁰ *Id.*

⁶¹ Texas S. 79(R) SB3 79th Legislative Session (2005); *See* §11.02362(c)(5); *See also* Author/Sponsor's Statement of Intent *available at* Texas Legislature Online, <http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=79&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=00003&VERSION=1&TYPE=A> (last visited March 31, 2006).

⁶² Bill status for Texas S. 79(R) SB3 *available at* Texas Legislature Online, <http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/actions.d2w/report?LEG=79&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=00003&SORT=Asc> (last visited March 31, 2006).

3. Alaska

Alaska has also experienced problems, because of its statutes. In Alaska, one of only two states where individuals are allowed to acquire instream rights, muddled statutory language of the 1980 law granting the power to private parties to acquire water rights along with high burdens on applicants have flummoxed private parties attempting to protect instream flows.⁶⁵ Instream rights in Alaska are essentially reviewable and revocable at any time by the state water commissioner.⁶⁶ In addition, the statute lacks a time frame in which applications for instream rights must be adjudicated by the state agency overseeing surface water, thus, the agency is able to ignore them all together.⁶⁷

IV. Non-Legal Barriers to the Effective Functioning of Water Trusts

Despite these problems, with the proper changes in place in the prior appropriation system, water trusts are poised to enter the water market in several states, in an attempt to succeed where regulation so far had failed to accomplish the optimum level of protection for instream flows;⁶⁸ however, water trusts face other difficulties in accomplishing their goals. Water trusts must not only overcome legal barriers, but also ideological, political, and logistic hurdles to acquire the senior water rights they need. The rapidly growing population and the decreasing water supply due to the recent severe

⁶³ Email Dianne Wassenich March, 31 2006 (“This bill is far from passing, and the special session on education finance this spring may or may not get around to water, since the education item is such a divisive and hot one.”) (on file with author).

⁶⁴ *Id.*

⁶⁵ Kimbrell, *supra* note 27; See Alaska Stat. § 46.15.145 (1986).

⁶⁶ Kimbrell, *supra* note 27, at 91-92; See Alaska Stat. § 46.15.145(f) (1986).

⁶⁷ Kimbrell, *supra* note 27, at 93.

drought in Western states⁶⁹ have only magnified the controversy surrounding the acquisition of water rights by trusts. Trusts, after all, are merely one player in the mix of interested parties vying to reallocate existing water rights.⁷⁰

Never before have communities, governmental organizations, ecological groups, appropriators, and the public-at-large better understood the implications that water policies and decisions may create, and never before have the issues and values placed on water been so diverse. ...All individuals and groups wish to use water for individual objectives, yet, also realize that water is becoming more and more scarce. The fear of not having water for a particular objective results in a willingness to become better informed and a greater willingness to advocate for use of water.⁷¹

Opponents to water trusts have philosophical and economic objections to the acquisition of instream rights. Agricultural interests have been vocal opponents to water trusts. Janet Neuman, a founder of the Oregon Water Trust, writes of the founders of the trust being “somewhat surprised” at the amount of resistance the organization encountered from the agricultural community that depended on irrigation.⁷²

There is still no broad consensus that rivers need water, at least not if it means any loss of consumptive water use to accomplish that goal. Generations of farmers and ranchers have grown used to the idea that if there is water in the stream, and their water right is not being satisfied, they can take it, unless an irrigator with more senior priority is waiting downstream.⁷³

⁶⁸ *Id.* at 139, *See also*, Colorado Water Trust Homepage, <http://www.coloradowatertrust.org/> (last visited March 31, 2006).

⁶⁹ *See generally*, U.S. Department of the Interior U.S. Geological Survey, *Climactic Fluctuations, Drought, and the Flow in the Colorado River Basin*, USGS Fact Sheet 2004-3062 version 2 (August 2004), available at <http://pubs.usgs.gov/fs/2004/3062/>

⁷⁰ Diane K. Brownlee, *The Public Vote in the Game of Water Wars: An Unquenchable Thirst to Define and Implement “Public Values” in Western Water Laws*, 70 UMKC L. Rev. 647, 647-651 (2002).

⁷¹ *Id.* at 651.

⁷² Neuman and Chapman, *supra* note 6, at 138, 177-178.

⁷³ *Id.* at 179.

