

# Statutory Water Bank Creation and Operation Checklist



In the 2020 General Legislative Session, the Utah Legislature passed S.B. 26, which enacted the Water Banking Act (“Act”), Utah Code § 73-31-101 et. seq. The Act created a framework for both statutory water banks and contractual water banks. This checklist is being provided for the purpose of assisting the creation of statutory water banks and ensuring that such statutory water banks comply with the Act.

## Step 1

### Create a Statutory Water Bank

- Identify a Service Area for a Groundwater or Surface Water Bank.** In determining an appropriate service area, note that a statutory water bank can only be a groundwater bank or a surface water bank, but it cannot be both.
- List Possible Bank Participants within Proposed Service Area.** In determining the feasibility of a water bank in a specific location and to the extent possible, identify possible water bank participants before engaging in the process of creating a legal entity and submitting an application for approval of a water bank.
- Identify a Bank Applicant.** The bank applicant must be a record holder of a perfected water right (one that is listed in a decree, a certificate of appropriation, or a proposed determination or court order issued in a general adjudication) or valid diligence claim that is encompassed within the proposed service area of the bank. An applicant cannot be the Federal Government.
- Create a Legal Entity for the Water Bank.** The Act gives applicants flexibility to determine what type of legal entity the bank will be, so long as the legal entity is “recognized under Utah law.” Some examples of a legally recognized entity are non-profit corporations, cooperative associations, and interlocal entity, if government entities are involved. Determining which legal entity to create may require a legal and regulatory analysis to identify the legal entity that can best meet local needs.



## **Prepare Governing Documents and Policies for the Legal Entity.**

The governing documents should comply with applicable laws and be structured to best meet local needs, which means that a legal and regulatory analysis may be necessary to properly structure the legal entity. While the governing documents are required to comply with the laws regarding the specific legal entity that will be created, the governing documents, at a minimum, must contain the following:

1. **General Information about Entity.** Provide the name, mailing address, and service area of the entity.
2. **Registered Agent.** Provide the name and mailing address for the registered agent.
3. **Board Composition.** Provide an odd number of governing members and list the initial governing members' names, telephone numbers, and post office addresses.
4. **A Proposed Service Area Map.** The service area map is crucial because the water bank's operations, including the receipt of water right deposits and borrower's use of deposited water rights, are limited to the service area.
5. **Procedures Governing Member's Qualifications and Elections or Appointments.** The water bank will need to determine how the governing board is structured, who can serve on the board, and whether board members are elected or appointed.
6. **Procedures for Funding the Water Bank.** Determine the costs of operating the water bank and describe procedures about how the legal entity will fund its administrative costs, including change application reviews, staff time, materials, and legal and regulatory analysis. Funding could come from assessments or user fees.
7. **Procedures Governing Transactions.** Describe procedures to design, facilitate, and conduct transactions between borrowers and depositors for the use of a banked water right.
8. **Procedures for Reviewing Deposit Applications and Managing Deposited Water Rights.** Describe the procedures the water bank will follow to review, accept, reject, and manage banked water rights. These procedures should include:
  - a. what information a depositor must provide regarding the feasibility of using the water right within the water bank's service area;
  - b. how the depositor will work with the water bank to file a joint change application with the State Engineer to deposit the water right into the water bank;



- c. conditions on depositing a water right into the water bank;
- d. how payments to depositors will be determined; and
- e. conditions for how a depositor could use the deposited water right at the heretofore place of use.

9. **Procedures for Reviewing, Approving, or Rejecting Delivery**

**Requests.** Describe the procedures the water bank will follow in reviewing, approving, rejecting, and managing delivery requests. These procedures should include:


- a. a deadline for a borrower to submit a delivery request;
- b. the cost or fee of submitting a delivery request and how the cost or fee is to be applied or used by the water bank;
- c. the information that must be included in the delivery request to sufficiently inform the water bank, the State Engineer, or other distributing entities whether the delivery request is feasible within the water bank's service area;
- d. any notice and comment procedures for notifying other water users of the delivery request;
- e. the criteria that will be used to evaluate the delivery request;
- f. how to inform the water user who submitted a delivery request whether the delivery request was approved or denied, including 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 standards of review and burden of proof;
- h. how prices for loan water will be determined; and
- i. how to coordinate with the State Engineer to facilitate distribution of approved delivery requests.

10. **Procedures for Proper Water Allocation.** Describe the procedures the water bank will follow to 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 water bank.

11. **Procedures for Complaint Resolution.** Describe what process the water bank will take to resolve potential complaints regarding the administration of the water bank.



12. **Procedures for Termination, Dissolution, or Revocation of the Water Bank.** Describe the process the water bank will follow if the water bank is terminated, dissolved, or has its permission to operate revoked by the Board of Water Resources. Such procedures should, at a minimum, include how the water bank will return banked water rights to depositors and how the water bank will return any amounts owing to depositors.


 **Submit Application to Board of Water Resources.** In addition to providing the governing documents, the application must include a signed declaration or affidavit from at least two governing members affirming that:


1. the information submitted is correct;
2. as a condition for permission to operate, the statutory water bank may not discriminate between the nature of use, depositors, or borrowers;
3. the water bank will comply with the conditions of an approved change application for a banked water right; and
4. the water bank will report to the State Engineer known violations of approved change applications.

