Opinion No. 98-01

March 27, 1998

OPINION OF: Tom Udall, Attorney General

BY: Alletta Belin, Assistant Attorney General

TO: The Honorable Dede Feldmen, New Mexico State Senator, The Honorable Carlos R. Cisneros, New Mexico State Senator, State Capitol, Santa Fe, New Mexico 87503

QUESTIONS

Does New Mexico law (constitutional, statutory, or case law) permit the State Engineer to afford legal protection to instream flows[1] for recreational, fish or wildlife, or ecological purposes?

CONCLUSIONS

Yes. So as not to speculate about hypothetical scenarios that are unlikely ever to arise, we limit our response to this question in the following respects as suggested by the State Engineer in his January 1998 analysis[2] of these issues:

1. We address only the scenario of applications being submitted to the State Engineer for approval of a change in purpose of use from a traditional diversionary use to an instream flow for recreational, fish or wildlife, or ecological purposes. As the State Engineer notes, it is unlikely that applications for new appropriations of surface waters for instream flows will be submitted and acted upon, since the State's surface waters are currently fully appropriated.

2. Because the State Engineer has indicated that his approval of any instream flow application, if it were to occur, would be conditioned on use of measuring devices, we have assumed such a condition.

We conclude that there is nothing in the New Mexico Constitution, statutes, or case law that would preclude the State Engineer from approving an application to change the purpose of use of an existing water right to an instream purpose and conditioning that approval upon the installation of gauging devices to measure the instream flow beneficially used.

ANALYSIS

The question addressed herein is whether state law presents any barriers to the State Engineer approving a change in purpose or place of use of a permit to appropriate water from traditional diversionary or impoundment uses to instream uses. Answering

that question requires analysis of the pertinent portions of the New Mexico Constitution, the state statutes, and relevant case law.

A. New Mexico Constitution

A review of the New Mexico Constitution must address the following two questions: (1) Does the Constitution require a diversion or impoundment in order to obtain a valid water right; and (2) Do "recreational, fish or wildlife, or ecological" uses constitute beneficial uses as contemplated by the Constitution?

The State Constitution does not on its face require a diversion or impoundment for a valid water appropriation. Article XVI, Section 2 and 3, of the New Mexico Constitution provide:

Sec. 2: Appropriation of water.

The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

Sec. 3: Beneficial use of water.

Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

Although some constitutions in states adopting the prior appropriation doctrine expressly make reference to the "right to divert," the New Mexico Constitution does not. **See** Idaho Const. Art. XV, Section 3; Colo. Const. Art. XVI, Section 6; Neb. Const, Art. XV, Section 6. The supreme courts of each of the three states whose constitutions refer to the right to divert have considered whether statutory instream flow schemes, by not requiring diversions for instream flow appropriations, violate the state constitution. In each case, the court has found no constitutional diversion requirement. **State, Dep't of Parks v. Idaho Dep't of Water Admin.,** 530 P.2d 924, 926-927 (Idaho 1974) **(Idaho Dep't of Parks)**; **Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.,** 594 P.2d 570, 572-575 (Colo. 1979); **In re Application A-16642,** 463 N.W.2d 591, 601 (Neb. 1990). In no case has a court found the opposite: that a state constitution bars instream flow because it requires a diversion to effect a proper appropriation.

Thus, neither the language of our state constitution nor relevant case law indicates that there is any constitutional requirement for diversion or impoundment of waters in New Mexico. **See** Charles T. DuMars and Michele Minnis, "New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation," 31 **Ariz. L. Rev.** 817, 819 (1989) (stating that the New Mexico Constitution does not expressly bar instream flow water rights).

