

**Water Banking Large Group**  
**July 9, 2018**  
**DNR 10:00 -12:00**

**Attendance** (partial list):

Marcelle Shoop: Audubon Society [mshoop@audubon.org](mailto:mshoop@audubon.org)  
 Elizabeth Kitchens: TNC [ekitchens@TNC.ORG](mailto:ekitchens@TNC.ORG)  
 Rich Tullis: CUWCD [Rich@cuwcd.com](mailto:Rich@cuwcd.com)  
 Chris Finlinson: CUWCD [Christine@cuwcd.com](mailto:Christine@cuwcd.com)  
 Nathan Bracken: Smith Hartvigsen [nbracken@shutah.law](mailto:nbracken@shutah.law)  
 Jordan Neilson: Trout Unlimited [Jordan.Nielson@tu.org](mailto:Jordan.Nielson@tu.org)  
 Paul Barnett: Trout Unlimited [Paul.Burnett@tu.org](mailto:Paul.Burnett@tu.org)  
 Erica Gaddis: Division of Water Quality [egaddis@utah.gov](mailto:egaddis@utah.gov)  
 Sen. Jani Iwamoto: [jiwamoto@le.utah.gov](mailto:jiwamoto@le.utah.gov)  
 Sterling Brown: Utah Farm Bureau [sterling.brown@fbfs.com](mailto:sterling.brown@fbfs.com)  
 Boyd Clayton: Division of Water Rights [boydclayton@utah.gov](mailto:boydclayton@utah.gov)  
 Jay Olsen: State Department of Ag. [jayolsen@utah.gov](mailto:jayolsen@utah.gov)  
 Claudia Cottle: Bear Lake Watch [bearlakewatch@aol.com](mailto:bearlakewatch@aol.com)  
 Emily E. Lewis: Clyde Snow – [eel@clydesnow.com](mailto:eel@clydesnow.com)  
 Jon Schutz: Mabey Wright & James - [jschutz@mwilaw.com](mailto:jschutz@mwilaw.com)  
 Steve Clyde – [sec@clydesnow.com](mailto:sec@clydesnow.com)

**Meeting Summary:**

The large group met to report on the activities of the three smaller working groups:

- 1) Changes Needed to Existing Law to Facilitate Water Banking (Wendy Crowther);
- 2) New Legislation Needed to Facilitate Water Banking (Nathan Bracken)
- 3) Potential Pilot Water Banking Project (Steve Clyde)

Generally – all groups are making good progress on their respective tasks.

**Assignments for Next Meeting:**

Each sub-group will continue to meet and work on their respective topics and tasks.

**Next Meeting:**

August 20, 2018  
 9:00 – 11:00 AM  
 Department of Natural Resources – Room TBD

<p><b>MINUTES:</b>          These minutes are taken contemporaneously as a courtesy record of the group’s conversation. Please excuse any inadvertent attributions, accidental misstatements, omissions, or errors.</p>	<p><b>MAIN THEMES/USEFUL TOOLS:</b></p>
<p><b>Nathan Bracken: New Legislation Group</b></p> <ul style="list-style-type: none"> <li>- Goal of New Legislation Group:             <ul style="list-style-type: none"> <li>o How are water banks created?</li> <li>o How are the groups regulated once created?</li> </ul> </li> </ul>	<p><b>Changes to Existing Legislation:</b> The Existing Legislation group made good</p>

