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MEMORANDUM

**TO: BOWMAN-SLOPE SOIL AND WATER CONSERVATION
DISTRICT LAND USE PLAN STEERING COMMITTEE**

VIA: EMAIL
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**FROM: KAREN BUDD-FALEN & CONNER NICKLAS
BUDD-FALEN LAW OFFICES, LLC**

**THROUGH: BRENDA YOUNKIN & ABBY MOORE
Y-2 CONSULTANTS**

DATE: SEPTEMBER 12, 2017

RE: NORTH DAKOTA INSTREAM FLOW ANALYSIS

I. BACKGROUND

Although North Dakota has not explicitly granted instream flows statutorily, there are several indicators that an instream flow could possibly be granted.

North Dakota is a prior appropriation state, meaning that in order for a person to obtain a water right, a person must demonstrate that they can put the water to a beneficial use and apply for a permit. N.D.C.C. § 61-04-01.2 (2017). The definition of beneficial use for a water right is “a use of water for a purpose consistent with the best interests of the people of the state.” *Id.* at § 61-04-06. One of the recognized beneficial uses is water used for fish, wildlife, and recreational use. *Id.* at § 61-04-06.1. Fish, wildlife, and recreation is defined “as the use of water for the purposes of propagating and sustaining fish and wildlife resources and for the development and maintenance of water areas necessary for outdoor recreation activities.” Further, North Dakota’s statutory criteria for granting a conditional water permit does not explicitly require a diversion. *Id.* at § 61-04-06. Finally, North Dakota stated statutorily that “The effect on fish and game resources and public recreational opportunities” is a public interest. *Id.* at § 61-04-06. Thus, if protecting fish and game resources is

a public interest, perhaps, the state would recognize instream flow appropriations for those uses. *Id.*

However, North Dakota administratively requires that “works” be associated with the proposed appropriation in order to be considered for a permit. N.D.A.C. § 89-03-01-07. “Works” include:

canals, ditches, pipelines, and other conveyance systems, irrigation facilities, wells, pumps, dams, dikes, reservoirs, and other devices used for the appropriation or storage of water and land improved for irrigation.

Id. at § 89-03-03-01(3). Notably missing from “works” are instream flows or anything else that does not actively divert the water. *Id.* Thus, under the current regulatory structure for the North Dakota Water Commission, it would be unlikely that the commission would grant a permit due to the fact that a “work” would not be associated with the instream flow.

II. ISSUES FOR BOWMAN-SLOPE LAND USE PLAN

With regard to the land use plan, some policies you might want to consider:

A. If the land use plan would want to take a position on instream flows despite the question as to whether appropriations for instream flows are permitted in the state has not been decided.

Should you have any questions, please do not hesitate to contact us.