

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

July 2, 2018

Smith Hartvigsen 1:00 – 3:00

Attendance:

Marcelle Shoop: Audubon Society mshoop@audubon.org
Elizabeth Kitchens: TNC ekitchens@TNC.ORG
Rich Tullis: CUWCD Rich@cuwcd.com
Chris Finlinson: CUWCD Christine@cuwcd.com
Nathan Bracken: Smith Hartvigsen nbracken@shutah.law
Jordan Neilson: Trout Unlimited Jordan.Nielson@tu.org
Erica Gaddis: Division of Water Quality Gassegaddis@utah.gov
Sen. Jani Iwamoto: jiwamoto@le.utah.gov
Sterling Brown: Utah Farm Bureau sterling.brown@fbfs.com
Wayne Pullan: BOR wpullman@usbr.gov
Boyd Clayton: Division of Water Rights boydclayton@utah.gov
Keith Denos: Provo River Water User gkd@prwua.org
Peter Gessel: Utah Department of Ag. pgessel@utah.gov
Scott Martin: Snow Christensen shm@scmlaw.com
Jay Olsen: State Department of Ag. jayolsen@utah.gov
Claudia Cottle: Bear Lake Watch bearlakewatch@aol.com
Emily E. Lewis: Clyde Snow – eel@clydesnow.com

Meeting Summary:

The group met to discuss the goals and objectives of the Water Banking New Legislation Sub-Committee. Sub-Committee Chair Nathan Bracken identified two key areas where new legislation is needed:

- 1) Water Banking Criteria: 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)
- 2) Water Bank Governance: 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.).

As a starting point it was recommended the group review the administrative rules governing Distribution Systems and Water Commissioners. Utah Admin Code R655-15 et seq. The conversation touched on the above topics but much of the time was spent on summarizing this history of the water banking group and the reasoning for focusing on local “organic” banks supported by light legislation.

Assignments for Next Meeting:

Nathan Bracken will summarize and distribute bullet points for concepts to be addressed under both 1) Water Banking Criteria and 2) Water Bank Governance. The group is to review and at the next meeting we will refine and assign tasks for drafting legislation on each topic.

Next Meeting:

Larger Water Banking meeting for sub-committees to report on activities is July 9th at 10:00 am – DNR. Next New Legislation Sub-Committee is July 16th from 9am -11am at Smith Hartvigsen.

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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: - o concept of bank is to change the consumptive portion of your water right - o locally centered - Goal of this group is to come up with ways to authorize local users to create a water bank - a process to create their own water bank but provide it a framework for approval and oversight - Process needs to be fair and equitable and needs to incentivize agricultural participation: certainty and dollars - Want to start by looking at the distribution system Admin. Rules Rich Tullis: - Want to make sure whatever we do works for everyone and are generally applicable to municipal water needs (M&I, environmental, etc.) - One size does not fit all Nathan Bracken: - Yes – we don’t want this to supplant or preclude existing efforts Nathan Bracken: Distribution System Model - May not work for everyone but this may be a good starting point about how look to actually govern their bank - Need flexibility but need a regulatory framework (oversight, equity, etc.) - A framework that a group of water users can present to the State Engineer and have them check it - meets boxes - We also need to think about how will these banks will be regulated once they are created - o Once water is in the bank want to give flexibility to move water around the bank with few transactional costs - o Banked water use is going to have to be on a fixed time basis so we need to authorize the banks to have rules to govern the fixed nature of the bank - o Is there some way for the Bank to report back to the State Engineer to summarize the activities?	Goal of Group: Draft new Legislation on 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,) 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.). Spot Market: It was confirmed the overall goal of a water bank was to act more like a spot market for water. This is to avoid “buy and dry” and having individuals purchase entire water rights to meet short term needs. Local Control: Numerous topics were discussed - such as, physical scope of bank /watershed, pricing mechanism, use preferences, inter-basin transfers –that were determined to be best

