

## **UTAH WATER BANKING ACT - TITLE 73 CHAPTER 31 STATUTORY WATER BANK PROGRAM GUIDELINES**

The Utah Water Banking Act, Utah Code 73-31, (act) authorizes the Board of Water Resources to approve eligible leasing arrangements as water banks and receive certain rights and benefits.

Utah Code 73-31-203 requires the board to review, notice and approve complete statutory water bank applications as statutory water banks. A statutory water bank is a legal entity organized for the purpose of facilitating water leases between interested local water users. The act allows a record holder, other than the United States or an agency of the United States, of a qualifying water right to request approval of a proposed statutory water bank. Once approved, a statutory water bank applicant has certain annual reporting duties to the board.

Utah Code 73-31-106 authorizes the board to direct and delegate responsibilities under the act to the Division of Water Resources.

### **Statutory Water Bank Program Guidelines:**

1. A record holder, other than the United States or an agency of the United States, of a perfected water right or a valid diligence claim that has its point-of-diversion in the proposed statutory water bank service area, can request approval of a proposed statutory water bank by submitting a statutory water bank application to the board.
2. The board must mark the date a statutory water bank application is received by the board.
3. Once marked received, the board is required to review the statutory water bank application for completeness. To be complete under Utah Code 73-31-202, a statutory water bank application must contain the following information (reflected in the statutory water bank application form):
  - (a) The name of the statutory water bank;
  - (b) The mailing address for the statutory water bank;
  - (c) The type of legal entity recognized under Utah law that constitutes the statutory water bank;
  - (d) A proposed service area map for the statutory water bank;
  - (e) Whether the statutory water bank will accept deposits of surface water rights or groundwater rights, provided that:
    - (i) A statutory water bank may not accept deposits of both surface water rights and groundwater rights; and
    - (ii) The applicant's perfected water right or valid diligence claim is of the type accepted by the statutory water bank.
  - (f) A copy of the statutory water bank's governing documents that specify:
    - (i) The number of members of the governing body, which may not be an

- even number;
  - (ii) The qualifications for governing members, including terms and election or appointment procedures; and
  - (iii) The initial governing members' names, telephone numbers and post office addresses.
- (g) A confirmation that the applicant satisfies the criteria listed in subsection (1)(e)(ii);
- (h) Procedures that describe how the statutory water bank will:
- (i) Determine and fund the water bank's administrative costs;
  - (ii) Design, facilitate and conduct transactions between borrowers and depositors for the use of a banked water right;
  - (iii) Accept, reject and manage banked water rights, including:
    - (A) What information a depositor shall provide to inform the statutory water bank, the State Engineer or any other distributing entity regarding the feasibility of using the water right within the statutory water bank's designated service area;
    - (B) How a potential depositor is to work with the statutory water bank to jointly file a change application seeking authorization from the State Engineer to deposit a water right within the statutory water bank;
    - (C) Conditions for depositing a water right with the statutory water bank;
    - (D) How payments to depositors are determined; and
    - (E) Under what conditions a depositor may use a water right at the heretofore place of use pursuant to subsection 73-31-501(4).
  - (iv) Accept, review and approve delivery requests, including:
    - (A) Deadlines for submitting a delivery request to the statutory water bank;
    - (B) A cost or fee associated with submitting a delivery request and how that cost or fee is to be applied or used by the statutory water bank;
    - (C) What information a borrower is to include on a delivery request to sufficiently inform the statutory water bank, State Engineer or another distributing entity whether the delivery request is feasible within the statutory water bank's designated service area;
    - (D) Any notice and comment procedures for notifying other water users of the delivery request;
    - (E) The criteria the statutory water bank will use to evaluate delivery requests;
    - (F) How the statutory water bank will inform water users who have submitted a delivery request if the delivery request is approved or denied, the reasons for denial if denied, and any applicable conditions if approved;
    - (G) Appeal or grievance procedures, if any, for a borrower seeking to

