



---

Volume 39

Issue 1 *Coping with Scarcity in the Rio Grande/Rio Bravo Drainage Basin: Lessons to be Learned from the Droughts of 1993-1996*

---

Winter 1999

## Possible Solutions: Policy Tools to Achieve Flexibility to Meet New Conditions, Preliminary Thoughts for Coping with Future Droughts

Maria O'Brien

### Recommended Citation

Maria O'Brien, *Possible Solutions: Policy Tools to Achieve Flexibility to Meet New Conditions, Preliminary Thoughts for Coping with Future Droughts*, 39 Nat. Resources J. 175 (1999).

Available at: <https://digitalrepository.unm.edu/nrj/vol39/iss1/17>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact [amywinter@unm.edu](mailto:amywinter@unm.edu), [lsloane@salud.unm.edu](mailto:lsloane@salud.unm.edu), [sahrk@unm.edu](mailto:sahrk@unm.edu).

## Possible Solutions: Policy Tools to Achieve Flexibility to Meet New Conditions, Preliminary Thoughts for Coping with Future Droughts

The following comments are premised on the author's experience with the Middle Río Grande Conservancy District (Conservancy) in New Mexico and its endeavor to implement a water banking system. Background information about the Conservancy is helpful for an understanding of its efforts at water banking.

The Conservancy was formed under state law in the 1920s for the primary purposes of providing flood control, drainage, and irrigation to the middle Río Grande valley of New Mexico. The Conservancy's statute also provides that the Conservancy is to utilize its assets to work generally for the "public welfare." The Conservancy consists of approximately 150 river miles, stretching south from Cochiti Dam to the northern boundary of Bosque Del Apache Wildlife Refuge.

The Conservancy has water rights pursuant to state water permits. Generally, its permits entitle it to provide irrigation water to approximately 123,000 acres. In addition to providing water for agriculture, the Conservancy's statute also permits it to provide water for municipal and industrial use, domestic use, and even for power. Historically, the Conservancy supplied water to approximately 90,000 acres, provided water for environmental purposes, and leased water for municipal and industrial purposes. Currently, approximately 50,000 to 60,000 acres of the Conservancy's benefited lands are under cultivation.

Given the disparity between historical use and actual current use, the question became what path to take with regard to the Conservancy's perfected, but currently unused, rights. The Conservancy's water rights are not subject to abandonment or forfeiture and the Conservancy Act forbids the Conservancy Board from permanently selling or otherwise disposing of the Conservancy's rights.<sup>1</sup> It is from this question that the Conservancy arrived at the concept of water banking.

The term "water bank" is now used widely in the West. Depending on what state you are in or whose "bank" you are referring to, the term can

---

\* Maria O'Brien is an attorney working in Albuquerque with the Law Offices of Modrall, Sperling, Roehl, Harris, & Sisk. She served as counsel to the Middle Río Grande Conservancy District for the implementation of its water bank.

1. See N.M. STAT. ANN. §§ 73-17-21, 72-5-28(G), 73-14-47(J) (Michie 1978).

mean different things. Generally, however, a water bank is typically a brokerage type institution created for the purpose of pooling water not currently needed by one user, for rental or sales to other users in need. The states of Arizona, California, Colorado, Idaho, New Mexico, and Texas all have water banks in use or a process for water banking at either the state or local level. A brief overview of several of these programs identifies some of the key issues underlying water banking and provides context for the conservancy's efforts.

The Arizona Water Banking Authority was created in 1996 and is authorized to execute interstate water banking agreements. The Authority may buy otherwise unused Colorado River water within the limits of Arizona's entitlement. Such water is then "banked" via recharge pursuant to Arizona's underground storage statutes or through other conjunctive use opportunities.

The California Water Bank, administered by the California Department of Water Resources, was originally conceived in 1991 in response to drought in the state. Originally it was contemplated as a simple clearinghouse where willing sellers would deposit rights in the bank and make them available to willing buyers. Water for the bank was provided by fallowing agricultural land, using groundwater instead of surface water, and transferring stored water. The bank has been so successful that it is evolving beyond its singular original purpose of addressing drought situations. Fallowing of land is no longer a source of water for the bank.

In Colorado, the Fort Lyon Canal Company has proposed a water banking program to facilitate the transfer of irrigation water to urban users. Water comes from fallowing of land within the canal company. Eligible lessees would be any water users below Pueblo Dam and the bank leases available water to the highest bidder. Lessees from previous years have the right of first refusal in subsequent years at an established price.

Idaho's water bank is administered by the Idaho Department of Water Resources. The bank "provide[s] a source of adequate water supplies to benefit new and supplemental water uses, and provide[s] a source of funding for improving water user facilities and efficiencies."<sup>2</sup> The water resource board operates the bank on a statewide basis and appoints committees in local drainage areas. Farmers (or others) "deposit" water held under private rights or by allocations in federal reservoirs into either the state or local water banks where it may be leased by other water users.

The Texas water bank was adopted in 1993 and is administered by the Texas Water Development Board. The Bank was created specifically to facilitate water marketing and the transfer and reallocation of water.

---

2. IDAHO CODE § 42-1761 (1996).

Virtually any kind of water is accepted into the bank. However, transfers can and do take place outside the context of the bank.

In New Mexico, the Pecos River Conservation program enacted by the New Mexico legislature in 1991 is in essence a "water bank."<sup>3</sup> The program allows holders of rights on the Pecos to pledge water to an account of a water bank administered by the Interstate Stream Commission. The water user informs the state that the water is not being utilized that year and is available for other uses.

The Conservancy's water bank, not unlike water banks in place elsewhere, is an attempt to facilitate voluntary transfers of water. The focus of the Conservancy bank, however, is also on preventing permanent severance of water rights from agricultural lands. The premise is to preserve as much water for agriculture as possible while at the same time providing water for growing municipal needs as well as for environmental and instream uses. The mechanism is important in providing the traditional users, the agricultural community, the ability to maintain control over the resource while allowing "newer" users access to the much needed water.

The concept underlying the bank is quite simple; inventory the Conservancy's water rights, document the beneficial uses of the Conservancy's water rights, and provide an efficient administrative mechanism to facilitate placing Conservancy water to beneficial use. The concept, now formally denoted a water bank, is not new to the Conservancy. The Conservancy has been empowered since its inception to lease water for numerous purposes other than agriculture and has in fact done so. However, the changing nature of the western landscape has mandated more formalized efforts by the Conservancy to protect its water rights and participate in the water marketplace. The water bank provides a mechanism for the Conservancy to proactively plan rather than react ad hoc to water allocations after they have already occurred. The Conservancy is hopeful this endeavor will make water available for other users with increasing demands but scarce resources.

Water banking mechanisms have become increasingly important as municipal and environmental users increasingly "compete" with agricultural users for the same resource. Water banking mechanisms such as the Conservancy's water bank should be used as a means to build bridges between these "competing" uses rather than allowing the wholesale sacrifice of one use over another.

---

3. N.M. STAT. ANN. § 72-1-2.2 (Michie 1978).