

UTAH WATER BANKING ACT

Legislative Summary and Key Considerations

OVERVIEW

Successfully stewarding Utah’s limited water resources is a difficult and challenging task. The Utah Water Banking Act (“Act”) is one tool providing local water users greater flexibility in meeting increasing demand and changing conditions. The Act is the result of an intensive collaborative stakeholder process and works in concert with a number of existing state water policies and programs.

The Act is a 10-year pilot project that promotes the creation of voluntary local water banks to coordinate the temporary leasing and optimization of local water rights. To become a water bank under the Act, interested water users must first meet to determine the interest, scope, scale, and function of their local water bank. When ready, local water users complete an application process with the Utah Board of Water Resources (“Board”) intended to notify the public about the water bank’s proposed operations. Complete applications are approved by the Board. The Act requires regular reporting and addresses how water users are protected if a bank is terminated or in default. The Act also employs existing law, like the Change Application process, water users are familiar with and trust.

To incentivize the use of water banks and optimization of water, the Act exempts banked rights from forfeiture and allows leased water to be used for a number of purposes, including agriculture, water quality and environmental.

OBJECTIVE, SCOPE, AND TERM

- **Objectives:** The Objectives in creating a water bank are to (Line 376-389)
 - o Promote
 - The optimal use of the public’s water
 - Transparency and access to water markets
 - Temporary, flexible, and low-cost water transactions between water users &
 - Utah’s agricultural economy by providing access to water resource and income
 - o Facilitate
 - Robust and sustainable agricultural production while meeting municipal and industrial demand
 - Water quality improvement
 - Water rights administration and distribution
 - A healthy and resilient natural environment
- **Scope of Act:** The Act is voluntary and not intended to interfere with existing or alternative water marketing or water banking activities. (Line 391-395)
- **Sunset Date:** The water banking act will expire on December 31, 2030. (Line 81-84)

PRE-WATER BANK APPLICATION ACTIVITY:

To prepare to file an application to become a water bank, local water users must first identify local water needs, engage potential participants, and assess the local water system and water rights. From this inquiry, local water users then create a proposed bank that satisfies the application criteria (discussed below).

The water banking statute does not govern or direct how water users are to conduct this pre-application effort. However, a successful water banking application is predicated on this activity occurring.

APPLICATION TO BECOME A WATER BANK:

When ready, the owner of a qualifying water right files a Water Bank Application with the Board of Water Resources ("Board") that identifies the key elements informing the form, function, and objectives of the proposed bank. The Act provides for two kinds of water banks: statutory water banks and contract water banks.

- **Board Authority:**

- The Board has the authority to review, approve, and revoke a water bank application, require reporting, and conduct other functions related to the Act. (Lines 310-313)
- The Board may direct the Division of Water Resources to assist with fulfilling the Act. (Lines 398-399)

- **Statutory Water Banks:**

A statutory water bank is a legal entity formed by and for the benefit of local water users, who determine the type of entity the bank will be, such as a non-profit organization or a cooperative association. Statutory banks operate on a free market system and are intended facilitate low cost temporary leases of water rights between users.

Statutory Water Bank Application:

The statutory Water Bank Application creates transparency about bank operations so local water users can determine whether to participate in the bank. (Lines 407-485)

- The record holder, other than the Federal Government, of a perfected water right or valid diligence claim within the proposed service area of the bank can file an application. (Line 408-412)
- The application must identify (among other items):
 - The type of legal entity the bank will be (Lines 415-416)
 - A proposed service area for the bank and map (Line 417)
 - Whether the bank will accept surface or ground water rights, but not both (Line 418-421)
- The applicant must provide a copy of the proposed water bank's governing documents. (Line 424)
- The applicant must provide procedures governing how the bank will (among other items):
 - Determine and fund bank operations (Line 432)
 - Design, facilitate, and conduct the leasing or temporary use of water rights (Line 433-434)
 - Accept, reject, and manage banked water rights, including (Line 435)
 - what information the bank needs to assess the feasibility of using a water right in the bank's service area (Lines 436-438)
 - how the bank will coordinate with the State Engineer on filing change applications to deposit water rights into the bank (Line 439-441)
 - conditions for depositing water in the bank (Line 442)
 - how payments for leased water are to be determined (Line 443)
 - Accept and review delivery requests for water, including guidance on deadlines, costs, delivery, and internal grievance procedures (Line 446-461)
 - Calculate prices for water leased out of the bank (Line 462-463)
 - Coordinate water distribution with the State Engineer and keep a water balance (Lines 464-466)
- The applicant must describe how the bank will unwind if terminated, dissolved, or revoked, including how the bank will return banked water rights and monies owned to depositors. (Lines 471-474)
- Each Application requires a statement from the applicant that if approved the bank will (Lines 475-483):
 - not discriminate between the nature of use, depositors or borrowers
 - comply with the conditions of approved change applications moving water into the bank
 - Report any known violations of an approved change application

Approval of Statutory Water Bank Application: (Lines 487-546)

- When the Board deems a statutory water bank application complete, it provides public notice and holds a public meeting where local water users can submit comments.
- Once all application criteria are complete, the Board issues an order approving the statutory water bank application and the bank can begin operations.
- If the Board denies an application, it must provide written comments explaining the denial. A denial does not create a right of appeal under the Utah Administrative Procedures Act.
- Proposed amendments to the Bank's approved Water Bank Application must go through the same review and notice process as the underlying application.