As one commentator has pointed out, "[i]t is beneficial use, and not diversion, that is the constitutional hallmark of a water right." Christine A. Klein, "The Constitutional Mythology of Western Water Law," 14 **Virginia Environmental Law Journal** 343, 349 (1995). The language of the New Mexico Constitution, Art. XVI, Section 3, bears that principle out in declaring beneficial use "the basis, the measure and the limit of the right to the use of water." Although no court has addressed whether the specific uses enumerated in the opinion request herein constitute "beneficial uses" under the New Mexico Constitution, we believe that a court would recognize these uses as "beneficial uses" for purposes of water rights determinations.

A 1984 unpublished Attorney General opinion found that recreational use "is probably a beneficial use." Jan. 31, 1984, letter from Assistant Attorney General Lee Peters to Brant Calkin, Secretary of Natural Resources Department. In **State ex rel. State Game Commission v. Red River Valley Co.,** 51 N.M. 207, 218. 182 P.2d 421, 428 (1945) on which that A.G. opinion relies, the New Mexico Supreme Court held that "beneficial use" as used in this state, at least in relation to unappropriated water, includes recreation and fishing. Beneficial use "requires actual use for some purpose that is socially accepted as beneficial." **State ex rel. Martinez v. McDermett,** 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct. App. 1995). A use is beneficial if it is "necessary for some useful and beneficial purpose." **State ex rel. Erickson v. McLean,** 62 N.M. 264, 273, 308 P.2d 983, 988 (1957). **See U.S. v. Ballard,** 184 F. Supp. 1 (D.N.M. 1960) (conservation by the state game commission is a beneficial use).

Beneficial use is not defined by statute, instead maintaining a flexible meaning dependent on the current concepts of public interest, waste, and reasonable use. **See** Klein, **supra,** pp. 349-350; 2 **Waters and Water Rights** (Beck, ed. 1991), Section 12.03 (C)(2). Many states have statutorily defined some or all of the instream uses listed above as beneficial. **See, e.g.,** Ariz. Rev. Stat. § 45-151 (1994) (recreation, wildlife, fish); Cal. Water Code § 1243 (Cum. Supp. 1997) (same); Mont. Code Ann. § 85-2-102(2) (1995); Nev. Rev. Stat. 533. - .030(2) (1995) (recreation); N.D. Cent. Code § 61-04-06.1 (1995) (fish, wildlife, recreation); Wash. Rev. Code Ann. Ch. 90.54 (Cum. Supp. 1986) (same). In other states, courts have found such uses to constitute beneficial uses. **See, e.g., Idaho Dep't of Parks, supra**, 530 P.2d at 928 (preservation of aesthetic values and recreation). The fact that most other western states recognize those uses as beneficial is confirmed by their statutory or other legal authorization for instream flows. Alaska Const. Art VIII, § 13; Colo. Rev. Stat. § 37-92-101 to 103 (1990 Repl. Vol. and 1996 Cum. Supp.); Idaho Code §§ 42-1501 to 1505 (1990); Kan. Stat. § 82a-703a (1989); Or. Rev. Stat. §§ 536.300(1), 537.170(3)(a), 538.110-.300, 543.225(3) (1995); Tex. Water Code Ann. Tit. 2, §§ 11.023 to 11.024 (Vernon 1988).

New Mexico accords a high value to recreation, fish and wildlife, and ecological values associated with riparian and aquatic systems. Not only is this confirmed by numerous statutes designed to protect these values, NMSA 1978, Chapter 16 (state parks and recreation); § 17-2-37 **et seq.,** § 17-4-1 **et seq.,** § 17-6-1 **et seq.** (1995 Repl. Pamp.) (fish and wildlife); § 74-6-1 **et seq.** (1993 Repl. Pamp.) (water quality), but as recently as the 1997 legislative session the New Mexico legislature passed a memorial

confirming its desire to preserve river ecosystems and promote the ecological, recreational, and other instream values associated with those ecosystems. Sen. Joint Memorial 18 (passed 3/97). In light of all these factors, we believe that a court would find these uses to be "beneficial uses" under the constitution, as long as the uses of water were reasonable and not wasteful.

