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## **Jump in Before It's Too Late: Protecting and Increasing Streamflows in New Mexico**

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# Jump In Before It's Too Late: Protecting and Increasing Streamflows in New Mexico

## ABSTRACT

*Freshwater ecosystems need adequate streamflow to supply clean water for humans and maintain healthy habitat for wildlife. Over-appropriation, overuse, climate change, and drought plague New Mexico's rivers, taxing many rivers beyond sustainability. Despite the myriad of problems caused by little or no water in our rivers, policies and procedures to protect and increase streamflows in New Mexico are limited. While most Western states have made demonstrable progress in alleviating various legal and technical barriers to protecting and increasing streamflows, New Mexico has made only limited, recent progress towards solutions for our drying rivers. This article takes a critical look at the historical and current position of the Office of the State Engineer, the state's authority for permitting and administering water rights, regarding instream flow rights. The article concludes with several recommendations to ease or eliminate concerns about the administration of rights to instream flows such that New Mexico's rivers can be restored to better health and maintained for the benefit of current and future generations.*

## I. INTRODUCTION

Freshwater is an invaluable resource. Humans depend on freshwater for drinking water, irrigation for our food supply, transportation and commerce, recreation, and aesthetics. Healthy freshwater ecosystems act as natural filters for pollutants, protect against floods, and—especially in the western U.S.—provide habitat essential for maintaining biodiversity and wildlife survival. Healthy freshwater ecosystems also help secure local food production by capturing flood flows, enhancing base flows, recharging groundwater, and purifying water. These services are, however, at risk. Changes in climate will alter the magnitude and timing of snowpack, precipitation, and run-off. These changes will, as with the recent and extended drought in the West, further exacerbate negative impacts on freshwater ecosystems from excess extraction and

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use. Protecting our freshwater resources and emphasizing healthy ecosystems should be among our highest priorities.

New Mexico's laws to protect freshwater resources lag behind those of other western states.<sup>1</sup> In 2005, New Mexico passed the *Strategic Water Reserve Act*,<sup>2</sup> which provides for publically held water to be managed for the benefit of threatened or endangered species and to avoid the listing of additional species. All other major attempts to pass legislation protecting streamflows between 1977 and 2013 were challenged by New Mexico's Office of the State Engineer ("OSE"). With each attempt, the OSE posited one or more reasons why streamflow rights and protection were unconstitutional, unable to be administered, or impermissible under New Mexico law. The OSE's past position on streamflow rights and protection, however, may be shifting at last. After securing several amendments, the OSE finally supported a 2013 bill,<sup>3</sup> which would have allowed private leasing for the purpose of augmenting streamflows.<sup>4</sup>

One mechanism for enhancing streamflows, available in New Mexico and many other western states, is a transfer of consumptive water use to instream flows. Expedited leasing is a particularly effective tool during drought years—allowing irrigators to preserve their water rights while forgoing crop production during periods with suboptimal growing conditions. Such an option for farmers to lease water enhances streamflows when rivers most need water and when farmers are least able to use water without additional supply and delivery. Despite this reciprocal opportunity, no private leases have yet transferred water from consumption to instream flow in New Mexico, expedited or otherwise. It remains unclear whether the OSE will resist applications for private streamflow rights in the same manner that it has resisted past legislative efforts to increase and protect streamflows.

This paper summarizes past legislative attempts to provide for streamflow rights and protection, with an emphasis on the OSE's legal interpretations of New Mexico water law and streamflow legislation, a 1998 OSE memorandum, and a 1998 New Mexico Attorney General

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1. See generally *WESTERN GOVERNORS' ASSOCIATION, WATER TRANSFERS IN THE WEST: PROJECTS, TRENDS, AND LEADING PRACTICES IN VOLUNTARY WATER TRADING* 95–118 (Dec. 2012), available at [http://www.westgov.org/images/dmdocuments/Water\\_Transfers\\_in\\_the\\_West\\_2012.pdf](http://www.westgov.org/images/dmdocuments/Water_Transfers_in_the_West_2012.pdf) (providing an overview of state laws for water transfers); see also SASHA CHARNEY, *DECADIM DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES* 10 (July 2005), available at <http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf>.

2. N.M. STAT. ANN. § 72-14-3.3 (1978).

3. N.M. H.R. 181, 51st Leg., 1st Sess. (2013).

4. See discussion *infra* Part I.E.

("AG") opinion. These historic legal interpretations will largely determine the future of instream flows; either placing hurdles in the path of, or helping pave the way for, recognizing and administering streamflow rights. This paper concludes with recommendations for implementing instream flow transfers in New Mexico, drawing from instream flow programs across the West. New Mexico can allow private instream flow rights in a way that comports with New Mexico law, achieves effective implementation without undue burden to lessees or the State, and protects both the rivers and current water rights.

## II. REVIEW AND ANALYSIS OF PAST INSTREAM FLOW LEGISLATION AND INITIATIVES

The summary of early instream flow legislative and state initiatives comes largely from a 1989 article by Tim De Young.<sup>5</sup> Text of introduced legislation is available from various sources, but what is not available—and what is potentially most valuable to this analysis—are specific comments to the legislation made by the OSE. The only available source of comments on bills introduced between 1977 and 1989 is De Young's article, which was based on a reading and review of OSE records. Beginning in 1993, summaries of state agencies' comments to pending legislation can be obtained from the New Mexico Legislative Council's Fiscal Impact Reports; however, the actual comments are not retained by the Legislative Council.

### A. 1977 House Bill 228, "An Act Relating to Water Rights"

In 1977, a bill was introduced with the simple purpose of including non-diversionary, instream uses for the maintenance, enhancement, and protection of wildlife in the statutory definition of beneficial use.<sup>6</sup> Then-State Engineer Steve Reynolds made two comments regarding the legislation: (1) a diversion was a prerequisite to ownership of a water right under state law, even if instream flow is defined as a beneficial use; and (2) redefining beneficial use was more likely an issue for a state constitutional amendment than a statutory revision.<sup>7</sup>

This is perhaps the first appearance of the OSE's argument that an instream flow right requires a diversion under state law, an argument that the OSE continued to use to condition instream flow permits on in-

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5. Tim De Young, *New Approach, Same Result: New Mexico's Instream Flow Protection Act of 1989*, N.M. Nat. Res. L. Rep. 17 (1989).

