

The Water Report

Water Rights, Water Quality & Water Solutions in the West

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UTAH WATER BANKING

UTAH'S WATER BANKING ACT — PILOT PROJECTS UNDERWAY

by Emily Lewis and Robert DeBirk, Clyde Snow Attorneys at Law (Salt Lake City, UT)

Introduction

Utah is often cited as being the second driest state in the nation, while also being one of the fastest growing. Utah is also in the unenviable position of being situated between the competing potential catastrophes of a diminished Colorado River and a drying Great Salt Lake. These circumstances require new and innovative tools to address the demands of growth, environmental needs, changing land use patterns, and the desire to preserve Utah's robust agricultural community.

Across the Western US, water users are looking for flexible means of adapting to changing and challenging conditions. Water marketing is increasingly being explored as one such dynamic tool. Water markets can facilitate the voluntary transfer of water between users, while honoring the principles of the Prior Appropriation Doctrine and maintaining the value of private property rights. Such conditions can lead to "win-win solutions" that retain the economic value of water in the local community, provide needed water for new uses, and strengthen relationships between users.

Recognizing the potential benefits of water marketing, the State of Utah has recently embarked on a bold project to pilot its novel Utah Water Banking Act and create a Statewide Water Marketing Strategy Report. The goal of this effort is to: assist water users in understanding how water marketing works; provide practical guidance in how to apply and use water markets where appropriate; and add a suite of tools to help address Utah's complex water needs.

This article discusses: 1) the development of Utah's water banking concept; 2) the Utah Water Banking Act's key provisions and operations; 3) Utah's three-year effort to pilot the Utah Water Banking Act and draft a broader Statewide Water Marketing Strategy; and 4) lessons learned and the five "Water Marketing Milestones" Utah is using to organize and guide water users interested in exploring water marketing.

Developing the Utah Water Banking Concept

Utah has a long and proud history of water planning: it is part of the State's pioneering DNA and contemporary character. Seeing the need to directly address looming water challenges, in 2017 several working groups began to explore means and methods to manage the State's water.

In particular, four independent groups began parallel discussions about what was legally and practically possible. First, Democratic Senator Jani Iwamoto ran a bill to give municipalities the ability to use municipal water for instream flow to address water quality and environmental concerns. This bill did not pass in the 2017 Legislative Session, but a study group was formed to continue exploring the topic. Second, Republican Representative Tim Hawkes began an agricultural efficiency study group to study how Utah's agricultural community could implement the means to better manage and conserve water. Third, Central Utah Water Conservancy District — the largest wholesaler of

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Water Bank**Market Concepts****Forfeiture
Protections****Change
Applications**

water in the State — began reviewing ways to manage the Bonneville Unit of the Central Utah Project and adapt the State’s administrative Change Application process to quickly and efficiently move water between water users. Fourth, Governor Gary Herbert convened a working group of 40+ water experts to draft the 2017 Governor’s Water Strategy Report outlining various priorities, methods, and tools for managing Utah’s water.

All four groups independently identified “water banking” as a possible solution to Utah’s water challenges. However, the term “water banking” remained a novel and undefined concept without the necessary specifics to implement concrete actions or programs. To move ahead, the groups combined their study efforts into an unprecedented 70+ member Stakeholder Working Group organized for the purpose of studying “water banking” concepts across the West and developing a Utah-specific water banking program tailored to Utah’s particular needs. The Stakeholder Working Group consisted of a wide range of water users and water interests from the Utah Farm Bureau, municipalities, non-governmental organizations (NGOs), water conservancy districts, State agencies, and interested citizens.

The Stakeholder Working Group met regularly throughout 2018 and 2019 to develop a Utah water banking concept and draft the Utah Water Banking Act. Central to the Stakeholder Working Group’s efforts was an early push to study and understand what kinds of water marketing or “water banking” activities were already occurring in Utah and its sister states. Subcommittees were formed to talk to local water users in key Utah watersheds. These subcommittees summarized local water marketing activities and asked local water users what obstacles were present in the existing law that had the effect of depressing water marketing activities.