Because there is not constitutional requirement for a diversion or impoundment, and because reasonable instream flow for recreational, fish and wildlife, and ecological values constitutes "beneficial use" of water, we conclude that there is no constitutional bar to State Engineer approval of appropriations for instream uses.

B. New Mexico Statutes

We must next review the state's water statutes to determine whether they present an obstacle to State Engineer recognition of instream flows. As stated above, we consider the state's statutes as they relate to transfers of existing rights to instream uses, rather than applications for new appropriations for instream uses.

New Mexico's statutes do not expressly make a diversion or impoundment a prerequisite for a valid appropriation. Unlike some states, there is no requirement that a water rights application describe diversion works, nor is there any reference whatsoever to diversions. **See** NMSA 1978, § 72-5-1 (1985 Repl. Pamp.); **see also State v. Morros,** 766 P.2d 263, 266(Nev. 1988) (referring to NRS 533.335 (5) and (6)).

New Mexico statutes governing applications for new appropriations of surface waters do, however, appear to contemplate that construction of dams, ditches, or other "works" will occur. **See** NMSA 1978, Sections 72-5-6, 72-5-8, 72-5-9, 72-5-10, 72-5-13 (1985 Repl. Pamp.). For example, the State Engineer's permit approval is to state the time within which the construction must be completed, and only after completion of inspection of the constructed works is the State Engineer directed to issue a license to appropriate water. Sections 72-5-6, 72-5-13.

The State Engineer has indicated that it would require any instream flow permit to be conditioned on "accurate and continuous gauging throughout the permitted stream reach" and that such measuring devices could meet any statutory requirement that "constructed works," be present. We agree that to the extent that state statutes might be construed to require presence of "constructed works," devices that measure flows would suffice to meet that requirement for instream flow permits. We believe the statutory reference to "constructed works" would be construed to encompass any sort of facilities or instrumentation that evidence beneficial use of an identifiable amount of water. The term would be interpreted broadly, in keeping with the flexible and evolving underpinnings of the appropriative rights doctrine. We know that from the very inception of the appropriative rights doctrine, "works" were not limited to dams and ditches, but also included such items as instream water wheels of mills and other water-powered facilities. **See McDonald & Blackburn v. Bear River and Auburn Water and Mining Company,** 13 Cal. 220 (1859); **Tartar v. The Spring Creek Water and Mining Co.,** 5

Cal. 395 (1855). Assuming that some sort of measuring or metering device was installed in connection with an instream flow permit, such a device would qualify as "works" under the statute. **See City of Thornton v. City of Fort Collins,** 830 P.2d 915, 929-30 (Colo. 1992)(holding that nature dam, boat chute, and fish ladder are "diversions" as contemplated in statute because they either remove water from its natural course or control water in its natural course).[3]

Thus, the State Engineer could, consistent with state statutes, allow the transfer of a water right from a diversionary use to an instream use and condition the transfer upon installation of appropriate measuring devices. Because the State Engineer has indicated that this is the manner in which he would likely proceed if faced with an instream flow transfer application,[4] we need address other hypothetical situations that do not involve such measuring devices.

C. Case Law.

There are few New Mexico cases relevant to this issue. The most pertinent case is **State ex rel. Reynolds v. Miranda,** 83 N.M. 443, 493 P.2d 409 (1972) (**Miranda**) , which is often cited as the basis for the conclusion that a diversion is required for a water right appropriation in New Mexico. In addition, we consider **Hagerman Irrigation Company v. McMurry,** 16 N.M. 172, 113 P. 823 (1911), which has also been cited as the basis for a previous State Engineer's belief that diversion or impoundment was required.

