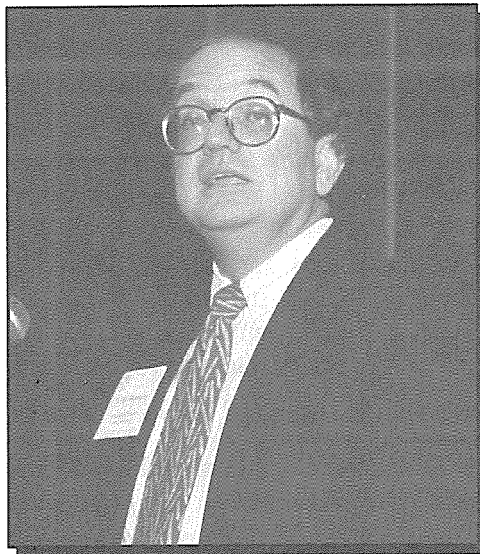


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SORTING OUT OWNERSHIP OF THE MIDDLE RIO GRANDE: AN ANALYSIS OF THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT

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In the early 1920s, residents of the Middle Rio Grande Valley organized to drain lands saturated by the river and to control the devastating floods that terrorized valley communities. In 1923, a small group of concerned middle valley property holders convinced the state legislature to pass the Conservancy Act, which authorized the formation of conservancy districts in the State of New Mexico.¹ In 1925, the Middle Rio Grande Conservancy District was formed to provide flood control, drainage and irrigation to the residents of the Middle Rio Grande Valley.

The geographical boundary of the Conservancy runs along the Rio Grande from Cochiti Dam in the north to the Bosque del Apache Wildlife Refuge in the south. The Conservancy is approximately 151 river miles in length and 1-5 miles in

width, and its boundaries cross dozens of local governments and six Indian Pueblos. Several governmental agencies at the local, state, interstate and federal level have jurisdiction over land and water issues within the middle valley. Each of these governments and governmental agencies makes decisions that either directly, or indirectly, affect the river. The Conservancy, however, is the only elected body in the middle valley that gives the people who live on the river the power to make decisions that directly impact the Rio Grande.

New Mexico's Conservancy Act provides that individuals residing within the Conservancy may elect seven representatives to sit as the Conservancy's board of directors.² The makeup of the Conservancy board has traditionally reflected irrigation and Pueblo interests. However, as land use

changes from irrigation to urbanization within Conservancy boundaries, and as water becomes a more scarce resource, the Conservancy's board is having to respond to a much more complex constituency with varied concerns over the Conservancy's land and water assets. Today, the Conservancy board members face pressure from not only federal and interstate players on the Rio Grande, but from the Rio Grande community as well.

Changes in land use over the last 70 years reflect a basic change in the makeup of the Conservancy District. Due to the rapid increase in urbanization in the Middle Rio Grande Valley, especially in Albuquerque and surrounding communities such as Belen, Los Lunas, Rio Rancho and Bernalillo, much of the farmland that existed in 1925 has been transformed into residential or industrial neighborhoods. Agricultural water use on those previously irrigated lands has been retired. Simultaneously, new demands for Conservancy water have been created to supply wildlife, industrial, and municipal uses.³ This historical inevitability has created legal, economic and environmental problems for the constituents of the Conservancy. Conservancy constituents maintain that as urbanization continues, the loss of irrigable lands will decrease the Conservancy's effectiveness as trustee for the Middle Rio Grande Valley and will destroy traditional ways of agrarian life.⁴ Other Middle Rio Grande Valley residents fear that rapid urbanization will destroy the riverine environment supported by agricultural uses of water, with concomitant adverse impact on established urban areas, both economically and aesthetically.⁵

The purpose of this paper is to illustrate that the Conservancy's water rights are an asset that is increasingly in demand and frustratingly constrained. First, the paper will outline the Conservancy's relationship with the U.S. Bureau of Reclamation. Next, it will categorize water rights found within the Conservancy's boundaries, followed by an examination of how federal and state laws affect the alienability of Conservancy water rights. Finally, the paper will discuss how the Conservancy is attempting to protect its water rights by promoting maximum beneficial use through internal and external water transfers.

