Technical and Physical Feasibility Fact Sheet
Alternative 63: Instream Flow

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1. Definition of Alternative

A-63: Change state water law to include instream flow as a beneficial use.

2. Summary of the Alternative Analysis

Alternative A-63 calls for a change in state law to include instream flow as a beneficial use. "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.[1] 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.[2]

By statute, New Mexico does not currently specifically authorize appropriations for instream flow. However, even in the absence of a statute, New Mexico law nevertheless recognizes instream flow as a beneficial use of water. Thus, New Mexico law currently offers adequate protection for instream flow. Nonetheless, a change in state law to specifically recognize instream flow, as done in other western states, would further strengthen the protection of instream flow in New Mexico. Finally, even specific instream flow protections offer no guarantee of water remaining in the Rio Grande, especially during times of drought.

2.1 New Mexico Law on Instream Flow

In 1998, the Attorney General issued an opinion (AG opinion) on instream flow rights.[3] The AG opinion legitimized instream flow use in New Mexico by recognizing a reasonable instream flow for recreational, fish and wildlife and ecological values as a beneficial use of water in New

Mexico.[4] The Attorney General found no legal impediment to prevent the State Engineer from approving an application to transfer an existing water right to an instream purpose and conditioning the approval on the installation of gaging devices to measure the instream flow beneficially used.[5] Thus, any transfer to instream flow would have the priority date of the existing water right that was transferred. The AG opinion was limited to consideration of applications for changes from traditional diversionary uses to instream flows, because it is unlikely that applications for new appropriations of surface waters for instream flows would be submitted and acted upon since the State's surface waters are fully appropriated.[6]

The AG opinion addressed two issues: (1) whether the state constitution, statutes and case law require a diversion or impoundment in order to obtain a valid water right and (2) whether recreational, fish and wildlife, or ecological uses constitute beneficial uses of water. The Attorney General concluded that New Mexico law has no diversion requirement.[7] Moreover, the Attorney General found that recreational, fish or wildlife, and ecological uses are beneficial uses.

> New Mexico accords a high value to recreation, fish and wildlife, and ecological values associated with riparian aquatic systems. Not only is this confirmed by numerous statutes designed to protect these values 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. In light of all of 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.[8]

While the Attorney General debunked the belief that appropriations require an actual diversion, the state statute governing applications for new appropriations nevertheless contemplates the construction of dams, ditches or other "works" to effectuate an appropriation.[9] In his opinion, the Attorney General found that this requirement would be satisfied by the imposition of the State Engineer's recommendation of "accurate and continuous gaging" of instream flows throughout the permitted stream reach.[10] Thus, instream flows must be measured in order to be recognized.

New Mexico case law also lends support to instream flow as a beneficial use. While there is no statutory definition for beneficial use, determining whether a specific use is a beneficial one has

become a common law inquiry based on fact.[11] Over time, New Mexico state courts have established a body of common law beneficial uses, albeit not a comprehensive one. For instance, domestic water use and stock watering are recognized beneficial uses in the state.[12] Moreover, the attainment of state conservation purposes by the state game commission constitutes a beneficial application of water.[13] The leasing or renting of water by an irrigation district together with the use of water by the lessee is also considered a beneficial use.[14]

As early as 1945, the New Mexico Supreme Court recognized a beneficial use traditionally associated with an instream flow right. In *State ex rel State Game Commission v. Red River Valley Co.,* the Court found that a "beneficial use" to which public waters may be placed includes fishing and recreation.[15] This holding is consistent with statutory instream flow allowances of both Arizona and Utah.[16]

2.2 Instream Flow Programs in New Mexico

In the absence of a statute recognizing the validity of instream flow rights in New Mexico, several surface water programs currently underway in the State legitimize instream flow as a beneficial use. Perhaps the most notable is the effort being undertaken on behalf of the Rio Grande silvery minnow (silvery minnow). In 1994, the U.S. Fish and Wildlife Service listed the silvery minnow as an endangered species under the Endangered Species Act (ESA).[17] Since then, multiple lawsuits have been filed. In September 2002, the federal court ordered the Bureau of Reclamation (Reclamation) to release approximately 40,000 acre-feet of San Juan-Chama Project and Middle Rio Grande Project water in storage in Heron Reservoir to keep the Rio Grande flowing for the benefit of the silvery minnow.[18]

Prior to this mandate, a conservation water agreement (Agreement) was brokered between the State of New Mexico and the United States to release native Rio Grande water into the river from a conservation pool above Elephant Butte Reservoir.[19] Under the Agreement, New Mexico is required to store 100, 000 acre-feet of water over a period of three years and make available to the United States for release an amount up to 30,000 acre-feet per year to benefit the silvery minnow.[20] The initiatives and mandates to release water into the Rio Grande on behalf of the silvery minnow demonstrate a recognition by state and federal agencies, and the federal court, that releasing flow into reaches of the Rio Grande for the continued existence and propagation of the silvery minnow as required by the ESA is a beneficial use of water.

