Instream Flows in New Mexico

Denise D. Fort

University of New Mexico - School of Law

Follow this and additional works at: https://digitalrepository.unm.edu/law_facultyscholarship

Part of the Law Commons

Recommended Citation

Available at: https://digitalrepository.unm.edu/law_facultyscholarship/189
Instream Flows in New Mexico

Denise D. Fort

Professor of Law
University of New Mexico School of Law
Albuquerque, New Mexico 87131 USA

Instream flows have been sanctioned, through legislation, judicial decision, or administrative action across the western states. New Mexico now joins the ranks with the issuance of an Attorney General’s opinion that is well-grounded in state law, but may sanction overly restrictive conditions on applicants. Further, although the opinion is likely to point the direction in which the state’s water law will develop, powerful opponents may yet prevail to block its implementation. Legal progress in establishing instream flows highlights the daunting physical problem of keeping water in the state’s rivers, in light of extreme aridity, declining groundwater reserves, and a generally hostile water establishment.

A BITTER DISPUTE

New Mexico has often been cited as the last holdout in the West against instream flow rights. With the release of an opinion by former Attorney General Tom Udall delineating conditions under which waters can be left instream, New Mexico now creeps toward the modern West, albeit at its own pace.

Instream flow protection in New Mexico has been extremely contentious. The debates in the state are born of its extreme aridity, poverty, a hitherto exclusive water establishment, and unique tensions surrounding the state’s agricultural heritage. From the stream’s perspective, the needs of New Mexico’s rivers are physical, not legal: water (“wet” water, as insiders say) must be allowed to remain in the rivers to maintain the richness of their existence. The mechanisms to accomplish this are many, but the most commonly envisioned is a private or publicly held water right, in which water is maintained in a stream, rather than applied to irrigation purposes or put to another traditional use. The widely held belief is that New Mexico water law requires a diversion for a right to be perfected under state law.

For over two decades, environmental activists in the state had attempted to procure an instream flow bill from New Mexico’s conservative state legislature. I remember one such occasion when a bill was up for hearing before its first committee. Just before the vote, eyes turned to the door—where the legendary Steve Reynolds, the state’s chief engineer, shook his head and killed the bill with a few words. Several unsuccessful appeals have been made to the state legislature to provide for instream rights (DeYoung 1989, 1993).

The legal situation was not as clear cut as the political situation. In 1984, Brant Calkin, an environmentalist who enjoyed a short tenure as Secretary of the Natural Resources Department, procured an informal letter from the Attorney General’s office in which an assistant Attorney General opined that instream flows were beneficial uses under state law and that a diversion was probably not required for instream flows (letter from Assistant Attorney General, Lee

---

1 Professor Fort has been an advocate for instream flows for a number of years, as a Cabinet Secretary in New Mexico state government (1983-1987), more recently as a convenor of an instream flow conference (1995), and as a participant in some of the events described herein.
This opinion was not binding on the State Engineer, however, and the Office of State Engineer (hereafter O.S.E. or State Engineer) continued to maintain that instream flows would not be recognized under New Mexico law.

This changed with the appointment of Eluid Martinez as State Engineer in 1991. Martinez, who had served under Steve Reynolds for many years, indicated in speeches and private conversations that he was not as adamant in his opposition as was his predecessor. Although he invited an application from the environmental community, none was made during his administration.

The stage was set for a clarification of New Mexico’s law. Tom Udall served New Mexico as Attorney General from 1991 until 1998, when he was elected to the United States House of Representatives. His father, Stewart Udall, is the former Secretary of the Interior and his uncle was Arizona Congressman Morris Udall. His environmental record as a private citizen and as Attorney General perhaps reflects this lineage.

Two New Mexico state senators, Dede Feldman and Carlos Cisneros, joined in a letter to the Attorney General in 1997 requesting a formal opinion as to whether instream flows could be recognized under state law for recreational, fish or wildlife, or ecological purposes. After a suspenseful period, which included consultation with the State Engineer, the opinion was issued (New Mexico Attorney General Opinion 98-01). Assistant Attorney General, Alletta Belin, an experienced environmental attorney, authored the opinion.

