SUMMARY OF WATER BANKING SUBGROUP FINDINGS
MAY 29, 2018

I. INTRODUCTION AND BACKGROUND

To date, the water banking group has worked to study ways to develop an effective water banking program in Utah. In order to be successful, any such program will need to incentivize and support participation by agricultural water right holders. As Sterling Brown has noted, to be effective, any banking program will need to provide both "certainty and dollars" in that order for Utah's agricultural community.

With this in mind, the group has determined that any banking program that seeks to impose a uniform or one-size-fits all program will be practically and politically infeasible because of the significant variations in hydrology and circumstances that exist throughout Utah. Instead, the group has coalesced around a concept in which local water interests would create so-called "local banks" that would be structured to account for and address the unique circumstances and needs of each drainage, sub-drainage, or other local area. Under this general concept, only the consumptive portion of a right would be transferred into a bank, which would be managed and operated by local interests. Once the water right has been transferred into a local bank, the bank could then lease out the water for any beneficial use, including instream uses, within its service area with minimal further approvals, similar to the manner in which rights that are approved for municipal use can be used for a variety of uses within a municipality's service area. Importantly, banks would be created on a voluntary basis and would not be mandatory.

To better understand the local dynamics that would influence water banking, the group divided into subgroups to explore how water banking would potentially work in the following basins: the Bear River, the Price River, the Provo River, the Sevier River, and the Weber River. As discussed in the summaries attached as **Addendum 1**, each subgroup identified various incentives, barriers, and other factors that will likely affect water banking in their respective basins. Ideally, the larger group will now be able to use these findings to craft legislation that provides the necessary statewide regulatory framework that will allow for the creation and regulation of local banks but also provide sufficient flexibility to account for the local needs and interests of the areas each bank serves.

This document summarizes the common themes and areas of consensus that emerged from the subgroups' efforts and the larger group's discussions. It also proposes possible next steps for the development of water banking legislation.

II. SUMMARY OF SUBGROUP FINDINGS

Notwithstanding the significant differences in each basin, there do appear to be a number of common themes regarding water banking.

A. Water Trading is Already Taking Place to Some Degree but a More Formal Structure Could Facilitate the Development of More Robust Water Markets, Provided that New Banks Build Upon Existing Trading Efforts and Markets

Some water trading is taking place in most of the studied basins. However, as the Weber River Subgroup noted, the lack of a formal structure to broker water transactions means that there is generally not a robust water market. Similarly, the Price River Subgroup found that a "transparent central banking authority could help smooth out some of the tensions between local water interests, provided that the bank is transparent and representative of the water interests in the area." Consequently, there appears to be a consensus that banking legislation should be structured in a manner that builds upon, supports, and enhances existing water trading and markets.

That being said, there are some areas with robust and well-developed water markets. Most notably, the Sevier River Subgroup reported that portions of the Sevier River Basin, particularly around Delta, "are already adept in terms of moving water between willing buyers and sellers." Consequently, for those areas, statewide banking legislation "may not improve upon the current framework."

B. Banking Legislation Should Allow for Multiple Uses and Should Allow for Effective Participation from All Sectors

All five subgroups appear to agree that the local banking framework could serve as a "potential solution for meeting M&I, [agricultural], and environmental needs," as noted by the Provo River Subgroup. As such, there is unanimous agreement that water placed into a bank should be allowed to be leased out for any use within a local bank's service area, including instream flows. Moreover, there is clear agreement that all parties and sectors that desire to lease water should be treated equitably and that so-called "deep pockets" should not be allowed to price out other interests. This concern may be particularly acute for agricultural users and those seeking to lease for instream flows.

C. The Process Used to Create a Local Bank Should Provide as Much Local Control as Possible Over the Pricing, Structure, and Operations of A Bank

Similarly, there appears to be a consensus that ensuring local control over the pricing and operations of a bank will be practically and politically essential for any enabling legislation. As the Price River Subgroup noted, "a centralized banking structure could help facilitate a market and access to available water but could also increase prices by facilitating competition, further illustrating the need for each bank to have flexibility to establish its own pricing."

In addition to pricing, it also appears that banking legislation should allow local water interests significant flexibility in both the structure of the local banks they create as well as the operations of the bank. There also appears to be unanimous agreement that protections are required to protect against situations in which a handful of water interests could operate a bank for their benefit to the detriment of others. This will likely require a governance structure that is representative of the water interests within the service area of a local bank. As both the Sevier and

Price River Subgroups noted, however, "larger entities...will likely require a greater vote in how the local bank operates, while smaller entities will need to have some assurance that they will have an influence in the bank."

With respect to the process local water users would use to create a local bank, both the Sevier and the Price River Subgroups also proposed using the process used to create water distribution systems under Section R655-15-1, et seq. of the Utah Administrative Code as a possible guide.

D. The State Engineer and Possibly Other Government Entities Will Need to Play Some Role in Regulating or Overseeing Banking

There appears to be general agreement that some level of approval or regulation by the State Engineer will be needed for some or all of the following:

(1) Creation of Local Banks: Approving the creation of a local bank in a manner that allows for consideration of public input (e.g., there is some type of process or general requirements to govern how local water interest envision and propose a bank, which the State Engineer would review and approve). Relatedly, there are also questions about whether a new entity would need to be created to operate a local bank or whether existing entities could assume the responsibility.

(2) Overseeing the Operations of a Local Bank: Overseeing the bank after its creation to ensure that it operates appropriately, fairly, and equitably.

(3) Transferring or Changing Rights Into a Bank: Ensuring some type of process to ensure that rights transferred or changed into a bank will not impair other right holders, provided that such a process is quick and efficient and does not impose transaction costs that serve as a disincentive to participation in the bank (e.g., once water is placed into a bank it can be leased with minimal review). Notably, the Provo River Subgroup's proposed contractual bank model would require an expedited process to confirm the validity of water rights participating in the bank.

