Proposal for an Enhanced Colorado Water Bank[1]

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Introduction

To promote needed flexibility in the use of water rights, Colorado has been experimenting for many years with temporary transfers to additional consumptive and nonconsumptive uses. Interest in facilitating streamlined, short-term transactions has intensified with recognition in the Colorado Water Plan (Water Plan) that, without further changes, growing water demands associated primarily with population growth, especially in the Colorado Front Range, are likely to be largely met by widespread purchases of irrigation water rights. The Water Plan concluded that this type of permanent transfer to urban and commercial uses could weaken Colorado's agricultural sector and related rural economies. In response, the Water Plan encourages the development of more and better alternative transfer methods (ATMs) under which at least some of the anticipated new water demands could be met through creative, temporary uses of irrigation water rights that would remain in their original ownership.

We propose an enhanced Colorado Water Bank that would build on the existing mechanisms under Colorado law and add the flexibility and structure necessary to achieve the goals articulated in the Water Plan. A water bank is intended to provide an institutionalized process for facilitating the transfer of all or a portion of an existing water right to other uses. Just like financial institutions, water banks can serve as a repository for water rights not needed at present. Water users in search of additional water can take out a loan of the necessary rights in return for payments to the owner. Because these transactions involve water rights rather than money, however, the bank must also be able to quantify the amount of water available under the deposited right (based on its historical use) and ensure that this water can be made physically and legally available to the borrower without material injury to other water rights. For the bank to be successful and attractive to depositors and borrowers, it must be able to manage these transactions in a timely and cost-effective manner.

Colorado's existing water bank program is intended to accomplish exactly this objective. The legislative statement of purpose is consistent with the stated goals of the Water Plan:

[1] This proposal is drawn from a more detailed white paper, *An Enhanced Water Bank for Colorado*, available from the Getches-Wilkinson Center for Natural Resources, Energy and Environment, University of Colorado (GWC). Detailed support and citations for statements made in this proposal can be found in that document and are not repeated here.

> to simplify and improve the approval of water leases, loans, and exchanges, including interruptible supply agreements, of stored water within each river basin, reduce the costs associated with such transactions, and increase the availability of water-related information. It is also the purpose of the water banks to assist farmers and ranchers by developing a mechanism to realize the value of their water rights assets without forcing the permanent severance of those water rights from the land.[2]

Despite its intention to encourage temporary changes of water uses, this existing water bank authority has only been used in the Arkansas, and even there, no transactions have ever occurred. The restriction to stored water and uncertainties in the review and approval process have been cited as barriers to the utility of this program. Drawing on the experience gained since this initial effort, the existing Colorado water bank program can be enhanced and strengthened to achieve the interests articulated in the Water Plan, facilitate more effective use of our water rights, and provide a viable alternative to buy-and-dry.

How an Enhanced Water Bank Would Work

1. Deposits may be made of any type of valid decreed water right or interests in such water rights, including contract rights

The bank would be authorized to accept deposits of all types of valid water rights or interests in water rights. The depositor would be obligated to provide evidence of ownership or control of the water right or an interest in the water right and the continuing right to its use during the period of deposit.[3] The depositor must also be able to document historical beneficial use under the right in order to allow an historical consumptive use evaluation by the bank operator, as described in paragraph 5 below.[4]

2. Deposits may be made for periods of up to ten years, with an option to extend the deposit period

The depositor may specify the length of time for which the water right is to be held by the bank, up to an initial period of ten years. Water rights deposited into the bank continue to be owned by the depositor, subject to use by others during the period of deposit. Thus all additional uses are temporary, and the depositor can return the water right to its historical use at the end of any arrangement for alternative use or if the water right is not subscribed by a borrower.

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[2] Colo. Rev. Stat. § 37-80.5-102.

[3] Such requirements have already been established under the Rules Governing the Arkansas River Water Bank Pilot Program, 2 CCR 402-12 (ARWB Rules), and in the Criteria and Guidelines for Fallowing-Leasing Pilot Projects, November 19, 2013 (FLPP Guidelines).

[4] FLPP Guidelines, Section II.F.