The subcommittees found that most water marketing in the State of Utah consisted of independent water leases between water users. There were only a few formally organized water markets, such as water auctions or local irrigation company “rental pools” — a system whereby some irrigation companies provided shareholders not immediately needing to use their water shares during an irrigation season an opportunity to place those shares up for lease. Rental pools allow the company to maintain their water rights in good standing, provide water to those who need it, and create a revenue stream for shareholders.

The most important finding of the subcommittee work was that local water users were most interested in water marketing activities that honored three key concepts:

Local: Water users wanted local solutions and did not want a top-down or state-administered water marketing program. Users wanted to keep their water in the local community and under local control.

Voluntary: Water users were very clear that any water marketing activity needed to be voluntary. Concepts that deprived water users of dominion over their water were non-starters and would not receive the necessary public buy-in and support.

Temporary: Water users were most interested in water leasing programs and were not interested in water markets that permanently sold water. Temporary transactions were preferred because they keep the water’s economic value with the water right owner and avoid permanent sale of agricultural water rights for other uses — a process known to have devastated rural communities in other Western states (“buy and dry” transactions).

Using these three guiding principles the Stakeholder Working Group went to work designing a Utah water banking concept that reflected the water user community’s needs.

The Stakeholder Working Group also endeavored to address several desires expressed by the water user community during the subcommittee studies. In particular, agricultural users wanted a means of protecting water rights from forfeitures in the face of changing land use patterns including development of their historical places of water use. This desire was particularly acute as Utah previously granted forfeiture protections to municipal water rights held for future public use. Agricultural interests wanted equal treatment.

Additionally, there was a strong desire to expedite the State Engineer’s Change Application process. At the time, the pace of the Change Application process — which has improved greatly in the intervening years — prevented quick changes in water use or the development of any kind of “spot market” for water transactions.

Spot Markets

Spot markets are markets specializing in quick transactions that provide immediate delivery and receipt of a resource. Spot markets are used in the energy sector to stabilize the power grid and provide immediate power needs. A spot market for water could be used in similar emergency situations for temporary needs (e.g., for construction), or during periods of peak demand (e.g., hot summer days).

- Water Bank**
- Instream Flows**
- Legislative Buy-In**
- Water User Buy-in**
- Leasing**
- Board Evaluation**
- Preventing Speculation**
- Contract Provisions**

A third primary consideration was to increase the ability to use water for environmental and instream flows. At the time, Utah’s stringent instream flow statute was challenging to use and had limited application. Water users wanted to address condemnation protections for leased water, “piggy-backing” on existing administrative process and known water use models, and add guardrails to avoid speculative practices.

Between 2018 and 2019 the Stakeholder Working Group spent hundreds of hours debating nitty gritty water law concepts, balancing a diverse set of wants, and drafting what would become the Utah Water Banking Act. To vet their ideas as they progressed, the Stakeholder Working Group also conducted a Statewide “road-show” — conducting over 40 presentations across the State to interested local water users to solicit feedback on the working concepts. This iterative working model proved incredibly valuable in troubleshooting potential pitfalls in the draft legislation and ensuring that the concepts truly reflected the values and desires of local water users. The Stakeholder Working Group kept the Legislature apprised of its work by seeking a Joint Resolution in 2019. This Resolution endorsed continued study and development of the Utah Water Banking concept and appropriated \$400,000 to support and pilot the eventual Water Banking Act (discussed below).

Most importantly, the ubiquitous nature of the statewide discussions created a community of engaged participants. These extensive efforts led to widespread buy-in and acceptance from the water user community. By the time the final Water Banking Act Bill (SB 26) was voted on in the 2020 Legislative Session it only received one “no” vote. Notably, even that single vote was due to the unique local politics in that region and was not a substantive reflection on the bill.

The Utah Water Banking Act

The efforts of the Stakeholder Working Group resulted in the creation of the Utah Water Banking Act. As noted above, the Utah Water Banking Act is primarily focused on promoting the three guiding principles of creating local, voluntary, and temporary water transactions: in other words, promoting water leasing. The Water Banking Act also sought to address the other policy priorities noted by water users during the stakeholder sessions. The Utah Legislature passed the Water Banking Act in 2020, codified as Utah Code Ann. Title 73 Chapter 31.