(4) Shepherding: Ensuring that water leased out of the bank is shepherded or otherwise allowed to be used for its leased purpose, which will likely require coordination with the applicable Regional State Engineer, river commissioner, or other applicable government entity, such as the Cache County Conservancy District as noted by the Bear River Subgroup.

(5) Addressing Environmental Impacts: Further discussion may also be needed to determine how to address potential environmental impacts that may result from banking and what role the State Engineer or other state entities should play, without creating transaction costs that act as a disincentive. As the Weber River Subgroup noted, "there is concern with the impact of water banking on water making it to the Great Salt Lake and surrounding wetlands."

(6) Interaction with Water Commissioners and Other Entities: There appear to be significant questions about how local banks would interact and coordinate with water commissioners and other governmental entities with overlapping jurisdiction. For example, the Bear River Subcommittee reported that "ditch-riders or other officials [would need to be] employed, with authority from the Division of Water Rights, to enforce the authorized use of the water...leased out of the bank." Similarly, the Bear River Subgroup noted that there may also be a role for other entities, such as the Cache County Water Conservancy District, "to manage relations among canal companies in Cache County."

More work is needed to flesh out the specifics of how to accomplish these goals and it is likely that banking legislation may need to allow for significant flexibility on these issues. For example, the Bear, Price, Sevier, and Weber River Subgroups appear to envision a process in which the State Engineer would review and approve applications to move the consumptive portion of a water right into a bank that would be similar to the process that governs most traditional change applications. On the other hand, the Provo River Subgroup's contractual model would be intended to work "primarily outside State Engineer administrative process" for the purposes of speed and efficiency, meaning that State Engineer "participation would be lateral" and could entail the establishment of criteria that would be met to receive an endorsement from the State Engineer.

E. Banking Legislation Will Need to Address Concerns Regarding Out-of-Basin Transfers

Most of the subgroups reported concerns about the potential for water banking to facilitate the movement of water outside of their respective basins. For instance, the Sevier River Subgroup reported that any banking framework that allowed for water to be moved outside of the Sevier River Basin would be a "nonstarter" for water right holders in the area. This concern appears to be focused primarily on the possibility that a banking framework that allows for out-of-basin transfers could facilitate the movement of water rights away from rural areas to fuel urban growth along the Wasatch Front. However, although this concern represents the majority view, there does appear to be a minority of right holders who believe that out-of-basin transfers would increase the value of their rights and the amount of money they could receive through banking.

Regardless of the differences of opinion regarding out-of-basin transfers, it appears there is a consensus that local banks within the same basin should have the ability to negotiate agreements that allow for intra-basin transfers within the same basin. More work, however, is needed to define what will constitute a "basin" or drainage for water banking purposes, particularly with respect to larger basins, such as the Colorado River Basin.

F. Legislative Changes Should Ensure that Banked Water is Considered to be Beneficially Used and Will Not be Subject to Abandonment and Forfeiture

There appears to be a near unanimous consensus that changes are likely needed to the Utah Code to ensure that water rights placed within a water bank will retain their original priority date. As the Bear River subgroup noted in its summary: "Especially in times of shortage, priority is critical in the administration of water rights, and in particular when water rights are transferred

upstream." Similarly, legislative changes may also be needed to clarify that water placed in a bank and then leased out qualifies as a beneficial use.

G. A Pilot Program May be Helpful in Developing the Concept of Water Banking and in Building Support in the Water Community

The larger group has discussed the possibility of doing a pilot project. The Bear River Subgroup even recommended "a pilot project with a single canal company, dealing with shares on a specific stretch of a tributary river, as an experiment in determining how to work out the details." To be effective, a pilot project will likely need to be done in a manner that will address the most common circumstances that banking efforts will likely experience in Utah.

III. NEXT STEPS

The banking effort has likely reached a point where it would be appropriate to begin preparing draft or at least conceptual legislative language based on subgroups' findings and the larger group's efforts to date. It may be beneficial for the larger group to divide into drafting groups to prepare language addressing the following category of issues. A group could be created to address each category or smaller groups could be organized to address the sub-issues listed within each larger category.

A. Changes to Existing Statutory Language

Based on the discussions to date, it appears that statutory changes will likely be needed for at least the following issues, which are intended to be a starting point and will likely lead to additional issues and considerations.

(1) Abandonment and Forfeiture: Changes may be needed to Section 73-1-4, at a minimum, to ensure that banked water is not subject to abandonment and forfeiture.

(2) Change Application Process: More work is needed to determine how water rights would be placed into a bank, or the extent to which the State Engineer would be involved with contractual banks, as the Provo River Subgroup has proposed. At minimum, addressing these issues will necessitate a review of the statutes that govern change applications, namely, Section 73-3-3 through Section 73-3-8.

(3) Beneficial Use: Under the local banking concept that the group has developed, water rights that are banked could be leased for any purpose, including purposes (e.g., instream flows) that would not typically qualify as a beneficial use outside of the banking context. As a result, this group would determine whether statutory changes are needed to ensure that leased water qualifies as a beneficial use.

(4) Shepherding: What changes, if any, are needed to ensure that leased water will be used for its leased purpose and will not be diverted by other users?

B. Statutory Changes to Establish the Process to Govern the Creation, Regulation, and Operation of Local Water Banks

It appears there is general agreement that there should be a process to govern the creation, operation, and regulation of local banks. The process that governs water distribution systems under Section R655-15-1, et seq. of the Utah Administrative Code could serve as a possible starting point. In developing such a process, this group will likely need to address at least the following questions:

(1) Creation and Operation of a Local Bank: How will the process ensure that sufficient flexibility exists to allow local water interests to determine the governance, pricing, and local control over the administration of a local bank, while also establishing clear requirements to ensure that banks operate in a fair, transparent, and equitable manner?

(2) Public Input: How will water right holders or perhaps even the general public weigh in on a proposed local bank or seek redress if a water bank does not operate appropriately?

