NATURAL RESOURCES JOURNAL

Volume 15
Issue 4 *Symposium on Natural Resource Property Rights*

Fall 1975

Appropriation by the State of Minimum Flows in New Mexico Streams

John B. Draper

APPROPRIATION BY THE STATE OF MINIMUM FLOWS IN NEW MEXICO STREAMS

In 1973, the National Water Commission reported the following:

> The water law systems of most of the States, both in the East and the West, are deficient in that they fail to give appropriate recognition to social values of water. These values arise primarily from such instream uses as fish and wildlife propagation, recreation, and aesthetics. The appropriation law of the Western States generally requires diversion of water from the stream or lake and its application to beneficial use in order for a water right to be created. Instream values are thus heavily discounted; water has been diverted from streams to such an extent that instream values which should have been protected frequently have been impaired, and sometimes destroyed.... [W]here the action can be taken without impairing vested rights, State officials should be authorized to set minimum streamflows and lake levels to protect *in situ* values.[1]

It is the purpose of this comment to canvass the nonfederal alternatives for accomplishing these goals.

States may be divided into four groups according to the system of water law under which they operate.[2] Some use the pure prior appropriation, or "Colorado," doctrine.[3] Others, mostly those east of the Mississippi River, use the pure riparian system. In between fall two hybrid, "California" doctrine, groups. In one, some existing rights were established under the riparian doctrine, but all new rights must be created under the prior appropriation system.[4] In the other, although most new rights are appropriative, there is some possibility for the creation of new riparian rights.[5]

New Mexico is a member of the first group. Requirements for creation of a water right in this state, as formulated by an authoritative commentator on prior appropriation law, are:

> an intent to appropriate, notice of the appropriation, compliance with state laws, a diversion of the water from a natural stream, and

1. National Water Commission, New Directions in U.S. Water Policy 63 (1973).
2. F. Trelease, Cases and Materials on Water Law 11-12 (2d ed. 1974).
3. Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.
4. Kansas, Mississippi, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington.
5. California and Nebraska.

> its application, with reasonable diligence and within a reasonable time, to a beneficial use.[6]

This formulation and quotation at the beginning of this article raise two questions: Can the diversion requirement be reconciled with maintenance of instream flows? And is the maintenance of an instream flow a beneficial use? These questions are crucial when an appropriation is to be made. There are alternatives, however, to appropriation, even in a prior appropriation state.

ALTERNATIVES TO APPROPRIATION

Waters can be withdrawn from appropriation, essentially taking them out of the system at certain points. This is how Oregon has preserved the flow of its streams for recreational and scenic purposes for more than a half century.[7] It is an attractive approach to the problem because it sidesteps the requirements of prior appropriation, including diversion, forfeiture, and abandonment. It is impossible to use this approach in New Mexico, however, unless the state constitution is amended. Article 16, Section 2 of the constitution reads:

> 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.

This provision appears to create a right in individuals to appropriate any waters not already appropriated. Thus, any attempt by the legislature to withdraw waters from appropriation could be successfully challenged as in violation of this provision. The Oregon legislature did not have to leap this constitutional hurdle.

Montana has sought to achieve the same objective by "reserving" waters,[8] and Washington has phrased its statutes in terms of "establishment of a minimum flow" which is not to be appropriated.[9]

6. Trelease, *supra* note 2, at 37.

7. Ore. Rev. Stat. § § 538.110 to .300 (Repl. 1973). The proposal made here for this state's streams could be usefully applied to lakes as well.

8. The state or any political subdivision or agency thereof, or the United States or any agency thereof, may apply to the board [of natural resources and conservation] to reserve waters for existing or future beneficial uses, or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

Mont. Rev. Codes Ann. §89-890 (Supp. 1974).

9. The department of water resources may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values

Although the words differ slightly, they achieve the same effect in the same way that Oregon's "withdrawal" of water from appropriation does. The essence of the process is removing certain waters from the substantive and procedural requirements of the prior appropriation regime. Thus, the phraseologies employed by the latter two states would also run afoul of Article 16, Section 2 of the New Mexico Constitution.