**Water Banking Large Group**  
**July 9, 2018**  
**DNR 10:00 -12:00**

<ul style="list-style-type: none"> <li>- Overlap with other groups</li> <li><b>Wendy Crowther: Existing Legislation Group:</b></li> <li>- 73-1-4: Public Water Supplier <ul style="list-style-type: none"> <li>o Currently – the best fit for a Change Application is currently a municipal use <ul style="list-style-type: none"> <li>▪ Need to add banks as municipal water suppliers?</li> </ul> </li> <li>o One question is whether we want to have water rights deemed municipal use- do we want to talk with State Engineer on this?</li> <li>o Boyd: Municipal use is something we created – we should get something titled Banked Water so there is not confusion that its actually municipal</li> <li>o May want to look at what municipal is in general</li> <li>o Rich: Do these really need to be municipal or have this involve SB 51?</li> <li>o Steve: exempt from forfeiture – just need to add banked water as a beneficial use</li> </ul> </li> <li>- 73-1-4: Forfeiture <ul style="list-style-type: none"> <li>o Boyd: as long as this gets used that is the most important</li> <li>o Protected from forfeiture while it is in the bank</li> </ul> </li> <li>- 73-3-8: Change Applications <ul style="list-style-type: none"> <li>o Change Application does not become permanent until it has proof filed on it</li> <li>o Boyd: Common process that people file Change Applications and let them lapse or withdraw them</li> <li>o If we did a fixed time Change Application it could expire when the banking lease ends</li> <li>o Steve: could do a special banked Water Change Application – want to stay away from annual Temporary Change Applications</li> <li>o Rich: year to year is too quick – some people want to have their water for 3 years, some people want it for 20 years</li> <li>o Wendy: allow the fixed time application to match the contract time – flexibility for the bank and certainty for the bank</li> </ul> </li> <li>- <b>General Discussion</b> <ul style="list-style-type: none"> <li>o Boyd: Proof Due Dates – we intentionally set Proof Due dates at short increments to stay in contact with owner – pay attention to the water right – we will need to find a way to stay in contact with banked water users</li> </ul> </li> </ul>	<p>progress on identifying what existing statutes and modification may be needed. They identified the following statutes as being impacted by water banking (see notes and Memorandum for discussion):</p> <p>Utah Code Ann. §</p> <ul style="list-style-type: none"> <li>- 73-1-4</li> <li>- 73-3-3</li> <li>- 73-3-8</li> <li>- 16-6a-1201, 1202</li> </ul> <p><b>New Legislation Needed:</b>  Sub-Committee Chair Nathan Bracken identified two key areas where new legislation is needed:</p> <p>1) <u>Water Banking Criteria:</u>  What criteria water users need to meet to have a water bank approved for use (i.e. what is the “checklist” of required issues water users need to address in forming a bank such as boundary of bank, pricing mechanism, potentially use preferences, organization of governing body, etc)</p> <p>2) <u>Water Bank Governance:</u>  What legislation is needed to govern water use once water rights have entered a water bank (i.e. how do banks shepherd water, lines of communication with the State Engineer etc.).</p> <p><b>Pilot Water Bank:</b> The group discussed filing for a BOR Water Smart Grant to fund Pilot Water Bank. Though much effort was expended to define the goals and key</p>
---	--

**Water Banking Large Group**  
**July 9, 2018**  
**DNR 10:00 -12:00**

<ul style="list-style-type: none"><li>○ Nathan: We will need it to be fixed term in the bank to make people feel comfortable with the water not being permanently co-opted by the bank – maybe just have it be an extension process to stay in the bank</li><li>○ Boyd: we can just add something to the extension form similar to the public water supplier that having a banked right constitutes due diligence</li><li>○ Boyd: we will need to have communication with the bank which may be enough</li><li>○ Nathan: we had thought that there would be not be need for proof</li><li>○ Boyd: what if they want to sell the water after 30 years- make him file a new Change Application?</li><li>○ Jon Schutz: Why can't we have both – have contracts for 30 years and then no new change application?</li><li>○ Mark Strafford: if you want to transfer the water right to the City then you should do your own Change Application when you take the water out of the bank or sell to a municipality using the bank</li><li>○ Mark Stratford: should it be the bank filing the Change Application or the water right owner – might want to be co-applicants?</li><li>○ Steve Clyde: we have had all the anguish with share owners – don't want to open door to non-title owners file Change Application</li><li>○ Steve Clyde: Is the Bank going to have to be some kind of legal entity?</li><li>○ Mark Stratford: County and cities have building authorities</li><li>○ Steve Clyde: Idaho has a built in funding mechanism – and operates through the state. Going to need some kind of legal status so they can be sued – legally responsible for operating the bank. Inter-local Agreements are only going to be governmental entities</li><li>- State Engineer Authority:<ul style="list-style-type: none"><li>○ Need to bolster the authority of the State Engineer on enforcement and shepherding</li></ul></li><li>- Boards of Water Companies:<ul style="list-style-type: none"><li>○ A little out of the field but shareholder companies – can't bank their underlying water right without a majority or super majority not the Board</li><li>○ Rich Tullis: history of shareholder change applications – same process for shareholder process for filing a Change Application</li></ul></li></ul>	<p>elements of a potential grant application, it was determined the project was not yet ripe to meet a July 17, 2018 application deadline. It was determined the Pilot Water Banking group would take the coming year to continue to build contacts with key stakeholders and BOR representatives and define the specifics of a BOR Water Smart grant application.</p>
--	--