6. N.M. H.R. 228, 33rd Leg., 1st Sess. (1977).

7. De Young, *supra* note 5, at 19 (citing Memorandum from S. Reynolds re: H.B. 228 (Feb. 27, 1977)).

stream gaging during Steve Reynolds' long and storied tenure as New Mexico's State Engineer (1955–90). One plausible interpretation of the OSE comment, which is impossible to explore fully without access to the original comments made by Reynolds, is merely that the underlying water right must have first been perfected through diversion. This interpretation would mirror OSE concerns that appear in later years over pre-1907 claims to non-diversionary instream flow rights and the associated problems those claims would cause for administering current rights based on prior appropriation.<sup>8</sup>

As to the constitutional amendment issue, case law since 1977 and a change in position by the OSE in the late 1980s indicate that there is no constitutional bar to recognizing instream flow as a beneficial use.<sup>9</sup>

## B. 1985 Anaya Administration Initiative

The 1985 initiative by then-Governor Toney Anaya included directing several top state officials<sup>10</sup> to develop pre-legislation that provided a mechanism for “minimum flow in streams and rivers in New Mexico.”<sup>11</sup> Two major elements of the draft legislation were: (1) only state agencies could acquire instream flow rights; and (2) the physical diversion requirement could be served by a combination of administration by water masters and measurement of stream flows.<sup>12</sup> Ultimately, state agencies disagreed over several aspects of the proposed legislation, like which department would bear the costs of the additional monitoring and measurement requirements, and the state officials recommended that the Governor not submit the legislation.

## C. 1987 House Bill 64, “An Act Relating to Water Rights to Provide for In-Stream Flow”

A 1987 bill was similar to the 1977 legislation because it allowed for non-diversionary beneficial use “provided that when water is used for the propagation or maintenance of fish and wildlife, diversion of the water from its natural channel shall not be required to maintain benefi-

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8. See *infra* Part III. (analysis of issue of pre-1907 claims raised by the OSE).

9. See *infra* Part I. and note 39 for a description of the OSE's rationale and a review of the relevant case law.

10. State officials included the Secretary of the Natural Resources Department, the Director of the Game and Fish Department, and the State Engineer. De Young, *supra* note 5, at 22 (citing Letter from T. Anaya, Governor, to S. Reynolds, State Engineer (Nov. 09, 1985)).

11. De Young, *supra* note 5, at 22 (citing Letter from T. Anaya, Governor, New Mexico, to S. Reynolds, State Engineer, New Mexico) (Nov. 09, 1985)).

12. See De Young *supra* note 5, at 22–23.

cial use.”<sup>13</sup> During consideration by the House Agricultural Committee, the bill was amended to include several qualifications. The amended bill would not allow a newly acquired instream flow right to qualify for protection against downstream, junior users beyond the point of diversion of the original water right owner.<sup>14</sup> The OSE comments to the unamended bill conceded that “the use of water for fish and wildlife, recreation, and aesthetic purposes unquestionably are beneficial uses under state law.”<sup>15</sup> However, the OSE questioned again the legality of waiving the diversion requirement, relying on *State ex rel. Reynolds v. Miranda*<sup>16</sup> for the conclusion that removing the diversion requirement could only be done through a constitutional amendment.<sup>17</sup> The argument that a constitutional amendment was necessary to allow instream flows without diversion echoed concerns raised in response to the 1977 legislation, but the OSE’s reliance on *Miranda* was a new addition to that argument. There are several problems in the OSE’s reliance on *Miranda* for the sweeping statement that instream flow rights require diversion, which is explored later in this article.<sup>18</sup>

Also in response to House Bill 64, the OSE suggested that only public agencies be eligible to hold instream flow rights.<sup>19</sup> This comment seems unique to this legislation and the 1985 Anaya Initiative, a concern that was not repeated in subsequent positions taken by the OSE.

Finally, the OSE commented that instream flows already received protection. According to the argument, “institutional constraints”<sup>20</sup> (such as interstate compacts and federal court decrees) and patterns of public land ownership<sup>21</sup> incidentally establish and protect instream flow

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13. H.R. 64, 38th Leg., 1st Sess. (N.M. 1987).

14. H. Ag. Comm. Substitute for H.B. 64, 38th Leg., 1st Sess. (N.M. 1987).

15. De Young, *supra* note 5, at 19 (citing Memorandum from S.E. Reynolds regarding H. B. 64 (Jan. 23, 1987) (on file with the State Engineer in Santa Fe, NM)).

16. *State ex rel. Reynolds v. Miranda*, 493 P.2d 409 (N.M. 1972).

17. De Young, *supra* note 5, at 20–21; *see also infra* Part II (detailed analysis of relevant New Mexico case law, including *Miranda*).

18. *See infra* Part II.A.

19. De Young, *supra* note 5, at 22.

20. Institutional constraints include interstate compacts and federal court decrees. *Id.* at 18 (citing Memorandum from S.E. Reynolds regarding H. B. 64 (Jan. 23, 1987) (on file with the State Engineer in Santa Fe, NM)).

21. “Mountain streams generally do not provide favorable sites for conservation storage and beneficial use of water” *Id.*

22. *Id.*

#### D. 1989 S.B. 491, “An Act Relating to Water; Protection of Instream Water Flows”

A 1989 bill attempted to create a system for identifying stretches of rivers upstream of existing diversions that would benefit from preserved flows for fish, wildlife, and recreation.<sup>23</sup> The specific steps the OSE would have to take in order to protect designated reaches—including denying or limiting upstream diversions—were key to the bill. Furthermore, the bill marked a departure from earlier legislation in that it protected instream flow through regulations and administrative procedures rather than changing the law to create instream flow rights.<sup>24</sup>

The OSE comments to the bill apparently repeated similar concerns voiced in comments to previous legislation; yet, De Young does not list these concerns. He does recognize one new OSE concern: denying new diversions in protected stream segments might violate the state constitution.<sup>25</sup> This constitutional question did not appear in OSE comments to subsequent legislation, likely because this approach to protecting instream flows was not repeated in subsequent legislation.

#### E. 2011 House Bill 578, “An Act Relating to Water; Providing for Change in Point of Diversion or Place or Purpose of Use of an Adjudicated Water Right for Use Without Diversion”

A bill introduced in 2011 provided for the OSE to authorize the use of adjudicated water rights without requiring a diversion, thus allowing transfers of diversionary rights for instream flows.<sup>26</sup> The bill also included a provision that “the state engineer may condition the approval . . . on the use of gauges or devices to measure flows within the permitted area.”

With the exception of the measurement provision, the 2011 legislation is fundamentally the same as that introduced 34 years earlier, in 1977. Likewise, comments from the OSE in 2011 largely echo comments made by the OSE to previous legislation, as developed over those 34 years. The OSE raised the following three concerns, as summarized in the Fiscal Impact Report for House Bill 578.<sup>27</sup>

First, the OSE expressed concern that the instream flow permits could increase administrative demand. The OSE recommended hiring at

23. S. 491, 39th Leg., 1st Sess. (N.M. 1989).

24. See De Young, *supra* note 5, at 24.

25. *Id.* at 25 (citing Memorandum from S. Reynolds re: S. 491 (Feb. 16, 1989)).

26. H.R. 578, 50th Leg., 1st Sess. (N.M. 2011).

27. Fiscal Impact Report, Legis. Fin. Comm., H.R. 578, Reg. Sess. (N.M. 2011), available at <http://www.nmlegis.gov/Sessions/11%20Regular/firs/HB0578.pdf>.



least five additional watermasters to administer new instream flow permits statewide, especially in areas without current watermasters, and to help “resolve increased disputes between water users”.<sup>28</sup> The OSE also wanted permittees to bear administration costs, including the cost to hire the new watermasters and install real-time gaging stations.