The Utah Water Banking Act operates under the general premise that qualifying leasing arrangements can be approved by the Utah Board of Water Resources as a Utah Water Bank and thereafter extend benefits defined under the Act. Importantly, local water users expressed a strong desire for the autonomy to design their own leasing arrangement. As a result, the Board of Water Resources’ review of Water Bank applications is solely a completeness review and the Board does not opine on the substance or structure of a proposed water bank. As long as the Water Bank Application meets the criteria of the statute it is approved.

The Water Banking Act primarily works by establishing two “kinds” of water banks that leasing arrangements can be organized under: Contract Water Banks and Statutory Water Banks.

CONTRACT WATER BANKS

Understanding that most water leasing occurs under independent lease contacts between discreet parties, the Stakeholder Working Group created a means for similar contracts to be recognized as a Utah Water Bank and be extended the benefits of the Water Banking Act. To be eligible for approval as a Contract Water Bank the applicant must be a public entity. This stipulation is to: prevent water speculation; provide a public process for interested parties to review the contract at the entity level; and to make the leasing contract subject to Utah’s Open and Public Meetings Act.

Interested applicants file a specific Contract Water Bank Application form with the Board of Water Resources. The Contract Water Bank Application requests that the applicant summarize key information and include a copy of the leasing contract. The leasing contract must include specific provisions intended to protect the water users, including:

- A description of how the banks governing body will be structured and operate
- A description of the bank service area and map
- A description of how water delivery requests and loaned water rights are to be administered
- Criteria for the participation of any non-public entities
- Whether groundwater or surface water is going to be leased
- The process the Contract Water Bank will follow if the water bank terminates, including how the Contract Water Bank will return deposited water rights to the water right holders.

Water Bank

Key provisions such as lease length, lease pricing, and leasing process are determined by, and agreed to by the parties. As long as the contract satisfies the statutory criteria, the Board of Water Resources will approve the Contract Water Bank Application to be a Contract Water Bank and extend the benefits of the Act. It is anticipated that the majority of water banks, especially in the early stages of development, will be Contract Water Banks.

Regional Middleman**STATUTORY WATER BANKS**

The second type of water bank created under the Water Banking Act is a “Statutory Water Bank.” A Statutory Water Bank is intended to be a legal entity organized for the express purpose of facilitating leases between generally unknown parties. Whereas under the Contract Water Bank there is a discrete set of known parties, the Statutory Water Bank may act as more of a “middleman” in a local area connecting those people who have water with those who want water. A Statutory Water Bank may be as simple as a bulletin board platform or a fully organized spot market for water. A good example of how Utah envisions a Statutory Water Bank would be the Idaho Department of Water Resources Water Supply Bank (<https://idwr.idaho.gov/iwrb/programs/water-supply-bank/>) — except that, in Utah, the entity running the Statutory Water Bank could be either a local public entity or a private entity.

Articles & Bylaws

Applicants for a Statutory Water Bank must own a perfected water right within the Bank’s proposed service area. Utah defines a perfected water right as a fully developed water right that has been certificated by the State Engineer, decreed by a court of law, or has been legislatively defined as such and is considered real property. Since the participants in a Statutory Water Bank are likely to be unknown — as opposed to discreet parties in a contract that have mutually agreed to the terms of the contract — the Water Banking Act requires Statutory Water Banks to provide much more information about how the entity is to operate and facilitate water leasing. Modeled after Utah’s strong reliance on private non-profit irrigation companies — which use Articles and Bylaws to govern operations — it is anticipated that Statutory Water Banks will establish the criteria in organization documents. Based on early experiences piloting the Water Banking Act, discussed later, it is anticipated that Statutory Water Banks may develop at a slower rate than Contract Water Banks as they require substantial commitment and resources. Despite these constraints in certain areas of Utah, Statutory Water Banks may be a very useful tool.

OTHER KEY PROVISIONS OF THE UTAH WATER BANKING ACT

In addition to establishing Contract Water Banks and Statutory Water Banks, there are several other notable elements of the Water Banking Act:

Reporting Requirements**Annual Reports**

Approved water banks must make an annual report to the Board of Water Resources detailing information like: the volume and Change Application number of water rights deposited in the water bank; the nature of use and volume of water before being deposited into the water bank; tabulation of the characteristics of water rights loaned from the bank; and financial information about water leasing and bank operations.