The waters of New Mexico streams are nearly fully appropriated. Indeed, at the time the Rio Grande Compact of 1938 was negotiated, the Rio Grande was already fully appropriated within the state.[10] What can be done in areas where there is nothing left to be appropriated? One possibility is to deny applications for new uses and restrict changes in present uses that would adversely affect instream flows still existing. Changes in use take the form of reduction of return flows and changes in points of diversion and points of return flow. Utah, for instance, has given its state engineer express authority to deny applications which "unreasonably affect public use or the natural stream environment."[11]

The New Mexico state engineer would seem already to have the power to deny applications for the purpose of preserving instream flows. Section 75-5-6 of the New Mexico statutes empowers him to do the following:

> [The state engineer] may also refuse to consider or approve any application . . . if, in his opinion, approval thereof would be contrary to the public interest.[12]

Only once has the New Mexico Supreme Court been called upon to interpret how much latitude is allowed the state engineer under the public interest clause. In the 1910 case of *Young & Norton v. Hinderlider*[13] the Court rejected a narrow reading of the clause which would have limited its application to projects which endanger the public health or safety. The Court has never struck down a use of the power. Nevertheless, the state engineer, like his counterparts in other states,[14] has never used the power to preserve instream flows

---

of said public waters whenever it appears to be in the public interest to establish the same.

Wash. Rev. Code Ann. § 90.22.010 (Supp. 1974).

10. *See* Hill, *Development of the Rio Grande Compact of 1938,* 14 Nat. Res. J. 163, 187 (1974).

11. Utah Code Ann. § 73-3-8 (1975 Supp.). *See also* § 73-3-29(3) (1975 Supp.).

12. N.M. Stat. Ann. § 75-5-6 (Repl. 1968).

13. 15 N.M. 666, 110 P. 1045 (1910).

14. Robie, *Modernizing State Water Rights Laws: Some Suggestions for New Directions,* 1974 Utah L. Rev. 760, 765 and n.48. The author is the Director of the California State Water Resources Control Board.

or for any other purpose.[15] Even if the state engineer were willing to exercise this power, two questions would have to be answered. Would its exercise for the purpose of maintaining instream flows be constitutional? And if so, is it the best method for preserving such flows?

Article 16, Section 2 declares that all unappropriated water shall be available for appropriation to beneficial use. It first appears that this section might be violated by refusal to allow appropriation of unappropriated water for the purpose of maintaining the riparian habitat in a section of a stream. However, the same constitutional section contains the statement that the water "is hereby declared to belong to the public." The Supreme Court recognized this in the *Young & Norton* case and emphasized the impact of this public ownership.[16] It is fundamental that the right to use water is a usufructuary right to be exercised consistently with the public good.

Can the state engineer also deny applications in the public interest where a present water user with a valid vested appropriation seeks to change his use or his point of diversion?[17] Conspicuously missing from the section[18] requiring approval of the state engineer for such changes is the express power to deny applications because they are "contrary to the public interest." It is plausible, nevertheless, that a court would find that the public interest standard is inherent in all duties of the state engineer in view of the words of the constitution,[19] the first section of the water code,[20] and the section governing applications for new rights.[21] Again, the usufructuary nature of water rights is paramount. There must, however, be a balancing between the public interest and private property rights. The owner of a vested water right is in a stronger position than one who is applying for such a right. Indeed, the Court has said that "a water right is a property right and inherent therein is the right to change the place of diversion, storage, or use of the water if the rights of other water

15. Telephone interview with Paul Bloom, Counsel to the State Engineer, in Santa Fe, New Mexico, on Sept. 17, 1975.

16. 15 N.M. at 677, 110 P. at 1050.

17. The deleterious effect that a change in the point of diversion can have on instream flows is illustrated by the protests of the Forest Service to the transfer of water rights from points downstream of a part of the national forest to a point upstream. The Forest Service complained that during periods of low flow the upstream diversions might "severely impair and perhaps eliminate this necessary flow." Letter from William D. Hurst, Regional Forester, Southwestern Region, U.S. Forest Service, to the N.M. State Engineer, June 18, 1973 (on file at the Forest Service in Albuquerque).