The OSE raised a similar issue regarding insufficient watermasters during the 1985 Anaya Initiative, though at that time, the OSE wanted the Game and Fish Department to bear the additional costs. The related concern over “increased disputes” between water users, however, was unique to the 2011 legislation. The bill’s Fiscal Impact Report did not explain the basis for this concern.

The OSE’s second concern was how to protect instream flow rights from downstream diversion and verify that water was being put to beneficial use by remaining in the stream. According to the OSE, both protection and verification of an instream flow right would be impossible to administer in reaches that lacked gages and/or meters. Concern over protection of instream flows from downstream diversions appeared previously in both the 1985 Anaya Initiative and the 1998 OSE memorandum. Using gages to verify instream beneficial use seems to have first appeared in the 1985 Anaya Initiative. At that time, gages were intended to monitor the diversion requirement for beneficial use.

The OSE’s final concern was that no other beneficial use of water is specifically defined by statute. Thus, this bill’s statutory recognition of instream flow as a beneficial use “could cause the use of this water to be recognized higher than other uses.” Statutory references to beneficial use, however, already exist. The statutory provision that “waters appropriated for irrigation purposes”<sup>29</sup> implies beneficial use. Another statute refers to “irrigation or other beneficial use,”<sup>30</sup> and yet another law includes references to beneficial use for livestock watering and domestic use.<sup>31</sup> Still, it is true that beneficial use in New Mexico has largely been defined through case law.

## F. 2013 House Bill 181, “Lease of Water Rights for Streamflow”

A 2013 bill<sup>32</sup> sought to add a section to the Water-Use Leasing Act<sup>33</sup> to expressly allow instream flow leases for the purpose of maintain-

28. *Id.*

29. N.M. STAT. ANN. 1978 § 72-1-2 (1978).

30. N.M. STAT. ANN. 1978 § 72-5-17 (1978).

31. N.M. STAT. ANN. 1978 § 72-12-1 (1978).

32. H.B. 181, 51st Leg., 1st Sess. (N.M. 2013); companion bill S. 309, 51st Leg., 1st Sess. (N.M. 2013).

33. N.M. STAT. ANN. 1978 §§ 72-6-1 to -7 (1978).



ing or enhancing fish or wildlife resources. Unlike past legislation, the OSE did not comment that the approval of an application for instream flows would require metering or demonstration of diversion. However, the OSE did comment that the application should document both how forbearance of the leased right would be measured and how the instream use would be monitored.<sup>34</sup> In correspondence related to the legislation, State Engineer Scott Verhines suggested that the state's Strategic Water Reserve be used for maintaining or augmenting streamflows to "avoid the metering requirements that will be included as a condition to any permit issued by the State Engineer."<sup>35</sup> This statement indicates that metering would not necessarily be required if the rights were placed into the Strategic Water Reserve, created for the purpose of "increasing flows to benefit the interests of the State,"<sup>36</sup> because metering would be at the direction of the State Interstate Stream Commission, the administrator of the Strategic Water Reserve.

Under this interpretation, privately held instream flow would still be subject to OSE metering requirements. New to the dialogue is the State Engineer's curious distinction between private and public instream flow rights, a distinction that the State Engineer would rely upon to determine whether to require metering. No such distinction between private and public rights could be found in case law, the Water-Use Leasing Act,<sup>37</sup> or the Strategic Water Reserve.<sup>38</sup> This proposed distinction would either elevate rights placed in the Strategic Water Reserve above privately held rights or confer on private lessors greater responsibilities than those imposed on the Interstate Stream Commission.

## G. Summary

The history of comments to instream flow legislation highlights which positions regarding instream flow protections in New Mexico have changed and which positions have persisted. While several issues raised in response to past instream flow legislation and initiatives were idiosyncratic to those efforts, three themes emerge. First, absent from the dialogue for quite some time is the position that either an amendment to the state constitution must redefine beneficial use to include instream flow or otherwise the OSE must predicate any permit for beneficial use

34. Fiscal Impact Report, Legis. Fin. Comm., H.R. 181, Reg. Sess. (N.M. 2013), available at <http://www.nmlegis.gov/Sessions/13%20Regular/firs/HB0181.PDF>.

35. Letter from Scott A. Verhines, State Engineer, Office of the State Engineer, to Phil A. Griego, N.M. State Senator (Mar. 11, 2013) (on file with author).

36. *Id.*

37. N.M. STAT. ANN. 1978 §§ 72-6-1 to -7 (1978).

38. N.M. STAT. ANN. 1978 § 72-14-3.3 (1978).

on diversion. In fact, as recently as 2013, the State Engineer wrote that New Mexico law allows for the use of streamflow for the beneficial use of fish and wildlife habitat, maintenance, and/or restoration.<sup>39</sup> Second, the OSE no longer insists that private owners cannot hold rights to instream flows. Third, concern about measurement and gaging has been the most consistent and persistent issue regarding instream flows, a concern that remains today. Gaging has been proposed as the means to: meet the requirements for diversion; ensure water left in the stream is placed to beneficial use; maintain dominion and control of an instream flow right; distinguish an instream flow right from other categories of rights; and minimize the burden of administering instream flow rights. Each of these concerns related to gaging was a component of the 1998 memorandum by the OSE and the 1998 Attorney General ("AG") opinion, as analyzed in the following section.

## II. REVIEW AND ANALYSIS OF 1998 OSE MEMORANDUM AND 1998 AG OPINION

In 1998, the OSE<sup>40</sup> and AG<sup>41</sup> addressed the following question posed by New Mexico state senators Dede Feldman and Carlos Cisneros to then-AG Tom Udall: Does New Mexico law (constitutional, statutory, or case law) permit the State Engineer to afford legal protection to instream flows for recreational, fish or wildlife, or ecological purposes? The AG considered and included input from the OSE to answer this question. Though written more than fifteen years ago, these documents remain the last detailed and definitive statement of legal and policy positions regarding instream flow rights in New Mexico from the offices of the AG and the OSE.<sup>42</sup>

In short, both the OSE and the AG agree that instream flow is a type of beneficial use that is not precluded by New Mexico's constitution, statutes, or case law, which is consistent with OSE comments to legislation regarding instream flows since 1987.<sup>43</sup> However, the OSE memorandum makes it clear that such a right is still predicated on the constructions of works as a means to exercise "dominion and control over the surface water in order to perfect the right and demonstrate its

39. Letter from Scott A. Verhines, *supra* note 35, at 1.

40. Memorandum from D.L. Sanders and Stephen R. Farris, Special Assistant Attorneys General, Office of the State Engineer, to Tom Turner, State Engineer, Office of the State Engineer (Jan. 08, 1998) (on file with author).