The 1998 opinion provided a legal basis for the State Engineer to allow rights in instream flows. Importantly, the opinion narrowed the scope of questions that it addressed. This reflected a politically important dialogue with the O.S.E., which employs its own legal staff and is responsible for the administration of water in the state. The opinion restricted its scope to transfers of water rights to instream purposes, reasoning that applications for new water rights were unlikely in a state where water rights appear to be fully appropriated. It also reflected the beliefs of the O.S.E., however, by accepting its position that instream flows, to be valid, must be measured through devices in the stream. Finally, the wording of the original request by the legislators contained another implied limitation; they asked whether the State Engineer was permitted to afford legal protection to instream flows. This formulation begs the question of whether the State Engineer could be compelled to grant a transfer, although the reasoning of the opinion establishes a road map should an applicant be denied a transfer.

An Attorney General’s opinion does not put water in a stream. It is a needed tool for those agencies or individuals who want to protect instream uses, but the protection and restoration of ecological, recreational, and other values in New Mexico’s rivers will require far more. The opinion did change the political landscape surrounding this issue and opened the way for a more meaningful discussion about what needs to be done to protect the state’s streams.

The immediate effect was political. As long as the proponents of instream flows were required to seek legislation, instream flows were doomed except for very narrowly drawn bills. With the clarification that the existing state constitution and laws need not be changed, legislative efforts can be directed toward measures that will be needed to reallocate water uses to achieve a more balanced system.

The substantive effect of the ruling was to enable federal agencies to exercise additional strategies in protecting federally listed endangered species in New Mexico’s rivers. Federal agencies have control over water (through federal ownership, leases, and opportunities for purchase) that can be used for instream flows. Changing the widespread perception that New Mexico prohibited instream flows (which was never an entirely accurate understanding of State practice) enabled federal agencies to be more creative in using water rights for these purposes.

LEGAL ANALYSIS

The precepts of the prior appropriation doctrine have been drummed into generations of water law students: “Beneficial use shall be the basis, the measure, and the limit of the right to the use of water” (N.M. Const., art. XVI, § 3; N.M. Stat. Ann. § 72-1-2 (Michie 1978)). This formulation and New Mexico’s constitution and statutes governing water rights are silent with respect to instream rights and no New Mexico court has directly considered the question of the validity.
of these rights under state law.

The Attorney General had no great difficulty establishing that instream flows could constitute beneficial use under the state's water law framework. The constitution does not define beneficial use and no cases in New Mexico considered the "recreational, fish or wildlife or ecological purposes" referenced in the legislators' request. Nevertheless, this did not seem to be the point on which the doctrine would encounter difficulties. Water that is dedicated to a stream can support fisheries, improve water quality, provide recreational opportunities, and provide other benefits that are worthwhile to society. New Mexico case law contains dicta indicating that water for wildlife, or for aesthetic purposes, constitutes a beneficial use within the meaning of the statute (State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 218, 182 P.2d 421, 428 (1947)). Steve Reynolds conceded the point in a letter written in 1984 to gubernatorial aide Sally Rodgers, "[i]t cannot reasonably be argued that instream flows and the use of water for fish and wildlife, recreation and aesthetic purposes in the State are not beneficial. The State, as well as private enterprise, has appropriated water and developed reservoir and irrigation projects, in accordance with State law, to enhance the environment, fish and wildlife habitat and recreation opportunities" (letter on file with author).

An examination of other states' statutes provided reassurance that the contemplated uses were considered beneficial under western water law, because these uses were often specifically identified in the statutes. The opinion observed that New Mexico has expended state funds in the protection of its parks and of fish and wildlife. Indeed, fishing is a surprisingly large economic activity in New Mexico. A national survey reports that $195,000,000 per year is generated by fishing in New Mexico (U.S. Fish and Wildlife Service 1996). In the larger context of western water law it is difficult to imagine the state scrutinizing proposed water uses with a narrow conception of "beneficial use." Across the West, the uses to which water is put reflect contemporary values in which water is used for golf courses, swimming pools, bluegrass lawns, water cooled patios, and fountains, as well as fields of alfalfa.

The greater difficulty in establishing instream flow rights is the widespread belief that an appropriative right requires diversion from the water body, although neither the constitution nor the state's statutes contain this requirement. The Attorney General's opinion found that the New Mexico constitution does not require diversion for a right to be legitimate. It cited case law from other states with similar constitutional provisions, noting that even where the "right to divert" was explicitly referenced in the constitution, courts had found no constitutional requirement of diversion.