18. N.M. Stat. Ann. § 75-5-23 (Repl. 1968).

19. N.M. Const. art. 16, § 2.

20. N.M. Stat. Ann. § 75-1-1 (Repl. 1968).

21. N.M. Stat. Ann. § 75-5-6 (Repl. 1968).

users will not be injured thereby."[22] Thus, it would seem that at least statutory authority for denying applications to make changes in water rights would be necessary. There is also the possibility that to deny a change would violate the takings clauses of the state and federal constitutions if done without compensation to the right-holder.[23]

Aside from statutory and constitutional difficulties, the method under discussion is inferior to straightforward appropriation by the state. It is inferior because (1) it provides no notice to the holder or seeker of a right that the application to the state engineer will be denied for the purpose of maintaining instream flows;[24] besides being unfair, time and money devoted to preparing the application will be lost unnecessarily; (2) there is no orderly quantification of the proper amount of water to be reserved for minimum flow; (3) such a case-by-case approach where the instream values are balanced against specific projects would result in obfuscation of the general public policy at stake;[25] (4) it is difficult to deny applications upon which considerable sums of money have already been expended; and (5) success depends crucially on the degree to which any particular state engineer is sensitive to the values protected by preserving instream flows.

Two other methods of preserving instream flows will not be considered here. They are the federal reserved water rights[26] and the navigation servitude.[27]

APPROPRIATION UNDER SPECIAL LEGISLATION

Superior to all methods of preserving minimum flows previously discussed is appropriation of such flows by the state. Unlike the federal methods and use of the public interest standard for limiting appropriations, this approach fits neatly into the existing state regulatory regime and thus provides other appropriators with all the safeguards and rights inherent in the statutory scheme.

---

22. Clodfelter v. Reynolds, 68 N.M. 61, 66, 358 P.2d 626, 629 (1961), *quoting from* Lindsey v. McClure, 136 F.2d 65, 69 (10th Cir. 1943).

23. U.S. Const. amend. V, N.M. Const. art. 2, § 20.

24. Robie, *supra* note 14, at 770.

25. *Id.*

26. *See* Robie, *supra* note 14, at 771; National Water Commission, Water Policies for the Future 464-68 (1973). The federal government is presently asserting claims to the waters of the Red River in northern New Mexico reserved under the Wild and Scenic Rivers Act and under executive orders creating national forests. *See* Complaint in Intervention, State ex rel. Reynolds v. Molybdenum Corp., Civil No. 9780 (D.N.M. filed Nov. 2, 1972).

27. *See* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation,* 3 Nat. Res. J. 1 (1963); National Water Commission, Water Policies for the Future 468-69 (1971).

It is submitted that minimum flows can best be preserved in New Mexico streams through enactment of special legislation. This legislation would define beneficial use, abrogate the diversion requirement, and establish an independent state commission which would appropriate instream flows up to the minimum necessary to sustain natural riparian habitat and compatible recreation. These appropriations would benefit from the normal safeguards given water rights, particularly those against impairment through change in use of point of diversion by senior appropriators.

Under the law of the New Mexico, recreation is already a beneficial use of water.[28] The proposed act would further define "beneficial use" to include maintenance of the riparian environment to support wildlife that has or will depend on it, whether permanent or migratory, and preservation for educational, historic, scientific, scenic, aesthetic and other similar public uses.

It seems clear that the legislature has the power to define the term "beneficial use" which appears in Sections 2 and 3 of Article 16 of the state constitution.[29] Many other states have done it.[30] The judiciary has been doing it throughout the history of the prior appropriation doctrine in the western states. In addition, Section 2 contains the proviso, "in accordance with the laws of the state." Until enactment of the comprehensive water code in 1907[31] water rights had been administered through litigation in the courts, and that is where the rules of law had been developed and refined. The language of Article 16, Section 2, adopted four years after the code, seems to affirm the new role the legislature was shaping for itself as public policymaker in the field of water law.

The definition of "beneficial use" is central to proper allocation of water resources. The definition should be adjusted from time to time to meet the needs of society. The legislature is the primary policymaking organ in the state, and it would be unwise to exclude it from the process of determining how water should be allocated. It is both consistent with the state constitution and sound water resource administration that the legislature be able to define "beneficial use."

As pointed out initially, a major stumbling block to appropriation of instream flows is the requirement of a diversion in order to estab-

---

28. State *ex rel.* State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 218, 182 P.2d 421, 428 (1947).

29. Section 3 provides: "Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

30. *E.g.,* Mont. Rev. Codes Ann. § 89-867 (1974 Supp.); Wash. Rev. Code Ann. § 90.54.020(1) (1974 Supp.).

