

DRAFT MEMORANDUM
Office of the State Engineer
Water Rights Division, District 6

DATE: May 1, 2020

TO: Ramona Martinez, Upper Rio Grande Manager, Water Rights Division

FROM: Anthony Meluso, Water Resource Specialist II, Water Rights Division

APPLICANT: Chevron Mining Inc. & Agua Nueva, LLC

SUBJECT: Application for Permit to Change an Existing Water Right, from OSE File Nos. SP 1432 et al. into OSE File Nos. RG1441-S through RG-1441-S-11, for Permit to Change Point of Diversion, Place, and Purpose of Use within the Upper Rio Grande River Basin.

Introduction

The applicants seek a permit to transfer 421.7 acre-feet per annum (afa) of water rights from Chevron Mining Inc. (heretofore referred to as “Chevron”) Tailings Facility in Questa, NM to a series of wells at Agua Nueva, LLC’s The Top of the World Ranch located to the north in the San Luis Valley.

The validity of the subject water rights will require a determination from the Office of the State Engineer (OSE). This application will set precedent for other Chevron water transfer applications and likely other cases of unused water transfers. Chevron has submitted similar applications to the OSE.

In the following section, I use New Mexico water law and New Mexico district court cases to evaluate the validity of the water rights in question. I argue that the water rights should be treated as valid rights for transfer from Chevron to Agua Nueva for two reasons. Primarily, circumstances outside of the control of Chevron prevented them from fully using the water rights, and furthermore to prevent undue burden in the application process.

Tailings Facility Rights

The Tailings Facility has a total of 951.1 afa of water rights. These rights can be split into two groups, proven beneficial use and those without proof of beneficial use. When the Chevron’s Questa mine closed in 2014, 409.7 afa of the 951.1 afa were being consumed at the Tailings Facility. Chevron provided proof of beneficial use to the OSE for the consumed water rights. The remaining 541.4 afa of water rights have not been consumed nor proven to have a beneficial use. However, under the conditions of approval from the OSE, Chevron could not yet consume this water.

In 1984, the OSE approved the transfer of 951.1 afa to the Tailings Facility. The conditions of approval for this permit restricted the amount of consumable water based on a schedule of allowable Rio Grande flow depletions that increased over time. By 2014, Chevron's allowable depletion had reached 409.7 afa, less than half of the total permitted amount. Therefore, Chevron had not used much of the permitted water, and was unable to have used the water.

Application to Transfer a Water Right

This application seeks to transfer 421.7 afa from the portion of the Tailings Facility water rights that have no proven beneficial use.

Under normal circumstances, the OSE requires a proof of beneficial use to transfer a water right (*Sun Vineyards, Inc. v. Luna County Wine Dev. Corp.*, [1988-NMSC-075](#), [107 N.M. 524](#), [760 P.2d 1290](#)). Unused water or water without proof of beneficial use would revert back to the public (*State ex rel. Reynolds v. S. Springs Co.*, [1969-NMSC-023](#), [80 N.M. 144](#), [452 P.2d 478](#)). This water has not been used, the mine is no longer in operation, and therefore cannot be proved up on. The failure of the water right owner to use water results in forfeiture. Nevertheless, the OSE will not necessarily consider unused water forfeit if "circumstances beyond the control of the owner have caused nonuse" (72-5-28). In this case, Chevron did not use the fully permitted amount of water because the OSE conditions of approval limited the mine from doing so. This would constitute a circumstance beyond the control of the owner. Even if there are circumstances beyond the control of the owner, the OSE may still declare a water right forfeit; however, precedent from New Mexico's sixth district court ordered otherwise in 2010.

In a similar case (*Joseph R. & Sherri L. Runyan v. NMOSE*, 2010), an applicant wanted to transfer a water right that had not been fully proven up on. The permitted water right in question previously came from an adjudicated water right. The applicant wanted the permitted water right to revert back to the adjudicated location. The New Mexico District Six Court ordered that the transfer be allowed because of two OSE policies and the 72-5-28 clause stating that "forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused nonuse." First, the OSE policies, WR-03-2006 and WR-14-2007, "allowed cancellation and transfer of water rights back to the original location" (*Joseph R. & Sherri L. Runyan v. NMOSE*, p. 2). Secondly, the court ruled that:

"it is not in the best interests of the state to extinguish water rights that were previously adjudicated and subsequently transferred through a permit to a new place and purpose of use, but could not be placed to beneficial use at the 'move-to' location through circumstances beyond the control of the water rights owners." *Joseph R. & Sherri L. Runyan v. NMOSE*, p. 2

This Chevron to Agua Nueva application mirrors the *Joseph R. & Sherri L. Runyan v. NMOSE* in many ways. If the same precedent were to be applied to this case, Chevron's unused water rights would revert to the pre-transfer, adjudicated place and purpose of use. At this point, the Chevron application diverges from the *Joseph R. & Sherri L. Runyan v. NMOSE* case. Chevron does not want the water to revert to the adjudicated place and purpose of use, but instead to transfer the water to a new place and purpose of use.

Transfer to the Top of the World Ranch from Chevron's Tailings Facility should be possible because Chevron also owns the adjudicated lands that the water rights would revert to. Before **1984**, the mine company purchased adjudicated lands and water rights in the Sunshine Valley in order to transfer the water rights to the Tailings Facility. Chevron is the current owner of these original move-from locations.

In the spirit of preventing undue burdens in the application process, the OSE should allow a transfer from the Chevron Tailings Facility to Agua Nueva's Top of the World Ranch *as if* the water rights were transferred from the Chevron Tailings Facility to the adjudicated place and purpose of use, and then to the Top of the World Ranch. Because an adjudication qualifies as a proof of beneficial use (72-4-19), the OSE should consider the intermediate step of passing through the adjudicated lands as part of this application *pro hac vice*.