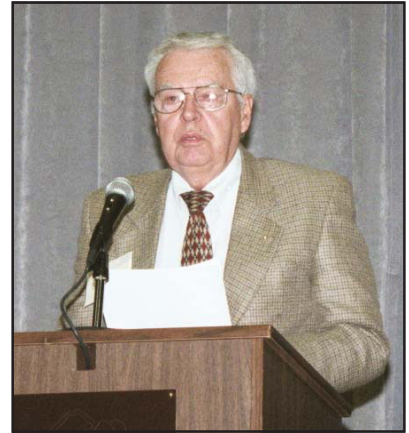


**P.R. (Bob) Grant, Jr.** is a consulting geologist with an office in Albuquerque specializing in the evaluation of New Mexico's water and energy resources. He has addressed these subjects for numerous clients, in professional publications, and in many appearances before professional organizations, state legislative bodies, civic groups, legal hearings, White House Forums, and U.S. Senate Committees. A graduate of the University of New Mexico, he has served in the New Mexico Legislature, was Chair of the state's Energy Research and Development Committee in the early 1980s, and was a member of the New Mexico State Investment Council in the early 1990s. He is a Fellow of the Geological Society of America, a member of the American Association of Petroleum Geologists, state and local geological societies, and serves on a number of boards and commissions. His biographical sketch has appeared in *Who's Who in the West*, *Who's Who in Frontiers of Science and Technology*, *Who's Who in Finance and Industry*, *Who's Who in Science and Engineering*, and *Who's Who in the World*. In 1999 Bob was appointed to a six-year term on the New Mexico Interstate Stream Commission.



**Sue Wilson Beffort** is serving her second term in the New Mexico Legislature. She currently is a member of the Senate Finance Committee as well as the interim Legislative Finance, Water and Natural Resources, and Tax and Revenue Stabilization committees. Sue is most noted for her initiatives in the areas of tax and water reform. In the 2002 legislative session, she was the Senate sponsor (Representative Pauline Gubbels was the House sponsor) of water banking legislation, which is limited to the Lower Pecos River only. However, this may serve as an exciting model for statewide adaptation. She has been a proponent of attaching tax credits to upgrading irrigation technology to encourage best practice techniques, such as drip farming, to conserve water and expand the reach of agricultural production. As a major proponent of watershed management and riparian restoration, she is demonstrating that forest thinning is not only an important tool to protect against catastrophic forest fires, but also a valuable technique to retain additional water in our state. Sue was a small business owner for 25 years and still maintains her Outplacement Division for the service of downsizing companies and assisting dislocated workers.



## WATER BANKING: PANACEA OR PLACEBO?

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In speaking of the futility of certain actions, Winston Churchill once said: "It's like a man standing in a bucket and trying to lift himself up by the handle." That's somewhat the position we find ourselves in today with regard to our water dilemmas. We're standing in that bucket, grasping its handle and pulling. But there's little hope of lifting ourselves up and resolving our water problems without stepping outside of that confining bucket. Trying to balance all the assaults on our state's water against a prosperous future that **must** include enough of this precious resource for all of us may be futile as well as very expensive if we don't take a serious look at changing some of the ways we do our water business.

Who would have given serious consideration a few years ago that rough fish and minnows, many of which state and federal agencies spent a great deal of time, money and effort to eradicate, would now control New Mexico's economic fate?

Who would have thought that meeting river compact requirements that were agreed to many decades ago, when New Mexico's financial destiny relied almost wholly on farming and ranching, would seriously impact our ability to grow in the sophisticated technology based economy of today?

Couple these with an all-encompassing, devastating and potentially extended drought, the desire of others outside our borders to stick their straw in our glass, and looming calls on our rivers, and there's little doubt that there's trouble—not only in river cities, but throughout the state.

Nostalgia is a wistful longing for the past, which is something we sometimes wish for. We often think of earlier times being easier, simpler and less complicated. But would any of us admit that we'd really love to turn back the clock and do things now the way we did things a hundred years ago? I doubt it.

And yet, that's almost precisely how we currently manage our water. Virtually all of New Mexico's water laws were promulgated in territorial days and ratified for the most part in the state's constitution in 1912. Water laws have changed little since then, but society certainly has. The 1920 census, the first after statehood, had 327,301 persons living here. We're approaching 2,000,000 now. Bernalillo county's 23,606 people then made it the state's largest, but by less than 700 more than San Miguel county. The state was a rural community then, folks, and most of the ways we do our water business haven't changed since then.