31. Ch. 49 [1907] N.M. Laws 71.

lish the right. This obstacle presents itself in two contexts: (1) it is necessary for a legally effective appropriation of the instream flow itself, and (2) it requires an appropriator to remove water from the stream even when the use to which it is to be put does not require that it be removed, thus depriving the stream unnecessarily of some of the flow that would otherwise be present. It is the first of these which is of primary concern here.

Colorado's experience with the diversion requirement provides graphic illustration of the need to deal explicitly with the requirement. The Colorado legislature had given the state's Colorado River Conservation District the power to "file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish."[32] But when the district sought to exercise this power, denial of the claim was affirmed by the Colorado Supreme Court because no appropriation could be valid without a diversion from the stream.[33] Subsequently, the state legislature remedied the situation by removing the diversion requirement from the statute.[34]

New Mexico has a somewhat similar situation. In the case of *State ex rel. Reynolds v. Miranda,*[35] the New Mexico Supreme Court denied an alleged appropriation for lack of a physical diversion. Lorenzo Miranda claimed a right to follow his diminishing surface water supply to its source by drilling a well. He and his predecessors claimed to have used, since before 1907, the water flowing intermittently down an arroyo to irrigate grass growing in the bed of the arroyo. He let his cattle graze on the grass in the warmer months and cut and stored the grass for winter use. The Court concluded:

> We hold 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.[36]

In light of the foregoing it is imperative that the proposed legislation include a provision abrogating the diversion requirement. The ques-

32. Colo. Rev. Stat. Ann. § 37-46-107(1)(j) (1973). *See also* § § 37-47-107(1)(j) & 37-48-105(1)(j).

33. Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 158 Colo. 331, 406 P.2d 798 (1965). *See* Ellis, *Recreational Uses for Water Under Prior Appropriation Law,* 6 Nat. Res. J. 181 (1966).

34. Ch. 442, § 1 [1973] Colo. Laws 1521.

35. 83 N.M. 443, 493 P.2d 409 (1972), *noted in* 13 Nat. Res. J. 170 (1973).

36. 83 N.M. at 445, 493 P.2d at 411.

tion again arises, however, whether such abrogation would be constitutionally permissible.[37]

Article 16, Section 2 of the New Mexico Constitution clearly makes prior appropriation a constitutional doctrine. It cannot, therefore, be abrogated except by amending the constitution. From this axiom we may extract the rule that no essential part of that doctrine, *e.g.*, the element of diversion, may be changed by an act of the legislature. Applying a familiar mode of constitutional interpretation,[38] the problem then is to determine what the framers of the New Mexico Constitution meant by the phrase "appropriation for beneficial use." The Supreme Court has said that this provision of the constitution was only "declaratory of existing law."[39] What, then, was the existing law? About the time the constitution was adopted the Supreme Court of the United States handed down the decision of *Schodde v. Twin Falls Land & Water Co.*,[40] which purported to describe the right of an appropriator to instream flows under the law of Idaho, a pure prior appropriation state. The Colorado Supreme Court cited the *Schodde* case for the proposition that "the right to the maintenance of the 'flow' of a stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation."[41] If the New Mexico Supreme Court were to approve this strong language, it might well be forced to declare the Act unconstitutional under Article 16, Section 2.

The argument made earlier in favor of the legislature's power to define "beneficial use" applies to the diversion requirement in most respects. It applies more strongly here because the constitution does not even mention the necessity of diversion, whereas it devotes a separate section to the requirement of beneficial use.[42] It is also true, however, that what the proposed legislation would do in this area is not merely define an admitted requirement, but abolish altogether what has been assumed to be a requirement. The argument

37. There has been some difference of opinion on this point. It was stated that the legislature could do so in Comment, *Constitutional Revision–Water Rights*, 9 Nat. Res. J. 471, 479 (1969). No authority was cited for the statement, however. Although the question was not expressly taken up, the Constitutional Revision Commission implied the opposite. Report of the [New Mexico] Constitutional Revision Comm'n 187 (1967).

38. *See, e.g.*, the analysis by which the content of the jury trial requirement of the Sixth Amendment to the U.S. Constitution was determined. Patton v. United States, 281 U.S. 276, 288 (1930).

39. State *ex rel.* State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 217, 182 P.2d 421, 427 (1947).

40. 224 U.S. 107 (1912).