- **Contract Water Bank:**

A contract water bank is a contract that orchestrates water deliveries between a public entity and other parties to the contract. The goal of a contract bank is to allow public entities more flexibility in working with other water users to meet the objectives of the Act. Contract banks rely on the existing legal framework governing the public entity to ensure transparency.

Contract Bank Application:

- A public entity owning a qualifying water right may seek to have a contract for water use approved as contract water bank by submitting an application to the Board that (among other items):
 - Names the bank (Line 558)
 - Includes a proposed service map (Line 560)
 - Describes how the contract bank's governing body is structured and will operate (Line 561-562)
 - Describes how delivery requests and loaned water rights are to be administered (Line 563-564)
 - Includes criteria for the participation, if any, of non-public entities (Line 565)
 - Includes a copy of the underlying contract, redacted if necessary (Lines 566-568)
 - Identifies where the public can learn when the contract bank application or the underlying contract is on the agenda of a public meeting held by the Applicant (Lines 569-571)
 - Identifies whether the bank will accept ground or surface rights, but not both (Lines 572-574)
 - Describes how the bank will unwind if terminated, dissolved, or revoked, including how the bank will return banked water rights and monies owned to depositors (Lines 575-578)

Approval of a Contract Water Bank:

- Within 30 days of the Board deeming an application complete, it posts notice that the contract bank application has been filed and where it may be viewed by the public. (Lines 599-604)
- Once all application criteria are complete and notice has been issued, the Board issues an order approving the contract water Bank and publishes a summary of information submitted. (Lines 607-613)
- If the Board denies an application, it must provide written comments explaining the denial. A denial does not create a right of appeal under the Utah Administrative Procedures Act. (Lines 614-617)
- Proposed amendments to an approved contract water bank must go through the same review and notice process as the underlying application. (Lines 620-624)

WATER DEPOSITS AND DELIVERY RQUESTS

- **Change Application to Deposit a Water Right In a Bank (i.e. Banked Water):**

The Act uses the existing change application process to approve water rights for general use in the service area of the bank. Additional approvals to distribute water in accordance with the change application are not needed.

- A water right is deposited into a bank pursuant to an approved Change Application that outlines the conditions for which a water right may be used in a bank service area. (Lines 720-721)
- Subject to bank lease terms and procedures, a water user may choose to use its water right at either its heretofore or hereafter location, but not both. (Lines 726-733)

- **Delivery Requests for Loaned Water:**

- A local borrower seeking to use banked water may file a delivery request with the bank. (Line 744-745)
- The State Engineer is to supervise water delivery and can review an approved delivery request at any time to ensure it complies with a State Engineer order approving water rights to be used in the bank or can restrict a delivery requests causing impairment to other users. (Lines 746-751)
- A bank must report illegal water use to the State Engineer's enforcement program. (Line 754-755)
- A bank is responsible for distribution costs to deliver a banked water right. (Line 756-757)

WATER BANK REPORTING REQUIREMENTS AND REVOCATION OF APPLICATION

- **Annual Bank Reporting:** (Lines 630-680)

- On or before November 30 each year the governing body of a water bank shall make report to the Board regarding the water bank's operations including (among other items):
 - The volume and change application number of water rights deposited in the bank
 - The original nature of use and volume of water deposited in bank
 - A tabulation of loaned water rights, volume of loaned water, and nature of use
- If a bank fails to either file an annual report or timely correct deficiencies, the Board can deem the bank in non-compliance and order operations terminated by the end of calendar year. (Lines 681-683)

Supplementary Statutory Bank Annual Reporting Requirements (among other items): (Lines 650-670)

- The borrower of loaned water, amounts charged for loaned water rights, revenue generated by statutory bank, amounts paid to depositors, bank expenses, bank accounting practices, end of year balance, notice of any pending or ongoing litigation, government audits, proposed amendments to procedures, and a narrative explanation of how well the bank is fulfilling the objections of the Act.

- **Board Reporting Requirements:**

- The Board of Water Resources shall submit an annual report to the Natural Resources, Agriculture, and Environment Interim Committee regarding implementation of the Act. (Lines 765-767)
- By October 31, 2029 the Board must submit a written report recommending whether the Act should be repealed and justification for the recommendation. (Lines 768-810)

OTHER KEY CONSIDERATIONS

- **Exemption From Beneficial Use:**

A water right that is subject to a valid approved change application approving the water right for use in an active water bank is exempt from beneficial use requirements. (Lines 213-215); (Lines 724-725)

- **Condemnation Limitation:**

If an entity with condemnation powers leases a water right, it cannot exercise those powers to condemn that right during the lease term or for 5 years after. (Lines 734-738)

- **Title to Water Rights:**

A depositor retains title to banked deposited water rights; the bank acquires no ownership interest. (Lines 715-716)

ADDITIONAL INFORMATION

For more information on the Act and on the process used to create it, please see: <https://utahwaterbank.org/>.