3. Use of the water bank is risk-free to the water right owner

Use of the water bank must not decrease the value of the deposited water right by reducing the historical consumptive use calculation or subjecting it to claims of abandonment. [5] These protections are provided regardless of whether the banked water is ultimately withdrawn by a borrower.[6]

4. Deposited rights may be made available for any alternative use acceptable to the depositor

A primary purpose of a water bank is to enable temporary additional use of existing water rights in a timely and cost-effective manner. The proponent of any proposed beneficial consumptive use should be potentially able to borrow rights on a willing seller-willing buyer basis. Water rights or interests in rights may also be banked for the purpose of enhancing stream flows.[7]

5. Following established guidelines and procedures, the bank operator will determine the amount of water potentially available for use by others

The depositor will provide evidence of historical use, including diversion records, number of acres irrigated, crops irrigated, and other relevant information.[8] The bank operator, with the assistance of the Division of Water Resources and following established procedures, will use this information to determine consumptive use credits associated with the deposited water rights and historical return flows that must be maintained.

6. Potential users (borrowers) work with the bank operator to determine whether deposited rights can serve their needs

Those interested in using banked water would work out arrangements needed to be able to use the water, similar to the manner in which a borrower works with a bank loan officer to work out the terms of a loan. Water borrowers will need to be satisfied that sufficient banked water is available at the time and place of their intended use, and at an attractive cost. Borrowers, depositors, and the bank operator must establish terms

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[5] Colorado law already provides such protections for rights deposited in the existing water bank. *See* Colo. Rev. Stat. §§ 37-92-103(2) and 37-92-305(3)(c)(II)(D).

[6] Consideration may be given to restrictions on extended non-use to prevent utilization of the water bank for unintended purposes, such as "parking" water rights.

[7] There are several existing processes under which water rights may be temporarily used for instream flows. *See* Colo. Rev. Stat. §§ 37-83-105, 37-92-102(3), and 37-92-305(3)(c). The ability to deliver consumptive use water downstream as part of a transaction intended to also enhance stream flows is recognized in Colo. Rev. Stat. § 37-92-305 (3)(b).

[8] Such requirements have already been established under the ARWB Rules and the FLPP Guidelines.

of use. Borrowers will want to take into account any additional costs, such as for structural improvements necessary to be able to use the water, including any provision of required return flows, to evaluate whether the total costs of the transaction will be offset by the benefits of the use. When the terms have been agreed to, public notice of the proposed transaction will be provided and interested parties given a reasonable time for comment.

7. The State Engineer must ensure that loaned water can be used without material injury to other water rights

Just as under existing procedures for interruptible supply agreements and substitute water supply plans, the State Engineer would evaluate the proposed transaction, including the calculation of historical use, determination of return flows, and any other issues of potential injury based on comments received from interested parties. The State Engineer will develop any necessary additional terms and conditions to prevent injury.

8. The CWCB, working with the Division of Water Resources, will establish guidelines for the bank's operation. The CWCB will operate the water bank, with branches in each water division, and with opportunity for participation by interested water conservation and conservancy districts

The many challenges in initiating and operating a successful water bank will require the committed effort of the State of Colorado, acting through the CWCB and the Division of Water Resources. Drawing on experience gained to date with administrative review procedures, these agencies would establish the basic statewide rules governing operation of the bank as well as basin-specific rules, including requirements for deposits, determination of consumptive use credits and return flows, and terms and conditions for ensuring transactions can occur without adverse effects to other water rights. Once these rules are established, the CWCB as bank operator would actively work with interested holders of water rights to encourage bank deposits, put in place streamlined procedures for determining consumptive use credits, work with interested users/borrowers to put together workable transactions, and ensure the transactions can occur without adverse effects.

The bank must be an active facilitator of useful short-term transfers, helping to put together the transactions in a timely and cost-effective manner that meet parties' needs and that can be effectively implemented without harm to other water users. It should solicit participation by water conservation and conservancy districts that are interested in helping water users within their boundaries participate in bank transactions, and potentially delegate some or all of its bank operator responsibilities within a basin to a capable district.