The diversion requirement can be located in a case that concerned pre-1907 rights that were based on agricultural uses—not of water, but of grass grown with the water (State ex rel. Miranda v. Reynolds, 83 N.M. 443, 493 P.2d 409 (1972)). The Miranda case arose out of an action by the State Engineer in which a declaration was sought that the defendant (Miranda) had no legal right to use groundwater in a declared basin. The defendant's claim to this water evidenced an ingenious mind. Miranda argued that his predecessors had used grass grown in an area that occasionally filled with runoff from a wash. This wash no longer flowed into the defendant's land because of an arroyo that had been cut. There were many questions that might have been raised about the rights claimed by Miranda. The litigants made the state Supreme Court's task easier by agreeing that the controlling issue was a legal one, "whether physical efforts of man resulting in visible diversion of water are necessary to the establishment of water rights in the state of New Mexico." The court had only dicta from the New Mexico case of Harkey v. Smith2 (31 N.M. 521, 247 P.550 (1926)), so it considered two cases from other states in reaching its decision.

In the first of these, Town of Genoa v. Westfall (141 Colo. 533, 349 P.2d 370 (1960)), the Supreme Court of Colorado had stated that a manmade diversion would not necessarily be required. However, the New Mexico Supreme Court observed that even if that were true, an intent to appropriate would still be required, and that no such intent could be found in the case before it.

---

2 This case was a significant case from which to quote because it explicitly described the requirements of the common law before the state's water law was codified. In Miranda, it will be argued, the court was also considering the requirements in place before the law was codified.
The absence of a showing of intent clearly disturbed the court: "The mere cutting of the grasses would not be sufficient to manifest an intention to appropriate the water for beneficial use, nor can it be said that defendant's predecessors applied the waters to beneficial use by grazing cattle upon the grasses in the wash. These acts only manifested an intention to reap nature's bounty gratuitously provided by water flowing through the Abo Wash, not to appropriate the water itself" (State ex rel. Miranda v. Reynolds, 83 N.M. 443, 444, 493 P.2d 409, 410 (1972)).

The court also relied on a similar 1902 case from Nevada. In it, water rights were claimed based on the cutting of wild grass that had been watered by an overflowing river (Walsh v. Wallace, 26 Nev. 299, 67 P.2d 914 (1902)). The New Mexico court simply quoted from the Nevada court's holding that a diversion was required, and concluded without explanation that the Nevada rule was the better one.

The Attorney General, and possibly future courts, was faced with one relevant New Mexico case in which a rule was announced, but based on circumstances that are not likely to be repeated. The rights claimed were based on acts that occurred before New Mexico established its current framework for water rights. The necessity of showing intent demonstrates the significance of the pre-1907 rights at issue in Miranda: had the rights been claimed after that time the intent to appropriate would have been manifested by a permit filed with the state engineer. For pre-1907 rights, however, there was no such requirement, and the practical difficulty of reviewing these claims would make diversion a good surrogate for proving intent. The Attorney General opined that the Miranda holding should be limited to the specific set of circumstances presented, namely to "pre-1907 agricultural water rights."

The requirement of a manmade diversion has been grafted onto the prior appropriation doctrine in several states (Klein 1995). When the requirement is read into constitutional provisions, constitutional amendment is required to obviate the objection, unless a court can be persuaded to reconsider an earlier opinion; where the requirement is implied in a statutory provision, the path of legislative amendment is open. The New Mexico Supreme Court gave no indication that it was interpreting the constitution of New Mexico in Miranda, but every indication that it was interpreting the status of pre-1907 rights.

The requirement that a diversion be made to perfect a right has been criticized both in and outside New Mexico. In criticizing the Miranda decision, one author condemned the doctrine: "The requirement of a diversion where none is needed is economically inefficient and burdensome as well as unfair and prejudicial in its legal consequences. Such a requirement is economically inefficient because the same amount of product is created at greater cost; burdensome because it forces a capital outlay by a person who often cannot afford such an expenditure; unfair because it forces a class of water users to take an otherwise unnecessary action that is perhaps required because the other classes of water users have found a diversion necessary regardless of any legal requirement; prejudicial because it denies uses that may require that no diversion be made" (Kury 1973). The diversion requirement has been harshly criticized as an inaccurate reading of state constitutional provisions (Klein 1995).

New Mexico's statutory provisions do not require a diversion. However, the Attorney General's opinion deferred to the O. S. E.'s position that statutory provisions governing new appropriations contemplate that works of some sort would be constructed. Here the State Engineer's caveat that it would require that an instream flow right have "accurate and continuous gauging throughout the permitted stream reach" comes into play (Memorandum from Legal Services Division of O.S.E. to Tom Turney, State Engineer, 8 January 1998. On file with author.) The caveat, accepted as a premise of the opinion, permitted a finding that such devices would constitute "constructed works."