41. N.M. Op. Att'y. Gen. No. 98-01 (Mar. 27, 1998).

42. WESTERN GOVERNORS' ASSOCIATION, *supra* note 1, at 129.

43. See *supra* at Part I.G.

continued use.”<sup>44</sup> According to the OSE, such works remain the “only means to meet the legal requirement that the appropriated water be identifiable.”<sup>45</sup> This analysis focuses especially on the OSE’s legal arguments that appropriation of water in New Mexico is dependent upon construction of works which could be satisfied in a permit for instream flow by “accurate and continuous gauging throughout the permitted stream reach.”<sup>46</sup> This position persists today in the OSE’s insistence that gaging be used to protect and verify instream flow rights.<sup>47</sup>

The OSE memorandum presents three bases for a measurement requirement for an instream flow permit: (1) perfecting the right through constructed works (a present-day proxy for the historical diversion requirement under the Prior Appropriation Doctrine); (2) analyzing constructed works to demonstrate continued use; and (3) using the same constructed works to identify water in a stream as appropriated and used for instream flows.

### A. Diversion: a Requirement of Appropriation

During Reynolds’ tenure as State Engineer, the OSE’s official and unwavering position was that instream flow was not a recognized right in New Mexico because case law and statutes provided that an appropriation of surface water was dependent on the construction of reservoirs and ditches.

The OSE memorandum concluded that “under New Mexico’s statutes a diversion is an indispensable component of a surface water right,”<sup>48</sup> thus requiring constructed works (“e.g., dams or diversion structures”).<sup>49</sup> The OSE based its conclusion on four cases: *Vanderwork v. Hewes et al.*,<sup>50</sup> *Hagerman Irrigation Company v. McMurry*,<sup>51</sup> *State ex rel. Reynolds v. Miranda*,<sup>52</sup> and *State ex rel. State Game Commission v. Red River Valley Co.*<sup>53</sup>

*Vanderwork* addresses whether the territorial engineer had authority over water that seeped from an unknown source on private land. The

44. Memorandum from D.L. Sanders and Stephen R. Farris, *supra* note 40, at 4.

45. *Id.* at 5.

46. *Id.*

47. *See supra* at Part I.F.

48. Memorandum from D.L. Sanders and Stephen R. Farris, *supra* note 40, at 3 (discussing the position of Steve Reynolds, former N.M. State Engineer).

49. *Id.* at 2.

50. *Vanderwork v. Hewes*, 110 P. 567 (N.M. 1910).

51. *Hagerman Irrigation Co. v. McMurry*, 113 P. 823 (N.M. 1911).

52. *State ex rel. Reynolds v. Miranda*, 493 P.2d 409 (N.M. 1972).

53. *State ex rel. State Game Comm’n v. Red River Valley Co.*, 182 P.2d 421 (N.M. 1945).

opinion focuses narrowly on interpreting water law enacted in 1907, affording special attention to the authority given to the territorial engineer under the act. The central issue in *Vanderwork* was not how to define diversion or constructed works required for diversion, but rather, how to delineate what constituted seepage over which the territorial engineer had authority. The opinion states, in passing, that “[t]he term ‘constructed works’ is used in many of the sections of the act of 1907, and . . . refers to constructed reservoirs and ditches.”<sup>54</sup> The OSE uses this quote to conclude that an appropriation of surface water depends on diversion because diversion is indispensable to the use of a reservoir or ditch.

This conclusion seems an overly broad conclusion drawn from *Vanderwork*, given that the legal question in the case was a narrow issue regarding the territorial engineer’s authority over seepage from constructed works. The AG opinion characterizes this quote from *Vanderwork* as dicta.<sup>55</sup> Nowhere does the *Vanderwork* opinion state that a diversion is required for a surface water right nor does the court address whether or not constructed works are required for diversion.

Additionally, the focus on this one excerpt from *Vanderwork* ignores the portion of the opinion that makes it clear that the governing laws evaluated in the case “relate to public and unappropriated waters within the territory.”<sup>56</sup> The OSE memorandum does not explain how *Vanderwork*, which involves pre-1907 rights to unappropriated surface water and rights to seepage from an unknown source on private land, would control present-day permit transfers from consumptive use rights to instream flow rights in a fully appropriated stream system. Instead, the OSE merely relies on quotations from *Vanderwork*, taken out of context, to support the OSE’s historical position that gaging is a requirement of an instream flow right.<sup>57</sup>

Finally, and perhaps most importantly, the New Mexico Supreme Court effectively limited *Vanderwork* to its facts in *Reynolds v. City of Roswells*.<sup>58</sup> “It is true as urged by the State Engineer that in *Vanderwork v. Hewes & Dean* . . . this Court limited the term ‘constructed works’ . . . to reservoirs or ditches. The result in that case is limited to the specific facts in that case.”<sup>59</sup> Lower courts have since relied on this case as a limitation of *Vanderwork*.<sup>60</sup>

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54. *Vanderwork*, 110 P. at 569.

55. N.M. Op. Att’y. Gen. No. 98-01, *supra* note 41, at 6.

56. *Vanderwork*, 110 P. at 568 (emphasis added).

57. Memorandum from D.L. Sanders and Stephen R. Farris, *supra* note 40, at 2–3.

58. *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982).

59. *Id.* at 540 (emphasis added).

60. See *Town of Silver City v. Scartaccini*, 126 P.3d 1177, 1184 (N.M. Ct. App. 2006) (repeating that *Reynolds v. Roswell* limited *Vanderwork* to its facts) (emphasis added).

Next, the OSE relied on *Hagerman*, which considered whether impoundment can create a right. *Hagerman* was a dispute between two users on the Rio Hondo where the defendant claimed a riparian right to the natural flow of the stream against the plaintiff's upstream impoundment for irrigation.<sup>61</sup> The court rejected the defendant's claim to a riparian right and clearly identified that New Mexico water rights follow a system of prior appropriation rather than a system of riparian rights. In doing so, the court stated that "water flowing in a natural stream is not the subject of private ownership any more than the fish in it, yet, when it is impounded and reduced to possession by artificial means, it becomes personal property, as the fish do when caught . . . ."<sup>62</sup> Although the OSE relies on this quotation to conclude that diversion is necessary for a surface water right, the AG determines that the statement was merely the court's reference to the upstream user's actions in that case, which included impounding water and reducing it to possession.

The AG labels this quote as dicta, perhaps as a cautionary note against OSE's over-reaching statement that *Hagerman* generally, and the cited material specifically, provide a basis for concluding that any surface water right requires diversion.<sup>63</sup> As the AG points out, there was no need for the court to discuss precisely what actions might suffice to turn public waters into private waters.<sup>64</sup> As with its use of *Vanderwork*, the OSE relies on an excerpt from the court's opinion in *Hagerman* to broadly claim diversion is a requirement for a surface water right under New Mexico law. Although *Hagerman* considered whether the plaintiff's impoundment created a right, the holding does not address whether an impoundment or other form of possession is always necessary for the creation of a private right. A review of recent cases confirm the AG's statement that the *Hagerman* citation relied upon by the OSE "has never been cited or relied upon in any subsequent court decisions."<sup>65</sup>

Lastly, the OSE relied on *Miranda*, which involved a claim to a pre-1907 water right. The defendant's predecessor grazed livestock on grasses that grew within an intermittent wash that traversed the defendant's property.<sup>66</sup> Sometime after World War I a natural arroyo formed, diminishing the grazing area of the wash by allowing surface flows that previously ran through the wash to instead run through the arroyo. There was no evidence that the defendant or his predecessors used a

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61. *Hagerman Irrigation Co. v. McMurry*, 113 P. 823 (N.M. 1911).