- challenge a denial of a delivery request, including identifying who has the burden in an appeal and the standards of review;
  - (H) How the statutory water bank will determine prices for the use of loaned water rights; and
  - (I) How the statutory water bank will coordinate with the State Engineer to facilitate distribution of approved delivery requests.
  - (v) How the statutory water bank will ensure that the aggregate amount of loaned water rights during a calendar year does not exceed the total sum of the banked water rights within the statutory water bank; and
  - (vi) How the statutory water bank will resolve complaints regarding the statutory water bank's operations.
  - (i) The process that the statutory water bank will follow if the statutory water bank terminates or dissolves or if the board revokes the statutory water bank's permission to operate pursuant to this chapter, including how the statutory water bank will return banked water rights to depositors and how the statutory water bank will return any amounts owing to depositors; and
  - (j) A signed declaration or affidavit from at least two governing members of the statutory water bank affirming that:
    - (i) The information submitted is correct;
    - (ii) As a condition for permission to operate, the statutory water bank may not discriminate between the nature of use, depositors or borrowers;
    - (iii) The statutory water bank shall comply with the conditions of an approved changed application for a banked water right; and
    - (iv) The statutory water bank shall report to the State Engineer known violations of approved change applications.
4. As part of the completeness review, the board is to determine whether the statutory water bank meets the objectives in Utah Code 73-31-104. The objectives in creating a water bank are to:
- promote:
- (a) The optimal use of the public's water;
  - (b) Transparency and access to water markets;
  - (c) Temporary, flexible and low-cost water transactions between water users; and
  - (d) Utah's agricultural economy by providing access to water resources and income for Utah's agricultural industry.
- and facilitate:
- (a) Robust and sustainable agricultural production while meeting growing municipal and industrial water demands, such as following arrangements;
  - (b) Water quality improvement;
  - (c) Water rights administration and distribution; and
  - (d) A healthy and resilient natural environment.
5. If the board finds the applicant has not included the necessary information to deem the application complete, the board is to notify the applicant of any additional information

or changes needed to process the application.

6. The board is to mark the date it deems the statutory water bank application complete.
7. Within 30 days of marking the statutory water bank application complete, the board must publish notice according to Utah Code 73-31-103 (which references the notice procedure established under Utah Code 73-3-6). This notice shall state that an application to create a statutory water bank has been filed with the board, where an interested party may obtain a copy of the application and any additional information related to the application, and the date, time and place of the public meeting required by Utah Code 73-31-204.
8. It is recommended the date of the public meeting for a statutory water bank application be the next regularly scheduled Board of Water Resources meeting that falls after the notice period in under Utah Code 73-31-103/ Utah Code 73-3-6 has run. These notice statutes require notice of an application be published once a week for a period of two successive weeks in a newspaper of general circulation in the county in which the source of supply is located and where the water is to be used. This is in accordance with Utah Code 45-1-101, which requires two weeks of notice on the public notice website.
9. Pursuant to Utah Code 73-31-204, on the date indicated in the notice, the board shall hold a public meeting to inform water users within the service area of the proposed statutory water bank and receive comments from water users regarding the application.
10. The board shall accept public comments for no less than 30 days after the adjournment of the noticed public meeting. Submitting a comment does not create a right of appeal of the board's decision under Utah Code 63G-4, Administrative Procedures Act, nor is the board required to address how or whether the public comments impacted the board's decision.
11. The applicant for statutory water bank may review public comments and comments from the board before a final decision is made. If the statutory water bank desires to make changes to their application, the statutory water bank may notify the board in writing before the board takes action on the application and submit a revised application following the same process that governs the filing and review of the original application for a statutory water bank.
12. Pursuant to Utah Code 73-31-205, after the 30 day public comment period has passed, the board shall liberally interpret the standards set in Utah Code 73-31-202 (noted above) to find the statutory water bank application complete and approve the application.
13. In approving the statutory water bank application, the board shall:
  - (a) Issue an order approving the statutory water bank;

- (b) Approve persons to serve as the initial members of the governing body in accordance with the proposed statutory water bank's structure and as noted in Utah Code 73-31-202; and
  - (c) Publish the approved application on the water banking website.
14. If the Board of Water Resources denies an application, it must provide a written explanation describing the reasons for the denial. Denial of statutory water bank application does not create a right of appeal under Utah Code 63G-4 of the Utah Administrative Procedures Act.
  15. Once approved as a statutory water bank, bank participants will use the State Engineer's existing change application process under Utah Code 73-3-3 and 73-3-8 to secure approval from the Division of Water Rights to use water rights for water banking purposes inside the statutory water bank service area.
  16. The statutory water bank is responsible for overseeing internal administration of water leases between participating parties and coordinating with the State Engineer on distribution and enforcement matters.
  17. On or before November 30 each year, the governing body of a water bank will make a report to the board regarding the water bank's operation and including the information listed under Utah Code 73-31-401.