The O.S.E.'s insistence in its legal memorandum on continuous monitoring confused two separate issues, with a result that could be unduly injurious to instream rights applicants. The legal question of whether a diversion (or some other form of asserting dominion over flows)

Kein argues "western water decisions use the diversion [fn omitted] element of appropriation as a convenient, but highly inaccurate, proxy for the constitutionally mandated beneficial use requirement. Thus, courts have elevated the constitutional myth that all water uses must involve diversion in order to receive legal protection. This mythology has undermined the integrity of an entire body of law [fn omitted]."
was required as a means of creating a water right was confounded with the question of how an applicant would prove ownership of water in a stream, where it would be mixed with other water. Separating the two questions, however, leads to a more eloquent analysis. The establishment of an instream right does not, under New Mexico law, require a diversion, a gauge, or any other constructed works. The caveat (and the practical reality) that instream rights will only be proposed where they result from the transfer of water rights ensures that diversion and beneficial use will have been the means by which the original right was created, as well as providing a date for the creation of the right. The question as to how instream rights are measured in a stream should have been addressed in a specific application, where the experience of the State Engineer’s office in protecting flows (for other purposes, such as downstream delivery) and the experience of other western states in administering instream flows could have been consulted.

WHY IS INSTREAM FLOW PROTECTION OPPOSED?

The opposition to the protection of instream flows is widespread in the state. For many opponents, there is simply no desire to allow a new interest group to share a resource that historically has been controlled and managed for the benefit of a few. One would not expect an exclusionary sentiment to be so baldly stated, and the very limited written public debate reveals instead policy arguments that are intended to show the difficulty of administering instream rights in the existing system. These arguments are made seriously, but satisfactorily addressing them will not satisfy most of those who oppose instream flows.

The opponents of instream flow legislation have raised an issue regarding the difficulty of administering instream rights. This argument is based in the difference between an instream right and other types of water rights. Traditionally, a water right is measured by the amount of water diverted from a stream. An instream right might be measured at a single point (i.e., the retirement of agricultural lands could result in the relinquishment of a permit, with an agreed upon amount then dedicated to a stream), but the enforcement of that right is feared to have a negative effect on other appropriators.

Thus, an entity that wishes to transfer a junior diversion to a point upstream of a senior instream flow right presents one example (DeYoung 1993). The transfer might be denied, it is asserted, because it would have a negative effect on the instream flow. The transfer should be denied, if there were no water available for the transfer, whether the negative effects were felt on an existing irrigator or an existing instream flow right. This problem is probably less legal than practical: an irrigator would be likely to vindicate her water right, but it is less clear who would protect the instream right. Insofar as the administration of water rights occurs largely through complaint, either a state-paid agent or the owner of the right would need to be constantly vigilant to protect it.

The attorneys for the State Engineer were concerned that new instream rights might be claimed based on very early priority dates (Memorandum from Legal Services Division of O.S.E. to Tom Turney, State Engineer, 8 January 1998. On file with author). If an instream right was claimed based on fish caught in a creek in the 1880s, that right could predate later rights and upset existing rights. The Attorney General allayed that concern by limiting his conclusions to approval of a change in purpose of use, thus ensuring that instream rights will initially have been based on consumptive uses.

Finally, the State Engineer’s staff identified problems regarding the measurement of flows with stream gauges, and concluded that, “If the instream flow is not measurable, it cannot be administered” (Memorandum from Legal Services Division of O.S.E. to Tom Turney, State Engineer, 8 January 1998. On file with author). These technical difficulties should not defeat the legal doctrine, but may require reconsideration of the approach used to measure instream rights, as suggested above.