62. *Id.* at 825.

63. N.M. Op. Att'y. Gen. No. 98-01, *supra* note 41, at 10.

64. *Id.*

65. *Id.*

66. *See* State ex rel. Reynolds v. Miranda, 493 P.2d 409 (N.M. 1972).

man-made diversion for waters from the wash. The issue in the case was whether a diversion was necessary to establish the defendant's water right. Lacking evidence of diversion, the court could find no evidence of an intent to appropriate, the latter of which is a *de minimus* requirement in proving a right to appropriate water. Under the facts of the case, the court held "that man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes."<sup>67</sup> The AG argues against using *Miranda* as an across-the-board enunciation of a constitutional diversion requirement. Rather, the AG states that *Miranda* "stands only for the proposition that, prior to 1907, diversion was required in order to perfect an agricultural water right in New Mexico."<sup>68</sup>

*Vanderwork*, *Hagerman*, and *Miranda* revolved around the establishment of pre-1907 rights. Using these cases as precedent for a present-day transfer of an established right to an instream flow right appears to reach beyond the case holdings.

Finally, the OSE memorandum relied on the fourth case, *Red River Valley Co.*, which the OSE interpreted to link dicta involving pre-1907 rights to the post-1907 statutory framework.<sup>69</sup> In *Red River Valley Co.* the defendant allegedly held exclusive, private rights to fish in the two streams that were impounded to create Conchas Reservoir, and claimed an exclusive right to fish in the reservoir. The court ultimately denied the defendant's claim of exclusive ownership and determined that the waters in question were public waters and recreational and fishing purposes are beneficial uses to which public waters can be put.<sup>70</sup> In a lengthy analysis of laws and customs prior to the enactment of the 1907 water code and adoption of the state constitution in 1911, the court states that the old customs and rules remained in force as the law of New Mexico until incorporated in part or in whole by statute and the state constitution. The OSE relies on this analysis for its argument that a diversion was required to establish a surface water right prior to 1907 and this require-

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67. *Id.* at 411.

68. N.M. Op. Att'y. Gen. No. 98-01, *supra* note 41, at 8 ("In other words, the Court held that under pre-1907 common law, grazing and cutting wild grass was not enough to effect an appropriation" and "[a]bsent a statutory permitting scheme, the diversion requirement served multiple purposes."); see also Memorandum from D.L. Sanders and Stephen R. Faris, *supra* note 41, at 3 n.2 ("Whether *Miranda* is limited in application only to irrigation surface water rights is subject to debate . . .").

69. See State ex rel. State Game Commission v. Red River Valley Co., 182 P.2d 421 (N.M. 1945).

70. *Id.* at 428.

ment was then codified as implicit in the term “constructed works,” thus requiring a diversion today.

Even though the 1907 statute and 1911 constitution continue the same general customs and rules in effect prior to 1907, the court clearly concludes in *Red River Valley Co.* that these are only “declaratory of prior existing law”<sup>71</sup> in support of its specific holding that unappropriated waters in the reservoir are public waters subject to appropriation for beneficial use. The court never holds that only those laws and customs in place prior to 1907 are valid after 1907, or that the 1907 laws adopt all of the pre-1907 customs, or even that each of the pre-1907 customs is necessarily mirrored in some aspect of the current statutes. The OSE relies on the mere fact that the 1907 laws are declaratory of some laws that existed at the time to conclude that the pre-1907 diversion requirement created a mandatory equivalent for diversions post 1907. Such blanket assumptions reach beyond the court’s opinion in *Red River Valley Co.* In fact, as laid out by the AG, the 1907 laws, despite drawing from pre-1907 customs and rules, also “mark[ed] a wide departure from the [common law] doctrine.”<sup>72</sup>

The AG opinion agrees that diversion was, and still is, an essential element in establishing a pre-1907 right, but does not find a mandatory diversion requirement under case law, current statutes, or the state constitution for transfer of an existing consumptive right to instream flow.<sup>73</sup>

## B. Construction of Works: Maintaining Dominion and Control and Identification of Appropriated Water

Under Eluid Martinez’s tenure as State Engineer (1991–94), the OSE position was that in New Mexico’s fully appropriated system, all existing surface water rights have been perfected through diversion and the issue of construction of works is no longer relevant to an application for change of purpose to instream flow.<sup>74</sup> However, the OSE position shifted in 1998. The OSE began insisting that constructed works should be a legal requirement of instream flows.

Nevertheless, it is significant in the prior appropriation system that there be adherence to the requirement that there be some sort of “constructed works” as contemplated under section 72-5-1 to evidence dominion and control over the surface water

71. *Id.* at 427.

72. N.M. Att’y. Gen. Op. No. 98-01, *supra* note 41, at 9 (citing *Harkey v. Smith*, 247 P. 550, 551 (N.M. 1926)).

73. N.M. Att’y. Gen. Op. No. 98-01, *supra* note 41.

74. Memorandum from D.L. Sanders and Stephen R. Farris, *supra* note 40, at 3–4.



appropriation. The construction or installation of devices for measuring an instream flow might fall within the definition of “constructed works”, in that, an owner could demonstrate continued dominion and control over the water so that it could be distinguished from the public flow of the stream. This would have the effect of maintaining the legal distinction between instream use water rights under the prior appropriation system and those of a riparian system.<sup>75</sup>

The OSE memorandum relies on *Lagenegger v. State ex rel. Bliss*<sup>76</sup> and three other cases: *Kelley v. Carlsbad Irrigation District*,<sup>77</sup> *State ex. Rel. Reynolds v. King*,<sup>78</sup> and *Hagerman*,<sup>79</sup> for the conclusion that identification of water instream, through continuous and accurate gaging, is a legal requirement of an instream flow right. However, whether continuous and accurate gaging is legally necessary for purposes of perfecting a water right or merely considered necessary for administration purposes remains unclear.

Following the reasoning of *Lagenegger* . . . if the instream flow does not lose its identity as appropriated water, then the permitted water right can be administered in the natural stream by the State Engineer. This means that, at a minimum, any permit for an instream flow must be conditioned to require continuous and accurate gauging throughout the permitted stream reach. This appears to be the only means to meet the legal requirement that the appropriated water be identifiable. We express no opinion as to whether this is technically or financially prohibitive.<sup>80</sup>

*Langenegger* involved an application for a change in diversion from a system of artificial drains to wells.<sup>81</sup> Under a prior court decree in 1933, the plaintiff was originally allowed to let some water in one drain empty into the Pecos River and recapture it at a downstream point in the river, “provided that the amount so diverted from the river was limited to the amount actually contributed to the river from the drain, making

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75. *Id.* at 4.

