

## Water Banking Drafting Group – Large Group Meeting

May 29, 2018

DNR 9:00

**Attendance:** Jani Iwamoto – State Senator; Wendy Crowther – Parsons, Behle, & Latimer; Steve Clyde, Emily E Lewis – Clyde Snow & Sessions; Boyd Clayton, Kent Jones – State Engineer’s Office; Paul Burnett, Jordan Nielson, Andy Rasmussen – Trout Unlimited; Jay Olsen, Peter Gessel – Utah Dept. of Ag.; Elizabeth Kitchens, Megan Nelson – The Nature Conservancy; Marcelle Shoop – Audubon Society; John Mabey – Mabey, Wright & James; Rich Tullis, Chris Finlinson – Central Utah Water Conservancy District; Nathan Bracken – Smith Hartvigsen; Mark Stratford – Ogden City; Sterling Brown – Utah Farm Bureau

**Meeting Summary:** The group discussed the summary of shared concepts and principles across watershed groups prepared and provided by Nathan Bracken. After discussing common themes, the group moved into discussing next steps for moving any proposed water banking legislation forward.

### Assignments for Next Meeting:

The larger group is going to break into three sub-groups/drafting groups (see discussion below for more substance).

- 1) Legislative Changes to Existing Law: Chair - Wendy Crowther [wcrowther@parsonsbehle.com](mailto:wcrowther@parsonsbehle.com)
- 2) News Statutory Language Needed: Chair - Nathan Bracken [nbracken@shutah.law](mailto:nbracken@shutah.law)
- 3) Pilot Program: Chair – Steve Clyde [sec@clydesnow.com](mailto:sec@clydesnow.com)

Those interested in working a specific sub-group are to contact their respective group chair. Once a meeting time and date for the sub-group is established, the group Chairs are to email Jon Hennington at [jhennington@le.utah.gov](mailto:jhennington@le.utah.gov) so he can distribute the meeting details to the larger group in case any member wants to join more than one sub-group.

### Deadline for Sub-Groups to Meet:

July 9, 2018

10:00 DNR – Room TBD

### Larger Group Meeting:

TBD

<b>MINUTES:</b> These minutes are taken contemporaneously as a record of the group’s conversation. Please excuse any inadvertent attributions, accidental misstatements, or omissions.	<b>MAIN THEMES/USEFUL TOOLS:</b>
Paul Burnett: <ul style="list-style-type: none"><li>- Weber River Committee update on activities:<ul style="list-style-type: none"><li>o Meeting with WBWCD, and River Commissions, Davis Weber Canal Company</li><li>o There are some informal exchanges</li><li>o DWCC runs a rental pool within their Company<ul style="list-style-type: none"><li>▪ Bring it in February</li><li>▪ March the Buyers will pay for the water they want touse</li><li>▪ The Company sets the price</li></ul></li></ul></li></ul>	<b>“Toolbox”/Not Upset the Boat:</b> It is imperative that any water banking legislative work in concert and support any existing water banking efforts already underway. The concept is to provide a legislative “toolbox” of options for local water users to take of advantage of and not try to