---

4 New Mexico is a state with a paucity of fora for policy debates. In describing the political setting of this debate, one is unable to consult written transcripts of legislative hearings, and there are few newspaper articles quoting parties. This discussion primarily reflects the author’s years as a participant in environmental policy making in the state. For more information on instream flows, see Montano (1993).
Whereas the debate surrounding instream flow protection in New Mexico would indicate that the state is unable to protect flows, one claim has been filed and settled that assured federal rights to flows. It was made by the Bureau of Land Management for 4 mi of the Red River, where the Instream Flow Incremental Methodology was successfully applied (Garn 1986; Red River Adjudication, Final Judgment and Decree on the United States’ Water Rights, U.S. v. Molybdenum, No. CIV 9780-SC (D.N.M. filed 11 June 1992)).Claims by the United States may result in instream flow protection on other streams.5

Agricultural Interests

The most powerful and consistent opponents of instream flows have been New Mexico’s agricultural interests. In New Mexico, as in other western states, irrigators withdraw and consume the lion’s share of available water. One reason for opposition by agricultural users lies in the many different meanings of instream flows (Gillilan and Brown 1997). The very notion of protecting instream waters may imply that waters would be protected regardless of the ownership of water rights. The approach of establishing minimum flows for designated stretches has been used in other states, but was not the model adopted in the 1998 Attorney General’s opinion in which water rights must be bought and sold through the state framework for water acquisition. The discussion was limited to the market model because the state’s rivers are all fully appropriated. Perhaps education about the protection offered by the market model will reassure opponents.

Acequia Interests

One group of irrigators is emphatically not reassured by the market model. Acequia associations have been outspoken opponents of instream flows in recent years. Acequias were utilized by Hispanic colonists for irrigation and have been maintained over generations (Rivera 1998). Although their membership is changing as Anglos move to northern New Mexico and begin to irrigate farms, these institutions are seen as essential to the preservation of the land and culture of New Mexico’s irrigated valleys. The opposition of some acequia activists is based on the fear that new competitors for water will be able to purchase rights held by acequia members, thereby hastening the movement of water out of the community. Indeed, acequia communities have protested transfers of water rights out of the community for other uses. Most of the environmentalists involved in river protection are sympathetic to the desire to protect these historic villages and it seems quite likely that mutually satisfactory solutions can be found.

If any of the long-standing beliefs about instream flows can be changed, it is most likely to happen in the context of an actual water controversy or proposal for action, in which the benefits and burdens can be more accurately assessed and mutually acceptable solutions sought. When there is a concrete dispute, the parties may be able to move beyond abstract concepts and seek cooperative solutions. Instream flow protection is not necessarily incompatible with the interests of irrigators, cities, or acequia associations, but rather can accompany the adjustment of allocations among users, or affect facility operations. As an example, instream flow protection can help the state fulfill its delivery requirements on an interstate river. It may make water available for irrigation downstream of where it is presently used.

Various articles have comprehensively reviewed the prior appropriation doctrine and how it has evolved to permit instream flow rights (Johnson and DuMars 1989; Kaufman 1992). The state’s framework for water management can be adapted to serve an evolving societal understanding of the roles that water should play. Within this framework there are ample opportunities to improve the flows of water in rivers and protect ecological values.

5 See, Statement of Claim for Instream Flow Water Rights for the Rio Chama Wild and Scenic River (State of New Mexico ex rel. v. Aragon CIV 7941-SC D.N.M. filed 28 Feb. 1995); Wild and Scenic River Claim for the East Fork of the Jemez River (U.S. v. Abousleman, No. 83-1041 D.N.M. filed 2 April 1991); Black River, Application for Permit to Change Place and Purpose of Use of Surface Waters (1994) (withdrawn). The current status of each of these claims should be confirmed with the appropriate office.
New Mexico’s water establishment is still dominated by conservative and traditional water users. With 90% of all water consumed by agricultural users, unrelenting pressure from municipal users, and no statutory protection of environmental uses, it is only in the rarest instances that instream uses are “at the table” in water management decisions (Fort 1998). Without political influence, the legal establishment of instream flows will be hollow. A variety of approaches may yield increased flows and ecological restoration (see Kaiser and Binion 1988 for a similar analysis in Texas).

River Restoration

For the objective of instream flows to be realized, the establishment of a legal right to instream flows must be accompanied by measures to restore New Mexico’s rivers. With greater understanding of ecological processes in rivers, it is manifest that the new sciences supporting river restoration should assist in defining goals and methods, with institutional change to follow. All instream flow strategies should be understood within a broad program for river restoration.

The Endangered Species Act

As in other western states, the failure to balance environmental protection with water use has led to extinction and threatened extinction of aquatic and riparian species (Minckley 1997). Where endangered species are identified and critical habitat established, flow requirements may be imposed through a notice in the Federal Register rather than through state permits. The designation of habitat for the Rio Grande silvery minnow has now given rise to several lawsuits motivated by this fear.