76. *Lagenegger v. Bliss*, 326 P.2d 1098 (N.M. 1958).

77. *Kelley v. Carlsbad Irrigation District*, 415 P.2d 849 (N.M. 1966) (holding that surface water becomes public upon reaching an underground reservoir).

78. *State ex. rel. Reynolds v. King*, 321 P.2d 200 (N.M. 1958) (holding that surface water becomes public upon reaching an underground reservoir).

79. *Hagerman Irrigation Company v. McMurry*, 113 P. 823 (N.M. 1911) (water flowing in a natural stream is not private property).

80. Memorandum from D.L. Sanders and Stephen R. Farris, *supra* note 40, at 5.

81. *Langenegger*, 326 P.2d 1098 (N.M. 1958).

allowance for carriage losses.”<sup>82</sup> The case involved the plaintiff’s subsequent application for a permit to drill wells because the drain system no longer provided adequate amounts of water for irrigation. The OSE memorandum summarizes this as a case where private water commingled with public water in the river did not become public water subject to appropriation “because it was measured both at the location that it entered the watercourse and at the point at which it was diverted for the downstream use.”<sup>83</sup>

This general interpretation of *Langenegger* overstates the specifics of the case. The case concerns commingled private and public water, and a logical inference from the quoted decree<sup>84</sup> is that the 1933 arrangement required measurement at the points of release and recapture to ensure that the plaintiff was not recapturing more water than he was releasing to the river and losing through conveyance. The opinion, however, never actually states that measurement occurred at either point, nor did the opinion specifically state that such measurement was required. In fact, measurement itself was not an issue in the case because there was no water to measure—the plaintiff was no longer receiving any water via the drain system nor discharging water to the river. Thus, connecting the plaintiff’s right in *Langenegger* with a measurement mandate for a current instream flow right seems tenuous at best.

*Kelley v. Carlsbad*,<sup>85</sup> *Reynolds v. King*, and *Hagerman* provide better support to the OSE’s argument that measurement of some kind is necessary to maintain control of private water when it intermingles with public water.<sup>86</sup> Both *Kelley v. Carlsbad* and *Reynolds v. King* involved the loss of surface water identity as surface water reaches an underground reservoir, which then becomes public and subject to appropriation as an underground source of water. *Hagerman*, as summarized above, was about possession of water based on impoundment and application to beneficial use. The OSE’s conclusion that public waters become private only through dominion and control, and thus, require continuous measurement to exert dominion and control over instream flows, follows the holdings of these three cases, all of which address the issue of public versus private waters.

The AG opinion agreed that “the statutory reference to ‘constructed works’ would be construed to encompass any sort of facilities or

82. *Id.* at 1099.

83. Memorandum from D.L. Sanders and Stephen R. Farris, *supra* note 40, at 4–5.

84. *Langenegger*, 326 P.2d at 1099.

85. *Kelley v. Carlsbad*, 415 P.2d 849 (N.M. 1966) (involving a permit request for a supplemental well under the Templeton Doctrine).

86. *Reynolds v. King*, 321 P.2d 200 (N.M. 1958) (involving an injunction against using an unauthorized well for irrigation).

instrumentation that evidence beneficial use of an identifiable amount of water.”<sup>87</sup> While constructed works are legally permissible, the AG never stated that it is a legal mandate, and instead emphasized that “constructed works” be “interpreted broadly, in keeping with the flexible and evolving underpinnings of the appropriative rights doctrine.”<sup>88</sup> Indeed, as presented in this paper, measurement of instream flow rights is not the only way to ensure that such rights are used to benefit rivers, riparian habitat, and the wildlife that depends on that habitat.

### C. Construction of Works: A Requirement to Avoid Run On Declarations of pre-1907 Instream Flow Surface Water Rights

In anticipation of problems that might accompany new claims for instream uses—and particularly claims of pre-1907 instream flow rights—the OSE promotes requiring metering, as a proxy for constructed works, to develop and perfect instream flow rights. The OSE seems to be concerned that allowing a pre-1907 right that is not based on proof of diversion would open up a Pandora’s Box, creating substantial problems in prior appropriation administration. The OSE argues that if courts find that constructed works are not required to appropriate surface water, the ruling in *Red River Valley Co.*, at least as interpreted by the OSE, would then create the basis for claims of pre-1907 instream uses.<sup>89</sup> First, as already analyzed, this overstates the reach of *Red River Valley Co.*, which did not hold that only those laws and customs in place prior to 1907 are valid after 1907, or that the 1907 laws adopt all of the pre-1907 customs, or even that each of the pre-1907 customs is necessarily mirrored in some aspect of the current statutes. Second, it would not be inconsistent for a court to deny a claim to a pre-1907 instream flow right because it lacked a diversion and still allow a present-day transfer to instream flow without requiring a diversion. This is particularly true in light of the case law relied upon by the OSE to conclude that a diversion is a requirement, all of which involve establishment of pre-1907 rights, and none of which address present day transfers of an established right.

### D. Summary

New Mexico case law does not lead to the simple conclusion that control and measurement of an instream flow right is a mandatory legal condition for permitting such rights. If case law does not support a mandatory diversion or measurement requirement for a transfer to in-

87. N.M. Att’y. Gen. Op. No. 98-01, *supra* note 41, at 6.

88. *Id.*

89. Memorandum from D.L. Sanders and Stephen R. Farris, *supra* note 40, at 5–6.

stream flow, why does the OSE continue to insist upon gaging today? The answer seems to be that diversion and constructed works, or metering and gaging (as proxies for diversion and constructed works), if not legal requirements, are necessary for the administration for at least some instream flow rights. The following sections of this paper provide recommendations for effectively administering instream flow rights in New Mexico.

### III. RECOMMENDATIONS FOR IMPLEMENTATION OF INSTREAM FLOWS IN NEW MEXICO

Several commonsense recommendations are presented here to address some of the problems associated with administering and measuring instream flow rights in New Mexico. Many of these recommendations require little monetary investment, if any, and several draw from successful instream flow programs in other western states.

#### A. Local Programs: Decreasing Administrative Burdens

One way to achieve maximum impact with minimum administration is to focus on specific reaches that experience seasonal drying or heavily degraded habitat. In such locations, even moderate streamflow increases would improve river flows and habitat. Three major benefits of a localized focus include:

**First**, local transfers keep water within the community most impacted by reduced flows. Thus, local programs should have a higher likelihood of success than state-wide programs because the benefitting river reach is viewed as “my river” to the local residents and users.<sup>90</sup>

**Second**, local transfers maximize the benefits to the river, as less water is lost to conveyance and carriage losses than distant transfers. Thus, even transfers of relatively small amounts of water might effectively improve flows when the transfers are localized.

