

# Private Property vs. Public Access: Managing Non-Meandering Waters in South Dakota's Prairie Pothole Region



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## Overview

In recent decades, South Dakota has experienced dramatic hydrological changes due to increasingly frequent and severe precipitation events. These changes have led to the flooding of historically dry depressions, giving rise to thousands of water bodies now legally known as non-meandered waters (NMWs) (May, 2021). Legally, NMWs are any body of water that was not designated as meandered by the federal government during the 1868 land survey of the S.D. territory, not including new manufactured bodies of water (May, 2021). These bodies of water, most prevalent in the eastern half of the state within the Prairie Pothole Region (PPR), now intersect with one of the state's critical challenges: balancing private landownership with the public's right to access surface water.

While water is considered a public good in South Dakota, its presence on private land has sparked ongoing legal, environmental, and social debates. This fact sheet explores the constitutional concerns surrounding public use of NMWs, reviews South Dakota's legislative history in relation to the topic, and outlines potential legal and socio-engineering strategies to promote environmental sustainability, economic fairness, and non-discriminatory access.

## Key Definitions

**Non-Meandered Waters (NMWs)** – Depressional wetlands too small or intermittently dry to be designated

as “meandered” by the federal government during the original land surveys of 1868. These water bodies are frequently located on private land but may still be publicly accessible (May, 2021).

**Prairie Pothole Region (PPR)** – A geologically unique area in the northern Great Plains characterized by numerous shallow wetlands formed by glacial activity, covering large parts of eastern South Dakota (May, 2021).

**Public Trust Doctrine** – A legal principle stating that certain natural resources (like surface water) are preserved for public use, and that the government must protect and maintain them for the public's benefit (Strantz, 1995).

**Inverse Condemnation** – A legal process through which a private landowner seeks compensation for property effectively taken or devalued by government action without formal eminent domain proceedings (Sax, 1971).

**Public Access Easement** – A legal right allowing the public to use land or water they do not own, often used to clarify access to rivers or lakes on private property (Craig, 2010).

**Prior Appropriation** – A water rights doctrine giving legal priority to the first person who diverted water for a “beneficial use,” regardless of land ownership (Strantz, 1995).

## Context

Surface water in South Dakota is managed under the Public Trust Doctrine and the principle of prior appropriation (South Dakota Codified Laws [SDCL] § 46-1, 1955; Strantz, 1995). While the state and its people own the water, much of the land beneath NMWs remains private. As a matter of fact, of the 1.87 million acres of depressional wetlands in the state, 90% overlay private agricultural land in the PPR (Dahl, 2014). This has led to controversy in recent years, especially between recreationalists who have a right to enjoy the water and farmers whose land has become permanently inundated. Proactive comprehension of the status of NMWs could lead to fewer legal disputes while subsequently offering the chance to improve state water quality and increase water monitoring efforts.

## Legal Foundation

To understand NMW from a legal standpoint, one must first familiarize themselves with key laws that govern surface water in South Dakota as listed below:

**SDCL 46-1-1** states, “It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.” (South Dakota Codified Laws [SDCL] 46-1, 1955).

**SDCL 46-1-4** declares water should be used efficiently and responsibly for the public good, with water rights limited to the amount needed for beneficial use, and wasteful or unreasonable water use strictly prohibited (South Dakota Codified Laws [SDCL] 46-1, 1955).

**SDCL 46-1-3** states “that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation in the manner provided by law (South Dakota Codified Laws [SDCL] 46-1, 1955).

These laws lay the framework for the regulations overseeing NMWs but have not exempted the topic from resurfacing in the judicial system.

Legal tension heightened following the South Dakota Supreme Court’s decisions in *Parks v. Cooper* (2004) and *Duerre v. Hepler* (2017), the latter ruling that neither the public nor private landowners held superior rights to the water. This legal ambiguity prompted the legislature

to pass the Open Water Compromise in 2017 with a goal to strike a balance between all concerned parties, by permitting recreational access to publicly accessible surface water overlaying private land, but with caveats such as requiring landowner permission prior to use (May, 2021).

### Key Open Water Compromise Bill Regulations:

(South Dakota Game, Fish and Parks, n.d.)