Federal purchase or lease of water rights under state law for species protection may come to be seen as a more orderly way of providing water for instream purposes. Under the pressure of the Endangered Species Act (16 U.S.C. §§ 1531-1544 (1994 & Supp. III 1997)), the O.S.E. has urged just this course on the Department of the Interior. Across the West, the federal government has provided financing for river restoration and species protection.

Needed Scientific Research

There is an urgent need for scientific studies to aid in the understanding of the ecological condition and potential of New Mexico streams. Economic and institutional studies are needed to understand how more optimal allocations could be arrived at among competing users. In particular, institutional barriers such as rock bottom charges for agricultural water (typically paid to conservancy or irrigation districts), the absence of charges for pumped groundwater (except for extraction costs), the absence of mechanisms to reward conservation of water, and the absence of mechanisms to enable the public to purchase instream flows, have affected the search for solutions to better water management for the region. Research into how change has occurred in other regions would be helpful. Because New Mexico does not have a broad-based entity to manage river restoration, I would argue that is has been disadvantaged in the competition for federal funds and support. Institutional design, building on the state’s unique institutions and laws, as well as the experience of other regions, would be valuable.

Education of Decision Makers

Instream flows are the province of the cognoscenti, about as attractive to the public as preserving biodiversity or other esoteric causes. There is no widespread constituency for instream flows, although environmental protection and species protection rank high among New Mexicans, as with citizens of other states. Decision makers need to be educated in the new language of conservation biology, ecosystem management, and similar concepts directed at new goals for state environmental programs.
Dialogue with Water Users

Everyone in New Mexico has a stake in how water is administered. Success in procuring environmental protection of streams will require dialogue with the many interest groups that are affected by the state’s water administration system. These include irrigators, municipalities, acequias, and industrial interests. Tribal governments are potentially important allies, but they often have development plans that will require additional water withdrawals.

State Financed Purchase of Water Rights for Stream Enhancement

If water is to be found for New Mexico’s rivers, it will most likely have to be purchased. In a poor state, with a small population, money is more of an impediment than it might be in other states. A tax on water transfers, in which a percentage of transferred water is dedicated to a stream, could be politically attractive (Oregon utilizes a tax on water transfers in which 25% of conserved water can be dedicated to streams; Ore. Rev. Stat. § 537.455-500 (1998 Cum. Supp.)). However, the volume of water transfers in New Mexico is probably insufficient to result in acquiring much water.

The attempted rescue of the farmers along New Mexico’s Pecos River provides another model for New Mexico. Because of over-appropriation (and a political unwillingness on the part of the O.S.E. to confront the necessity for restrictions on usage) New Mexico has struggled and failed to meet compact obligations on the Pecos River (O’Leary 1980). A rescue program was adopted by the Interstate Stream Commission, with some direct legislative funding. Under this model, farmers can lease water rights to the state, with the leased water left in the river for delivery to Texas (N.M. Stat. Ann. § 72-5-28 (g) (Michie 1978, Repl. Pamp. 1985, Cum. Supp.1995). This model could easily be adapted to allow water to be leased by the state for other purposes.

The state could also fund the purchase of flows using general obligation bonds or severance tax bonds. General obligation bonds require voter approval and are generally packaged with elements that are attractive across the state. Severance tax bonds do not require voter approval and are appropriated by the state legislature with a great deal of deference to individual legislator’s interests.

From an ecological perspective it would be sound to provide for purchase of both flows and, in some instances, lands or conservation easements. Colorado has employed a share of lottery proceeds to establish a fund for the purchase of critical lands and riparian areas (Colo. Rev. Stat. Ann. § 24-35-210(4.1)(a) (West 1990)). The riparian areas of the state are subject to pressure for development and their protection is critical. The purchase of conservation easements opens the door to potential political alliances with farmers and ranchers. In New Mexico, as in other western states, the protection of open space has brought together unlikely partners, as environmentalists acknowledge the role of farming in maintaining large tracts of land.

CONCLUSION

The 1998 Opinion of Attorney General Udall was an important step in permitting New Mexico to begin to protect its rivers and streams. It removed a barrier to more balanced water policy, especially for federal agencies that own water rights and have the funds to acquire more rights. On the other hand, the transfer of private water rights to instream flows is limited under the Engineer’s interpretation, if measuring requirements prove onerous. On a broader note, the movement toward restoration that is sweeping the West has extended to New Mexico. Instream flow restoration and protection will be implemented through a broad array of measures, aided by the legal analysis of this opinion.

REFERENCES


