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## THE MANY FACETS OF INSTREAM FLOW

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I'm very happy to be here in Taos. The last water meeting I attended in Taos was with the Upper Rio Grande Working Group. I remember the late Señor Andres Martinez getting out a great big magnifying glass, everyone looking at him, and someone finally asking, "Mr. Martinez, what's that for?" He responded, "I find that this contraption is very handy for keeping track of what the state engineer might be doing to me in the legal notices in the newspaper." I feel the spirit of Andres Martinez here as well as the spirit of Steve Reynolds.

About ten years ago I was asked to address that year's water conference about water planning. It was held in Albuquerque and I remember Steve Reynolds would always find a prominent place at these meetings, chain smoke cigarettes and keep us honest. He would correct anybody, even during their presentation if they said something he thought was wrong. We have a changed atmosphere here today. No longer is planning a dirty word. I agree with the other speakers

who believe this is an exciting time for New Mexico water policy and planning.

Peter Drucker talks about the end of the commodity view, the commodity age, and the beginning of the informational age. I think his views apply to water. No longer do we think of water as a thing to be bought and sold to the highest bidder. This is the age when we begin to look at connections, interconnections, and interrelationships, rather than looking at water as something to be used, to be developed, and with which to make a profit.

Today I want to talk about a couple of issues. First, I'll talk about the ecology of instream flows and how instream flow water rights, if they are recognized in New Mexico, might impact that ecology. Second, I'll talk about the legal aspects of the problem by looking at some historical attempts by the state legislature to recognize instream flows.

My seven-year-old daughter Alana and I live in the North Valley of Albuquerque, where we can get on

our bikes and ride along the ditches of the Middle Rio Grande Conservancy District. The ditch is a wonderful place for us to go, a place where we don't have to worry about cars, and a place where we can enjoy free-flowing water. Very quickly we get to the fields surrounding the Anderson Vineyards that is one of the last open spaces in Albuquerque's North Valley. It occurs to me that instream flows perhaps is a misnomer. Even though the water doesn't flow all year in the ditch, when that water flows in the summer time, it's a good place to be. It's a quiet place, a riparian habitat, a place to get out of the heat, a place to enjoy free-flowing water. It saddens me to hear talk about how the acequias will fight attempts to implement instream flow protection. It seems to me that we have flows, free-flowing waters in acequias, that create instream values. Instream flow protection, if it is broadly defined to include natural and man-made riparian habitats, should include the acequias, not be a threat to them.

Let's think about ecology. "Eco" means home. Let's think about the home where we find water and the home that water creates. If we think about three types of watersheds in New Mexico, or surface flow regimes if you will, then we can begin thinking about the ecology of instream flows. First of all, we have natural, free-flowing rivers and streams, although we don't have many of them. These are the streams above reservoirs, above the acequias. These rare stretches largely are found on federal reserves including national forests, and federal and private lands. By and large, instream flows already are protected by the land owners, such as the U.S. Forest Service or Bureau of Land Management (BLM), and there does not appear to be an immediate need for further protection.

The second type of watershed is much more prevalent in the state, the artificial free-flowing streams and rivers found between reservoirs. In some cases, these stretches are regulated for the express purpose of protecting and preserving riparian habitats but in other locations, riparian habitat protection is an incidental or unintended benefit. For example, some of our best trout fisheries are tail waters below reservoirs. The instream flows in those stretches generally are managed by the Bureau of Reclamation (Bureau) or the U.S. Army Corps of Engineers. Importantly, these watersheds are being protected throughout the West without the creation of instream flow water rights.

I recently attended an instream flow conference in Jackson Hole, Wyoming. It was tough duty, I had to do some instream flow monitoring with my fly pole and I'm pleased to report that the Snake River still has

some fish in it. Interestingly, I never heard anyone talk about the need for instream flow water rights. Instead, instream flow management below reservoirs was talked about most often. The Bureau of Reclamation is doing some incredible things in terms of managing instream flows. In the Columbia River Basin, for example, regulation of flows to protect endangered salmon species is occurring. And it was encouraging to me to hear some of the Bureau people talking about managing flows, managing timing, not just for irrigators, but for preservation and enhancement of riparian habitats.

In the Colorado River Basin, which of course includes the San Juan River, endangered fish species including the Colorado squawfish, the humpback chub, and the razorback sucker have led the Bureau to enter into a Memorandum of Understanding with the U.S. Fish and Wildlife Service to mimic historic flows. In other words, to imitate the pre-reservoir pattern of high spring flows and lower flows in the winter time. This is a good example of instream flow management, but there have been effects downstream. Tom Bolack's ranch along the San Juan River, for example, suffered the loss of thousands of geese eggs due to rapid increases in releases from Navajo Dam last spring. So, instream flow management is a difficult task. But the point I want to emphasize is that instream flows can be regulated, are being regulated, and riparian habitats protected, all without the creation or use of instream flow water rights.

In New Mexico, I have talked with a number of people. Tom Mottle with BLM tells me that on the Rio Chama, they are reaching the point where they have a final plan almost in place regulating flows for rafters. Rich Barrios of the Bureau also tells me that flows are being managed for recreation and for habitat protection. As a fly fisherman I wonder about that, and I worry about effects downstream to some of the acequias. However, I think those problems are being resolved.