Don't misunderstand. No responsible person, and certainly not me, is suggesting wholesale dramatic changes in our water laws, especially as they pertain to the private property elements of a water right. But, I can't overemphasize that to meet future needs of our citizens and sustaining or improving the economic vitality of the state, **providing new uses from New Mexico's fully appropriated water supplies will require transfer of water from existing uses.**

And that primarily means agriculture. Secondly it includes new and effective controls on and management of reservoir evaporation, phreatophytes and watersheds.

Our most recent and reliable data on water consumption in New Mexico says that in 1995 we depleted, consumed and removed from the hydrologic system some 2,762,000 acre-feet of water, about equally divided between surface and groundwater. If you live in the High Plains of eastern New Mexico, your source of water is virtually 100 percent from the underground Ogallala aquifer. On the other hand, if you live in the San Juan Basin, your water supply is almost entirely from surface streams. The rest of New Mexico uses more equal proportions of surface and groundwater.

Of this more or less considerable volume of water, irrigated agriculture's share is 68 percent or 1,880,000 acre-feet. Next on the scale of major consumers of New Mexico water is reservoir evaporation, accounting for the loss of 521,500 acre-feet annually, or 19 percent of the total, almost half of which is from Elephant Butte lake. Municipal, urban and public water supplies use a little more than 7 percent of our water, or about 198,400 acre-feet. The remaining 6 percent, in order of declining consumption, is divided among commercial uses, power plants, mining, livestock, domestic wells and industrial applications.

This is a preamble to the subject of this presentation, water banking, and why this subject should be given serious consideration as a mitigating factor in the dynamics of New Mexico water management.

Generally, the concept of water banking is analogous to financial banks. Those with water that is surplus to their needs deposit it in an approved bank where it is lent to others for a fee which is returned to the depositor after administrative costs are recovered. Although many western states, including New Mexico, have statutory provisions to lease, sell and transfer water, the process is usually lengthy, complicated, expensive and the results are uncertain.

With the availability of water and access to it becoming the most critical element in New Mexico's economic future, a more sophisticated and speedy process to "move" water from where it is to where it's needed is imperative.

Achieving a sustainable supply of water that meets the current and future needs of all our citizens relies on making the best use of all the water that is available to us. It will require the development and application of innovative technologies for water storage and conservation, managing use and demand, and increased reliance on water marketing. All within the framework of the least disruption to existing institutional water-related privileges and rights. Legally constituted water banks administered under rules and regulations promulgated by the State Engineer would:

- Provide a legal mechanism for conserving and salvaging water that is otherwise surplus to customary agricultural and other beneficial uses, creating "new water" for other uses while preserving the ownership of the water right.
- Make "new water" available for reallocation and application to expanded conventional needs as well as to higher, better, more economical and financially rewarding uses through facilitated voluntary transactions and sharing profits from these arrangements with the water rights owner/depositor.
- Provide incentives to conserve water as well as economic benefits and reassurance to those holding valid water rights and permits that their conserved water will not be forfeited for non use.
- Ensure that banked water is "wet water" and that non-impairment of the water rights of others is a prerequisite to depositing and withdrawing banked water.
- Avoid expensive, drawn-out, confrontational and contentious processes that would accompany efforts to dramatically change existing water laws and rights.

Water for a bank is derived from conserving it or giving up its use. Deposits could include adjudicated or licensed water rights, irrigation project water, water conserved through improvements in irrigation practices, water temporarily out of use because of system upgrades or lack of demand, water salvaged from evaporation and, perhaps, portions of Indian water rights. The bank not only provides a safe harbor for deposited water, protecting it from forfeiture for non-

use, it also provides users and lenders with a convenient central clearing house for information on water availabilities, costs, origin, destination, and bookkeeping.

Many would say that New Mexico already has effective water markets. Certainly, the buying, selling, leasing and transferring of water rights has been an ongoing process in the state's water world literally for centuries. In more recent times, the transfer of a water right, or a change in its use or to a new point of diversion requires approval by the State Engineer. In granting his approval, the State Engineer must determine that no other water right will be impaired and the change must not be detrimental to the conservation of water or the public welfare of the state. Each request must be evaluated individually and even applications on relatively non controversial transfers may take months to move through the system. Pending requests in the Office of the State Engineer have been in the thousands until recently when the legislature made additional funds available to the State Engineer to reduce the backlog.

