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MEMORANDUM

TO: Senator Jani Iwamoto
Water Right Banking Group

FROM: Water Right Banking Subgroup 1 – Existing Law Task Force

DATE: July 6, 2018

SUBJECT: Water Banking Amendments to the Existing Water Code

On July 2, 2018, the Water Right Banking Subgroup 1 – Existing Law Task Force (the “Task Force”) conferred to discuss possible amendments to the Water Code that would be needed to support the introduction of a new water banking statute. These changes reflect the Water Right Banking Group’s desire to integrate new water banking legislation into the Water Code while avoiding unintended consequences or failing to remove potential hurdles to the effectiveness of banking.

A principal concern for the water bank is ensuring the fungibility of the water deposited—unless water can freely move between lessees and depositors, the banks will have very little value. Utah Code § 73-1-4(b), which defines a “public water supplier,” should be amended to include water banks as they are defined in the new statute. This will help ensure that water banks have the same freedom to move water within their service area as other public water suppliers have,

including community water systems and water corporations. As part of this effort to maintain fungibility, all water undergoing a transfer into a bank should also be changed to municipal use.¹

Another chief concern for water banking is the prospect of water forfeiture. The Code currently holds water subject to forfeiture if it is (a) not beneficially used for seven years and (b) either is not subject to a nonuse application or does not fall within a series of miscellaneous exceptions. Utah Code Ann. § 73-1-4(2)(b),(2)(e). The Task Force believes that the easiest way to exempt water banks from forfeiture is to add reference to them under Section (2)(e). This will incentivize bank usage for rights that individuals or other entities are not using, and provide a way to better distribute water to truly beneficial use.

The currently envisioned structure of water banking will also benefit from the addition of a new “fixed-term” form of change application. Currently, change applications are either “permanent” under Utah Code Ann. § 73-3-3(1)(a), or “temporary” for up to one year under § 73-3-3(1)(b). Neither scheme is conducive to water banking. The nature of banking for a period of years would require bank depositors to either (a) renew a temporary application yearly for the entire deposit period, creating the risk of missed years, or (b) file a permanent change for a knowingly temporary deposit to the bank, only to risk having to file a second permanent change once the depositor reclaims the water. As an alternative, the Task Force recommends creating a third category of change application under Utah Code Ann. § 73-3-3(1) that can be defined for a fixed term of years.² This will permit depositors to plan their change applications in accordance

¹ While this suggestion reflects language that would likely be included in the new statute as opposed to an amendment to the existing Code, the Task Force mentions this to address the issue of “municipal” water and potential misunderstandings over the scope of its use. In an effort to stymie concerns over the definition of “municipal” water, the Task Force recommends that another, more neutral, term be considered to replace “municipal” water while retaining the same expansive definition that it currently has.

² At this time, the Task Force does not believe that any particular limit on the fixed term need be set, but that such time limits are better left to the discretion of the State Engineer and the agreement between the depositor and the water bank.

with the terms of their respective agreements with various water banks. For similar reasons, the State Engineer should be granted authority to issue an application to appropriate for a term of years alongside the current one-year temporary application to appropriate contained in Utah Code Ann. § 73-3-5.5(1) and (2).

The Task Force recognizes that any water banking legislation cannot account for every variable or circumstance that may arise. Because of this, the Task Force also recommends granting the State Engineer rulemaking authority with reference to the new statute under Utah Code Ann. § 74-2-1(5). Complimentary to this, the State Engineer should also be granted the power to enforce against violations of water bank approval orders³—this authority would be best couched under Utah Code Ann. § 73-2-25(2)(a).

While the Task Force was primarily concerned with review of the Water Code, an additional concern was raised over the ability of a water company board of directors to bank the company's underlying water company's water rights over the objection of the shareholders. To help alleviate this concern, the Task Force recommends adding language to the Utah Non Profit Act Article 16 to require majority or even super-majority *shareholder*, as opposed to *board*, approval before a company's underlying water right (as opposed to shares) can be banked.⁴ The Task Force takes no position on where in Article 16 this language would be most appropriate.

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³ New legislation may also want to enshrine the legal enforceability of a water bank's approval order.

⁴ Task Force assumes that shareholders will be entitled to bank their own shares to the extent that their water company board approves it, or otherwise in accordance with company procedures.