U.S. BUREAU OF RECLAMATION: PARTNER TO THE CONSERVANCY

Under federal reclamation law, the United States has signed contracts with the Conservancy to furnish significant benefits, including water itself, to the Conservancy. In 1951, the Conservancy contracted with the United States Bureau of Reclamation for the rehabilitation and improvement of the Conservancy's water works.⁶ The Conservancy agreed to repay the United States for the costs of improving the Rio Grande channel and rehabilitating Conservancy works as well as for operation and maintenance of the works. In order to repay this debt, the contract required the Conservancy to collect assessments from Conservancy landowners.⁷ In addition to agreeing to repay improvement, operation and maintenance costs, the Conservancy conveyed an interest in ownership of all of its works and water in trust to the United States for the benefit of the rate payers in the Conservancy.⁸

The contract between the District and the United States places federal reclamation law constraints on the Conservancy's ability to provide water within the Conservancy's boundaries. For example, the Conservancy is obligated to deny water delivery to landowners whose land holdings violate the acreage limits of federal reclamation law.⁹ The Conservancy also is required to service Pueblo Indian water rights within the Conservancy before serving any state-defined water rights.¹⁰ Although the Conservancy can enter into third-party lease agreements for the use of Conservancy water, it can do so only with the approval of the Bureau of Reclamation and only if irrigation and Pueblo uses are not detrimentally affected.¹¹

THE CONSERVANCY'S WATER RIGHTS

Although the Conservancy was not formed with the intention that it would hold assets, over the past 70 years the Conservancy and its constituents have acquired some of the most valuable water assets in the State of New Mexico. Seven categories of legally recognized water rights are found within the Conservancy's boundaries.

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Individual Pre-1907 Diversionary Water Rights

Before the creation of the Conservancy, and prior to 1907, when the State Engineer was given jurisdiction over water rights, individuals within the middle valley had perfected surface water rights by diverting and putting water to beneficial use. These pre-1907 water rights are outside the jurisdiction of the State Engineer and are vested in the individual water rights holders who reside within the Conservancy.

Individual 1907-1927 Water Rights

A very small number of individuals within the Conservancy may hold permits from the State Engineer for water rights established before the creation of the Conservancy, but after 1907.

Conservancy's Permitted Surface Rights

Shortly after its inception, the Conservancy applied for water permits from the State Engineer's office to effectuate its goals of delivery, conservation, and reclamation of water along the Middle Rio Grande Valley. Permit No. 1690 allows the district to irrigate at least 42,482 acres with surface flows from the Rio Grande. The acreage provided for in the Conservancy's permit does not include those acres within the Conservancy that were irrigated prior to the formation of the Conservancy.¹²

Pueblo Reserved Water Rights

The six Pueblos within the Conservancy acquired surface water rights through assignments by the United States, or through reservation under the federal reserved water rights doctrine. Pueblo water rights are senior to all other rights within the Conservancy and irrigate approximately 8,847 acres of Indian land.

Pre-1956 and Permitted Groundwater Rights

Individuals and the Conservancy own water rights based on wells drilled prior to 1956, when New Mexico's State Engineer asserted jurisdiction over the underground waters of the Rio Grande Basin. Groundwater rights based on permits from the State Engineer issued after 1956 are also abundant in the Conservancy. Although there has never been a formal quantification of these groundwater rights, they nonetheless comprise a valuable asset to the Conservancy.

San Juan/Chama Water Rights

In 1963, the Conservancy contracted with the Bureau of Reclamation for a water right to 20,900 acre-feet of water from the San Juan/Chama Project (SJCP). The United States has approved SJCP water for irrigation and other beneficial purposes.¹³ In return for the water right, the Conservancy agreed to pay a portion of the construction, operation and maintenance costs of the project. The 1963 contract is an amendatory contract to the 1951 contract and places the same federal reclamation law constraints on the Conservancy's ability to provide SJCP water within the Conservancy.

Storage Rights

The Conservancy has water storage rights for 198,110 acre-feet at El Vado reservoir pursuant to State Engineer Permit No. 1690. Although the storage right is for reservoir space and not a water right per se, it is a valuable water asset held by the Conservancy.