(3) Role of the State Engineer: What role will the State Engineer play in approving banks and then overseeing them after their creation?

(4) Service Area: How will the service area of a local bank be determined? How will inter-basin and intra-basin transfers be addressed? How will basins be defined?

(5) Water Commissioners and Other Entities: What role will water commissioners and key governmental entities (e.g., Weber Basin Water Conservancy District, the Cache County Conservancy District, and Central Utah Conservancy District) play? How will a local bank interface with these entities?

(6) Flexibility and Transaction Costs: How can the process provide the flexibility need to support local control, while also providing adequate oversight without imposing overly burdensome transaction costs?

C. Identifying Possible Pilot Projects

Although there has been some discussion about pilot projects, if the larger group is interested in doing a pilot project, a subgroup could be created to develop a project proposal and conduct outreach to identify possible participants. As noted previously, a pilot project would ideally be structured in such a way as to address or otherwise reflect the most common issues and questions that are likely to arise regarding water banking in Utah.

Importantly, the Bear River Subgroup has also raised the possibility of doing a pilot project with a single canal company and utilizing shares on a specific stretch or tributary river. Furthermore, the Bear River Subgroup has proposed the Bear River Canal Company as a possible participant for the pilot program. A subgroup could further evaluate this proposal and other possible pilot programs in other areas of the state.

ADDENDUM 1

BEAR RIVER WATER BANKING

Our Approach

A two-pronged approach:

1) Create a "tributary" water bank

2) Create a water leasing pilot within the Bear River Canal Company Service Area

Rationale

The Bear River is a highly managed system with a long history governing water[1]. At this time, the major constraints in operating a main stem river water bank are the following:

1) During the irrigation season PacifiCorp provides the Bear River Canal Company up to 900 cfs of water, which irrigates 66,000 acres. The obligation is first met with natural flow and if there aren't sufficient natural flows in the river, this obligation is met out of Bear Lake storage water.

2) In accord with the Bear Lake Settlement Agreement (2004), irrigation storage water use (for all users) is rationed based on the level of Bear Lake. Depending on the water year – more or less water will be needed out of storage for PacifiCorp to meet its delivery obligation.

3) The Bear River Compact specifies the irrigation reserve at 5914.61 feet. The amount of water above that level is considered as storage and may be used for irrigation, power and "other beneficial uses"; water below that level is released **exclusively irrigation**. (Any environmental benefit from such a release are ancillary or incidental to the primary purpose.) This limits the ability of Bear Lake storage water to be banked or released for any other purpose. However, in the state of Utah, urban secondary water systems used for outdoor watering are considered irrigation. So that could be a potential change in use under a water banking scenario.

4) Under the 2004 Bear Lake Settlement Agreement, PacifiCorp makes annual storage water allocations from Bear Lake in April of each year to its contract holders in Idaho and Utah. The water users adjust their planting based on this allocation amount. All users have both natural flow water rights with various priority dates. Water obligations are met first by natural flows, then by storage. This works well when there is no change in usage and the cropping patterns are relatively static. However, if any Canal Company changes or expands their usage and uses their full allocation in a year when they otherwise would not have, now or in the future under a leasing/banking program, other canal companies would be affected because of the reduced storage in Bear Lake by diminishing the amount of storage water that could be used in future years. In essence, there already exists a community water bank in Bear Lake for

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[1] 1912 U&I Sugar Company Conveyance and Agreement; 1916 through 1919 three additional irrigation agreements; 1968 Bear Lake National Wildlife Refuge agreement; 1955 Bear River Compact (Irrigation Reserve); 1980 Amended Bear River Compact; 1989-1990 Original Small Pumper Agreements; 1995 Bear Lake Settlement Agreement; 1999/2000 Agreements between PacificCorp, Utah, Idaho and Wyoming to maintain historic operations of Bear Lake with hydro generation as an incidental use of Bear Lake water with a description of flood control operations and targets; 2004 Amended and Restated Bear Lake Settlement Agreement.

the current contract holders because the 2004 Bear Lake Settlement Agreement specifies that any storage water not used in any year increases the allocation for the following year because Bear Lake levels are higher due to the unused storage water.

5) The State Engineer has allowed the Bear River Canal Company the flexibility to "move water around" within their service area, i.e., if a shareholder wants to forego use of their water they may rent it to another user in the service area.

Advantages of Recommended Two-Pronged Approach

1) A program on the tributaries would not be as complicated as the main stem. Environmental flow needs have been documented for a number of tributaries.

2) The Bear River Canal Company already has the authority to manage water within its service area. The need for additional water for Great Salt Lake has been documented. A model for this program could be the Grand Valley Water Bank Pilot – a demand management program based on reduced agricultural depletion by temporarily drying up land, freeing up water for environmental uses.[2] Alternatively, shares could be redirected to irrigate wetland areas near the Great Salt Lake within the service area instead of agricultural land, thereby increasing habitat area with excess water flowing into the Great Salt Lake.

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[2] PacifiCorp delivers water to Bear River Canal Company at Cutler Reservoir. Hypothetically, a shareholder within BRCC or BRCC could lease water (delivered from Cutler to the Bear River Canal Company service area) to a duck club or other entity that wants to apply the water to irrigate wetlands type habitat. As such, there could be some related environmental benefit that accrues as part of the transaction.

Bear River Water Bank – Cache County Tributary Pilot Project

Place

Would largely be focused in Cache Valley

Water Source

It was the consensus that since most of the water used in Cache Valley is for irrigation, and most of that water use is under water rights held by irrigation and canal companies, that a water bank based upon banked shares of irrigation company stock be tried as a pilot project. Certainly, appropriated surface and groundwater rights owned by private individuals could also be considered. Banking individually owned appropriated rights would be the easiest to administer.

Priority Date and Pricing

It was concluded that the underlying priority date of the water right placed in the water bank would need to be retained. Especially in times of shortage, priority is critical in the administration of water rights, and in particular when water rights are transferred upstream. The market would dictate price.