Separating water from land where it has been used for many years or taking land out of agricultural production raises serious concerns for many people, even if done through voluntary transactions.⁷⁴ Other fears of the agricultural community surround the complexity of the series of water diversions and the dependence of many farmers on return flows, which might be disturbed by acquisitions for alternative uses.⁷⁵

Additionally, some harbor fears that instream rights will impede future economic growth, or reduce available municipal supplies.⁷⁶

In part because of this ground-level opposition, legislatures in Western states have often blanched at the idea of allowing privately held instream water rights.⁷⁷ In contrast to most kinds of property that can be completely privatized and treated as a commodity, water has often been viewed as something the entire community has a stake in, and that no one can completely own.⁷⁸ Those who hold the philosophical view that water is a public good and should be held in trust for the people, tend to believe that water should be controlled only by state agencies. Some also fear economic speculation from such a market-based system.⁷⁹

Another problem that comes along with the work water trusts do are freeriders. Many benefit from the acquisition of instream rights, few pay for them with time or

⁷⁴ Janet Neuman, speech given at the University of Nebraska's Water Law, Policy and Science Conference *The Impacts of Water Markets: the Good, the Bad, and the Ugly*, (March 4, 2004).

⁷⁵ *Id.*; Barton H. Thompson Jr., *Markets for Nature*, 25 Wm. & Mary Envtl. L. & Pol'y Rev. 261, 274-275 (Winter, 2000).

⁷⁶ *Id.*; Sterne, *supra* note 25, at 222-223;

⁷⁷ Kimbrell, *supra* note 27 at 77.

⁷⁸ Joseph L. Sax, *Understanding Transfers: Community rights and the privatization of water*, 1 West-N.W. 13, 13 (Spring, 1994).

money. This is no surprise, because it is inherent the land trust model water trusts seek to implement. As long as instream rights are not protected to the level trusts seek they will surely continue acquiring water rights regardless of the collateral freerider effect.

In addition to these problems, water trusts also face logistic impediments to their goals, including accurately valuing, measuring and enforcing the water rights they are attempting to acquire for the benefit of instream flows. As with other natural resources, it can sometimes be difficult to accurately attach a value to water. Frank Ackerman and Lisa Hienzerling have said:

All attempts as valuation of the environment begin with a problem: the goal is to assign monetary prices to things that have no prices because they are not for sale. One of the great strengths of the market is that it provides so much information about real prices. For any commodity that actually is bought and sold, prices are needed. To create artificial prices for environmental values, economists have to find some way to mimic the operation of the market. Unfortunately, the process is far from automatic, certainly not costless, and has to be repeated every time an updated price is needed. As a result, there is constant pressure to use outdated or inappropriate valuations.⁸⁰

In order for trusts to utilize the full spectrum of water acquisition tools available, this valuation problem must be solved. Especially in states where water rights have not been actively bought and sold, a lack of economic data on similar water transactions can be a

⁷⁹ *Id.* at 80.

⁸⁰ Frank Ackerman & Lisa Heinzerling, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection, 1550 U.Pa.L.Rev. 1553, 1569 (May, 2002).

challenge for water trusts, as was the case when the Oregon Trust began.⁸¹ The Oregon Trust has attempted innovative means to accomplish this goal.⁸²

Other practical concerns for water trusts include making adequate measurements and ensuring that these are enforced once they do acquire a water right or lease. Gathering accurate data on stream flows and wildlife populations where trusts can make the most impact on tributaries or streams can be difficult for water trusts, depending on the scientific data available.⁸³ Monitoring plans must be developed by the Trust in conjunction with the landowner or the local water resources department to ensure accurate measurements can be ascertained, and to make sure the proper amount of water is actually being left in the stream with the desired benefits to wildlife.⁸⁴ This can be difficult in states where continuous monitoring of most streams is not the norm, and where state agencies cannot meet needs because of limited staff, or where those in charge of enforcing the rights are simply uncooperative.⁸⁵

A final but important problem for water trusts is getting adequate sources of funding to purchase the sometimes expensive senior water rights they desire most. Trusts often lack the funding they need to make high-impact water purchases, and the degree of difficulty in securing those funds could vary depending on how hostile the climate is in which the trust functions, and on how much government and private support they can

⁸¹ Neuman & Chapman, *supra* note 6, at 153-160; *See supra*, Part I.B.

⁸² Oregon Water Trust website, *supra* note 10.

⁸³ *Id.* at 161-162. *See also* Kimbrell, *supra* note 27, at 93.

⁸⁴ Neuman & Chapman, *supra* note 6, at 161; *See also* Montana Water Trust website, *supra* note 9.