In total, the amount of consumptive use available within the boundaries of the Conservancy from surface flows of the Rio Grande is approximately 298,339.4 acre-feet.¹⁴ However, the acreage under permits held by the Conservancy may be greater than land actually irrigated today because the permits have not been fully developed. Thus, development of water use up to permit amounts could increase the Conservancy's water rights assets in the event of an adjudication.¹⁵

Moreover, water rights held by the Conservancy are not subject to the forfeiture and abandonment statutes enforced by the State Engineer against private water right holders. Section 73-17-21 of New Mexico's Conservancy Act provides that "[t]he rights of the district to the waters of the district, or the use thereof, or the land within the district and property owned by it shall not be lost by the district by prescription or by adverse possession, or for nonuse of the waters." The Supreme Court of New Mexico has read Section 73-17-21 to prevent "the loss of the water rights and the loss of the use of the rights."¹⁶ Therefore, the Conservancy has a right to full use of the water under permits No. 1690 and No. 0620. That right is fully vested and water under these permits is assumed to be put to beneficial use as a matter of law.

Maximizing Beneficial Use of Conservancy Water Rights

Although individual water rights holders within the Conservancy may sell their water rights, the Conservancy may not fully divest the water rights it holds for its constituents.¹⁷ However, the Conservancy has the legal authority to engage in water market transfers subject to the limitations posed by the U.S. Bureau of Reclamation or rights of individual water users under state law. Under state law the procedure for water transfers is established by the office of the New Mexico State Engineer. However, the New Mexico Legislature has expressly mandated that allocation and distribution of waters available for irrigation *within Conservancy boundaries* is under the jurisdiction of the Conservancy's board of directors.¹⁸ Furthermore, New Mexico law provides that the Conservancy may rent or lease Conservancy project water acquired under contract for any purpose, provided that the transfer is authorized by federal law or by reclamation contract.¹⁹ Recently, the Conservancy has been investigating methods to maximize beneficial use of its water rights through internal water transfers and external third-party municipal and industrial (M&I) water leases.

A Proposal for Internal Water Transfers: The Conservancy's Water Bank

The Middle Rio Grande Conservancy District's Water Policies Plan recommends that the Conservancy build an "inventory" of Conservancy water rights.²⁰ Because land use has changed dramatically since the Conservancy's inception, water that was once beneficially used after 1907 for irrigation is now being used for other beneficial purposes such as support for riparian habitat or for recreation. The Conservancy currently is inventorying all of these rights in order to make them available for beneficial use within the Conservancy's boundaries. It is the Conservancy's hope that the water bank will facilitate maximum beneficial use by providing a method for efficient allocation and distribution of water for beneficial purposes.

External Water Transfers: Third-Party M&I Water Leases

Within the last few years, the Conservancy and the Bureau of Reclamation have disagreed as to the extent of the Conservancy's authority to enter into voluntary water transfers with surplus SJCP water. Third-party leases of SJCP water are authorized by the Conservancy's reclamation contract subject to the federal contracting officer's approval.²¹ However, a recent dispute over how revenues generated by the third-party water leases are to be credited to the Conservancy's repayment obligation has precluded approval of pending water lease renewals.²² Until the crediting dispute can be resolved, or the Conservancy's debt is retired, the Conservancy appears to be constrained in its efforts to maximize beneficial use of its water rights outside Conservancy boundaries.

Another possible constraint on the Conservancy's ability to enter into third-party lease agreements with its surplus SJCP water is the Bureau of Reclamation's indication that it may require SJCP water users to prepare an environmental assessment before approving any transfers of 80 acre-feet or more.²³ Therefore, SJCP water users may have to fund the assessment process and prove that the Bureau's approval of the transfer will not result in a "finding of significant impact" on the environment.²⁴ Clearly, such a requirement would deter the Conservancy in any future action to maximize beneficial use of its SJCP water through third-party M&I leases.