Beneficial Use

It was concluded that water deposited in to the bank could be used for any purpose, including instream use, and that the use of water under the water right withdrawn from the water bank would not necessarily need to match the authorized use of the water right deposited in to the bank including instream use. There does, however, need to be a mechanism in place to assure that there is no enlargement of water right by virtue of its passing through the bank. The consumptive use of the right or portion of the right leased from the bank could not be increased. In other words, if agricultural water deposited into the bank is leased from the bank for industrial purposes, the total consumption under industrial consumptive use would have to match, or could not exceed, the authorized consumptive use under the agricultural right deposited into the bank; otherwise, there would be an unlawful enlargement of the water right deposited into the bank - upon which the lease out of the bank is based.

Storage

On the Bear River tributaries there is an opportunity for some storage, e.g., Hyrum dam, Porcupine Reservoir, small dams on the Logan. Where storage is not an option or needed, the leases could be executed through paper transfers.

State Oversite/Involvement

An important role for the State/Regional Engineer is to assure that the movement of a water right through the water bank will not impair any downstream users, e.g., the holders of water rights in Box Elder County. Any change to any element of the water right deposited into the water bank which is leased out of the bank would require administration and oversight from the Division of Water Rights. There may also be a role for the new Cache County Water Conservancy District to manage relations among canal companies in Cache County.

Enforcement/Shepherding

A monitoring / measuring system would need to be established, and ditch-riders or other officials employed, with authority from the Division of Water Rights, to enforce the authorized uses of the water under the water rights leased out of the bank, as approved by the Division of Water Rights. For instream flows, it will undoubtedly take a paradigm change in the minds of water users to get comfortable with the idea of water running in the stream with no one diverting and using it!

Recommendation

To answer many of the remaining questions on priority for banked water, economic incentives, ground water, mechanics for putting water into/taking out of the bank, quantity impairment/non-use (forfeiture), it is recommended to that a pilot project with a single canal company, dealing with shares on a specific stretch of a tributary river, as an experiment in determining how to work out the details.

SUMMARY OF FINDINGS

To: Senator Jani Iwamoto

From: Price River Water Banking Subgroup – Sue Bellagamba, Nathan Bracken, Wendy Crowther, Peter Gessel, Jordan Nielsen, and Marc Stilson

Date: March 26, 2018

I. Introduction

As you know, the larger water banking group agreed to divide into subgroups to explore how water banking may work in a different basins throughout Utah. The purpose of this scoping effort was to identify the incentives, barriers, and other issues in specific basins that the larger group should consider when drafting legislation that will authorize water users in different parts of the state to create water banks to serve the needs of their basin, drainage, or local area. Ideally, by looking at a number of different basins, the group will be able to craft legislation that provides the necessary regulatory framework but also provide each bank with sufficient flexibility to account for its local needs.

We agreed to study the Colorado River Basin. Given the size of the Basin, however, we narrowed our focus to the Price River Drainage. In studying the Price Drainage we conducted outreach with key stakeholders, such as Bill Butcher with the Price River Conservancy District, Kevin Cotner of the Carbon Canal Company, and Regional State Engineer Marc Stilson, who has joined our subgroup.

Our findings and recommendations are as follows.

II. Legislation should enable local interests to build upon or improve existing efforts to lease, trade, or share water

A form of water banking or exchange is already taking place in the Price to some extent through leases that are negotiated between parties. Many of these leases also rely on an established pricing structure. There is not, however, a central authority for parties interested in leasing water to learn about willing lessors and lessees or to gather information on water pricing.

1. Local banking should build on and support current water sharing practices and pricing structures used for leases in the Price, which means that any banking legislation cannot mandate a specific pricing regime.

2. Pricing in a local bank in Price will likely be different than in other areas, further illustrating the need for the legislation to give each bank some level of discretion to determine pricing for its service area.

III. Legislation should allow each local bank sufficient flexibility to create a governance structure that corresponds to its specific circumstances

A transparent central banking authority could help smooth out some of the tensions between local water interests, provided that the bank is transparent and representative of the water interests in the area:

1. Some of the larger entities in the Price will likely require a greater role or say in how the local bank operates, while smaller entities will need to have some assurance that they will have an influence in the bank.

2. A centralized banking structure could help facilitate a market and access to available water but could also increase prices by facilitating competition, further illustrating the need for each bank to have flexibility to establish its own pricing.

3. The Regional State Engineer's Office is well-respected in the Price and is seen by many as an independent and competent intermediary capable of resolving conflicts between the different water interests. Because of this, our outreach indicated that the Office, and Marc in particular, would likely need to play an integral role in the operations of the bank. Other areas in Utah may differ on this point, however, in which case any statewide legislation authorizing banking will likely need to afford flexibility in how each bank coordinates with the Division of Water Rights and the Regional State Engineer.

4. Local banks will also likely need sufficient flexibility to determine how best to interface and coordinate with distribution systems and water commissioners within their service areas.

IV. Water distribution systems may provide a good starting point for the process needed to create local banks

Section R655-15-1, et seq. of the Utah Administrative Code sets forth a process by which water right owners within a river system, a portion of a river system, or a hydrologic unit may organize as a distribution system to be regulated by one or more water commissioners. The process that governs the creation of a distribution system is locally driven and provides a significant amount of flexibility that allows those local interests to create distribution systems that are tailored to their specific circumstances. Although this process is not completely applicable to local banks and it is unlikely that distribution systems could take on banking responsibilities, there are procedural aspects that may serve as a model or as a starting point for a process to create a local water bank, including the following:

1. R655-15-5 sets forth the process by which water users in a specific area may request that the State Engineer create a water distribution, as well as the process the State Engineer will play in creating a distribution system pursuant to such a request. This process requires public meetings, the solicitation and review of public comments, the establishment of boundaries, and other to organize a distribution system in an open and transparent manner subject to the State Engineer's ultimate approval.