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o Pricing – lots of concern that banks might price out some participants: sensitive issue that needs to stay at the local level, but need to make sure there is some fairness built in to support the overall goal of water banking Rich Tullis: - One other source to look at: - o Mt. Nebo water authority was formed for a similar purpose of water management in southern Utah County - o Similarly, Mt. Nebo is based on projects – some members participate in some projects and don't participate in others - Once water is in the bank: - o we should bolster the authority of the river commissioners – bolster power to know what is happening and approve what is happening - o need ability to act fast - o system/bank infrastructure – may need to provide some additional funds and contributions to build the system to actually shepherd the water around the bank Wayne Pullan: - Parameters of Federal participation: - o reclamation projects have an existing water system but have a wall of reclamation policies and law - o need to figure out a way to pierce that wall – what changes to reclamation policy or law need to take place to either use reclamation facilities or water in the bank - o if we have a package of thoughts that - How do I stay whole to make sure our rights stay whole and are not impaired by use of water banked water? Rich Tullis/Nathan Bracken: We have discussed a Change Application like process to review impairment and can only bank the consumptive portion of the water bank Nathan Bracken: - A good chunk of our banks will not have a federal nexus – but where Federal projects they are going to have to participate - Do we need two processes? Feds. involved and feds, not involved Rich Tullis/Wayne Pullman:	decided at the local level. However, as the group moves forward with drafting it should determine what issues arise to statewide legislative importance and what is best left to local control. Existing Templates: The group discussed looking to existing formats for guidance on how to organize a bank: specifically the Mt. Nebo Water Authority structure for water banking board governance/water user participation and the Bear River Canal Company for shepherding water across a large service area. Federal v. State Law: Some federal changes to reclamation law and policy may be needed in areas that include federal projects. However, the scope of this group is to focus on state law changes as they will be applicable to areas with both federal projects and without federal projects. Federal law changes may be better addressed in another forum with help from this group if desired/needed. Funding/Resources: To make bank work we to have to invest in physical infrastructure and bolstered water commissioner presences to physically move water around and administer it. May need to build in a funding mechanism into banks
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- We hold state based water rights so we need to go through the state process, but then on top of that we have our federal hoops we will need to jump through - Nathan Bracken: - Are we going to need federal legislation? Wayne Pullan: - Yes - The Warren Act is a clunky mechanism - We may need amendments to Warren Act - We have done site specific amendments in the past and may have to do something similar here Nathan Bracken: - So we need to focus on state law, but also keep federal changes in our mind to allow federal participation Sterling Brown: - Confirm you want to have water moved intra-season? Rich Tullis: - Yes once the water is in the bank we should be able to move it around fast - Two- step process: 1) Extensive Change Application to determine no impairment; 2) more flexible system Nathan Bracken: - What you want is a spot market - The same right could be used for one use for half the season and a different beneficial use the other half of the season - The problem right now is that there is a one year application or a permanent change application – no spot market exists - This will dis-incentivize the buy and dry – water users may not need to buy the whole water right they may not need the whole water right but know they can get water on the bank Rich Tullis: - Will also need to account for: o Conjunctive use o ASR etc. - The initial Change Application process will need to be sophisticated to take into ground water uses, etc. Scott Martin:	
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- Contracts Clause – need to preserve the ability to contract – don’t want to undermine water sharing that is already happening Nathan Bracken: - This is one avenue among many Boyd Clayton: - Communication is going to be key – once it’s in the bank, there needs to be a solid line of communication Nathan Bracken: - Two biggest issues: - 1) the process by which these banks are created - 2) the process by which banks are regulated (oversight) EELewis: - We may need to look at some of the larger irrigation companies who have large service areas Claudia Cottle: - Is what we are trying to create different than water companies? Nathan Bracken: - We are going to take some of the lessons from the companies but really it’s going to individual water users and companies themselves can participate - In some ways work as a local district – this is the closest thing on the books now but still not a perfect fit Jani Iwamoto: - Have we discussed prioritizing certain needs and when water gets used in the bank? Nathan Bracken: - Leave this up to the banks - But one thing we will want to discussed though – is how we want to address prior appropriation EELewis: - We may need to have look at them more like stocks – Class A, Class B, Class C to account for the different values of the higher priority date - Don’t want bad rights to be treated same	
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Nathan Bracken:

- Use preference may be more difficult – may want to leave up to the local bank to determine that
- I would rather not see a preference posed

Rich Tullis:

- There needs to be a mechanism so that the bank works for everyone and not have different prices for different water users otherwise M&I is going to run over everyone

Erica Gaddis:

- 73-3-8 Change Application criteria – affect the public interest and the natural stream environment –has that ever been defined?
- Might be to our benefit to make sure these statutes coordinate

Marcelle Shoop:

- Steve reintroduced the public interest statute at the last EWTF

Nathan Bracken:

- The last remaining issue is the size of the service area
- Want to have size of banks as one of the checkmarks
- Also need to think about how to have these banks fit with the State Engineer's existing regulatory boundaries
- Also need to address inter-basin transfers – or bank to bank transfers inside the basin

Boyd Clayton:

- The devil is going to be in the details – Idaho is an anomaly because it has storage facilities

Nathan Bracken:

- This may be a second stage conversation

Jay Olsen:

- I don't know how you are going to move water in a lot of smaller ag areas
- Is going to be a horrendous process to figure this out where there are not adjudicated areas
- There are trans-basin diversions everywhere – how do we say you can move it here but can't move it there?
- Going to need to bolster the river commissioners and more resources - there are going to conflicts

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Wayne Pullan:

- General Observation – one of the things to remember is the whole purpose of this is to let resources move to their highest use and move to where they are valued most
- Don't want to create artificial restrictions that preserve artificial outcomes
- But we need to pursue an optimality that assures no one is worse off than they were before
 - o For Ag. as long as it is temporary then their interests are persevered

Nathan Bracken:

- Price – we are putting water in but worried we are not getting it out – need price checks

Wayne Pullan:

- Well this is a political decision that – sometimes we can bear an inefficiency in the system if we choose to

Jay Olsen:

- In the last 10 years we have opened to the discussion of instream flows because there is a price attached to it
- Worried water will leave to the higher use and not able to come back to its original use
- Want to maintain the balance

Wayne Pullan:

- As long as it's a choice to favor that use it is fine

Nathan Bracken:

- Keeping this local will address this
- Also going to have go through a process of Change application

Wayne Pullan:

- To move us forward we need to define a set of models and issues – each of these models determine what issues need to be determined at the local level or need legislation
- Or – is their pilot project

Jay Olsen:

- Need to work on funding and resources

EELewis:

- Fee on the Change Application process

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Rich Tullis:

- Mt. Nebo - each of the participating members pay as they go
- Central is saying yes to new ideas – we need to look at all kinds of options and are taking from successes

Chris Finlinson:

- If you don't want to participate then withdraw from the bank

Group Discussion:

- How the group came around to focus local banks instead of state run bank like Idaho

Next Meeting:

- Next Large Water Banking Group meeting
July 9, 2018
10:00 -12:00
DNR – Room TBD
- **Next New Legislation Sub-Committee Meeting**
July 16 , 2018
9am – 11am
Smith Hartvigsen offices

Next Assignment:

Bullet Points for:

- 1) Check list items
- 2) How to regulate once in the bank