**Finally**, local transfers can be initiated through a centralized, local program. This might help to reduce the tension between irrigators and the state and federal agencies that manage water operations in New Mexico, agencies not always welcomed or trusted by irrigators.<sup>91</sup>

Oregon has a state agency, the Oregon Watershed Enhancement Board, that provides grants for local river and habitat conservation programs in which “[c]ommunity members and landowners use scientific

90. Alan Hamilton and Mark Bockley, *Middle Rio Grande Farmers and Water Rights* 21 (2008) available at <http://www.kysq.org/docs/Atalaya.pdf>.

91. *Id.* at 16 (discussing irrigators’ attitudes towards the Office of the New Mexico State Engineer).

criteria to decide jointly what needs to be done to conserve and improve rivers and natural habitat in the places where they live.”<sup>92</sup> Individual watershed councils—locally organized, voluntary groups—manage the local conservation and restoration operations in Oregon. Similarly, Washington state law allows counties to establish water conservancy boards to “expedite the administrative process for water rights transfers” at the local level.<sup>93</sup> The boards make recommendations regarding transfers to the state water authority, which retains the authority to approve transfers.

A similar type of local authority could be created to implement local transfer programs in New Mexico. A local transfer program, in conjunction with the OSE, could delineate administrative requirements for transfers using “common assumptions about the amount of water available to transfer, impacts to other water users, and mitigation requirements” to simplify and expedite the transfer process.<sup>94</sup> Expedited reviews are especially effective for temporary, short-term transfers because of the role that such transfers typically fill—addressing pressing water supply needs for a specific location and period of time. For example, Washington provides expedited reviews for water rights that are transferred to instream use and does not review “the extent and validity of the portion of the water right that will remain with the water right holder.”<sup>95</sup> Such an approach serves two important functions. First, this can reduce the fear that a close look by the OSE might cause a loss of rights.<sup>96</sup> Second, it can allow for transfers to occur more readily in areas where rights have yet to be adjudicated, the majority of New Mexico’s river basins.

## B. Conservation Incentives: Moving Beyond Protection Against Forfeiture

Conservation is one way to alter the water balance, increasing streamflows by decreasing withdrawals. The “use it or lose it” paradigm of prior appropriation can lead to wasteful practices, essentially forcing irrigators to use the full extent of their water right, whether needed or not, to avoid the potential loss of those rights through non-use, abandonment or forfeiture. New Mexico implemented two important changes to the law in recognition of the problem of overuse due to the threat of

92. Oregon Watershed Enhancement Board, *About us*, OREGON.GOV, <http://www.oregon.gov/OWEB/Pages/index.aspx> (last visited March 18, 2015).

93. WESTERN GOVERNORS’ ASSOCIATION, *supra* note 1, at 57.

94. *Id.* at 58.

95. WASH. REV. CODE § 90.42.040(9) (1991).

96. See generally Hamilton and Bockley, *supra* note 90, at 16–17.

forfeiture.<sup>97</sup> (1) in 2003, the legislature clarified that conservation from irrigation would not affect an owner's rights or quantity of appurtenant acreage; and (2) in 2007, the legislature allowed water rights holders to make an application to the OSE to for a change in the point of diversion or place or purpose of use of the quantity of conserved water. While removing legal barriers to conservation, the 2003 and 2007 statutory amendments do not remove other important barriers that put conservation beyond the reach of many small farmers.<sup>98</sup> In particular, conservation can be technically complex and costly. State support for resolving technical issues and assisting with the financial burdens is likely the only way small farmers will be able to afford making meaningful conservation improvements.<sup>99</sup> Unless improvements in efficiency are made practical and accessible for small farmers, on-farm conservation will likely never play an important role in increasing streamflows.

### C. Reduce or Eliminate the Need for Gaging

Gaging can be an expensive<sup>100</sup> and technical undertaking that in and of itself does nothing to increase streamflows. Requiring gaging for any and all transfers of water to instream flows creates a barrier to such transfers and, as detailed in this section, is not necessary under many circumstances. Several scenarios that contemplate increasing streamflows without requiring gaging to effectively implement the transfer are presented below.

#### 1. Minimum Flows

The purpose of a transfer of consumptive use to an instream use is to provide *additional* water to the river to benefit fish, wildlife and habitat. Measuring the amount of water added to a river, often termed "flow augmentation," can be a daunting task. Most rivers have a *transient flow* regime due to seasonal and often unpredictable additions from snowmelt and rainfall; water additions often have variable pulses which can be extremely difficult to measure. Also, the smaller the added

97. N.M. STAT. ANN. 1978 § 72-5-18 (1978).

98. See generally U.N.M. SCH. OF LAW, THE UTTON CENTER, WATER MATTERS: BACKGROUND ON SELECTED WATER ISSUES FOR MEMBERS OF THE 51ST N.M. STATE LEG. 1ST SESSION (2013) (discussing barriers to conservation such as cost and technical issues), available at [http://uttoncenter.unm.edu/pdfs/Water-Matters-2013/2013\\_water\\_matters.pdf](http://uttoncenter.unm.edu/pdfs/Water-Matters-2013/2013_water_matters.pdf).

99. See WESTERN GOVERNORS' ASSOCIATION, *supra* note 1 (mentioning state assistance with funding as the first tool to facilitate transfers).

100. In 2002 in New Hampshire, the annual operating cost of a full-time, continuously recording stream-gaging station with satellite telemetry was \$11,300. Scott A. Olson, *New Hampshire's Stream-Gaging Network: Status and Future Needs*, U.S. Geological Survey, Fact Sheet 050 (June 2003), [http://pubs.usgs.gov/fs/fs-050-03/pdf/FS050-03\\_508.pdf](http://pubs.usgs.gov/fs/fs-050-03/pdf/FS050-03_508.pdf).

transfer amount, relative to the size of a river's natural base and pulse flows, the more difficult the transfer is to measure.<sup>101</sup> In some cases, measurement may even be impossible.<sup>102</sup> Though individual transfers may be small relative to the river's natural flow regime, many small transfers can have a significant cumulative effect on streamflows. Most states that provide protection for instream flow rights do so by protecting or guaranteeing minimum flows, far easier to measure than flow augmentation.<sup>103</sup> This solution confirms the beneficial use of the transfer without requiring the expensive and sometimes impossible gaging of streamflows.

## 2. Priority Status

Gaging may be more or less relevant depending on the priority status of a given instream flow right. For example, a newly transferred right may be junior to most rights on a river, or junior to other rights within a given reach; furthermore, it might be decades before that instream flow right could be protected against impairment by other users, an unavoidable consequence of the prior appropriation system. The junior status of a transferred instream flow right would be a strong basis to forgo any current gaging requirements for situations where downstream diverters have more senior rights. So long as an instream flow right is the junior right on a river or river reach, gaging would not serve to protect that right against other permitted uses. A permit conditioned on gaging for a junior instream flow right that cannot presently be protected because of its junior status is both burdensome and unnecessary.