At the same time, I have seen evidence that along the Rio Grande, the Gila, and the Pecos River, there are times when the main channel of those rivers dries up completely. It dries completely and jeopardizes endangered species such as the silvery minnow as well as other flora and fauna. In fact, you can point to endangered species in each of those watersheds. The ironic thing is, in those segments the river may be dried up, but the highline canal is almost full as it takes water down to Elephant Butte, to Safford, or to Texas. So I think there is a crying need in those situations for at least minimum flows for the preservation of the existing fish populations as well as the other

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wildlife that depend on minimum flows. Instream flow water rights, however, are not going to solve these problems largely because those rivers are controlled either by conservancy districts, the Bureau, or other agencies. This is project water that generally is governed by a whole different set of rules and procedures.

The third type of watershed includes artificial free-flowing ditches and canals. I've already talked about their importance to a certain extent. It would seem to me that we need not define instream flows as only those in natural habitats, but also to look at the homes or ecosystems that the acequias provide. These are the backbone of our farming communities and a source of New Mexico's rich cultural heritage. We need to recognize the role of acequias and agriculture in preserving open space and expanding riparian habitats.

Let me briefly discuss some of the other changes occurring. The Clean Water Act is up for reauthorization. Section 313 allows the regulation of water quality from discharges from federal facilities. Section 303 gives the Environmental Protection Agency (EPA) review authority which it is using, especially in light of the recent Supreme Court case, *Oklahoma v. EPA*, where it is now law that upstream and downstream water quality must be considered. You can't just consider water quality within your particular jurisdiction. Isleta Pueblo, for example, would like to see fishable and swimmable water quality on the main stem of the Rio Grande and it has the authority to implement its own water quality control regulations. Therefore, I think there will be increased use of the Clean Water Act as a tool for instream flow protection.

In New Mexico, attempts to create instream flow water rights have failed. The prior appropriation doctrine was designed specifically to permit diversions of waters from streams and rivers; it is a system set up to take water out of the streams and rivers. It's no surprise that it can't deal very well with demands to leave water in the stream and river. Some people think Steve Reynolds is the reason that instream flow bills have failed. I think it's more complicated than that.

I think if you look at the instream flow bills, they tried to provide that for instream flows, there will be no diversion requirement, or, that leaving the water in the stream will be a beneficial use. Both types of bills have a deceptive appeal because the idea is simply to monkey with the water law system a little bit. I oppose either type of bill because I don't think stretching the definition of a water right is the most effective means to the end of protecting and enhancing riparian habitats. I think to protect instream flows we need to

protect the watershed directly. We need to think about the riparian watershed that we want to create, to protect and to enhance. Then we need to determine how to protect instream flows.

An instream flow water right is different qualitatively than a regular diversionary water right. An instream flow water right, to be any good, has not only to be a certain quantity like a regular water right, but it has to be a certain quality. Fish won't live in dirty or polluted water. The water also has to be a certain depth. It has to be left instream, if it's going to do what we want it to do—keep fish alive for example—then the water right will be fundamentally different. It would be a water right with a quantity and quality dimension.

To recognize instream flow water rights would mean that someone—and who should own such a right is also an important consideration—will be given the right to block transfers of water rights effectively. This could occur because it would be relatively easy to impair an instream flow water right. In turn, this might negatively effect the water rights market system that has been established in New Mexico. And I think that is a fundamental reason why instream flow legislation has been opposed. There have been attempts to create a more comprehensive program for instream flow protection but these efforts also have failed.

In 1985, the Anaya administration explored public ownership of water rights or some other way to provide for minimum flows in selected streams in New Mexico. A team from the Environmental Improvement Division and the state's Game and Fish Department personnel conceived some really good ideas, including the designation of certain stream segments for protection. The main problem with the proposals was that Steve Reynolds responded with some difficult questions: "Who's going to meter this water? Who's going to look at water quality? Who's going to do those things necessary to have an instream flow that does what we want it to do?" Without financial resources it was difficult to answer these questions. Eventually, the attempt was abandoned before any legislation was proposed.

Some of those ideas resurfaced in a second approach tried initially in 1989. The Instream Flow Protection Act was unprecedented in several respects. Rather than modifying the language of state water law, a five-step process for establishing a statewide instream flow protection system was proposed. First, the New Mexico State Game Commission, in consultation with the state engineer, would inventory potential sites for protection. The rationale for this step is to address

the "NIMBY" syndrome, "Not in my backyard." People say, "Well, I like instream flow protection as long as it doesn't affect my water rights or isn't in my stream system." So the idea was to address this problem by talking specifically about locales. In other words, the first step is to determine exactly where instream flows could be protected. The second element of the proposed act would provide that after a public hearing, the Game and Fish Commission would recommend specific stream segments to the legislature for designation as protectable habitat. Third, the legislature would determine which, if any, of the recommended segments to designate. Fourth, the state engineer would maintain sufficient quantities of water, and here I presume that means preservation flows, in designated segments by placing limitations on new diversions at points upstream from the segments. Fifth, designated segments could be extended downstream by the legislature whenever a permanent discontinuation of diversions below existing designated segments occur. This element probably caused the most concern for the acequias who in my view, correctly fear that instream flow advocates would attempt to purchase and transfer acequia water rights downstream in order to allow expansion of the designated segment. Another part of the act looked at studying instream flows in other segments.

I believe this type of approach makes more sense from a holistic or ecological view than does the creation of instream flow water rights. And it corresponds to the Endangered Species Act notion of the designation of critical habitats. In any event, I believe that we should develop comprehensive programs to protect riparian habitats. Such programs can be created within the existing system without creating instream flow water rights. During the regional water planning process, the protection and enhancement of instream flows ought to be a central concern. I hope that those of you who are involved in that process and in the development of a state water plan will try to incorporate instream flow protection.

Thank you.