The Bureau of Reclamation should not discourage the Conservancy from entering into voluntary water transfers. The Conservancy's intent is not to sell all of its water rights and cease its protection of irrigation. Rather, it is "the promotion of the welfare of its constituency by ensuring maximum efficiency in water use while protecting public values in water."²⁵ Consistent with the Conservancy's legal authority to regulate and control use of all of its facilities, the Conservancy's water use increasingly supports such public goods as the riparian ecosystem, recreation habitat, groundwater recharge, and municipal and industrial water use. If Conservancy water rights holders cannot benefit from revenues generated by voluntary water transfers, they have little incentive to conserve or use their surplus rights in the interests of the general

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public. As with any natural resource, water that can be marketed is more valuable to the water right holder, and higher value leads to more efficient use.

Other External and Internal "Beneficial" Uses of Conservancy Water

If Conservancy water rights cannot be lost by non-use, then a host of water applications could be considered "beneficial use," whether or not such applications have traditionally been recognized by the State Engineer Office as beneficial use. The New Mexico Constitution does not enumerate beneficial uses.²⁶ Furthermore, New Mexico case law recognizes that use of water for any useful purpose, including recreation, constitutes beneficial use.²⁷

The New Mexico State Engineer Office requires that any new appropriation of water be acquired by a physical, man-made diversion. The physical diversion requirement has served somewhat of a regulatory function by giving notice to would-be appropriators that a water right has been established in a particular location. In the context of the Conservancy, this function is not necessary because the Conservancy's instream flows would not be a new appropriation of water. Moreover, the Conservancy's right to use water has been in effect and recognized for over 60 years. Since the Conservancy's works divert and allocate its water through the Conservancy's boundaries, a physical diversion requirement for instream beneficial use is duplicative.

Furthermore, the New Mexico Supreme Court has only required a physical diversion for the establishment of an *agricultural* water right. In *State ex rel. Reynolds v. Miranda*,²⁸ the court held that harvesting, and grazing stock on, grass produced by a natural wash did not amount to beneficial use of the water necessary for a water right in New Mexico. The Court's holding turned on the irrigator's *lack of intention to appropriate* the water.

The Conservancy could manifest its intent to beneficially use water in instream flows by determining how much water is available for instream flows, and inventorying its use for that purpose. The State Engineer should not discourage the Conservancy from promulgating instream flows because as long as the Conservancy protects irrigation uses, instream flows are within the public welfare of the state. Instream flows could be used to support

the riparian ecosystem and protect endangered species.²⁹

CONCLUSION

Since its inception, the Conservancy has had to manage not only drainage, flood control, and irrigation, but a host of secondary services as well. Conservancy facilities provide wildlife habitat, recreation, open space, and a peaceful respite for urban dwellers. Presently, the Conservancy is under increasing pressure to support these non-economic benefits that it holds "in trust" for the people of the middle valley. Clearly, the Conservancy cannot protect the interests of the public at large if it does not have the financial resources to do so. Until recently, the Conservancy has had to settle for being a passive participant in attempts to preserve the ecosystem established on Conservancy land. Before the Conservancy can define its financial commitment to the preservation of aesthetic goals on Conservancy land and with Conservancy water, it must be free to enter into voluntary water transfers of surplus water supplies.

ENDNOTES

1. See N.M. Stat. Ann. Sections 73-14-1 through 73-19-5 (1978 Orig. Pamp.).
2. See, e.g., N.M. Stat. Ann. Sections 73-14-18 through 73-14-32 (1978 Orig. Pamp.).
3. Although demands for water use typically associated with urbanization are the most abundant, water for agricultural use is also in demand by individuals who reclaim previously retired land within the Conservancy's boundaries.
4. Sheehan, Sheehan and Stelzner, P.A., et al., "MRGCD Water Policies Plan" (April 1993).
5. Over the last five years there have been a number of federal and state studies that have attempted to arrive at a biological management plan to preserve the fragile ecosystem of the middle Rio Grande riverine environment. See, e.g., Senator Pete Domenici's Bosque Task Force Biological Plan, in cooperation with U.S. Fish and Wildlife Service (1993); and Governor Bruce King's Rio Grande Bos-

- que Task Force, Recommendation to the State Legislature (October 1994).
6. See Bureau of Reclamation Contract with the Middle Rio Grande Conservancy District, Contract No. 178r-423 (1951) [hereafter referred to as “Bureau of Reclamation Contract”].
 7. Id. at Article 20.
 8. Arguably, the ownership interest is a security interest only:

The Bureau's interest in the District's water management is limited to the purposes it is created to serve—securing debt and achievement of the purposes of reclamation . . . the United States is a trustee of the individuals and the [District] with the sole goal of protecting the Bureau's security interests. When the loans are retired, the trust can and should end.