Miranda concerned water rights that were alleged to have been perfected before 1907, when New Mexico's statutory water rights permitting system was first adopted. Defendant Miranda's property was traversed by a wash, through which water would flow after some rains, and in which tall grass grew as a result of the surface water drainage. Miranda asserted that his predecessors in interest, prior to 1907, grazed their stock on the grass in the summer and in the fall would cut the grass and store it for winter use. This, Miranda claimed, constituted beneficial use of the water flowing down the wash and gave rise to his water rights. The evidence showed that no artificial diversion was ever installed or used, and that after World War I a natural arroyo formed, into which the water that formerly flowed into the wash began to flow. After that time, the wash diminished as a source of pasture for stock. In 1969, Miranda filed a declaration of pre-1907 water rights and applied to the State Engineer for a change in the point of diversion in order to drill two wells for irrigation.

The issue presented to the Supreme Court was characterized as whether a diversion was necessary to establish a water right in New Mexico. The Court answered in the affirmative, finding that "man-made diversion, together with intent to apply water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes." 83 N.M. at 445.

This decision has been criticized, at least insofar as it might be read as an across-the-boards enunciation of a constitutional diversion requirement. **See, e.g.,** Klein, **supra,**

361-62; Draper, "Appropriations by the State of Minimum Flows in New Mexico Streams," 15 **Natural Resources Journal** 809, 821-22 (1975); Kury, Comment, "The Prerequisite of a Man-Made Diversion in the Appropriation of Water Rights - State ex rel. Reynolds v. Miranda," 13 **Natural Resources Journal** 170, 174 (1973). We believe that while the result in **Miranda** is correct, the decision should be limited to the particular facts that were presented to the court. Thus, in our view, the case stands only for the proposition that, prior to 1907, diversion was required in order to perfect an agricultural water right in New Mexico. In other words, the Court held that under pre-1907 common law, grazing and cutting wild grass was not enough to effect an appropriation.

Absent a statutory permitting scheme, the diversion requirement served multiple purposes. It served as evidence of intent to appropriate, it served as public notice of the appropriation, and it ensured a definable and visible beneficial use of the water diverted. Thus, it provided a clear measure that the common law elements required for an appropriation were present. **See** Trelease, **Cases and Materials on Water Law** 37 (2d ed. 1969) Moreover, the element of diversion differentiated appropriative water rights from riparian rights, which did not allow diversions and which were not in effect in New Mexico or most western states.

In describing the common law prior appropriation doctrine that applied in New Mexico before 1907, the state Supreme Court has stated that a diversion or impoundment was required to effectuate a water right. **See Harkev v. Smith,** 31 N.M. 521, 247 P.2d 550 (1926); **Millheiser v. Long,** 10 N.M. 99, 61 P. 111 (1900). After the water code was adopted in 1907, however, the statutory scheme supplanted the common law appropriation doctrine. While the statute continued the same general customs and rules that had been in effect beforehand, **State ex rel. State Game Commission v. Red River Valley Company,** 51 N.M. 207, 270-73, 182 P.2d 421 (1947), at the same time it "mark[ed] a wide departure from the [common law] doctrine" in its regulation of the acquisition, means and manner of use of water rights. **Harkev v. Smith**, 31 N.M. at 526. Courts in other states have held that because statutory appropriation schemes served the same purposes (notice, evidence of intent to appropriate, etc.) as had been served by the diversion requirement, they eliminated the need for that common law requirement. **See In Re Application A-16642,** 463 N.W.2d at 601; **State v. Morros,** 766 P.2d at 266.

The prior appropriation doctrine has been described as "simply the legal adoption of the customs of water use developed by nineteenth century miners," and used by miners, farmers, and others. Klein, **supra,** at 346. As it was the custom in those days to build dams and ditches to divert stream waters for mining and agriculture, it was by and large simply not considered that water might be applied to a beneficial use without ever being diverted from the streambed. **See Steptoe Live Stock Co. v. Gulley,** 295 P. 772, 774 (Nev. 1931). Thus, a diversion was more a custom or an assumption than a prerequisite. **Id.** The fundamental prerequisite for an appropriative right is not a diversion but a beneficial use. **See** N.M. Const. art. XVI, § 3; **Steptoe Live Stock Co. v. Gulley,** 295 P.2d at 774; Draper, **supra,** at 817; Kury, **supra** at 173.