One of the primary missions of a water bank is to speed up the approval process. In order to do that, the State Engineer, who is responsible for promulgating the rules under which a bank will operate, will have to establish presumptive factors that will serve as the basis for approval of transaction agreements and the administration of transfers. Some of these presumptive factors would include return flows and consumptive use; transit losses and gains; evaporation losses; and effects of groundwater diversions on surface flows. Implicit is that there will be no impairment of other water rights, no depletion of the stream system beyond that which has historically occurred, compliance with state law and, perhaps, restrictions to operating within the same stream system, watershed or underground water basin.

Looked at another way, establishing water banks achieves a process to allow legally determined water to be transferred from senior to junior users on a streamlined basis without extended hearings, and provides a market mechanism to easily move water from less valuable to more valuable economic uses. Ancillary benefits include greater opportunities to meet compact requirements and endangered species demands from banked water, as well as mitigating drought conditions.

Where will banked water come from? Most of it will come from those who have the water: the

irrigation and conservancy districts. Recent decisions in state courts have determined that, at least in the Carlsbad Irrigation District, the farmers themselves own the water right appurtenant to their irrigated land. I wouldn't be surprised that this precedent won't hold for other irrigation districts. In the Middle Rio Grande Conservancy District, those farmers with pre-1907 water rights own them and can pretty well do what they want with them, independent of the district. The district itself, that manages all the irrigation water within its boundaries, does not own water rights. It obtains its water through permits with the Office of the State Engineer.

In any event, individual farmers or the districts themselves could elect to place water in a bank authorized by the district in compliance with a water banking law. Both Elephant Butte Irrigation District and the Middle Rio Grande Conservancy District have established pro-forma water banks for the purpose of leasing water to other entities that are not farmers. Although they have an undisputed right to transfer water within their boundaries from one irrigation purpose to another, it is not clear that this right extends to making water available to non irrigation users without approval from the state engineer and, perhaps, the federal government.

Further, most of the banked water will be derived through conserving water or fallowing land. Today, most of the rules regulating conserved irrigation water deprive the conserving farmer from an opportunity to benefit from it. His option is to place it in a state engineer approved conservation pool, which basically does nothing more than protect the farmer from the onerous "use it or lose it" forfeiture rule, or redirect it to another irrigation use. Conservation pools would be a good place to establish water banks by giving them the authority to move water to other places and uses and be paid for it.

Let's talk about conservation for a minute. About nine years ago my city of Albuquerque suddenly and dramatically became aware that it was mining its aquifer beneath the city. Conservation became a byword in 1995 when the city withdrew 135,000 acre-feet from the ground to serve its citizens. This year we'll produce about 110,500 acre-feet, a reduction or conservation of 24,500 acre-feet or 18 percent less than 8 years ago while population increased about 5 percent. Albuquerque isn't doing this to apply the saved water elsewhere, it's simply to extend the life of

the aquifer while the city prepares to begin withdrawing most of its supply from the Rio Grande, using its San Juan/Chama contract water and certain pre-1907 water rights it has purchased.

By the way, half of the water Albuquerque produces or diverts from the aquifer is consumed and the other half, discharged from the city's wastewater treatment plant, becomes one of the largest return flows in the Rio Grande, all of which is "new" water available for downstream irrigators and compact compliance, that wasn't in the river in historical times.

If Albuquerque can conserve 18 percent of its water, would this be an unreasonable goal for irrigated agriculture? Conserving 18 percent of the 1,880,000 acre-feet consumed by irrigation annually would hypothetically make available 338,400 acre-feet of water to use elsewhere with water banks. Under current laws, virtually all of that water, about 6 times the demand of an urban center like Albuquerque, would be redistributed to additional irrigated land.

One more example of the benefits of conserved, banked water. How often have we heard it said by those who should know better that Intel is a huge water hog on the Rio Grande? Folks, if we only had more animals like them! In the six years from 1996 when their water wells began production, through 2001, Intel has produced 23,867 acre-feet of water from its wells, consumed 3,920 acre-feet, and has returned to the Rio Grande through Albuquerque's water treatment plant 19,948 acre-feet. That's an average diversion of 3,978 acre-feet, consumption of 654 acre-feet, and a return flow of 3,325 acre-feet each year.

With 654 acre-feet of water, Intel directly provides jobs for 5,200 New Mexicans with a payroll of \$332,000,000, averaging \$46,000 per year. They are New Mexico's largest corporate income tax payer. They are currently constructing a \$2 billion expansion that will provide 500 to 1,000 new jobs and, they state on their web site, the additional water required will be negligible. Tell me where else we can get more economic bang for such a small amount of water. Water banks have the potential to alleviate the fears of business entities considering our state that immediately usable start up water is not available.