Instream flow rights also have been recognized on the Pecos River in response to a lawsuit filed against Reclamation for alleged noncompliance with key provisions of the ESA. Specifically, environmental groups claimed that Reclamation's water management activities on the Pecos River threatened the habitat of the Pecos bluntnose shiner, listed as a threatened species under the ESA.[21]

By virtue of a repayment contract between Reclamation and the Fort Sumner Irrigation District (FSID), both entities have an ongoing relationship until 2033.[22] When Reclamation was notified of the ESA lawsuit, it ordered the FSID to reduce its diversion amount by 30 percent for the remainder of the irrigation season in order to keep the river wet and secure compliance with the ESA.[23] Reclamation and the FSID formalized this arrangement by entering into a forbearance contract whereby Reclamation paid individual irrigators to forego irrigation of their crops for approximately six weeks in order to maintain flow for the bluntnose shiner.[24]

The FSID, however, was concerned that the six-week period of nonuse might result in the forfeiture of individual irrigators' water rights under state statute. As a preventative measure, the FSID entered into a agreement with the New Mexico Interstate Stream Commission Water Resource Conservation Project (Project).[25] The Project provided that the FSID would suspend use of its waters to comply with Reclamation forbearance contract, and would place the subject water in a Project "conservation pool."[26] The Project, in turn, would use the water to increase the flows of the Pecos River so New Mexico could meet its compact delivery obligations under the Pecos River Compact.

Because the Project water was allowed to remain in the Pecos River for the express purpose of increasing the flow of the river (initiated by the need for compliance with the forbearance contract) and satisfying ESA requirements, the subject water has been considered an instream flow recognized by both the State of New Mexico and the United States.

Finally, to guarantee its water delivery obligations to Texas under the Pecos River Compact, New Mexico purchases water rights from appropriators on the Pecos River.[27] Rather than being used for irrigation, these purchased instream flow rights remain in the river for delivery to Texas to satisfy New Mexico's Compact requirements.

2.3 Instream Flow in Other Western States

Eleven of the eighteen states that apply the prior appropriation doctrine to surface water have explicit statutes providing for instream flow protection.[28] Of these, Colorado, Arizona, Montana and Utah are instructive due to their proximity to New Mexico, relative scarcity of water, and arid climates.

2.3.1 Colorado

In 1973, Colorado enacted legislation to create an instream flow protection program.[29] The statute recognizes the appropriation of waters in natural streams and lakes "required for minimum stream flows or for natural surface water levels or volumes for natural lakes."[30] Among the key components of the statute is the recognition of instream flows "to preserve the natural environment to a reasonable degree" as a beneficial use of water, and the removal of the diversion requirement for the appropriation of a water right.[31]

The appropriation and protection of instream flow rights is placed in the Colorado Water Conservation Board ("CWCB").[32] The CWCB has the exclusive authority to appropriate and acquire water for minimum instream flows.[33]

Colorado's instream flow program operates within the same prior appropriation system in which all other water rights are obtained and administered.[34] Water users with priorities senior to those of instream flow rights will not be affected by a CWCB instream flow right, and senior users may continue to divert water even if they reduce the flow below the specified instream flow level.[35] However, enforcement efforts are pursued against junior diverters or against proposed transfers of senior rights to new places of use, different purposes, or new points of diversion.[36]

2.3.2 Arizona

Arizona's statute allows surface water appropriations for instream flow for "recreation, wildlife, including fish,"[37] in accordance with the law of prior appropriation.[38] The statute was amended to recognize instream flow using dictum from a previous Arizona Court of Appeals case. In the AG opinion, the court upheld an agency determination granting an instream flow use for recreational purposes.[39] The court stated that water could be appropriated for *in situ* use—without a diversion—for recreation and fishing purposes.[40]

2.3.3 Utah

Utah also has a statute that explicitly provides for instream flow. Utah's statute allows applications for permanent or temporary changes for the purpose of providing water for instream flows within a designated section of a natural stream channel or altered natural stream channel for the propagation of fish, public recreation, or the reasonable preservation or enhancement of the natural stream environment.[41] The statute gives exclusive authority to its Division of Wildlife Resources and its Division of Parks and Recreation to file applications for instream flow.[42]

These two divisions my file applications for (1) changes to perfected water rights presently owned by the respective division, (2) perfected water rights purchased by the respective division for the purpose of providing water for instream flows[43] , or (3) water rights appurtenant to land acquired or owned by the respective division.[44] Utah does not require a physical structure or physical diversion to implement a change for instream flow use.[45]