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<ul style="list-style-type: none"><li>▪ In times when there is excess water – they make less money</li><li>▪ Don't let water outside of their company boundaries</li></ul> <p>Sterling Brown:</p> <ul style="list-style-type: none"><li>- Does it go from Ag to MI and or just Ag?</li></ul> <p>Paul Burnett:</p> <ul style="list-style-type: none"><li>- We didn't get into that detail</li></ul> <p>Wendy Crowther:</p> <ul style="list-style-type: none"><li>- There is a municipal component but it is only for secondary irrigation</li></ul> <p>Paul Weber:</p> <ul style="list-style-type: none"><li>- Broader Water Bank discussion<ul style="list-style-type: none"><li>o Most watersheds have a water rights committee – may be a good source to run the bank</li><li>o Would increase the demand on those committees</li><li>o River commissioner would need to included</li><li>o Price is still an outstanding question</li></ul></li><li>- Blue Lake<ul style="list-style-type: none"><li>o Shares are leased annually</li><li>o Balance it out on paper – they can effectively shepherd the water down from Echo</li><li>o River Commissioner thought it would be very difficult to actually shepherd the water in a larger system</li></ul></li><li>- General Comments:<ul style="list-style-type: none"><li>o Complicating factor – if people want to do a larger weber bank – have to figure out</li><li>o Had a discussion about water rights are partially used – need to account for those rights to make sure only water in t</li><li>o Weber Basin folks have also entered into the Idaho Bank<ul style="list-style-type: none"><li>▪ 5 year rolling application – have to pay to have the water in the bank</li><li>▪ But don't get paid unless their actual water right is used – i.e. there is not a proportional sharing of proceeds</li></ul></li></ul></li></ul> <p>Marcelle Shoop:</p> <ul style="list-style-type: none"><li>- We will need to also address the issue of supplemental ground water</li></ul> <p>Kent Jones:</p> <ul style="list-style-type: none"><li>- That is a real problem – selling off the main water right and then using supplemental rights to continue watering</li></ul> <p>EELewis:</p> <ul style="list-style-type: none"><li>- In the review to get the water into the bank – will have to do a</li></ul>	<p>create a one-size fits all banking program that is unusable for some or undermines existing efforts.</p> <p><b>Supplemental Rights:</b> Water banking efforts need to address the issue of supplemental rights so that uses are not expanded by water users selling/leasing the main water right and then using supplemental sources/rights to continue watering.</p> <p><b>Maintaining Local Control:</b> Successful banks are going to be those that are built around and account for local conditions (pricing; transfers; definition of basin – etc.)</p> <p><b>Shepherding:</b> Shepherding the water in the bank is going to the primary issue in determining its success. Need quick means of determining allocations between parties and monitoring diversions for expansion/accurate deliveries.</p> <p><b>Inclusion of Water Users Outside of Irrigation Co.:</b> Most water users currently taking advantage of/exploring water banking programs are those who are part of an irrigation Company. The legislative tools are there to help those not inside a company form or participate in bank.</p> <p><b>Building in Protections against</b></p>
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<p>sole supply</p> <p>Nathan Bracken:</p> <ul style="list-style-type: none"><li>- In a recent Change Application we identified which ground was to be dried up</li><li>- The goal of the banks is to get the usable water into the bank and avoid expansion</li></ul> <p>Kent:</p> <ul style="list-style-type: none"><li>- The biggest issue is going to be making sure the correct depletion is accounted for and not increased</li></ul> <p>Nathan Bracken:</p> <ul style="list-style-type: none"><li>- My goal was to summarize the various groups and pull out the common themes</li><li>- The goal was to create legislation that local water users could apply to make a bank</li><li>- My thinking is that this would work similar to the distribution network<ul style="list-style-type: none"><li>o Lots of flexibility in how its applied on the ground</li><li>o There is a role for the State Engineer to play for oversight</li></ul></li><li>- Need to have low transaction costs:<ul style="list-style-type: none"><li>o Costs for Change Applications</li></ul></li><li>- Key Comments:<ul style="list-style-type: none"><li>o Process for getting consumptive use into the bank</li><li>o Water banking is occurring at some level across the State<ul style="list-style-type: none"><li>▪ We don't want to disrupt that –</li><li>▪ We want to build upon what is already happening</li></ul></li><li>o Any time of banking should allow for multiple uses and effective participation from multiple parties<ul style="list-style-type: none"><li>▪ Municipalities; instream flows</li></ul></li><li>o Monetary/pricing concerns<ul style="list-style-type: none"><li>▪ Real desire to make sure that deep pockets don't dictate/monopolize the bank</li><li>▪ Each bank would have to figure that out for what they want</li></ul></li><li>o Oversight:<ul style="list-style-type: none"><li>▪ State Engineer/other groups will need to be involved</li><li>▪ Water Distribution system can be a good start</li><li>▪ Change Application process to get into the bank</li><li>▪ Shepherding the water through the system is one of the largest issues</li></ul></li></ul></li></ul>	<p><b>“slippery slope” of losing AG water to other uses:</b></p> <p>Important to make sure protections from having AG watering entering bank become permanent supply for other uses – e.g. having temporary Change Applications that expire at end of banking lease.</p>
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- How do we address environmental impacts?
- Out of basin transfers –
  - Should we have the ability to move out of basin?
  - More limited
- Inter-basin transfer –
  - Unanimous consensus that within the larger basin – we should be able to move water between the sub-basins
  - Biggest issue is how do we define basin?
- Legislation:
  - Banked water needs to be protected from forfeiture
- Pilot Program:
  - There has been some discussion about

**Sterling Brown:**

- I have several questions:
- 1) How do we respond to the question – we can we already do this, why do we need to have a more formalized format?
  - NB:
    - Depend in each area – some places this will make sense and other places already have this going well (Delta)
    - Other places have barriers for water users actually using the bank – can't find where to sell it;
  - Rich Tullis:
    - Change Application process and the evaluation of how water gets into the bank and used, we need a much faster process
    - Administration/Distribution/Oversight to make sure the bank is running well
  - Wendy Crowther:
    - The express protection from forfeiture
    - If you are not in a Company that has a good bank – what is your option?
  - Nathan Bracken:
    - Making the systems work better –
    - Yeah these are happening, but they are not that easy to use
  - Sterling Brown:
    - Well for those areas that are not working – shouldn't they tweak it themselves?