Another element of water banks that has been suggested as a limiting factor is storage of banked water. Not all bank water uses require storage, but those that do may find it in reservoirs such as Abiquiu where, as Albuquerque drains its San Juan/Chama water stored there to meet the requirements of its new

Rio Grande diversion facilities, space might be available.

Further, it is likely that groundwater storage will become a significant water supply augmentation strategy which may be a strategic element of successful water banking. A major consideration in this regard is that recharge and water storage in depleted aquifers in, for instance, the Middle Rio Grande region, that were full before river compacts were ratified may avoid compact prohibitions against new on-stream reservoirs, since replenishment simply restores them to pre-compact conditions.

Thank you for the opportunity to present what appears to be a workable plan to derive additional benefits from a limited water supply. Water banking may not be the panacea that resolves all our water problems, but it is far from a placebo that does nothing.

11/07/02 DRAFT

**LOWER PECOS RIVER BASIN WATER BANKING REGULATIONS**

RULE 1 ISSUING AGENCY: Office of the State Engineer

RULE 2 PREFACE: These regulations are adopted by the State Engineer upon the recommendation of the Interstate Stream Commission, pursuant to the authorities in NMSA §72-1-2.3 (Supp. 2002) and other authorities for the administration of water. These regulations are adopted in furtherance of the efforts of the State of New Mexico to achieve long-term compliance with its obligations under the Pecos River Compact, NMSA §§72-15-19 *et. seq.*, and the Decree and Amended Decree in *Texas v. New Mexico*, 485 U.S. 388 (1987, 1988). These regulations are adopted in order to facilitate water right transactions between water users for the purposes of Replacement of Stream Depletions which transactions will enhance the ability of the State of New Mexico to comply with the Compact and Decree.

RULE 3 SCOPE: These regulations shall apply to the establishment and operation of water banks established for purposes of compliance with the Pecos River Compact by irrigation districts, conservancy districts, artesian conservancy districts, community ditches, acequias, or water users' associations located in the Lower Pecos river basin below Fort Sumner Dam. These regulations are adopted solely for the purpose of facilitating temporary sources of water (Replacement Water) to be obtained to address Stream Depletions caused by the temporary continued use of water rights junior to the Compact Administration Date determined by the State Engineer in the accompanying Priority Administration regulations. These regulations shall not apply to water banks established by acequias or community ditches pursuant to NMSA §\_\_\_\_\_.

RULE 4 STATUTORY AUTHORITY: These regulations are established pursuant to the authorities set forth in N.M.S.A. §§\_\_\_ (H.B. 421); 72-1-2; 72-2-8; 72-2-9; 72-4-20; 72-5-3 through 5; 72-5-23; 72-5-24; 72-5-28(G) and (H); 72-6-1 through 7; 72-12-1; 72-12-2; 72-12-7; 72-12-8(D); 72-12-24; 72-13-2; 72-13-4; 72-15-19 *et. seq.*; and *Texas v. New Mexico*, 485 U.S. 388 (1987, 1988).

RULE 5 DURATION: These regulations are effective through December 31, 2005.

RULE 6 EFFECTIVE DATE: These regulations are effective as of \_\_\_\_\_.

RULE 7 CONSTRUCTION: These regulations shall be construed consistent with and subject to the authorities of the State Engineer for the administration of water in the State of New Mexico, the Pecos River Compact, and the Decree and Amended Decree of the United States Supreme Court in *Texas v. New Mexico*. These regulations shall not be construed as imposing any limitation on the authority of the State Engineer to administer priorities of water rights, to approve changes of water rights, to permit water rights, or to order the curtailment in whole or in part of the use of water under any water right.

RULE 8 OBJECTIVE: The objective of these regulations is to establish a framework for the temporary accrual, pooling, exchange, assignment or lease of water rights for the purpose of Replacement of Stream Depletions, without the necessity of formal and time-consuming proceedings before the State Engineer. In furtherance of this objective, these regulations are designed to assure other water rights will not be impaired, water in the Basin will not be depleted above that level that would have occurred in the absence of the particular transaction, transactions occur in compliance with state law, and transactions occur within the same stream system or underground water

## Water Banking: Panacea or Placebo?

source. The State Engineer finds that achieving this objective will facilitate compliance by the State of New Mexico with the Pecos River Compact by furthering the application of the principle of prior appropriation within the Basin.