The analysis followed in **Miranda** provides further grounds for a narrow reading of the decision. The Court cited two decisions in support of its ruling: **Harkev v. Smith, supra,** and **Walsh v. Wallace,** 67 P. 914 (Nev. 1902). The language cited in **Harkev** is a general summary of the common law requirements for appropriative rights. 31 N.M. at 525. As noted above, however, the court in **Harkev** pointed out that the 1907 statute had replaced and changed that common law:

[w]e have, however, a statute in this state regulating the acquisition, means, and manner of enjoyment of water rights which controls the whole matter, and which marks a wide departure from the doctrine above stated.

31 N.M. at 526. Thus, by the court's own admission, the diversion requirement cited in **Harkev** would apply only to rights acquired before 1907 which were governed by common law, not statute.

The other case cited in **Miranda** was a 1902 Nevada decision where the court reached the same conclusion as was reached in **Miranda** : under common law, grazing and cutting wild grass was not sufficient to effect an appropriation. While the court stated a broad rule that diversions were required for appropriations, subsequent decisions by the Nevada Supreme Court held to the contrary. In **Steptoe Live Stock Co. v. Gulley, supra,** for example, the court held that beneficial use was the only indispensable requirement for an appropriation and that any pre-statutory diversion requirement arose only from the practical necessity for a diversion in agriculture, mining and similar uses of water. The court stated that an appropriation without a diversion could be recognized when no diversion was needed to put the water to beneficial use. 295 P. at 774-75. And recently, in **State v. Morros,** 766 P.2d 263 (Nev. 1988), the Nevada Supreme Court upheld a non-diversionary water right for a natural lake, finding that

Nevada water law recognizes and permits water appropriation **in situ,** without a diversion, for public recreation purposes.

766 P.2d at 267

Thus, the case law cited by the Supreme Court in **Miranda** supports limiting the application of the decision to pre-1907 agricultural water rights.

Another case sometimes said to support a diversion requirement is **Hagerman Irrigation Company v. McMurry, supra. Hagerman** involved a dispute between a downstream riparian landowner who had a 1883 appropriative right on the Rio Hondo and an upstream party who had a 1888 water right to appropriate the entire Rio Hondo. Between the two parties' dams enough water entered the river to supply the downstream owner's irrigation of one hundred acres, which is the amount of land he irrigated for the twenty years following his appropriation. In 1907, the downstream owner forcibly released water from the upstream owner's dam, claiming that he was a riparian landowner and was thus entitled to the entire natural river flow to irrigate all of his riparian land. The Supreme Court rejected the downstream owner's claim, pointing

out that in this state the appropriative rights doctrine rather than the riparian rights doctrine governed, that beneficial use was the "basis, the measure and the limit" of a water right, and that a delay of twenty years in putting water to beneficial use was not a "reasonable time." 16 N.M. at 180. Thus any expanded water use in 1907 did not relate back to the 1883 appropriation.

The court noted that while water flowing in a public stream is not subject to private ownership, when water "is impounded and reduced to possession by artificial means, it becomes personal property." 16 N.M. at 180. This part of the decision has never been cited or relied upon in any subsequent court decisions. The court's reference to "impound[ing] and reduc[ing] to possession" was merely a reference to what the upstream owner had done in that case; there was no need for the court to discuss precisely what actions might suffice to turn public waters into private waters. And, insofar as the court's dicta might have reflected a general view of the common law of appropriative rights in New Mexico, it is consistent with the view described above of the common law requirements in New Mexico for a pre-1907 water rights appropriation. In sum, nothing in the court's holding in **Hagerman** could be construed as a bar today to State Engineer approval of a water rights transfer to an instream use.