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<ul style="list-style-type: none"><li>▪ Nathan Bracken<ul style="list-style-type: none"><li>• This is not mandatory and they can keep moving and refining</li></ul></li><li>○ 2) I am not hearing from the Ag. Community that they want to facilitate or participate in the water banking. Perception is that this is a slippery slope for a permanent conversion move AG to M&amp;I. We need safe guards that the original owner of the water right can get that water back.<ul style="list-style-type: none"><li>▪ Scenario: someone leases the water for fish habitat – five years runs, how to get the water back to the fish</li><li>▪ Nathan Bracken:<ul style="list-style-type: none"><li>• This would deal with the process – built in protections<ul style="list-style-type: none"><li>○ These are not mandatory</li><li>○ Local users are designing</li><li>○ These are temporary in nature</li></ul></li><li>• We can design them to meet our needs – it’s a bank that we would pool that water together</li><li>• Practical Implication: there are no alternatives to buy and dry right now – this is a relief value to change the current dynamic</li></ul></li><li>▪ Jani Iwamoto:<ul style="list-style-type: none"><li>• A major concern preceding this effort was that Ag. could not park your right in municipality</li></ul></li><li>▪ Sterling Brown:<ul style="list-style-type: none"><li>• The words temporary and voluntary are uneasy words in the community</li><li>• Maybe this could be addressed through more education</li></ul></li><li>▪ Nathan Bracken:<ul style="list-style-type: none"><li>• Craft the legislation – there is no obligation to provide water after the lease expires</li><li>• Understand the concerns you are raising – the challenge of what we are doing, water participating in bank does not change the underlying ownership</li></ul></li><li>▪ Wendy Crowther:<ul style="list-style-type: none"><li>• The initial Change Application – could be a temporary change Application that is only for the 5 year length of the lease</li></ul></li></ul></li></ul>	
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<ul style="list-style-type: none"><li>• -could automatically expire and then go back to the original</li><li>• NB: yes – then we could do an extension on that</li><li>▪ Rich Tullis:<ul style="list-style-type: none"><li>• We envision this to be not like the traditional Change Application</li><li>• We want more flexibility so that those putting it in the bank the water can go back and forth between users with a simple notice proceeding</li><li>• WC: what we are talking about though is the first change application stage</li><li>• NB:<ul style="list-style-type: none"><li>○ this is why we need an overall framework then each group can design a more local system</li><li>○ This is not the end-all-be-all its just one more tool in the quiver</li><li>○ However –we are going to have to have some kind of review to determine the amount of water to make sure we are not expanding water rights and no impairment to other</li></ul></li></ul></li><li>▪ Sterling Brown:<ul style="list-style-type: none"><li>• If the State Engineer does not agree – can you appeal?</li></ul></li><li>▪ Nathan Bracken:<ul style="list-style-type: none"><li>• Same process – request for reconsideration</li><li>• To me the trickier questions – once the water is in the bank how do we put it to use?</li></ul></li><li>○ 3) Costs: How do we best determine what is best?<ul style="list-style-type: none"><li>▪ NB:<ul style="list-style-type: none"><li>• Costs are determined by the Board or Council - the local folks should price it so that those participating design something that works for them</li><li>• Could be a flat cost – or individually agreed to</li><li>• This would also no disrupt the banking that is currently occurring</li></ul></li></ul></li><li>○ 1(A))</li></ul>	
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- Sterling Brown: Come back to first questions – all of this could happen now?
- NB: No not really – Companies can do this now, but its more for the private water users
- WC: we have legislative certainty
- Kent Jones:
  - Thinking about global Change Application re Ron Thompson group –
  - SB: How do you enforce that?
  - KJ: The river Commissioner distributes the water and then submits an annual report
  - SB: River commissioner can monitor diversions but how do you deal with depletion?
  - Jay Olson: mostly self-policing model
  - NB: This doesn't have to be a one size fits all and this could go along
    - Where this makes sense is if there are low transaction costs,
- Jay Olson:
  - I can see a concern from AG. about how we determine what the depletion is
  - How do we determine what the consumptive use is – if I go through this process will I get a haircut? Will I have more water or less water after this process
- NB: If I had a right that was difficult to quantify – put a non-use on it and don't put it in the bank
- Kent Jones:
  - Beneficial use is the limit of the right – you can't deplete more water than you have a right to consume
  - If you supplement use – is there is extra water in addition to their use that supplemental, then there is no use for it and it can go in the bank for non-consumptive
- Rich Tullis:
  - M&I Group –
    - Loose consortium of water users – not all in agreement (lots of different users)
  - We are continuing to talk and looking a way to do a contract
  - Study Groups:
    - State Legislation – what things we think are needed and wanting to combine with this group

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- Federal Reclamation Law Group – looking at Warren Act Issues,
- Agricultural Group:
- Chartering Agreements:
- Environmental Group – looking at NEPA, 10% of water that goes into the bank is dedicated straight to
- Water Rights Group
  - ASR; Change Application
- Next Steps: Three Drafting Groups
  - Changes to Existing Legislation (Wendy Crowther)
    - Abandonment and Forfeiture
    - Change Application Process
    - Beneficial Use
    - Shepherding
  - What New Statutory Language is needed? (Nathan Bracken)
    - What type of process would be needed to create a bank?
    - Public process
    - Service areas be defined
    - Role for water commissioners
    - Flexibility in transaction costs
  - Identifying Pilot Process (Steve Clyde)
    - Do we need to do a pilot program first and craft language?
    - Do we do the legislation first and then do the pilot program?

Deadline for sub-groups to meet:

- July 9<sup>th</sup> 10:00 , 2018
  - Statutory Language:
    - Triage of what we need to do – maybe we move forward with statutory language
  - Pilot Program:
    - Pick one or two that are already in the works –