2. R655-15-6 sets forth the authority of the State Engineer to regulate distribution systems providing, among other things, that the State Engineer will retain supervisory authority to ensure that "water is measured, divided, regulated, and distributed in a manner consistent with the rights of the water users."

3. R655-15-9 requires that the creation of a distribution system committee be "established in a manner that will provide equitable representation of the interests of all water users in the Distribution System," and may be elected from the water users or duly appointed representatives of water user groups (e.g., water companies, districts, municipalities, etc.), or may be a combination of both.

4. Local districts may also provide a general concept for how to develop a transparent and representative governing body for a local bank, but making local banks comply with the "government entity" requirements that apply to districts (e.g., public meeting and public finance requirements) would be overly burdensome and problematic.

V. Flexibility is needed to account for differences in the types of entities that will place water rights in a bank and those entities seeking to lease water from a bank

In most parts of Utah, we expect the majority of lessors and lessees in a local water to be agricultural. Although the majority of potential lessees in the Price will be agricultural, non-agricultural entities like PacifiCorp and the Price River Improvement District have the majority of the water to lease. At the same time, the system is already fully allocated, which creates competition for the water that is available for lease.

1. Because agricultural users will be primarily focused on leasing water, there is a concern that agricultural users could be "priced out" if they are required to compete against municipalities and others with deeper pockets, particularly if those interests are coming from outside of the drainage.

2. Legislation authorizing the creation of local banks should give local banks flexibility to create a system that allows agriculture to be competitive in the leasing process, including but not limited to the processes that govern how lessees bid or otherwise acquire water to lease and how such water is priced (e.g., a flat price for all water similar to Idaho's water bank).

VI. Allowing inter-basin transfers between banks is likely infeasible but there are situations in which local banks within a basin should have the ability to voluntarily negotiate *intra-basin* transfers among themselves, as appropriate

As noted previously, there are concerns in the Price that agricultural interests will be priced out of a local bank if forced to compete with deeper pockets, particularly growing municipalities that are outside of the drainage, such as Saint George or cities along the Wasatch Front. Some water entities in the Price may also have articles, bylaws, or restrictions that require their water rights to be used within a specific area.

1. Although there appears to be unanimous concern about inter-basin transfers, some of the stakeholders expressed support for *intra-basin* transfers between banks located within the same basin.

2. In addition, given the hydrology of the Price drainage and its proximity to the San Rafael drainage, there appears to be an interest in creating a framework in which banking could take place between the Price and the San Rafael drainages.

3. Accordingly, any legislation that authorizes local banking should give local banks within the same basin the option of determining whether to allow for transfers among themselves on a voluntary basis per agreements or other arrangements.

VI. Miscellaneous

1. There is broad consensus that any legislation would need to clarify that water placed within a bank is not subject to abandonment and forfeiture.

2. Carrying water over from one year to another is likely not needed in the Price, but may be a necessary incentive in other drainages in Utah, further illustrating the need for each bank to have flexibility to determine how banking will work within its specific boundaries.

Water Banking Drafting Group
Provo River System
April 20, 2018 1:30-2:30 PM

Attendance: Steve Clyde & Emily Lewis - Clyde Snow & Sessions; Peter Gessel – Utah Department of Ag.; Chris Finlinson & Rich Tullis – Central Utah Water Conservancy District; Scott Martin – Snow Christensen & Martineau (via phone)

Not in Attendance: Jani Iwamoto – State Senator; Marcelle Shoop – Audubon Society; Erica Gaddis – Executive Director DWQ; Rusty Vetter – Salt Lake City.

Meeting Summary:
The meeting explored concepts and benefits of creating contract water banks. The group looked to Central Utah Water Conservancy District's Bonneville Water Bank as an example of what a "contract bank" might look like (distributed at the 12/18 Meeting and via email on 4/19). The benefits of a contractually based water bank include:

- Reserving control of the "bank" to the participating parties to the contract
- Flexibility to adapt the bank to local watershed needs and circumstances
- Avoiding a protracted legislative process or ill-fitting "one size fits all" legislation
- Works primarily outside State Engineer administrative processes (speed and efficiency)
- Potential solution for meeting M&I, Ag., and environmental needs

Some of the specific "contract bank" concepts include:

- **Contractual Basis**: Create virtual water banks through contractual agreements between water users. For now, contracts would primarily deal with surface diversions and would detail how and where water is to be used, under what conditions, and how duplicate use avoided. Contract must address monetary incentives for water users to curtail water use and enter conserved water into bank. Some money may be devoted to executing the contract.
- **Contract Mechanics**: Flexibility is desired and it would be ideal to have the contract built to accommodate real time water needs. Once a contract is approved/endorsed by the State Engineer water rights can be moved according to the terms of the contract without further State Engineer action (similar to how large irrigation companies have flexibility to distribute their water rights within their service areas according to internal policies).
- **Water Right Verification:** There is a need for an expedited process to confirm the validity of the water rights participating in the bank (i.e. an expedited Temporary of Fixed Term Change Application process). It was also discussed creating a more limited process to review the validity of the rights but not necessarily the full UCA 73-3-3/73-3-8 criteria. There could be a certified list of water rights deemed eligible to participate in the bank.
- **State Engineer Participation:** Ideal State Engineer participation would be lateral and could be modeled on State Engineer use of rulemaking to endorse the Utah Lake Management Plan as governing document for Utah Lake levels. It may be helpful to explore creating a Checklist, Guidelines or a MOU establishing the criteria a contract bank must meet to receive an endorsement from the State Engineer. The goal is to expedite processing of contract banks.
- **SE Administrative Practice:** To facilitate split season uses, which will be a primary component of contract banks, may need to change State Engineer administrative practice to review depletion instead of headgate diversions/duty when determining how much of water right is used and what water is available and eligible to enter the bank.
- **Water Commissioner Participation:** To maintain orderly distribution on the river, contract banks will need a means to alert the Water Commissioner of contract mechanics and when water is intended to be moved.

