Obstacles and Opportunities in State Water Right Change Process

Upper Rio Grande Basin
New Mexico

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Director of Freshwater Conservation
“New Mexico is moving cautiously toward protecting a portion of its water for environmental purposes. In this fully appropriated state, environmental water will have to come primarily by retiring existing consumptive uses.”

Lawrence J. MacDonnell

Wyoming Law Review 2009
Strategic Water Reserve
Sec. 72-14-3.3 NMSA 1978

• State agency can purchase or lease water or water rights from willing sellers or lessors to meet needs of river–dependent endangered species or species at risk of listing
• Statewide applicability but limited in scope, by annual basin priorities and available state funding
• Change must be approved by State Engineer and follow standard transfer provisions
• Since 2005, two transactions – one permanent acquisition of groundwater and one lease of surface water
Private Transactions for Instream Flow

• New Omnibus Appropriation bill likely to contain language encouraging Reclamation to develop a voluntary program to lease native Rio Grande water for stream flow in the Middle Rio Grande
• Statutory authority for temporary change of use would bet the Water-Use Leasing Act, Sec. 72-6-1 et al.
• Precedence setting
  • Atty General Op. 98-01 and State Engineer Memo (1998) concludes that New Mexico law permits State Engineer to afford legal protection to instream flow
• State Engineer would require measurement as indicia of continuous dominion and control, continuous use and ease of administration
• No expedited transfer process for leased water although State Engineer may be drafting guidelines for Reclamation’s upcoming lease of senior water rights for listed minnow
Water Conservation-a de facto instream flow program

- State Engineer approved water conservation program, Sec. 72-5-28(G) NMAS 1978
- Landowner agrees to forbear
- No notice requirement and no monitoring
- State Engineer will scrutinize historic and current use of water rights to be enrolled
- Period of non-use does not count towards the four-year forfeiture period
- State engineer has no obligation to protect conserved water left instream
- De facto change of purpose of use between historic diversion and next downstream diversion
- Three approved water conservation programs to benefit aquatic species on the Gila, Mimbres and the Black
Other flow optimization and lease agreements to help avoid jeopardy to listed species

- Deviation from authorized flood control reservoir operations for spawning and overbank flow with Compact Commission approval
- Use of Native American Prior & Paramount water rights for spawning and recruitment flow
- Deliveries of Interstate compact credit water for streamflow augmentation
- Reclamation’s lease of San Juan-Chama water for streamflow augmentation~500,000 ac-ft over 16 yrs. No State Engineer permit required since interbasin transfer.
Hybrid program on Lower Rio Grande

- Voluntary environmental water transaction program for riparian restoration and peak flow release
- Reclamation and District both agreed to recognize transfers to riparian habitat as “agricultural use” so no change of purpose of use required
- Local District control over requests for change in place of use within the District boundaries, Sec. 73-10-16 and Sec. 73-13-4 NMSA 1978
- District enacted a specific policy authorizing voluntary transfer and suspension for riparian habitat restoration, Policy 2013-ENG14
- Faster transfer process, with notice requirements, opportunity to be heard and appeal to District Court
- Requirement that riparian restoration sites have permanent “base” rights so temporary acquisition not viable transaction approach to water right restoration sites
- Peak flow would be a change of purpose of use and fall under Reclamation’s Miscellaneous Purposes Act requiring consent of Reclamation and Districts
What to emphasize with state policy makers about increasing utilization of NM policies statewide

- Embrace it--throw the light of day on instream flow in NM
- Dedicated, reoccurring funding for Strategic Water Reserve and other flow restoration projects
- Expedited transfer regulations and guidelines
- Amend the surface water regulations to remove requirement of a diversion and openly address requirements for applications for change of purpose of use to instream flow
Questions?

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