*Step 2*

## Board of Water Resources Reviews

### Application and Holds Public Meeting

 **Review for Completion.** The Board of Water Resources will initially determine whether the application contains all of the information required by law.

 **Review of Objectives.** In addition to reviewing the application for completeness, the Board of Water Resources will determine whether the application meets the objectives of a water bank in Utah Code § 73-31-103, which include:


A. **Promoting:**


1. The optimal use of the public's water;
2. Transparency and access to water markets;
3. Temporary, flexible, and low-cost water transactions between water users; and
4. Utah's agricultural economy by providing access to water resources and income for Utah's agricultural industry.





**B. Facilitating:**

1. Robust and sustainable agricultural production while meeting growing municipal and industrial water demands, such as fallowing arrangements;
2. Water quality improvement;
3. Water rights administration and distribution; and
4. A healthy and resilient natural environment.

 **Public Notice.** If an application is approved for completeness, the Board of Water Resources will post notice that the application has been filed, provide instructions on 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 a public meeting to discuss the application.

 **Public Meeting.** On the date indicated in the public notice, the Board of Water Resources will hold a public meeting to (1) inform water users within the service area of the proposed water bank and (2) receive comments from water users regarding the application.

 **Review of Public Comments.** The Board of Water Resources will review any comments provided when it reviews the water bank's application, but the Board of Water Resources is not required to address how or whether public comments impacted its decision to approve or deny the application. The water bank may review the public comments and amend the application in light of the public comments.

 **Application Approval or Rejection.** The Board of Water Resources is required to approve an application if the application includes all of the required information described above. In approving an application, the Board of Water Resources will issue an order approving the application and water bank, approve persons to serve as the initial members of the governing board, and publish the approved application on the water banking website. If the Board of Water Resources rejects the application, it is required to issue a written explanation explaining why the application was denied.



# Step 3

## Annual Reporting Requirements

**File Annual Report.** On or before November 30 of each year, the governing body of the water bank must submit an annual report to the Board of Water Resources on a form provided by the Board of Water Resources. The annual report must include the following information:

1. a tabulation of the volume and change application numbers for water rights deposited in the water bank;
2. the nature of use of each banked water right before the banked water right was deposited in the water bank and the volumes of water allocated to each use before being deposited;
3. a tabulation of loaned water rights from the water bank, including the change application number, the volume of water derived from the loaned water rights; the nature of use of the loaned water rights and the volumes of water allocated to each use, and the borrower;
4. the amounts charged for the loaned water rights, including a breakdown by nature of use if appropriate;
5. the revenue generated by the statutory water bank, including the sources of revenue;
6. the amounts paid to depositors;
7. the water bank's expenses;
8. the balance at the end of the reporting year of the water bank's bank account;
9. the accounting practices used;
10. whether there is any pending or ongoing litigation involving the water bank;
11. whether there are, or have been, any governmental audits of the water bank;
12. any proposed amendments to the water bank's procedures for the coming reporting year;
13. a narrative explanation of any inconsistencies in the annual report or in the operation of the water bank; and
14. a narrative explanation of how the statutory water bank is or is not fulfilling the objectives listed in Step 2 above.



- **Public Notice of Annual Report.** If the annual report is timely submitted and provides the required contents above, the Board of Water Resources will post notice of the annual report.
- **Deficient Annual Report.** If the annual report does not provide the required contents above, the Board of Water Resources will notify the water bank in writing and return the report to the water bank to be corrected, providing a written explanation that sets forth the information that needs to be corrected.
- **Noncompliance.** If the water bank fails to submit the annual report by November 30, or fails to submit a corrected annual report within 90 days of the rejection, the water bank is considered in noncompliance.
- **Written Notice of Noncompliance.** If a water bank is in noncompliance, the Board of Water Resources will provide a written notice of noncompliance that explains why the water bank is in noncompliance and gives the water bank 90 days to correct the cause of noncompliance. The Board of Water Resources will also post notice of the noncompliance and notify the State Engineer about the noncompliance.
- **Noncompliance Cured.** If the water bank corrects the noncompliance within 90 days, the Board of Water Resources will provide written notice to the water bank that the noncompliance has been cured, post the written notice, and notify the State Engineer that the noncompliance has been cured.
- **Noncompliance Not Cured.** If the water bank fails to correct the noncompliance within 90 days, the water bank's approval to operate terminates at the end of the calendar year. The Board of Water Resources will mail notice to the water bank that the water bank's approval to operate has terminated and that the water bank's operations under the application must cease at the end of the current calendar year. The Board of Water Resources will also post notice that the water bank's operations will terminate at the end of the calendar year. The water bank must then notify its depositors and borrowers of the dissolution within 60 days of receiving the notice from the Board of Water Resources and must enact procedures set forth in the water bank's application ceasing the water bank's operations. The State Engineer cannot approve any change application that seeks to deposit water rights into a water bank that the Board of Water Resources has determined to be in noncompliance.