2.3.4 Montana

In 1973, Montana enacted the Montana Water Use Act which sets forth a comprehensive mechanism for the protection of instream values.[46] This Act provides that the state, any political subdivision or agency of the state, or the United States may apply to acquire a state water reservation to maintain a minimum flow, level, or quality of water.[47] The applicant may apply for an instream flow reservation for periods of time throughout the year, or for a length of time designated by the state Department of Natural Resources and Conservation (Department).[48]

All water reservations, including instream flow reservations, must be reviewed at least once every ten years and if the objectives of the water reservation are not being met, the Department may extend, revoke, or modify the reservation.[49] Any undeveloped water made available as a result of a revocation or modification is available for reallocation to another qualified appropriator.[50]

Despite the absence of a statute authorizing instream flow, New Mexico nevertheless recognizes instream flow as a beneficial use of water. This is apparent in unpublished legal opinions, case law on beneficial use, and various ongoing and completed state and federal surface water programs occurring in the state. While the enactment of a state instream flow statute similar to that of Colorado, Arizona, Montana, or Utah would provide statutory

recognition of such a right, instream flow legislation is unnecessary in light of the protections already afforded it under New Mexico law.

3. Alternative Evaluation

3.1 Technical Feasibility

Enabling New Technologies and Status

As discussed above, instream flow is recognized and protected under New Mexico law. While the enactment of a state instream flow statute similar to that of other western states would provide statutory recognition of such a right, such a statute would not be considered a novel legal concept.

Infrastructure Development Requirements

The infrastructure development necessary to implement this alternative would be surface water gages to measure instream flow.

Total Time to Implement

The time to implement this alternative can be measured in the time necessary to complete the process of transferring a water right to a new use as instream flow. If unprotested, the process could be completed within six months of submitting a transfer application. If protested, the process could take two years to complete the administrative process, with additional time needed if appeals are taken to the New Mexico District Court, the New Mexico Court of Appeals, and the New Mexico Supreme Court.

3.1.1 Physical and Hydrological Impacts

Effect on Water Demand

None.

Effect on Water Supply (surface and groundwater)

None.

Water Saved/Lost (consumption and depletions)

There will be no water saved or lost if this alternative is implemented. Only the consumptive portion of any water right would be available to transfer for instream flow purposes.

Impacts to Water Quality (and mitigations)

Generally speaking, implementing this alternative would not impact water quality, unless significant instream flows were transferred to the surface water system at such locations to improve water quality through the effects of dilution.

Watershed/Geologic Impacts

None.

3.1.2 Environmental Impacts

Impact to Ecosystems

If significant instream flows were transferred to the surface water system, the ecosystem will be impacted by an increase in surface flows.

Implications to Endangered Species

If significant instream flows were transferred to the surface water system, there could potentially be a positive impact on the silvery minnow, since increases in instream flow could augment surface flows to support the silvery minnow.

3.2 Financial Feasibility

3.2.1 Initial Cost to Implement

Since the Rio Grande Stream System is fully appropriated, any costs associated with allowing instream flow as a beneficial use relates to the costs associated with transferring an existing water right to the new instream use. These costs relate to the transfer process (application, notice, and hearing) and include attorney and technical studies or model costs, as well as the cost of the water right. The current cost of a pre-1907 surface water right is $5,000 per acre-foot (consumptive) which represents a one-time purchase price.

3.2.2 Potential Funding Source

Transfers of instream flow rights would be privately and publicly funded. Private funding would be used in transactions that concern private parties, while public funding would be used if the State of New Mexico purchases water rights to meet compact delivery requirements.

3.2.3 Ongoing Cost for Operation and Maintenance

- The costs for operation and maintenance would be the incidental costs related to measurement and reporting, and would be paid by the water right holder.

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[1] 1998 Op. Att'y Gen. No. 98-01, at 9.

[2] Id.

[3] Although the Attorney General's Opinion legitimized instream flow protection in New Mexico, the New Mexico Supreme Court (and arguably other courts) are not bound by the Opinion, and will give it only such weight as it deems the Opinion merits. *City of Santa Rosa v. Jaramillo*, 85 N.M. 747, 750, 517 P.2d 69, 72 (1973). Yet, attorney general opinions are entitled to great weight. *Hanagan v. Board of County Comm'rs*, 64 N.M. 103, 106, 325 P.2d 282, 285 (1958).

[4]1998 Op. Att'y Gen. No. 98-01, at 4.

[5] 1998 Op. Att'y Gen. No. 98-01, at 1.

[6] Id.

[7] 1998 Op. Att'y Gen. No. 98-01, at 2,4.

[8] 1998 Op. Att'y Gen. No. 98-01, at 3 (citations omitted).

[9] §§ 72-5-6, 72-5-8, 72-5-9, 72-5-10, 72-5-13 NMSA 1978 (1997 Repl.).