41. Colorado River Conservation Dist. v. Rocky Mountain Power Co., 158 Colo. 331, 333, 406 P.2d 798, 800 (1965).

42. *See* N.M. Const. art. 16.

would seem to be that it is permissible for the legislature to assist in the definition of "beneficial use," but it would not be permissible to eliminate the beneficial use requirement altogether, which is proposed with respect to the diversion requirement. This reasoning is persuasive, but it suffers from one flaw: the concept of beneficial use is fundamental to the doctrine of prior appropriation, whereas diversion is not.[43]

The conclusion that diversion is not essential to accomplish the purposes of prior appropriation is reached by analyzing the necessities and policies which originally underlay that requirement. The diversion requirement serves three purposes. First, it provides objective proof of intent to appropriate. Its utility in this regard is amply illustrated by the *Miranda* case. Justice Montoya's opinion for the Court reveals that the reason for holding that a diversion is required for agricultural purposes is the necessity of providing objective evidence of the intent to appropriate.[44] The priority asserted in *Miranda* antedated enactment of the Water Code. Since adoption of the Code, evidence of intent is satisfied by filing notice of intent to appropriate with the state engineer or by obtaining a permit to appropriate from the state engineer.[45] If the would-be appropriator does not consummate the appropriation by applying the water to a beneficial use within a reasonable time, the permit will lapse and no license will be issued because the permittee has not shown sufficient intent and ability to appropriate.[46] Thus, the former objective-evidence-of-intent purpose of diversion is accomplished by other means for rights initiated after 1907.

Second, diversion was a practical kind of notice to others on the stream that a water right was being asserted.[47] This purpose, too, is accomplished by routine procedures under the Water Code. Since 1907 every new appropriation has required approval of the state engineer.[48] One of the chief functions of the state engineer is to

---

43. *See generally* Comment, *Water Appropriation for Recreation,* 1 Land & Water L. Rev. 209 (1966); Comment, *The Prerequisite of a Man-Made Decision in the Appropriation of Water Rights–State ex rel. Reynolds v. Miranda,* 13 Nat. Res. J. 170 (1973).

44. 83 N.M. at 445, 493 P.2d at 411.

45. N.M. Stat. Ann. § 75-5-1 (Repl. 1968). *See* Pueblo of Isleta v. Tondre, 18 N.M. 388, 137 P. 86 (1913).

46. N.M. Stat. Ann. § 75-5-5, & -7 (Repl. 1968) set out the maximum times. Section 75-5-7 allows additional time where delay has been caused by "acts of God, operation of law, or other causes beyond the control of the applicant." The implication is that as long as the applicant has the intent and ability under normal conditions to apply the water to beneficial use, the time will be extended. This is a codification of the doctrine of relation back.

47. *See* Millheiser v. Long, 10 N.M. 99, 106-07, 61 P. 111, 113-114 (1900).

48. N.M. Stat. Ann. § 75-5-1 (Repl. 1968).

limit appropriations to the amount of water available on a stream. Thus, the purpose of notice is fully served when the state engineer refuses to issue a permit for the amount requested by the applicant.

Third, as has been pointed out elsewhere,[49] diversions have been required on the assumption that dedication of water to uses which require diversions would result in better allocation of resources. However, the changing values and needs of society have eroded this assumption, as is amply demonstrated by the list of beneficial uses provided for in the proposed legislation. Most importantly, it seems fitting, in view of today's highly developed forms of water administration, that the optimum allocation of water be achieved through refinement of the term "beneficial use" and not through partial reliance on the blunt tool of the diversion requirement.

On the basis of the foregoing discussion it is concluded that a constitutional amendment is not necessary to abrogate the diversion requirement.

The commission which would be created under the proposed legislation will be referred to as the Instream Flow Commission. The commission would be given the following functions: (1) determining the minimum flow for each watercourse for each month of the year, (2) determining to what extent instream flows presently exist, (3) appropriating in trust for the people of the state[50] all unappropriated waters up to the minimum flow, (4) periodic review of the availability of flows necessary to bring appropriations up to the minimum flow, (5) monitoring enforcement measures of the state engineer necessary to maintain the appropriated flows, and (6) protesting[51] applications for new water rights or changes in existing rights that will impair rights held by the commission. The commission would be required to follow all normal procedures under the water code for establishing and protecting water rights. The determination of minimum flows would be made separately at public meetings after notice to the public and opportunity to comment, and determinations would be subject to judicial review for support by substantial evidence. These procedural safeguards are important because it is at this stage of the process that a limit is put on the appropriations the commission may make.