### RULE 9 AREA OF APPLICABILITY:

- A. These regulations do not apply outside the Lower Pecos river basin below Fort Sumner Dam.
- B. These regulations apply to Pecos River Basin surface and groundwater tributary to the Pecos River below Sumner Dam to the state line, including specifically the Roswell-Artesia and Carlsbad groundwater basins.
- C. These regulations do not apply to transfers of water for use outside the state of New Mexico.

### RULE 10 DEFINITIONS: Unless defined below or in a specific section of these regulations, all other words used herein shall be given their customary and accepted meanings.

- A. **Augmentation of River Flow:** Bankable Water delivered to the Pecos River in order to increase the flow thereof.
- B. **Bankable Water:** Historic Consumptive Use Credits, water stored in reservoirs, or stored water under Article 5A of Chapter 72 NMSA 1978, held by a Water Right Holder, which a Water Bank determines is eligible for Deposit.
- C. **Basin:** The hydrologically connected surface and groundwater area bounded by Fort Sumner Dam in the north and the New Mexico-Texas state line in the south, including specifically the Roswell-Artesia and Carlsbad Basins.
- D. **Compact Administration Date:** A date determined by the State Engineer pursuant to the Administrative Regulations for the Pecos River Basin. All use of water rights in the Basin junior to the Compact Administration Date shall be curtailed pursuant to said regulations.
- E. **Charter:** The evidence of recognition by the Interstate Stream Commission of a Water Bank pursuant to NMSA 72-1-2.3 (Supp. 2002).
- F. **Deposit:** A written agreement between a Water Bank and a Depositor, by which the Depositor makes available Bankable Water to the Water Bank for accrual and pooling for lease, assignment, or transfer to Purchasers.
- G. **Depositor:** The owner, lessee or contractee of Bankable Water located within the geographic boundaries of a Water Bank who has entered into a Deposit with a Water Bank. A Water Bank may be a Depositor.
- H. **Deposit Account:** The amount of Bankable Water a Depositor places in a Water Bank.
- I. **Historic Consumptive Use Credit:** The amount of water actually consumed on an average annual basis for the previous five years pursuant to a Valid Existing Surface or

Groundwater Right with a Priority Date senior to the Compact Administration Date, made available on an annual basis as a result of fallowing the land irrigated under such right for an entire irrigation season.

- J. **Measuring Devices:** Accurate and continuous gauging devices, as required by the State Engineer. Measuring devices will normally be required at the point of diversion, at all downstream diversions throughout an applicable section of stream channel, at appropriate groundwater locations and at the terminus of the water use.
- K. **Priority Date:** The date reflected on State Engineer permits or licenses, or on accepted offers of judgment within the pending adjudication in *State ex rel Reynolds v. Lewis*, No. 20294, 22600 (Chavez County 1956) (consolidated), as the date at which a water right came into being, either by application, in the case of post-1907 rights, or by beneficial use in the case of pre-1907 rights.
- L. **Priority Administration Regulations:** Regulations promulgated by the State Engineer pursuant to which water right holders with priority dates junior to a Compact Administration Date will be cut off, unless they obtain Replacement Water.
- M. **Purchaser:** A holder of a water right which is junior to the Compact Administration Date determined pursuant to the Priority Administration Regulations who seeks Replacement Water to allow continued use of the water right, or an entity who seeks to augment the flows of a surface water body for purposes of compliance with Interstate Compacts or State or Federal law, and who enters into a Transaction with a Depositor through a Water Bank. A Water Bank may be a Purchaser.
- N. **Replacement Water:** Water under a Valid Existing Surface or Groundwater Right required by the State Engineer to be provided as a condition of use of any water right with a priority date junior to the Compact Administration Date. The amount of Replacement Water shall be equal to Stream Depletions. Replacement Water may be provided through a Water Bank.
- O. **Stream Depletions:** Total depletions, regardless of the time of such depletion in relation to the time of the diversion, to the Pecos River at the New Mexico-Texas state line caused by diversions of tributary ground or surface water in the Pecos River Basin in New Mexico under a Valid Existing Surface or Groundwater Right. For purposes of these regulations, Stream Depletions shall be deemed to occur, and shall be offset, in the same year in which the diversion is made. The State Engineer will calculate Stream Depletions on an average annual basis, gearing these calculations to the Texas-New Mexico State Line.
- P. **Transaction Agreement:** A lease, assignment or option agreement between a Depositor and a Purchaser pursuant to which the Depositor shall forgo the use of and/or make available to the Purchaser water rights for a time certain for the purposes of Replacement of Stream Depletions or the Augmentation of River Flow.
- Q. **Valid Existing Surface or Groundwater Right:** A surface or groundwater water right diverting water from the Pecos River Basin recognized by permit or license issued from the State Engineer Office, or by accepted offers of judgment within the pending adjudica-



## Water Banking: Panacea or Placebo?

tion in *State ex rel Reynolds v. Lewis*, No. 20294, 22600 (Chavez County 1956) (consolidated).

