

Water Banking Group: New Legislation Sub-Committee – First Meeting
July 16, 2018
Smith Hartvigsen 9:00-11:00

Attendance:

Nathan Bracken: Smith Hartvigsen nbracken@shutah.law
 Sterling Brown: Utah Farm Bureau sterling.brown@fbfs.com
 Peter Gessel: Utah Department of Ag. pgessel@utah.gov
 Jon Schutz: Mabey Wright & James jchutz@mwjlaw.com
 Jay Olsen: State Department of Ag. jayolsen@utah.gov
 Boyd Clayton: Division of Water Rights boydclayton@utah.gov
 Emily E. Lewis: Clyde Snow – eel@clydesnow.com
 Marcelle Shoop: Audubon Society - mshoop@audubon.org
 Sen. Jani Iwamoto: Utah Senate - jiwamoto@le.utah.gov (phone)
 Keith Denos: Provo River Water User gkd@prwua.org (phone)
 Scott Martin: Snow Christensen & Martineau SHM@scmlaw.com (phone)
 Chris Finlinson: CUWCD - chris@cuwcd.com (phone)

Meeting Summary:

The group primarily focused on discussing sub-points for drafting legislation on the two main areas of needed new legislation: 1) Criteria necessary to create of a water bank; and 2) Governance/Operations of a water bank.

Assignments for Next Meeting:

The group split into two sub-drafting groups to address the first sub-points in each drafting area.

- 1) Criteria: organization/operation of bank
 - Jon Schutz; Rich Tullis; Sterling Brown; Nathan Bracken

- 2) Governance: Interbank Transfers
 - EELewis; Jay Olsen; Peter Gessel; Marcelle Shoop

Each group is to bring some draft language to discuss with the group and the next meeting.

Next Meeting:

August 16, 2018
 1:00-3:15
 Smith Hartvigsen Office

MINUTES: These minutes are taken contemporaneously as a courtesy record of the group’s conversation. Please excuse any inadvertent attributions, accidental misstatements, or omissions.	MAIN THEMES/USEFUL TOOLS:
Nathan Bracken: - Background of last meeting: identified a number of issues <ul style="list-style-type: none"> o Local; low transaction cost; dollars and certainty; 	Legislation Sub-Points: The group primarily broke things up into.

Water Banking Group: New Legislation Sub-Committee – First Meeting

July 16, 2018

Smith Hartvigsen 9:00-11:00

<p>fairness; simplicity</p> <ul style="list-style-type: none">- Work from 7.2.18 notes and work through summary themes together – divide up items into the two main themes:<ul style="list-style-type: none">o 1) how created ando 2) how governed- Try to keep new legislation as simple and as little as possible <p>Sen. Jani Iwamoto:</p> <ul style="list-style-type: none">- Housekeeping: Brian Alred is interested in being involved, especially in Ruth Anne Frost’s absence <p>Peter Gessel:</p> <ul style="list-style-type: none">- Did large meeting group change direction at all- Nathan Bracken: Not really – mostly focused on Existing Legislation Group <p>Jay Olsen:</p> <ul style="list-style-type: none">- General comment that we want our definitions to be general enough to be applicable statewide <p>Nathan Bracken:</p> <ul style="list-style-type: none">- Still want transaction costs low – don’t want work to be so onerous it is not worth participating <p>Jon Schutz:</p> <ul style="list-style-type: none">- Can we have a model water bank for someone to just pick up – a model application? <p>Creation of Bank: Development of criteria or checklist to create a bank</p> <ul style="list-style-type: none">- 1) Boundary- 2) Pricing<ul style="list-style-type: none">o Nathan Bracken: need to have the bank determine the pricing mechanism- 3) Organization/Operation of Bank:<ul style="list-style-type: none">o Jon Schutz: Rules of the Bank and who they comply with the Banko Reporting Requirements to State Engineer- 4) Fairness/Use preference/access to bank<ul style="list-style-type: none">o Marcelle Shoop: grievanceo Scott Martin: freedom to contract- 5) Shepherding- 6) Transparency/ access to water- Compliance with Change Application?<ul style="list-style-type: none">o Chicken and Egg – which comes first? Bank Approval or Change Application Approval?o Boyd Clayton: won’t know who is going to participate until this gets going- 7) Funding (General and Bank-Specific):<ul style="list-style-type: none">o Nathan Bracken: Going to need money for both 1)	<p>Creation of Bank Sub-Points:</p> <ol style="list-style-type: none">1) Bank Boundary;2) Pricing;3) Bank Organization/ Operation4) Fairness/Use Preferences/ Access to Bank5) Shepherding6) Transparency/ access to water7) Funding <p>Governance Sub-Points:</p> <ol style="list-style-type: none">1) Inter-Bank Transfers2) Water Measurement and Shepherding3) Reporting4) Termination of Bank5) Priority6) Water Availability
--	---