Next Meeting: No next meeting time was set.

Tasks: Clyde Snow will prepare an outline of the concepts/sample contract water bank for the group to discuss. To be distributed by May 1, 2018. Once an outline is distributed Peter Gessel and Scott Martin will review the need for legislative changes.

MINUTES:
These minutes are contemporaneously taken - please excuse typos, spelling errors, inadvertent attributions, or accidental misstatements.

- Rich Tullis: (working with Daryl Devey)
  - Working on Warren Act Contract down the road to help with water banking
  - Had a meeting with DNR – started talking some of the concepts we need to make this happen as a pilot
  - We know we can talk to the irrigation companies
  - Thinking we can start with some direct flow – split season; or even a more flexible system that can go and off
  - Will need some administrative controls to show not double dipping
  - CWP: renting water and using Geneva wells
  - Think we can get 1000 AF of trial and limit rented water – need the economics to work out for M&I but need the economics to work for instream flows too
  - Need to look at the relationship between M&I use, instream flows, and ag to make it all work out – everyone would get something out this
  - Provo River not a whole lot of need for instream flows because of our ESA requirements – more room in the upper river for flows
- Steve Clyde:
  - The New River commissioner is modeling a bunch of flows
- Rich Tullis
  - Actually that is Jared Manning project – we have some concerns because we want the river commissioner to still have the final say to address the complexities and nuances
  - Thought it is looking more promising than originally thought
  - For a pilot we need a few years to make sure the administration is going to work out – no double counting etc.
- Steve
  - I wish we had some Warren Act done now so we can have storage
- Rich
  - Warren will help but we will still have some other issues like NEPA to work through
  - Realistically surface flows are going to be best to pilot this on
- Peter
  - How good is the measuring on the Provo - that is going to be the biggest issue for split season uses
- Rich
  - Usually the companies are either on or off so instantaneous diversions are not need necessarily needed for this
  - May just take a cut from the beginning and calculate it that way
- Steve
  - Diamond Bar X: no fancy measuring devices but we are high up in the system
- Rich
  - How do we do this so we try and incentivize water for the instream flow folks – we really just need the economics to work – who is going to pay for the water for the instream flows
- Steve
  - Counter argument – if you not going to use your water why would I pay for it because it is

going to come down the stream anyway

- Rich
  - To avoid that may have to go back to reservoir releases and met out what people buy from farmers for instream flows – central distribution
- Steve
  - We might just need to draft out what a pilot program would like
- Scott:
  - I don't think we need any legislation – I think we can do it all through contracts
  - To the extent the State Engineer needs to be involved maybe at the management plan level
  - Each system is so unique in the state – hard to make a one size fits all statutory program
  - Maybe make templates for contracts at the basin level
  - For legislation less might be more
- Steve
  - Maybe a limited legislation like what Idaho has done and just set up the water banking component and administration side of things
- Peter:
  - If we can get a contract based program off the ground there is little resistance from outside forces because there is no vote – it is going to work or it is not going to work
- Steve:
  - Perhaps a truncated Change Application process
  - Need to look to see if there is bonafide water right and there is not going to be impairments or laundering bad rights
- Rich:
  - Want to clarify: the only way we are going to get half the water for conservation is to fallow half the land
  - My understanding that is the only way the law will work
  - Need to look at spreading water thinner
- Steve:
  - I was looking it more at taking the first three cutting of the 40 acres but not the later season 2 cuts
- Rich:
  - We needs something that is fast from the State Engineer not two years
- Scott:
  - Even temporary change applications take some time
  - Maybe some kind of standing order – if the arrangement meets these requirements you can go forward with 7 days state engineer's notice
  - Something a little more nimble but still has some notice of what is going on
- Rich:
  - This is where we might be on a different page than the water basin council concept – it's all contractual and we are going to just work with those folks involved in the contracts
  - Don't want the basin council to get in the way and veto a good contractual arrangement
- Scott:
  - We are going to be changing the parameters of the water so we are going to need something akin to a change application to note the change and keep the records update to date for the rights/actual use
- Steve:
  - Boyd has stated we can move to a depletion analysis and not a head gate diversion analysis
  - All of this can be administratively
- Peter:

    - Perhaps an MOU will be sufficient if you have active and working water rights
- Rich
    - Looking at it from the M&I perspective again
    - Visualizing a separate section of the code
    - Present your water "scheme" to the State Engineer of how you are going to move water around keep everyone whole
    - 120 days max to see what proposed scheme would to do – State Engineer approval of scheme
    - Then 24 hour notice of moving a component of your system
- Steve:
    - Looking at the Utah Lake Management plan
    - Have the plan and then through Rulemaking the State Engineer endorsed it
- EELewis:
    - Submit your water right to a certification list to validate the water
    - Then part of a contractual water bank
    - Operate like an irrigation company – move water around inside company/move water around the contractual bank
    - Need ways to notify the commissioner on what is happening so they can make arrangements on diversions
- Rich:
    - It is all got to work with all the parties
- Steve:
    - Moving forward – Steve and EELewis draft a contractual banking schematic, validity/certification list
- Scott:
    - More details on Rich's M&I proposal
    - Steve: it's mostly in the Bonneville paper distributed
- EELewis:
    - Contractual bank checklist
    - Something that allows the state engineer to review a contractual bank and give it a rubber stamp
- Chris:
    - Pros and cons from legislation
    - Pro – if we have invested legislators, is there benefit in having them pressures the State Engineer's office so they feel compelled to act
    - Con – present something up on the hill and then an opportunistic legislator jumping on the band wagon
    - Need to keep close contracts with Jani and Sterling to make sure we are all working on the same page
- Steve:
    - We may need to start looking for new/additional sponsors with the departure of Dayton
- Chris/Rich:
    - Whatever we need to do we need to be out in front so that we make something work well as pilot for the Provo and no other group dictates a project that won't work on this system
- Peter:
    - We need a win for Ag. –
    - I don't want to change what we are talking about - but the elephant in the room is Ag. to urban conversion
    - Avoid the buy and dry issues
- Rich:

    - Yes – this is exactly what this could be
    - Best in the world – would be if farmers give up some of us their water is much more attractive
    - Always going to be farmer land owner somewhere who wants to sell of their land
- EELewis:
    - This might change the economic decisions for future farmers to stay in
    - Alternative Transfer methods? Look to other states
- Peter:
    - Look to Nathan's white paper on this
-

SUMMARY OF FINDINGS

To: Senator Jani Iwamoto

From: Sevier River Water Banking Subgroup –Nathan Bracken and Jay Olsen

Date: April 30, 2018

I. Introduction

Our group offered to look into the various incentives, barriers, and other issues associated with water banking in the Sevier River Basin, as well as the key elements that water interests in the Basin will likely require for any statewide water banking legislation. In performing this task, we conducted outreach with a number of experts with an understanding of water issues in the Sevier, including Warren Peterson and Terry Monroe with the Division of Water Rights' Richfield office and Tracy Balch Conservation District, Zone 4 Coordinator. Our findings and recommendations, which are based in part upon the summary prepared by the Price River Subgroup, are as follows:

II. Legislation should not interfere with existing efforts to lease, trade, or share water

A significant amount of water trading is already taking place in the Sevier River Basin between shareholders at the canal company level. In addition, there is a large amount of data and information available in the Sevier with respect to water availability and pricing. The Basin is also extremely efficient and water supplies are fully allocated and used. As a result, parts of the Basin, particularly the area around Delta, are already adept in terms of moving water between willing buyers and sellers. Thus, it is possible that statewide water banking legislation may not improve upon the current framework in the Sevier, at least in some parts.

That being said, if statewide legislation were to improve water trading efforts in the Sevier or to be palatable to water right holders in the area, such legislation would likely need to have the following components:

1. In some parts of the Basin there is no centralized authority for parties interested in leasing water to learn about willing lessors and lessees or to gather information on water pricing. Although water companies in the Delta region appear to currently fulfill this role, a centralized authority may be useful in other parts of the Basin.

2. Because a significant amount of water trading is already taking place in the Sevier, local banking should build on and support current water trading practices and pricing structures. This means that any banking legislation cannot mandate a specific pricing regime and should give each bank that may be created in the Sevier some level of discretion to determine pricing for its specific service area.

III. Legislation should allow each local bank sufficient flexibility to create a governance and pricing structure that corresponds to its specific circumstances

It is likely that the Sevier would require four to five[1] separate local banks within the Basin organized on a sub-drainage basis. Although it is possible that not all of these drainages would choose to create a local bank, a transparent central banking authority could help smooth out some of the differences between local water interests at a sub-drainage level, provided that such banks are transparent and representative of the water interests within each bank's respective service area, particularly with respect to pricing.

1. Some of the larger entities in the Sevier will likely require a greater role or say in how the local bank operates, while smaller entities will need to have some assurance that they will have an influence in the bank.

2. A centralized banking structure at the sub-drainage level could help facilitate a market and access to available water in some parts of the Sevier, but could also increase prices by facilitating competition, further illustrating the need for each bank to have flexibility to establish its own pricing.

3. Local banks will also likely need sufficient flexibility to determine how best to interface and coordinate with the State Engineer, distribution systems, water commissioners, and the various water companies and other right holders within their service areas.

IV. Water distribution systems may provide a good starting point for the process needed to create local banks

The Sevier River Subgroup concurs with the recommendation from the Price River Subgroup that a framework that is similar to the process needed to create and operate water distribution systems may work for local banks.

V. Flexibility is needed to account for differences in the types of entities that will place water rights in a bank and those entities seeking to lease water from a bank

Like many other parts of Utah, we expect that most of the water rights placed into a local bank and leased from a local bank in the Sevier would be agricultural in nature. There is also a concern that agricultural users could be "priced out" if they are required to compete against municipalities and other potential lessors with deeper pockets, particularly if those interests are coming from outside of the Basin.

1. Any statewide local banking framework will need to ensure local control in how local banks are created and managed in order for banking to be acceptable to water interests in the Sevier; and

[1] Bacon's Bible page 3 VII list zones A-D

2. Water interests in the Sevier will likely not support any legislation that does not give local water right holders and local banks flexibility to create a system that allows agriculture to remain competitive in the leasing process.

VI. Allowing inter-basin transfers between banks is likely a nonstarter in the Sevier, but there is support for allowing local banks within the Sevier to have the ability to voluntarily negotiate *intra-basin* transfers among themselves, as appropriate

The Sevier is particularly sensitive to concerns that agricultural interests will not be able to compete if water that is banked in the Sevier can be moved outside of the Basin, particularly for municipal and other uses along the Wasatch Front. That being said, there also appears to be a general recognition that local banks within the Sevier would need and want the ability to negotiate *intra-basin* banking arrangements among themselves. Again, the concept of local control is key.

VII. Abandonment and Forfeiture

There is broad consensus that any statewide banking legislation would need clear and unmistakable language stating that water placed within a bank is not subject to abandonment and forfeiture.

VIII. Conclusion

Water interests in the Sevier may have less interest in water banking than other parts of Utah because of: (a) the existing efficiency in the Sevier River system; (b) the significant amount of water trading that already takes place in the Basin; and (c) the significant amount of water data and information currently available regarding water supplies and availability in the Sevier.

Consequently, some interests in the Sevier may not be inclined to see the need for statewide water banking legislation or how such legislation would benefit them. These interests may also be concerned that such legislation may disrupt the water trading that already take place in the Sevier or could adversely impact local control over the Basin's water rights. Because of the potential for these and similar concerns, statewide legislation will need to refrain from imposing mandatory obligations on local water interests and will need to include protections for local control to be palatable to water interests in the Sevier and to otherwise avoid generating opposition in the Basin.