- R. **Water Bank:** A plan chartered by the Interstate Stream Commission pursuant to these regulations to accept for deposit, accrual and pooling Deposited Water for lease, assignment, or transfer to persons, entities or other Water Banks for the purpose of Replacement of Stream Depletions or the Augmentation of River Flow.
- S. **Water Right Holder:** The holder of any Valid Existing Surface or Groundwater Right.

### RULE 11 CHARTER:

#### A. *Application for Charter.*

- (1) Any irrigation district, conservancy district, artesian conservancy district, community ditch, acequia, or water users' association located in whole or in part in the Basin may apply to the Interstate Stream Commission for a charter to operate a Water Bank.
- (2) All applications for a charter shall be made on a form provided by the Interstate Stream Commission, and shall be sufficiently complete so as to allow the Interstate Stream Commission to determine whether the proposed Water Bank is eligible to operate pursuant to these regulations, and whether the operations of the Water Bank may reasonably be anticipated to conform to these regulations. Any such application shall certify that the application and proposed charter have been duly adopted by the applicable entity pursuant to the regulations of governance of such entity.
- (3) All applications for a charter shall include a description of the proposed geographic boundaries of the Water Bank.
- (4) All applications for a charter shall set forth procedures by which the proposed Water Bank will provide notice and an opportunity for hearing to any Water Right Holder whose Valid Existing Surface or Groundwater Right may be impaired by any proposed Transaction Agreement.

#### B. *Procedure for Review of Application.*

- (1) The Interstate Stream Commission shall establish an application fee.
- (2) Upon receipt of a complete application, the Interstate Stream Commission shall refer the application to the Office of the State Engineer for review and comment. The Office of the State Engineer may recommend presumptive factors, limitations on operations or other terms and conditions that will facilitate banking transactions in compliance with these regulations.
- (3) Within \_\_\_ days from the receipt of a complete application, the Interstate Stream Commission shall approve, deny, or approve on terms and conditions an application for a Water Bank charter. The decision of the Interstate Stream Commission

shall be the final agency action, and shall be in writing.

- (4) Upon issuance of a charter, a Water Bank may conduct banking transactions consistent with these Regulations.
- (5) No charter shall be approved which allows for water to be transferred by means of the Water Bank for any purposes other than obtaining Replacement Water to address Stream Depletions caused by temporarily continuing to use water rights that are junior to the Compact Administration Date, or Augmentation of River Flow.

C. *Termination.* The charter for any Water Bank shall terminate on December 31, 2005.

## RULE 12 BANKING TRANSACTIONS:

A. *Deposit.* A Deposit shall provide or be based upon, at a minimum, the following:

- (1) The payment by the Depositor to the Water Bank of any application and/or posting fees that may be required by the Bank.
- (2) Authorization by the Depositor for the Water Bank to advertise and market the Bankable Water placed into the Deposit Account.
- (3) The Depositor's agreement that the Water Bank shall have the exclusive right to market, accrue, pool, exchange, assign or lease deposited water on behalf of the Depositor for Offset of Stream Depletions or Augmentation of River Flow purposes for the term of the Deposit, and that the Depositor shall not independently market, accrue, pool, exchange, assign or lease the deposited water during the time the Deposit is in effect.
- (4) The written agreement that the owner or operator of any facility from which water will be released or delivered to a Purchaser has approved such use of water and will properly account for the water in the facility and cooperate in regulating its delivery.
- (5) If the Deposit is of water requiring the use of federal facilities, a contract with the United States for such use, if necessary.
- (6) An affidavit by the Depositor, containing a description of the Bankable Water, including without limitation the following:
  - i. Proof of ownership, lease or contract that includes the right to use and control the disposition of the water.
  - ii. The amount and type of water that will be deposited.
  - iii. A description of the point of diversion, place of storage and historic place of use of the water for the previous five years, with meter readings where they exist. Sufficient descriptions may include maps, legal descriptions, and/or

## Water Banking: Panacea or Placebo?

aerial photographs.