Change Application**Transaction Cost**

To deposit water rights into the water bank, the water bank and water right owner must: 1) file a Change Application with the Utah State Engineer establishing that the water right can be used in the bank service area without impairing other water users; and 2) add “water bank” as a use for the water right. The Change Application process is an established public process well known by water users. Once a water right is approved for the water bank, no additional change applications are needed and the water right can be distributed according to water bank policies. This “one-time” Change Application process expedites the ability to move and deliver water within the bank service area. This concept is similar to the treatment of water rights approved for use in an irrigation company or municipal service area.

Forfeiture Protections**Protections**

Water rights approved for use in a water bank are protected from forfeiture. This was one of the primary requests of water users and was intended to incentivize the use of water banks and accommodate changing conditions. As noted above, this forfeiture protection also places agricultural uses on an equal footing with municipal uses and allows companies to retain their water rights in good standing.

Condemnation Protections

To ensure that water rights made available for lease are not viewed as “excess” or “unnecessary” — and thus vulnerable to a government taking — water rights approved to be in a water bank are extended protections from condemnation for the time they are in the water bank and for five years after the lease term ends and the water right is no longer active in the water bank.

Water Bank

Environmental Flows

In 2020, when the Water Banking Act was passed, Utah had a very limited instream flow statute. The statute only allowed certain parties (select fishing groups and certain state agencies) to file instream flow Change Applications. These Change Applications could only be approved if there were no intervening diverters in the desired flow reach and applications received the most junior priority date in the system. Accordingly, these restrictions severely dampened the usefulness of the instream flow Change Applications.

The Water Banking Act allowed water rights to be used “for any purpose identified in the Act.” The Stakeholder Working Group explicitly identified some of the objectives of the water banks as to facilitate “water quality improvement” and a “healthy and resilient natural environment.” These provisions were intended to act as a work around to the restrictive instream flow statute by allowing water rights to be used for instream flow and environmental purposes.

In 2022, the Utah Legislature passed HB 33, significantly changing the State’s instream flow statute to remove many of the constraints noted above. Much of the incentive for using the Utah Water Banking Act as a means to achieve instream flows may now be diminished. The water user community will be watching this instream flow development to determine if it affects the overall desire to use water banks or if the other benefits of the Water Banking Act will prevail in keeping the statute in use.

Sunset Period

The Water Banking Act is intended to be a pilot effort to test the water banking concepts and will sunset in 2030 if not renewed. Whether the State of Utah determines it is prudent to review the Water Banking Act will depend on the extent to which it is determined to be a useful tool being utilized by water users.

New Statute

Timeline

Statewide Water Marketing Strategy Report

To ensure the Utah Water Banking Act will function well for Utah water users, the State of Utah secured \$800,000 in funding to pilot the Water Banking Act and draft a complimentary Statewide Water Marketing Strategies Report. Funds for this effort came from a \$400,000 appropriation from the State of Utah and a \$400,000 US Bureau of Reclamation WaterSMART Water Marketing Grant. The goal of the Statewide Water Marketing Strategies Report is broader than just piloting the Utah Water Banking Act. It aims at studying water marketing principles more generally and providing water users with tools, tips, and tricks to explore and implement water marketing in their region.

Funding

To oversee the piloting effort and draft the State Water Marketing Report, the Utah Division of Water Resources selected a Project Management Team (Project Team) consisting of the law firm of Clyde Snow & Sessions, WestWater Research, and HDR Engineering. The Project Team brings experience in engineering, economics, law, public facilitation, and familiarity with the water banking effort. The Project Team is also working closely with other state agency partners, like the Utah State Engineer, to create administrative tools and practices to facilitate water marketing activities.

Project Team

Water Bank Pilot Projects

To provide content for the Statewide Water Marketing Strategy Report, the Project Team worked with water users in three pilot areas to test the concepts of the Utah Water Banking Act and explore broader water marketing themes. This was a three-year effort starting in July of 2020 and will be culminating in a final Report, website, and materials in the fall of 2023.

Pilot Markets

Three pilot areas were chosen based on local water user interest: Price River Area, Cache Valley, and the Snyderville Basin. In addition to the three official pilot areas, the Project team also worked with interested water users in several other areas of the state to answer questions about the Water Banking Act and water marketing principles. In particular, the Project Team also worked with water users in Southern Utah County through the Mt. Nebo water authority, groundwater users in Iron County, and the Ashley Valley Sewer Improvement District in Vernal, Utah. The lessons learned in the three pilot areas were invaluable.