One potential solution would be to seek a conditional gaging requirement such as that for United States' reserved rights on the East Fork of the Jemez River in New Mexico. Based on its designation as a Wild and Scenic River on June 6, 1990, the United States was awarded instream flows for the East Fork of the Jemez River for an 11 mile reach between the Valles Caldera National Preserve to the confluence with San Antonio Creek within the Jemez National Recreation Area. The court decree states that "the United States shall not assert a priority call to increase flows pursuant to this right unless and until the flows are gaged in accordance with accepted standards."<sup>104</sup> Agreeing to defer gaging until

101. See Memorandum from D.L. Sanders and Stephen R. Farris, *supra* note 40, at 7.

102. *Id.*

103. See WESTERN GOVERNORS' ASSOCIATION, *supra* note 1 at Appendix C.

104. *United States v. Abousleman, et al.*, No. 83cv01041-JEC slip op. at 6 (D.N.M. Oct. 3, 2008) (Partial Final Judgment and Decree of the United States' Wild and Scenic River Act Reserved Water Right), available at <http://www.ose.state.nm.us/Legal/CourtOrders/JemezRiver/Jemez-WSR-PFD-2008-10-03.pdf>.



an instream flow right “matures” would be a way to transfer the water immediately. The deferred requirement could have a more immediate impact on improving instream flows and avoid the unnecessary time and expense of gaging a junior right, which has little or no legal protection against other users.

### 3. *Direct Observation*

The OSE often verifies application of water for irrigation simply by observing whether or not areas permitted for irrigation are “green.”<sup>105</sup> Thus, direct observation of green, irrigated fields confirms water is placed to beneficial use. This is an effective monitoring tool for areas lacking gages, a common issue throughout New Mexico and especially in more remote locations. If direct observation is adequate for verifying irrigation uses, then direct observation, such as photographs, should also be adequate verification of whether or not a reach with permitted instream flow rights has flowing water. Such verification would be particularly effective if the instream flow right is small and is considered a right to a minimum flow. As with un-metered irrigation, photographs alone cannot determine how much water is flowing in a stream, nor would photographs be adequate to determine whose water is flowing where water is commingled with water appropriated for other users.

However, if the instream right is too junior to be protected against other users anyway, then photographs or other means of verification, like gaging, become an unnecessary requirement because a junior instream flow permit holder cannot enforce priority over senior users. Allowing irrigation permits without metering requirements but insisting on gaging for instream flow permits improperly burdens the owner of an instream flow right against other users. This notion became a point of contention during the 1985 Anaya Initiative, in which the Natural Resources Department questioned why diversionary rights could be established and maintained by estimation methods but an instream flow right would require metering and monitoring.<sup>106</sup> Instream flows should not have to wait for the decades it would take (if ever) to implement gaging of rivers statewide, nor should owners of instream flow rights bear a disproportionate burden resulting from the state’s lack of gaging and measurement.

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105. Proving beneficial use through historical photographs is typical evidence used in water rights claims. See 19.25.13.27(G) NMAC (Dec. 3, 2004).

106. De Young, *supra* note 5, at 22.

#### 4. *Forbearance*

For instream flow rights acquired through lease or purchase of consumptive uses, a showing of forbearance should be adequate to prove that the permitted amount is not being withdrawn from the river or delivery system. Evidence that consumptive rights are not being used, such as meter data showing zero use or the closing of a head gate, also demonstrates that an instream flow right is being used instream. In fact, an agreement of forbearance of irrigation without any demonstration of that forbearance was allowed for rights deposited into the Mimbres River Conservation Program in Southwestern New Mexico.<sup>107</sup> Similar to the use of photographs to demonstrate irrigation, forbearance of irrigation could be demonstrated by photographs showing that previously irrigated fields are now fallow.

#### 5. *Other Factors*

Administration of consumptive right transfers to private, instream flow rights could be made simpler by including one or more of the following:

1. Reduce surprises by transferring rights within an adjudicated basin; the more users know about who may be impacted (positively or negatively) by the transfer, the easier it will be to estimate benefits to fish and wildlife and avoid possible challenges;
2. Reduce downstream diversions by focusing on instream rights transfers in relatively long reaches without diversions, where instream flows can be placed near the top of the reach. This has the added benefit of reducing the need for gaging to prevent impairment to the instream flow right; and
3. Minimize or eliminate technical issues associated with a change in place of diversion by transferring a consumptive right with a diversion at, or very close to, the river.

### IV. CONCLUSION

There is a growing public awareness of the importance of protecting our freshwater resources from overconsumption and the problems that arise from highly managed rivers, as evidenced by the current debate over potential diversions from the Gila River, the last free-flowing river in New Mexico.<sup>108</sup> Yet, despite this growing shift in public aware-

107. See GILA NATIONAL FOREST, Mimbres River Conservation Plan (June 22, 2009) (on file with author).

108. Sandra Postel, *Still Wild and Free, New Mexico's Gila River is Again Under Threat*, NATIONAL GEOGRAPHIC NEWS WATCH, Sep. 27, 2011, available at <http://newswatch.national>

ness towards the value of instream flows and free-flowing rivers, the political will to provide legal protections for instream flows lags in New Mexico, as seen in the recent failures of the 2011 and 2013 bills for instream flow rights. Just as disheartening is the resurgence of decades-old arguments against instream flow protections in response to these bills. The OSE proffers these arguments even as it recognizes that “water transfers are the only remaining method available for obtaining new supplies.”<sup>109</sup> As the years pass and legislative efforts to allow instream flow protections continue to fail, perhaps the only way to meet the opposition to private instream flow rights will be through the courts. Whatever the means used to gain instream flow protections, the prize will be additional certainty and security for our state’s most valuable resource. To be sure, private instream flow rights are not the panacea for the problems of over appropriation, over use, and drought that plague our rivers. But, it is difficult to imagine addressing these problems without holistic and commonsense solutions that enable, not constrain, transfers of consumptive uses to instream flows. Though writing on a different subject, renowned writer and poet Annie Dillard aptly captures the danger in failing to act now to protect and conserve our precious rivers: “It is difficult to undo our own damage, and to recall to our presence that which we have asked to leave.”<sup>110</sup> Indeed, the longer we wait, the greater the losses and the more difficult the challenges.

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[geographic.com/2011/09/27/still-wild-and-free-new-mexicos-gila-river-is-again-under-threat/](http://geographic.com/2011/09/27/still-wild-and-free-new-mexicos-gila-river-is-again-under-threat/).

109. Andrew Fahlund, Min L. Janny Choy & Leon Szeptycki, *Water in the West* (CAL. J. POL. POL’Y 61, 85 at 25 (2014) (citing WESTERN GOVERNORS’ ASS’N., *supra* note 1, at 13).

110. ANNIE DILLARD, *TEACHING A STONE TO TALK: EXPEDITIONS AND ENCOUNTERS* 70 (Harper Perennial ed., rev. ed. 1983).