- iv. A quantification of the Historic Consumptive Use Credits that will be deposited.
- (7) In the case of Historic Consumptive Use Credits, deposit of all Valid Existing Surface or Groundwater Rights used upon or appurtenant to the land being fallowed, and certification by the Depositor that land fallowed in order to make Historic Consumptive Use Credits available will not be re-irrigated in the same irrigation season, from any source.
  - (8) Certification that Measuring Devices are or will be installed.
  - (9) Anticipated terms that may apply to the temporary accrual, pooling, exchange, assignment or lease of the Bankable Water, include, but are not limited to:
    - i. Applicable time frames, parameters and/or limitations for and on the use of the water.
    - ii. Where applicable, the minimum bid price the Depositor will accept for the water.
    - iii. The minimum amount of stored water or Historic Consumptive Use Credits the Depositor is willing to allow the Water Bank to accrue, pool, exchange, assign or lease.
  - iv. Contact information, including name, address, phone number and e-mail address (if available).
  - v. Any other relevant terms or documentation requested or deemed necessary by the Water Bank and the Depositor.
- B. *Publication.*
- (1) Upon finalization of a Deposit, the Water Bank shall list or market the availability of the Bankable Water. Listings of availability may also be available at the offices of the Interstate Stream Commission within the Basin, and on or linked to the Interstate Stream Commission's web site.
  - (2) The listing shall include, at a minimum, the minimum bid price, procedures for bid acceptance, the amount of water available, the stored location of the water, the point of diversion and place of use, and the historic type of use.
- C. *Accrual, Pooling, Exchange.* A Water Bank may, if appropriate and practicable, accrue, pool or exchange Deposits for purposes of making water available to Purchasers; provided, however, that Historic Consumptive Use Credits shall not be carried over from year-to-year.
- D. *Transaction Agreement.* Upon acceptance of a bid by a Depositor, the Depositor and Purchaser shall enter into a Transaction Agreement. No Transaction Agreement shall extend or be effective beyond December 31, 2005. Transaction Agreements shall only be

for the purposes of Offset of Stream Depletions. All Transaction Agreements shall not impair other water rights; not deplete water in the system above the level that would have occurred in the absence of the transaction; comply with state law; and be within the same stream system or underground water source. Transaction agreements for the purpose of Offset of Stream Depletions may not allow an increase in water use or diversion above the Purchaser's Historical Use, or a change in the Purchaser's Place of Use, Point of Diversion or Purpose of Use. The Transaction Agreement shall describe the transaction in such terms as may be established by the Water Bank, but shall include, at a minimum, the following:

- (1) The amount of water;
- (2) The type of use;
- (3) The point of diversion;
- (4) The place of use and, if applicable, the number of acres to be irrigated;
- (5) The proposed time of use;
- (6) Provision for adequate Measuring Devices;
- (7) Certification that any land fallowed for providing Historic Consumptive Use Credits shall not be re-irrigated in the same irrigation season;
- (8) Certification that the Purchaser is using the water for replacement of water rights cut off by priority administration;
- (9) A statement that the Purchaser is aware that replacement of water through water banking is a temporary expedient, and that the Purchaser intends to seek actively a permanent resolution of water supply concerns;
- (10) If the Transaction Agreement requires delivery of water into a different distribution system, the consent of the owner or operator of the receiving facility or system, including any terms or conditions related to the use of such facility or system.

E. *Approval of Intra-Water Bank Transaction Agreement.* For a transaction in which the Depositor and the Purchaser are both located within the geographic boundaries of a Water Bank, the proposed Transaction Agreement shall be reviewed and approved by the Water Bank. The Water Bank may condition its approval upon terms and conditions necessary for implementing the Transaction Agreement. Such terms and conditions shall be consistent with the terms and conditions of the Water Bank's Charter, and shall include any necessary and/or desirable limitations upon the time, place or type of use of the water made available through the Water Bank, or other terms and conditions as deemed necessary, including dry-up provisions where applicable.

F. *Approval of Transactions Where the Purchaser is Outside the Geographic Boundaries of the Water Bank.* For a transaction in which the Purchaser is located outside the geographic boundaries of a Water Bank, the proposed Transaction Agreement shall be

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reviewed and approved by the Interstate Stream Commission. The ISC may condition its approval upon terms and conditions necessary for implementing the Transaction Agreement. Such terms and conditions shall be consistent with the Water Bank's Charter, and shall include any necessary and/or desirable limitations upon the time, place or type of use of the water made available through the Water Bank, or other terms and conditions as deemed necessary, including dry-up provisions where applicable. The ISC shall not approve a Transaction where the Purchaser is outside the geographic boundaries of the Water Bank unless the ISC finds that it is not feasible for the Purchaser to obtain water from a more local Water Bank.