Water Banking Group: New Legislation Sub-Committee – First Meeting

July 16, 2018

Smith Hartvigsen 9:00-11:00

<p>internal administration of bank and 2) external costs for the State Engineer/outside entities to review bank.</p> <ul style="list-style-type: none">○ Sterling Brown: Hybrid – some general fee for applying and then each bank has to figure out how they figure out administrative costs internally (Irrigation Company Secretary becomes the Bank Secretary)○ Jay Olsen: depends on where you are in the state – go to a really simple bank with limited River Commissioner involvement – now the bank is going to triple their time. Who pays for that extra costs – pre-existing water users not participating funding extra costs. This should be self-funded once it is up and functioning. We may need some bridge money.○ EELewis: We are going to have the two part change application system, for the second party where water is moved more rapidly upon notice – can it be per transaction fee and directly contribute to the specific costs of running the bank. <p>- Definition of Bank/Mission Statement</p> <ul style="list-style-type: none">○ Nathan Bracken: maybe this would be in the 101 definitions of new Title to Chapter 73 <p>- Review or Notice of Proposed Bank:</p> <ul style="list-style-type: none">○ Most likely State Engineer is the entity to review potential banks○ Marcelle Shoop: Let us explore what the approval process will do○ EELewis: going through approval process makes them go through the paces of making sure the bank worksBoyd: If we are going to do Change Applications we need some mechanism to recognize it's a valid bank to go into○ Peter Gessel: could notice to the State Engineer be enough or do we want this to be an adjudication that the bank is approved?○ Boyd: Don't know if we want to be the fairness police○ Jon Schutz: State Engineer could give up or down on the bank and the publically notice it (rebuttable presumption)○ Jay Olsen: hasn't got off the ground but we have discussed the watershed council concept – we need a process for organizing to have representation of the all of the groups involved in a watershed. There is more than just water rights but involves more water resources○ Marcelle Shoop: really it's a completeness review.	
---	--

Water Banking Group: New Legislation Sub-Committee – First Meeting

July 16, 2018

Smith Hartvigsen 9:00-11:00

<p>What is the process if the bank gets negative feedback on the bank at public notice.</p> <ul style="list-style-type: none">○ Jon Schutz: do you we have to have address up front on whether this is a formal entity. How do we sue them for non-compliance? How does a water user downstream express a grievance?○ EELewis: Wouldn't contract theory cover those participating in the bank and general interference claims cover those outside the bank○ Marcelle: still need an entity to sue○ Jay Olsen: Still need to have the ability to move money around – explain how they are going to○ Nathan Bracken: maybe could let the bank decide what kind of entity of they are going to be. You show us how are you are going to meet these goals: a special district might but the best – could be a water company; inter-local agreement; Company○ Peter Gessel: so now they become a super irrigation company – is there form out there that exists○ Nathan Bracken: What about DMADC – how do they work things amongst companies? But these are just private companies and once you insert a public entity they have a whole bunch of different contracting provisions○ Sterling Brown: Do what degree does the State Engineer have to review to the formation of an irrigation company.○ Nathan Bracken: Generally the company is in charge of the internal administration of shepherding – here the State Engineer is going to be more involved in the administration. State interest is that rights in the bank are not subject to abandonment and forfeiture – need some oversight <p>- Inter-basin Transfers?</p> <ul style="list-style-type: none">○ Nathan Bracken: does this have to be a specific part of the checklist or encompassed under one of the other areas○ Marcelle Shoop: shouldn't this be part of service area?○ Peter Gessel: A lot of these water rights that might participate are already approved inter-basin transfers – should already be in the there and can just participate. New rights coming in are going to be an issue	
---	--