Case law from around the west supports the principles discussed above in the context of **Miranda** and **Hagerman.** In cases where someone has claimed an instream water right, generally where there has been a reasonable beneficial use of the water and the intent to appropriate has been clear the court has upheld that right . **See Steptoe Live Stock Co. v. Gulley, supra** ; **State v. Morros, supra** ; **Genoa v. Westfall,** 349 P.2d 370 (Colo. 1960); **R.T. Nahas Co. v. Hulet,** 674 P.2d 1036, 1043 (Idaho 1984) ; **Empire Water & Power Co. v. Cascade Town Co.,** 205 F. 123 (8th Cir. 1913). At the same time, courts have generally held that simple passive use of natural stream overflow, either by grazing wild grass or other use, does not give rise to a water right. **State ex rel. Reynolds v. Miranda supra** ; **Walsh v. Wallace, supra** ; **Hardy v. Beaver County Irr. Co.,** 234 P. 524 (Utah 1924). **But see In re Water Rights in Silvies River,** 237 P. 322 (Or. 1925) (no diversion necessary for appropriation where river delta naturally irrigates thousands of acres without need for ditches or dams). While the latter holdings are sometimes characterized in terms of a diversion requirement, they can more logically be seen as either failing to find the requisite intent to appropriate or refusing to recognize a wasteful, unreasonable use of water as a beneficial use. Such uses make little use of the stream water but, if found to be water rights, could prevent any other use of stream water. In all cases where the courts have been asked whether there is a constitutional barrier to instream appropriative rights, they have answered in the negative, notwithstanding constitutional reference to "diversion" rights. **Idaho Dep't of Parks, supra** ; **Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd., supra** ; **In re Application A-16642, supra.**

One final issue concerns the position taken by the State Engineer in past years on the matter of instream flow rights. The history of the State Engineer's position is set forth in detail in the January 1998 State Engineer analysis referred to above. As described therein, Steve Reynolds, State Engineer from 1955-1990, had the opinion that a

diversion was legally required. Reynolds' position was undoubtedly a primary reason for repeated introduction of legislation that would have expressly permitted non-diversionary instream water rights. The State Engineer's office no longer adheres to that interpretation of state law and has indicated that under appropriate circumstances an application to transfer an existing water right to an instream use could be approved if the statutory criteria were met. **See** January 8, 1998, Memorandum to State Engineer Tom Turney from State Engineer Legal Services Division.

In conclusion, we believe New Mexico law permits the State Engineer to afford legal protection for instream flows for recreational, fish or wildlife, or ecological purposes. In reaching this conclusion, we emphasize the narrow parameters of our analysis. We address only the situation where an existing water right is transferred to an instream use and where State Engineer approval of the transfer is conditioned on installation of accurate and continuous gauging throughout the permitted stream reach. We express no opinion as to the appropriate outcome of any particular application for an instream flow permit.

GENERAL FOOTNOTES

n1 "Instream flow" and "instream use" refer to the concept of leaving water in a streambed where it is "used" by way of providing aquatic and riparian environments for fish and wildlife and providing for recreational and aesthetic uses. Of necessity, instream use involves free-flowing water in a natural channel rather than diversion of water out of the streambed or impoundment of water behind a dam or dike.

n2 January 8, 1998, Memorandum to State Engineer Tom Turney from State Engineer Legal Services Division.

n3 Although the Supreme Court in **Vanderwork v. Hewes & Dean,** 15 N.M. 439, ___ P. ___ (1910) stated in passing that "constructed works" refers to "constructed reservoirs and ditches," we do not believe that this dicta would deter a court today from adopting an appropriately broader and more flexible reading of the statutory term.

n4 Although the State Engineer has stated that any instream flow permit would have to be conditioned to require gauging throughout the permitted stream reach, the State Engineer has expressly reserved opinion on whether such gauging might be technically or financially prohibitive. Obviously, the State Engineer makes no commitment as to how he would proceed on any particular permit application.

1997

97-02

97-01