The priority of appropriations under the proposed act would be the dates on which the Instream Flow Commission files notice of

---

49. Tarlock, *Preservation of Scenic Rivers*, 55 Ky. L. J. 745, 760 (1967).

50. Under Idaho Code § § 67-4301 to -4312 (1975 Supp.) the Governor is empowered to appropriate the waters of certain lakes "in trust" for the people of the state.

51. *See* N.M. Stat. Ann. § 75-5-4.1 (Repl. 1968).

intent to appropriate with the state engineer.[52] The commission would be required to file this notice immediately after its creation, and the state engineer would allow a reasonable time within which applications for permits would have to be filed.[53] The normal procedure for obtaining approval of permits, including notice, opportunity to protest, hearing, and appeal,[54] would then be followed. The state engineer would consider the application in accordance with normal criteria.[55] Once a permit was approved, however, the state engineer would be required to issue a license for the same water automatically since there would be no works to be constructed in order to perfect the right.[56] The commission's determination of minimum flows subject to the foregoing procedures and judicial review would be conclusive and could not be questioned in the permit proceedings. The state engineer would still have power under the public interest clause to deny permit applications in exceptional cases.

Like the other tenets of prior appropriation, the doctrines of forfeiture and abandonment should apply to appropriations made by the Instream Flow Commission. Generally, failure to use water beneficially results in loss of the right. If the rightholder intentionally fails to use the water he is held to have abandoned the right.[57] If he fails to use it for four years plus, is given notice and declaration of nonuse by the state engineer, and fails to use it for one more year, the right is forfeited no matter what the rightholder's intent or motive was.[58] Forfeiture will not necessarily be held to have occurred, however, "if circumstances beyond the control of the owner have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner."[59] Thus, it has been held that shortage of water is a sufficient excuse for nonuse.[60] However, in the recent *South Springs* case[61] the high court said in dicta that the rightholder should have pursued his water to its source, if possible, including the drilling of wells to replace surface waters

52. N.M. Stat. Ann. § 75-5-1 (Repl. 1968). The early priority asserted by the District in *Colorado River Conservation Dist. v. Rocky Mountain Power Co.* has been correctly criticized in Ellis, *supra* note 33, at 184.
53. N.M. Stat. Ann. § 75-5-1 (Repl. 1968).
54. N.M. Stat. Ann. § § 75-5-4, -4.1, -5 (Repl. 1968).
55. N.M. Stat. Ann. § 75-5-6 (Repl. 1968).
56. *See* N.M. Stat. Ann. § § 75-5-5 & -7 (Repl. 1968).
57. State *ex rel.* Reynolds v. South Springs Co., 80 N.M. 144, 452 P.2d 478 (1969).
58. N.M. Stat. Ann. § 75-5-26(A) (Repl. 1968).
59. N.M. Stat. Ann. § 75-5-26(A) (Repl. 1968).
60. Chavez v. Gutierrez, 54 N.M. 76, 213 P.2d 597 (1950).
61. 80 N.M. 144, 452 P.2d 478 (1969).

which had been appropriated before the water table declined and the surface flow ceased.[62]

A water right can also be forfeited, even if the water is being used beneficially and with the requisite intent, if the use is illegal, such as diverting water at a new location without obtaining a permit from the state engineer to change the point of diversion.[63] The Supreme Court has said that "forfeiture is a 'punishment annexed by law to some illegal act.' "[64]

The question here is in what situations the Instream Flow Commission could be found to have failed beneficially to use water under its appropriations. It is possible that a situation similar to that in the *South Springs* case will arise, where a naturally declining water table causes surface flows to disappear. Should the right of the commission to instream flows then be held to cease unless it drills wells and pumps water into the streambed? Clearly it should be held to the same standard as other appropriations. If the instream flow appears to have disappeared permanently for natural reasons, the commission would have to determine whether there is a riparian habitat valuable enough to justify replacing the waters. If it decides to take no action to replace the water, it should be found to have abandoned or forfeited the right. If the water table declines and causes the surface flow to disappear, due to appropriations of ground water or surface water in the stream systems, the commission should be held to have abandoned the water right by reason of its failure to protest the applications for such rights with the state engineer at the time of application. The commission would have to be vigilant to protect against impairment of its rights through other appropriations or changes in existing uses.