- Landowners can close areas of the water on their land upon approval from the Game, Fish, and Parks (GFP).
- Landowners are restricted from charging access fees to closed areas.
- Recreational use of NMW does not include wading, standing, or operating a motor vehicle, trapping, or hunting on the bed or ice of the water body without prior permission from the landowner.

## Reconsidering Constitutionality and Water Rights

Despite the legal clarity offered by the Open Water Compromise, concerns over constitutionality and equal access are still present—particularly regarding the Fifth Amendment’s protections against the uncompensated taking of private property (U.S. Const. amend. V).

As surface water increasingly overlays privately taxed land due to changing precipitation trends, questions arise about the scope of landowner rights. Drawing parallels to *United States v. Causby* — the court ruled that a landowner could claim interference with their property rights due to disruptive airplanes flying overhead, even though the landowner did not own the air or the public airspace (Mattson, 1966). The court determined that if the landowner’s right to the beneficial use of their land was effectively destroyed by such interference, it would constitute a “taking”. A similar argument could be made that persistent public use of NMWs above private property constitutes a “taking”, because storing a universal commodity with public access on private land diminishes property value and disrupts a landowner most beneficial use of their land.

One pathway forward is to revise South Dakota law to reflect a model similar to Utah, where the public is granted a clear easement for recreational use of water, regardless of lakebed ownership (Craig, 2010). This would eliminate ambiguity and clarify that the public’s access to water does not depend on the ownership

of the waterbed below. Alternatively, landowners may have legal grounds to challenge these laws under the principle of inverse condemnation, particularly if significant economic harm can be demonstrated (Sax, 1971).

## **Environmental Stakes**

Legal clarity of NMWs has the possibility to extend positive changes beyond that of property rights. The shift in legal recognition of NMW to significant bodies of water would classify them as having recreational beneficial use, which would expand the Department of Agriculture and Natural Resources (DANR) monitoring and report requirements (May, 2021).

Despite the ecological importance of these wetlands for flood control, groundwater recharge, and biodiversity, only a fraction of South Dakota's 29,033 NMWs are currently monitored for water quality (May, 2021). Of the 577 monitored lakes, which encompass both meandered and non-meandered water bodies, only 60 are NMWs — which equates to only 2% of total lake waterbodies in the state (May, 2021).

The DANR reports that only 20% of monitored lakes support their designated beneficial uses, while stating it is not feasible to “increase resources to the level necessary to sample all waters in the state at a frequency required to make water quality-based decisions” (South Dakota Department of Agriculture and Natural Resources [SD DANR], 2024).

More accurate and comprehensive monitoring—would increase data thus improving decisions that positively impact water quality.

## **A Path Forward: Commercialization and Beneficial Use Reform**

One promising avenue for balancing public and private interests is structured commercialization of recreational access. A statewide pass system—similar to the likes of a hunting or fishing licenses—could provide streamlined public access to NMWs while generating revenue to support increased environmental monitoring and landowner compensation. Such a system would reduce the need for case-by-case permissions and streamline user access while ensuring that landowners receive some benefit for the loss of productive land. Landowners who opt in to keeping their water open in this agreement, could access a portion of the permit revenue for compensation for economic losses and

disturbances caused by public access. Furthermore, revenue from access passes could be reinvested into wetland restoration programs like the Riparian Buffer Initiative (South Dakota Department of Agriculture and Natural Resources [SD DANR], 2024) or the Wetland Reserve Program (National Resource Conservation Service), strengthening long-term water quality efforts across the region.

In addition to economic solutions, legal reforms could clarify the classification and ranking of beneficial uses. Currently, beneficial uses such as irrigation, recreation, and wildlife support are loosely defined and unranked beyond the top priority of domestic use (South Dakota Department of Agriculture and Natural Resources [SD DANR], 2024). Establishing a clear hierarchy—while allowing flexibility during droughts or economic shifts—could bring greater transparency and equity to future water rights decisions (May, 2021).

## **Conclusion**

The management of South Dakota's NMWs is not just a legal dilemma—it is a social, environmental, and economic challenge with implications that ripple across the state. As flooding continues to impact more private land and water quality concerns grow, proactive legal reform and strategic socio-engineering solutions could offer critical relief. Through legal clarity, beneficial use reclassification, commercialization, and enhanced monitoring infrastructure, South Dakota has the potential to pave the way toward a more sustainable and equitable approach to surface water governance.

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