⁸⁵ Thompson, Jr., *supra* note 73 at, 283.

secure. The Colorado Trust, founded in 2002, has experienced problems procuring funds in its start-up phase. The Executive Director of the Trust, John Carney, said educating potential funders and water users about what the water trust does is part of the challenge of garnering monetary support.⁸⁶

V. Water Trusts and Free Market Environmentalism

Despite all of the problems and barriers discussed above, water trusts can and do work. Each water trust in existence today has exhibited that it can acquire water rights through market-based methods in order to accomplish its goals. Although the current scope of water trusts is limited, they can be viewed as a part of a greater environmental movement toward (or at least, an experiment with) the implementation of market-based environmental strategies. Indeed, Janet Neuman, a founder of the Oregon Trust said, “The idea was to apply the experience of private land trusts in the water arena and to test ‘market environmentalism.’”⁸⁷

A. What is Free Market Environmentalism?

“Free market environmentalism” is a school of thought that rejects the view that externalities, or costs to society at large not factored into a human activity in the environment, are not caused by market failure, but instead, by a lack of adequate property

⁸⁶ Telephone Interview with John Carney, *supra* note 14.

rights and markets.⁸⁸ Free market environmentalists assume that markets are essential to the efficient allocation of all natural resources.⁸⁹ Johnathan Adler has said,

Wherever we have exclusive private ownership, whether it is organized around a profit-seeking or nonprofit undertaking, there are incentives for the private owners to preserve the resource...Private ownership allows the owner to capture the full capital value of the resource, and self-interest and economic incentive drive the owner to maintain its long-term capital value.⁹⁰

The very existence of private trusts suggests the government regulatory schemes are not adequately protecting instream flows, at least in the eyes of some. Trusts are entering the market to fill in this perceived void in Western water law. They implement incentive-based conservation through a “public goods market,” where trusts act as “philanthropic organizations using the marketplace rather than regulation to provide a public good with diffuse benefits to a large segment of the population.”⁹¹

Water trusts certainly utilize the thoughts and market-based tools of a new way of thinking about environmental policy, and about water in general. Sax suggests the very act of hoarding water and wasting water has created an artificial shortage, and that reallocation by water markets can solve this problem.⁹² Water markets open up an efficient means to meet growing demand--the acquisition of existing water rights from other users.⁹³ Trusts embrace the idea that water is a commodity that can be bought and

⁸⁸ Johnathan H. Adler, *Free & Green: A New Approach to Environmental Protection*, 24 Harv. J.L. & Pub. Pol’y 653, 661 and 667-668 (Spring 2001).

⁸⁹ King, *supra* note 16, at 509.

⁹⁰ Adler, *supra* note 85, at 669 citing Robert J. Smith, *Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife*, 1 Cato J. 439, 456 (1981).

⁹¹ Thompson, Jr., *supra* note 73, at 266.

⁹² Sax speech, *supra* note 20.

⁹³ Thompson, Jr. *supra* note 73, at 264.

sold in order to accommodate the most wanted uses in the market place. Water trusts are a step toward a new water system based on market-based transactions, but the full extent of their impact is still uncertain.

Sixteen years ago Joseph Sax envisioned a future for market-based water transactions when he said,

Three interlocking programs will define the future of water policy: conservation of existing supplies, reallocation through marketing, and restoration and protection of instream flows to protect natural systems. None of these elements will suffice without the other two. Taken together they promise a fruitful integration of private needs and public claims.⁹⁴

Where are we today in achieving Sax's three elements, and where do water trusts fit in? Trusts appear to be a microcosm of all three of Sax's elements in one. First, water trusts encourage others to conserve existing supplies of water, so that they can then lease it or buy it for instream use. Second, the market-based strategies advocated by water trusts assist in the reallocation of water to more desirable uses. The third is obvious, because restoration and protection of instream flows are the very purpose of water trusts. Because water trusts encompass the ideas of a market-based system, they could lead the way to wider water marketing.

B. Will Water Trusts Blossom into a Wider Water Market?

Sax has proposed three criteria for determining whether the ideal water marketing system has been attained: 1) Do we have the incentive to use as little water as possible? 2) Do we have a water bank and market system? 3) Can we prove with

⁹⁴ Sax, *Future of Water Law*, *supra* note 17, at 281.

confidence to all, that actual needs will be met at actual prices?⁹⁵ Broadly speaking, it is safe to say, we're not there yet. As discussed above, water transactions are still difficult even in the modified prior appropriation system. It may be many years before we hear irrigators talking about water banking or their water rights portfolios complete with dry-year options.⁹⁶ Water marketing is permitted in all states, but the level of market activity varies greatly among them.⁹⁷ Just as with water trusts, legal and technical barriers must be overcome for water marketing to take hold.⁹⁸ It will take time for a true, active, multifaceted water market to emerge. Water trusts could help accomplish this.