Water Banking Group: New Legislation Sub-Committee – First Meeting

July 16, 2018

Smith Hartvigsen 9:00-11:00

Governance of the Bank:

- Inter-Bank Water Transfers: Notice and how to make it work with the River Commissioner
 - o Nathan Bracken: Ideally once the water is approved to be in the bank there is rebuttable presumption that any changes can occur – don't want the public weigh in.
 - o Jay Olsen: Need a way to measure and shepherd the water. Also want to have a way for the water users to comment on whether or not its actually going to work. Two-step process: 1) there is the stage one getting the water into the bank; 2) stage two you get in bank and need to comment on making sure the transfer actually works (need to account for some water for carriage). There are some realistic issues of.
 - o Nathan Bracken: That may be part of the process – how to effectuate the change in water.
 - o Jon Schutz/Peter Gessel: Need to give the river commissioner a certain amount of time (7 days) to review and see it will actually work. Do we need to give them more authority?
 - o Sterling Brown: Are they going to be use preferences – can I designate what my water is used for?
 - o Group: going to be difficult to meet the goals and objectives of the bank
 - o Nathan Bracken: Maybe someone wants to take their water out of the bank because its not making the money they thought it would.
 - o Jon Schutz: Maybe just a petition.
- Water Measurement and Shepherding:
- Reporting:
- Termination:
- Priority:
 - o Marcelle Schoop: How does the buyer know what they are getting so that they know they are getting good water?
 - o Jon Schutz: Can you sell out the water rights in order of priority?
 - o EELewis: Idaho also leases out when you put water in the bank not the underlying priority date.
 - o Nathan Bracken: Summit County Change Applications now have the priority table that cuts off the amount of water to what you would have historically received (i.e. haircut at the front end)
 - o EELewis: The Birdseye PD also has a table that melds

Water Banking Group: New Legislation Sub-Committee – First Meeting

July 16, 2018

Smith Hartvigsen 9:00-11:00

all of the classes of the water rights – water right equivalency

- Jay Olsen: lets look at this year - we came in with predictions

Water Availability and Distribution;

- Marcelle Shoop: How are we going to address split season leases? Put the whole water right in -
- Nathan Bracken: Earlier we had discussed conservation and how this fits into the bank. Do we let the individual banks figure this out?
- EELewis: A water user can also be a lessor putting its water into the bank and renter. Can they just “rent” their own water for the first part of the season and then lease their own water back into the bank.
- Jay Olsen: If your leased water is rented out then you can’t get it out because its accounted?

Termination of Bank in General:

Getting a Water Right Back

How do water right holders get paid?

- Nathan/ Jay: Equalization

Next Steps:

- Should we break into two working groups to attack fist part of both columns: 1) Criteria and 2) Governance: Get something in writing to work from
- Drafting Group 1: Checklist of Criteria (7 or so bullet points)
 - Nathan, Jon, Peter, Sterling
 - Nathan: give some thought to 3) organization and operation of banks and build off of
- Drafting Group 2: Interbank Water Transfers
 - Marcelle, Jay, EELewis

Next Meeting:

- August 16: 1:00-3:15
- Working groups have language to discuss
- Smith Hartvigsen