Water Banking on the Weber River

Meeting Date: 4/9/2018

Meeting participants: Scott Paxman, Derek Johnson, Marcelle Shoop, Mark Stratford, Paul Burnett

1) **Current Conditions**
   a) Informal, temporary water transactions are already occurring throughout the Weber River Basin. There are a handful of limited peer-to-peer informal short-term exchanges, but there lacks a formal structure to broker any water temporary water deals. As a result, there is not a robust temporary water market. Most of the current water transactions are being completed by larger water entities such as Weber Basin Water Conservancy District with individual small water users. These are happening on an informal annual basis in the following manner.
      i) The larger entities are reaching out to smaller, individual water users who typically hold senior natural flow water rights. The parties negotiate a lease and the water users fallow their field(s) and allow their water to flow downstream. Water is delivered downstream during the irrigation season as a natural flow within the service area of the leasing entity.
      ii) WBWCD is essentially using the natural flow water as it is available through leasing to supplement their reservoir releases and extend storage. For example, if their summer releases out of Echo Reservoir releases are 400 cfs, and they are leasing 1 cfs of natural flow rights from a water user in Coalville, then their actual call of stored water is 399 cfs from Echo Reservoir. This allows them to store water in the reservoirs for potential carry-over purposes.
      iii) The agreement is reported to the River Commissioner, who tracks the blend of natural flow and stored releases during the current water year. This is essentially a solution to the shepherding question.
      iv) This situation is enabled by the fact that the WBWCD service areas is essentially the entire watershed area.
         (1) There is also some uncertainty about the extent to which a larger volume of short term exchanges could occur without a more formal structure and enabling conditions. The uncertainty arises from questions about how extensively informal, peer-to-peer, annual leases would be allowed by the state engineer and tracked by the River Commissioner. The accounting for leases going from a handful of water users to a specific diversion point (e.g. the Stoddard Diversion) is straightforward, but with multiple parties entering into leases and informal exchanges, it appears that the existing flexibility could be overwhelmed.
      v) Another example of temporary water exchanges is occurring within Chalk Creek system where individual water users are leasing shares out of Blue Lake, a small storage reservoir within the headwaters of Chalk Creek.
   b) Under current conditions, entities like WBWCD are essentially running a very limited "bank." It could be said that individual water users are making deposits to the "bank" but WBWCD is the only organization actually making withdrawals. The primary goal of these transactions is to allow WBWCD to extend storage reserves by tapping in to natural flow rights to supplement current demands.

i) Specific end users within the Weber Basin System are not concerned with specific colors of water (e.g. natural flow or stored). Once it is in the WBWCD system, it is all essentially considered the same.
ii) On paper, the WBWCD is using the leased water as credits for stored water.

c) Pricing is negotiated between individiual water users (Depositors) and WBWCD. Because WBWCD is the only entity that can use the leased water, prices are essentially set by WBWCD.
d) WBWCD will sometimes lease stored Echo Reservoir water to the Weber River Water Users. This paper water is then transferred up to Wanship Reservoir, allowing WBWCD to store water as high in the watershed as possible.

2) **Two types of water banking options are possible in the Weber River**
   a) Natural Flow Bank
      i) In concept, this would consist of existing short term exchanges that are already occurring.
      ii) Would work on an annual basis without storage water.
      iii) A formal bank would broker the exchanges and allow for smoother exchanges of water.
   b) Stored Water Bank
      i) Banked water could potentially be stored in storage reservoirs.
      ii) Requires Warren Act approval for BOR reservoirs to store non-project water
      iii) A potential workaround would be for WBWCD or other entity with large storage reserves to broker leases of natural flow and reserve storage to ensure that reservoirs are not storing non-project water. This would require the entity with storage to purchase the lease, and then lease it back out to water users or use it within their system during the current water year. It is possible that storage water not released in lieu of natural flows could be pooled separately and leased during subsequent years.
3) **An independent water bank may facilitate more participants**
   a) Currently it is limited to people willing to work with WBWCD. Many small water users do not have a well-developed relationship with entities with storage such as WBWCD.
   b) In a third-party water bank, partner organizations (e.g. NGO's) could potentially facilitate participation in the bank
   c) An open market water bank, may change the pricing structure. A high price per acre-foot may price out smaller water users and agricultural producers from purchasing water. There is potential that an open market could also cause water to be exchanged to the Provo River system, which is generally a higher price per acre-foot market.
   d) There is potential concern with the impact of water banking on water making it to the Great Salt Lake and surrounding wetlands. If more water is consumptively used then less will pass downstream.
4) **Great Salt Lake System Water Program**
   a) Demand management within the Great Salt Lake tributaries similar to that of the SCPP in the Colorado River, could help support sustainable lake levels.
      i) A GLS System Water fund, set up to compensate water users for fallowing fields could be the basis for this program
         (1) Voluntary program
         (2) Based on consumptive use

ii) If the State Engineer accepts this program as a state fallowing program, then water users would not be at risk of forfeiture
iii) River Commissioners would need to shepherd undiverted water to the Great Salt Lake.

5) **Legislative Needs**
   a) Recognize water being placed into the bank
      i) Facilitates people entering water into a bank because it qualifies as a beneficial use
   b) Legally recognize the entity that actually runs the bank
      i) Provides staying power to the entity
      ii) An independent organization (i.e. a committee of the Weber River Partnership), would need funding for staff to oversee the bank and/or GSL System Water Program
6) **Questions to other water users and the River Commissioner**
   a) What tools are needed to account for water exchanges and shepherd water
   b) Would other water users with storage be willing to participate in possible water banks?
   c) What would the scope of a water bank be? Watershed level (e.g. Lost Creek, Chalk Creek, Upper Weber) or basinwide
   d) Concerns with flows for hydro?
   e) What entity would administer a bank?