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NEW MEXICO RESERVE LAW COULD LIMIT SUITS STEMMING FROM WATER SHORTAGES

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A novel New Mexico law creating a strategic water reserve could provide a model for other arid Western states to protect drinking water and head off litigation prompted by limited stream flow, such as Clean Water Act suits over contamination concentrations, suits to protect endangered species and interstate water resource disputes, according to sources who helped draft the law.

The sources say they are unaware of other states considering a similar plan but note that some federal lawmakers have raised the idea of creating a national strategic water reserve and say the New Mexico approach is a tool that other states could use.

Nevada, which is facing similar water challenges to New Mexico, has also begun taking steps to protect its water supplies through a legislative proposal that encourages conservation and aims to streamline adjudication of water rights conflicts within the state. *Relevant documents are available on InsideEPA.com.*

The New Mexico strategic reserve, signed into law by Gov. Bill Richardson (D) earlier this month, creates a pool of state-held water rights on every river system in the state. It marks the first time the state has held water rights, according to a source with Think New Mexico, the non-partisan think tank that first proposed the reserve in a 2003 report.

Under the strategic reserve, New Mexico's interstate stream commission can purchase or lease water rights from any willing seller or lessor. Because not all water rights have been adjudicated in the state, the legislation limits the purchase or lease of water rights to those that have "sufficient seniority and consistent, historic beneficial use." The think tank source says focusing on older water rights should prevent the lease or sale of water rights that may be claimed by more than one entity.

Initial funding for acquisition of water rights is \$2.8 million, but additional funding may come later from the sale or leasing of state-held water rights, as long as the "rights are no longer necessary for the purposes for which they were acquired for the reserve," according to the source and the legislation. The source says the state is also hoping the Bureau of Reclamation will provide grants that could be used for additional purchases.

The strategic reserve is supported by a broad coalition of stakeholders including business, agricultural, environmental, wildlife and municipal organizations.

By holding water rights, the state is able to legally dedicate water for public benefit purposes and allow it to take action to increase stream flows before litigation stemming from water shortages arise.

For example, the state may be able to increase stream flow to dilute high concentrations of contaminants to prevent enforcement litigation against dischargers. "With New Mexico's rivers drying up, the state is increasingly at risk of lawsuits over violations of the Clean Water Act," the group's report says.

Although water quality was not the primary focus of the reserve's creation, maintaining adequate stream flow "can only help [water] quality," the source adds.

The report also says the state may be able to use the rights to limit degradation of the state's drinking water, which may be the most serious consequence of failing to protect New Mexico's rivers.

"While the majority of New Mexico communities still rely on groundwater for household use, the state is increasingly shifting to surface water drawn from . . . rivers," the report says. "Unfortunately, this water is prone to both natural (e.g. naturally occurring arsenic) and manmade (e.g. septic tank seepage, farm runoff) water contamination. As long as the rivers maintain a strong flow, these contaminants are diluted to the point where they pose little or no risk to human health."

The report adds that such a system could also prevent litigation over endangered species, such as the 2003 federal appellate decision that allowed the Interior Department's Bureau of Reclamation to reduce deliveries of available water water under its contracts with irrigation districts and cities in New Mexico in order to comply with the Endangered Species Act and protect the endangered Rio Grande silvery minnow.

Think tank sources say the silvery minnow is just one of 22 river-dependent federally listed threatened and endangered species in the state. "Each one of them is a lawsuit waiting to happen," the report says. There is a potential for a silvery minnow-type lawsuit on each of New Mexico's river systems and in 26 of the state's 33 counties, sources say.

Meanwhile, lawmakers in Nevada have introduced legislation that, among other things, would provide goals for water conservation in each county and require the state to inventory its water resources. The bill would also create a fund to be used to support the adjudication of existing water rights, and create a fund to provide local governments, Indian tribes or other organizations with expert or technical advice to protect their existing water rights against interbasin transfers.

For the purposes of inventorying the state's water resources, AB 434 would set aside \$12 million for the state Department of Conservation and Natural Resources to evaluate the state of technical information related to surface water and groundwater in the state and a quantification of groundwater reserves in the state. National Groundwater Association sources say only 2 out of 28 states with significant aquifers know their aquifer yields.

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