[10] 1998 Op. Att'y Gen. No. 98-01, at 1,8.

[11]*Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981), *superseded by statute as stated in Rio Grande Silvery Minnow et. al. v. John Keys et. al.*, CV 99-1320 JP/RLP-ACE (D. N.M. April 19, 2002). Of special relevance to instream flow, the Jicarilla decision was subsequently superseded when Congress reversed that part of the decision that disallowed use of San Juan-Chama Project water solely for recreational purposes. Pub.L. 97-140, Act of Dec. 29, 1981, §5; 95 Stat. 1917 n. 15 (cited by *Rio Grande Silvery Minnow et. al. v. John Keys et. al.*, CV 99-1320 JP/RLP-ACE, at 64 (D. N.M. April 19, 2002)).

[12]*First State Bank v. McNew*, 33 N.M. 414, 422-423, 269 P.56 (1928).

[13]*United States v. Ballard*, 184 F.Supp.1, 12 (D.N.M. 1960).

[14]1963-1964 Op. Att'y Gen. No. 64-1.

[15]*State ex rel State Game Commission v. Red River Valley Co.*, 51 N.M. 207, 218, 182 P.2d 421, 428 (1945).

[16] See discussion *infra.*

[17] Memorandum Opinion and Order, *Rio Grande Silvery Minnow et. al. v. John Keys et. al.*, CV 99-1320 JP/RLP-ACE, April 19, 2002, at 6.

[18] Order and Partial Final Judgment, *Rio Grande Silvery Minnow et. al. v. John W. Keys et. al.*, CV 99-1320 JP/RLP-ACE, September 23, 2002.

[19] April 19, 2002 Memorandum Opinion and Order, at 19.

[20] Id. While the Agreement is in effect until December 2003, it is not likely that it will be acted on before it expires due to lack of water in the conservation pool. December 16, 2002, conversation with Karen Fisher, New Mexico Interstate Stream Commission.

[21] Complaint for Declaratory, Injunctive and Mandatory Relief, May 21, 2000, CIV No. 00-746 JP/RLP (Forest Guardians, Plaintiffs v. United States Army Corps of Engineers and the Bureau of Reclamation, Defendants).

[22] Presentation to the New Mexico Water and Natural Resources Committee, November 28, 2000, by John W. Utton, Attorney, Sheehan, Sheehan & Stelzner, P.A., Albuquerque, New Mexico.

[23] Id.

[24] Contract Between the United States Department of the Interior Bureau of Reclamation and the Fort Sumner Irrigation District of New Mexico to Forego Delivery of Water for the Remainder of the 2000 Irrigation Season ("forbearance contract"), Contract No. 00-WC-40-6750, September 15, 2000.

[25] Under statute, project water is immune from forfeiture. §72-5-28 (G) NMSA 1978 (2000 Cum Supp).

[26] New Mexico Interstate Stream Commission Water Resource Conservation Project: Pecos River Portion Supplemental Placement Agreement Between the New Mexico Interstate Stream Commission and the Fort Sumner Irrigation District, October 2000.

[27] § 72-1-2.4 NMSA 1978 (2002 Cum. Supp.); §72-14-3 NMSA 1978 (1997 Repl.).

[28] ROBERT E. BECK ET. AL., WATERS AND WATER RIGHTS §13.05(a) (2000).

[29] COLO. REV. STAT. 37-92-102(3)(Supp. 2000).

[30] Id.

[31] Id.

[32] Id.

[33] Id.; See also *City of Thornton v. Fort Collins*, 830 P.2d 915 (Colo. 1992) (under Colorado law, a claim for a minimum instream flow can be made only by the CWCB).

[34] COLO. REV. STAT. 37-92-102 (1)(a).

[35] COLO. REV. STAT. 37-92-102 (1)(b).

[36] Id.

[37] ARIZ REV. STAT. ANN. §45-151(A)(2001).

[38] "The person [appropriator], the state of Arizona or a political subdivision thereof first appropriating the water shall have the better right." ARIZ REV. STAT. ANN. §45-151(A).

[39] *McClellan v. Jantzen*, 26 Ariz. App. 223, 547 P.2d 494 (1976).

[40] Id. at 225, 496.

[41] UTAH CODE ANNOT. § 73-3-3(11)(a) (2002).

[42] Id.

[43] Funding may be provided for this purpose by legislative appropriation or acquired by lease, agreement, gift, exchange, or contribution.

[44] Id. at § 73-3-3(11)(b).

[45] Id. at § 73-3-3(11)(c).

[46] MONT. CODE ANNOT, §85-2-316 (2002).

[47] MONT. CODE ANNOT. § 85-2-316 (1) (2002).

[48] Id.

[49] Id. at § 85-2-316 (10).

[50] Id.