**Water Banking Large Group**

**July 9, 2018**

**DNR 10:00 -12:00**

- Nathan: don't want to prohibit this if it works for Company
- Scott Martin: have to be careful that this is contractual matter – ultimately a company is a contract. Want to be careful of trying to create a statutory mandated relationship between the Company and the Shareholder.
- Wendy/Scott: Bylaws could say something different –
- Jon Schutz/Scott Martin: can the shareholder opt out of having the company decide to enter their water rights
- ??????: Orchard v. alfalfa
- Nathan: Does Title 16 already address this- can we leave it to the Companies – or do we need to do more to address concerns of Shareholders?
- Sterling Brown: it's the transaction costs and simplicity that are going to be key to its success. The roll out is not going to work if it's too difficult to comprehend
- Sterling Brown: the 5 acre guy v. 500 acre guy. The 500 acre guys have the Board seat but there are more of the 5 acre guys
- Wendy: We should add in the word "bank" to Utah Code 16-6a-1201, 1202

**Nathan: New Legislation Group**

- We were not so specific - identify the issues we will need to address:
- 1) How do we create a bank:
  - Watershed size
  - Use preference
  - Organization of the governing body: what other models are out there (Mt. Nebo; local district; water commissioners)
  - Trick will be coming up with a checklist to make sure the banks are operated competently and effectively
- 2) How do we regulate the bank once we have created the bank?
  - To what extent do we need to the State to participate?
  - There will need to be some involvement:
    - Communications with the State Engineer
    - Shepard water
- Overriding themes:
  - Trying to create a spot market for water
  - Maintain local control – needs to be empowering and have them engaged

**Water Banking Large Group**

**July 9, 2018**

**DNR 10:00 -12:00**

- Utilize existing templates – surgical approach and create a little new legislation
- Federal v. State Law: this group is to focus primarily on state law
- Funding and Resources: how do we get these banks up and running and sustainable
- Don't Upset the Boat: this is not an overarching one size fits all –here is one of many ways to share water
- Mark Stratford:
  - What about overlapping banks – is that ok?
- Nathan Bracken:
  - Similar to issues of inter-basin. The bank can design its own roles and limits.
  - Helpful to have the watershed group give an update
- Boyd:
  - Once the water is in the bank – the best place to use it is downstream.
- Sterling:
  - Laundry list of potential new language – fairly lengthy and potential getting longer
  - Can we go to the basins that are already doing this – and ask them what they are doing and what they need from new legislation?
  - Worry about education curve – don't want to be educating and legislating at the same time
- Mark Stratford:
  - Only convene about going to existing system is that those groups are doing to meet their own interests
  - If we are trying to create a spot market is not going to work to go those groups
- Nathan Bracken:
  - The stage we are at is to get some conceptual language and work with the stakeholders once we have something
  - There is no real timeframe
- Sen. Jani Iwamoto:
  - We got to the point of deciding we needed something solid and concrete to shop out in the country
- Group:
  - Get it organized and then take the concepts on the road