What about a period of drought after which normal flows will return to the stream? In this situation the commission should normally not be held to have abandoned or forfeited its rights. This result is consonant with present law. Abandonment depends on the intent of the rightholder. The intent may be either express or

---

62. *Id.* at 149, 452 P.2d at 482.

63. State *ex rel.* Reynolds v. Fanning, 68 N.M. 313, 361 P.2d 721 (1961). Forfeiture for failure to comply with state law other than a failure to use beneficially does not appear to be covered by the forfeiture statute, § 75-5-26. Thus, the special notice feature of that provision would also seem to be inapplicable. *See generally* State *ex rel.* Reynolds v. Fanning, *supra;* State *ex rel.* Reynolds v. Mitchell, 66 N.M. 212, 345 P.2d 744 (1959); State *ex rel.* Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950).

64. State *ex rel.* Reynolds v. South Springs Co., 80 N.M. 144, 147, 452 P.2d 478, 481 (1969), *quoting from,* State *ex rel.* Erickson v. McLean, 62 N.M. 264, 272, 308 P.2d 983, 988 (1957) (emphasis supplied here), which quoted from 2 Kinney on Irrigation and Water Rights § 1118 (2d ed. 1912).

implied.[65] In this case intent would have to be inferred from nonuse, that is, lack of water in the streambed. According to the *South Springs* case, this nonuse would have to continue for an "unreasonable period" in order to create a presumption of intent to abandon.[66] The effect of the drought on the riparian habitat would also be relevant. If the habitat will be destroyed by the drought without hope of revival, then, absent any stopgap measures by the commission to preserve the habitat, the commission should be found to have abandoned the right.

APPROPRIATION UNDER CURRENT LAW

It is submitted that even if the proposed legislation is not adopted it is possible for the State Department of Game and Fish, the Sierra Club, or a private individual, to appropriate instream flows. First, Section 75-5-1 allows acquisition of water rights by "[a]ny person, association, or corporation, public or private, the state of New Mexico, or the United States of America." Second, recreation has been held to be a beneficial use.[67] The foregoing proposed beneficial uses have never been rejected by the New Mexico courts, and many of the proposed uses can be achieved through appropriations for recreation. Third, diversion will in all likelihood not be required. This may sound surprising in view of what has been said before. This conclusion is reached, however, by going back to the *Miranda* decision and comparing it with the policies underlying the diversion requirement. Although the *Miranda* decision has been criticized by one commentator,[68] it is submitted that (1) the decision in that case was correct and (2) that an appropriation made at the present time to maintain instream flows would not be subject to the diversion requirement set out in that case. The *Miranda* case involved water rights allegedly initiated before enactment of the state water code in 1907.[69] The traditional policies of providing objective evidence of intent to appropriate, notice, and optimal water resource allocation, which underlie the diversion requirement, all apply squarely to appropriations initiated before 1907. Thus, the decision is correct. Those policies have been otherwise satisfied only since the advent of comprehensive administrative water management. Therefore, despite

65. *Id.*
66. *Id.* at 146, 452 P.2d at 480.
67. State *ex rel.* State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 218, 182 P.2d 421, 428 (1947).
68. 13 Nat. Res. J. 170 (1973).
69. 83 N.M. at 444, 493 P.2d at 410.

the Court's broad language in *Miranda,* that holding should not be extended to any appropriations initiated after 1907.[70]

Appropriation of instream flows without benefit of the special legislation proposed is not the recommended solution, however. It would result in hit-and-miss appropriation without the benefit of an overall plan or the scientific and engineering expertise available under the legislative scheme. But it is the only solution if the legislature fails to act.

JOHN B. DRAPER

70. This analysis also answers the question whether the abrogation of the diversion requirement in the proposed statute should be limited to appropriations made under the act. The abrogation may safely be applied to all appropriations being made under the 1907 water code. Across-the-board abrogation has the collateral advantage in this context of allowing appropriators whose water use does not inherently require diversion to allow the water to remain in the stream.