### *G. Implementation of Transaction Agreement.*

- (1) Upon approval of a Transaction Agreement, including relevant terms and conditions, the Water Bank may finalize the Transaction Agreement between Depositor and Purchaser.
- (2) A Depositor shall comply with all state and local laws and regulations, and terms and conditions imposed by the Water Bank, regarding land use and vegetation (e.g. weed control).
- (3) A Water Bank may establish and charge sufficient fees to cover administrative costs incurred during the operation of the Transaction Agreement.
- (4) Upon commencement of operations pursuant to a Transaction Agreement, the State Engineer will administer water as set forth under the Transaction Agreement.

**RULE 13 QUANTIFICATION PROCEDURES:** The Interstate Stream Commission may establish by policy presumptive factors that may be included in any Charter and that will be applied by Water Banks and/or the Interstate Stream Commission in approving and developing terms and conditions for the operation of proposed Transaction Agreements. To claim values differing from those established, or with respect to water outside the systems or factors addressed in the policy document, parties to a Transaction Agreement must submit to the approving authority with the proposed Transaction Agreement an adequate historic use analysis or other engineering information sufficient to allow the approving authority to evaluate whether different values may be used with respect to the proposed transaction. Such information shall be submitted to the Interstate Stream Commission for review and approval.

**RULE 14 REPORTING:** A Water Bank shall submit to the State Engineer and the Interstate Stream Commission monthly summaries of the Bank's transactions, including a summary of Deposits and Transaction Agreements.

**RULE 15 ACEQUIA OR COMMUNITY DITCH WATER BANKS:**

- A. An acequia or community ditch may establish a water bank for the purpose of temporarily reallocating water without change of purpose of use or point of diversion to augment the water supplies available for the places of use served by the acequia or community ditch. The acequia or community ditch water bank may make temporary transfers of place of use without formal proceedings before the State Engineer, and water rights placed in the acequia

or community ditch water bank shall not be subject to loss for non-use during the period the rights are placed in the water bank. Acequia or community ditch water banks established pursuant to this rule are not subject to recognition or approval by the Interstate Stream Commission.

- B. The acequia or community ditch shall provide as requested to the State Engineer records of all such transfers, at least annually.
- C. Any transfer undertaken pursuant to the authority of NMSA §72-1-2.3 shall not result in an increase in the rate or volume of diversion, or the actual average historic beneficial use of the water made over the five years immediately prior to the transfer, within the boundaries of the acequia or community ditch.
- D. If any acequia or community ditch water bank desires to approve or enter into transactions with any Purchaser located outside the geographic boundaries of the places of use served by the acequia or community ditch, the acequia or community ditch water bank will become subject to, and must comply with, the full range of these regulations.

**RULE 16 FORFEITURE:** The four-year forfeiture period established by 72-5-28 or 72-12-8 NMSA 1978, shall be tolled for the period of time during which a water right or underground water right is deposited with a Water Bank or an acequia or community ditch water bank.

**RULE 17 ENFORCEMENT:**

- A. The Interstate Stream Commission may enforce the terms of any Water Bank charter or the terms and conditions of any approval of a Transaction Agreement by appropriate order and injunctive relief.
- B. A Water Bank charter and the approval of a Transaction Agreement will be conditioned to allow the Interstate Stream Commission to revoke the charter or cancel the Transaction Agreement if the terms and conditions of the charter or Transaction Agreement are not met or if the actions of the Water Bank, Depositor or Purchaser are not in accordance with such terms and conditions.

**RULE 18 LIBERAL CONSTRUCTION:** These regulations shall be liberally construed to carry out their purpose.

**RULE 19 KNOWLEDGE OF AND COMPLIANCE WITH RELEVANT STATUTES, RULES, REGULATIONS, AND CODES:** It shall be the responsibility of all applicants and permittees to know of and comply with all applicable statutes, rules, regulations, and codes.

**RULE 20 STATE ENGINEER OPTION TO REVISE REGULATIONS:** The State Engineer may modify these regulations as needed to assist in administering 72 NMSA 1978. Any major revision to these regulations shall be duly published and presented for public comment. Removal of a regulation or a section of these regulations, whether by a court or by the State Engineer, shall not affect the validity of the remaining regulations.