Although water trusts would surely find a place in Sax's ideal water market, many limitations on the way trusts are able to function, and in some states, whether they can function at all, remain. The innovative ideas of water trusts, up to this point, have almost had a bigger theoretical impact than an actual one. For the most part due to some of the limitations mentioned earlier, water trusts target specific, carefully selected tributaries where they can have the greatest impact. Additionally, many of the transactions water trusts conduct are temporary in nature such as short-term leases. It has proved much harder for trusts to acquire permanent, senior water rights than to convince an irrigator to lease an amount of water for only a period of years.⁹⁹ Differences in state law necessitate variations in water trusts that might make it difficult for a wider

⁹⁵ Sax speech, *supra* note 20.

⁹⁶ See Jason S. Wells, *Leasing Water Rights for Instream Flow Protection: The Opportunities and Impediments to Improved Public Interest Involvement in Colorado's Instream Flow Protection Regime*, 16. 7 U. Denv. Water L. Rev. 309, 319-323 (Spring, 2004).

⁹⁷ Sax et al., *Legal Control of Water*, *supra* note 5, at 226-227.

implementation of one easy-to-apply water trust model. This thwarts the proliferation of water trusts, which contrasts with the degree of success land trusts have experienced.¹⁰⁰ For example, the Colorado Water Trust is currently the only trust of its kind in Colorado and anticipates remaining so for quite some time; however, it works with thirty-nine land trusts throughout the state.¹⁰¹ As for the expansion of trusts to a broader basin-wide approach to instream flow management, the variations in state law and the lack of an integrated system of coordination and implementation will hamper their growth and expansion.

On the other hand, the advent of water trusts shows even states with rigid prior appropriation systems are willing to change to protect important interests through innovative means. Water trusts certainly are highly visible entities pushing for greater market-based water transactions in the conservation arena. Already, the Columbia Basin Water Transactions Program supported by the Oregon Washington and Montana water trusts, along with other entities, has begun working on basin-wide instream flow projects in the Columbia River basin.¹⁰² Colorado Water Trust Executive Director, John Carney, points out federal funding has helped this effort significantly, and although the Colorado Trust has future designs on a basin-wide effort, it is not feasible for an organization with limited funds like the freshly minted Colorado Trust to presently accomplish such a

⁹⁸ *Id.*

⁹⁹ King, *supra* note 16, at 514 .

¹⁰⁰ *Id.* at 532.

¹⁰¹ Telephone Interview with John Carney, *supra* note 14.

goal.¹⁰³ Overall, as incubators for testing market-based theories, water trusts could be the impetus for wider use of market-based exchanges on a broader scale.

Over time, water trusts might prove to be the best way to protect instream flows, but perhaps for now, the most important function of water trusts and other groups pushing for instream rights is the awareness they create about a different way of doing water transactions. In a prior appropriation system still in some ways entrenched in its strict legal tenets and incentives to hoard water, the buzz surrounding the type of market-based water transactions that water trusts create simply by coming into existence and then acting on their goals could lead to more understanding of how a market based water system might work. Whether water trusts will proliferate and progress toward market-based integrated management of river basins, or how far the pendulum toward broader water markets will swing is still unknown. What is certain is that water trusts are creating significant momentum in that direction.

VI. Conclusion

Significant changes in western water law have allowed water trusts to begin applying market-based environmental ideas to protect instream flows throughout the West. These organizations have stepped into the Western water market and demanded attention, with their new approach to instream flow conservation. Many barriers have already been overcome, but many remain. Water trusts have the potential to flourish and

¹⁰² See generally, Columbia Basin Water Transactions Program website <http://www.cbwtp.org/program.htm> (last visited April 3, 2006); Oregon Water Trust website, *supra* note 1. ⁹³ Telephone Interview with John Carney, *supra* note 14.

proliferate, as their land trust predecessors, or they could be relegated to their current number and limited functions by external legal, ideological, political and logistic barriers. The trusts that do exist are on the right path, and as more Western states grapple with instream flow problems, perhaps a new era in privately driven water conservation can emerge. Even if trusts do expand in number and operate efficiently within their home states, differences in state laws might always hinder large-scale water trust interactions or coordinated efforts.

Water trusts also have the potential to influence the creation of wide water markets. They are incubators for market-based ideas and solutions. They are also ground-level organizations with local interaction. Gaining the trust of the public and especially farmers and ranchers with irrigation rights could begin changing the attitudes of Westerners towards these types of transactions on a fundamental level. Only time will tell if the advent of these trusts and their approach to water conservation has signaled a true shift in the fundamental ideas toward our water resources, and whether Sax's vision of the future becomes reality, or whether water trusts are just an isolated experiment with market-based ideas.