Sheehan, et. al. supra note 4, at 70. See also, Holguin v. Elephant Butte Irrigation District, 91 N.M. 398, 575 P.2d 88 (1977) (under Reclamation Act, United States is not owner of water, but government is carrier or trustee for owners); and Ickes v. Fox, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937)(the United States is only a carrier or trustee for the owners of the water).
 9. Bureau of Reclamation Contract, supra note 6, at Article 32.
 10. Id. at Article 34.
 11. Id. at Article 28, which provides:

The District may, subject to approval of the [federal] Contracting Officer, or the Contracting Officer may to the extent now or hereafter authorized by law and insofar as can be done without adversely affecting Indian rights, contract for the disposal of a part of the project water supply for any use not detrimental to the primary uses herein specified...
 12. An application by the District to change the point of diversion for 80,785 acres of irrigated land with perfected water rights was granted on January 26, 1931, under Permit No. 0620. This acreage can be used as an estimate of the outside limits of the amount of all pre-existing water rights to which the District delivers water, whether pre-1907 or post-1907.
 13. See Preamble to 1963 Amendment No. 4, Bureau of Reclamation Contract, supra note 6.
 14. Sheehan, et. al., supra note 4, at 52, Table 4.1. Permitted acres were converted to acre-feet/year using 2.1 acre-feet/acre. The 2.1 acre-feet/acre ratio is the State Engineer's current estimated average consumptive use in the region, used for quantifying applications to change place and/or purpose of water use.
 15. Since “beneficial use” is the basis, amount and limit of a water right in New Mexico, the Conservancy can further guarantee the protection of its water rights by promoting maximum beneficial use of its permitted rights.
 16. City of Raton v. Vermejo Conservancy District, 101 N.M. 95, 100, 678 P.2d 1170, 1174 (1984) (emphasis by the Court).
 17. N.M. Stat. Ann. Section 73-14-47(J) provides that the Conservancy may not “permanently sell, lease, assign, permit or otherwise part with the control of the district use of the water thereof . . .” (1978 Orig. Pamp).
 18. See N.M. Stat. Ann. Section 73-14-50 (1978 Orig. Pamp.).
 19. See N.M. Stat. Ann. Section 73-18-15 (1978 Orig. Pamp).
 20. See Sheehan, et al., supra note 4, at 73.
 21. See text accompanying note 11, supra.
 22. The refusal to grant pending third-party water leases is a decision made by local staff of the Bureau of Reclamation, who have indicated that until the District agrees with a new crediting policy of the Bureau, no third-party leases will be approved. That position is interesting considering that U.S. Bureau of Reclamation policy is to approve voluntary water transfers if they are legal under reclamation law, project contracts, and state law. See Department of Interior Principles to Guide Bureau Review and Approval of Water Transfer Requests, December 16, 1988.
 23. The Bureau has indicated that a transfer of 80 acre-feet or more of SJCP water may constitute a “major federal action” subject to National Environmental Policy Act (NEPA) guidelines. Telephone conversation with Bu-

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reau staff member, Salt Lake City, Utah, October 25, 1994.

24. See National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. Sections 4321, 4331-4335, 4341-4347. Since SJCP water received federal approval for irrigation and other beneficial uses under applicable federal regulations at the time, it seems to make little sense that the subsequent use of the project water would constitute a “major federal action” subject to renewed NEPA oversight.
25. Sheehan, et al., supra note 4, at 72.
26. N.M. Const. art XVI, sec. 3 states only that “[b]eneficial use shall be the basis, the measure and the limit of the right to the use of the water.”
27. See, e.g., State ex rel. Erickson v. McClean, 62 N.M. 264, 308 P.2d 983 (1957) (if water use is for a useful purpose, then it is beneficial use).
28. 83 N.M. 443, 493 P.2d 409 (1972).
29. For example, the U.S. Fish and Wildlife Service claims that one reason the silvery minnow is endangered is because of depletions in the surface flow of the Rio Grande.