Water Bank

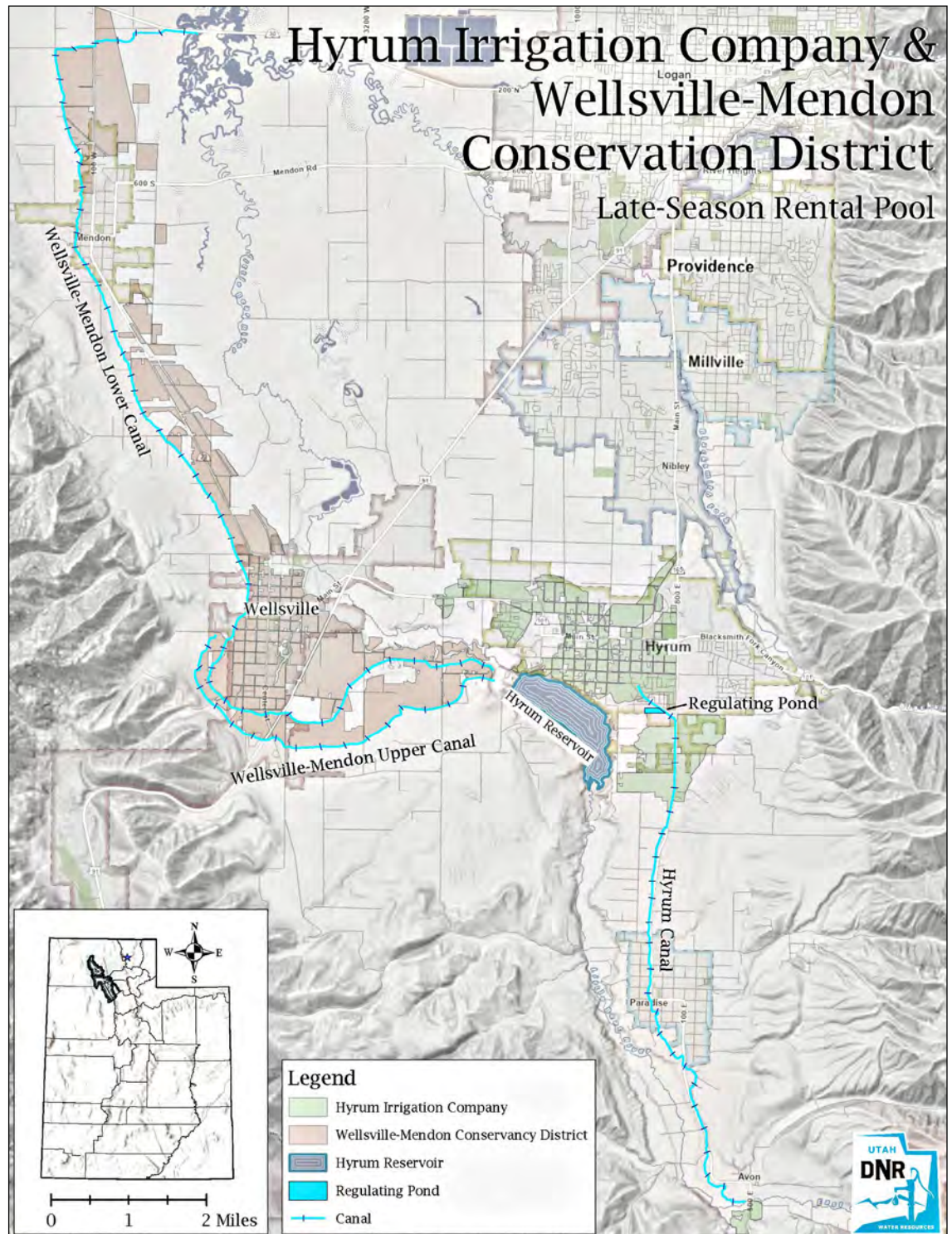


Figure 1.

CACHE VALLEY PILOT PROJECT

Water Bank

Cache Valley is located in northern Utah along the eastern portion of Cache County. The Cache Valley Pilot Project centered on the southern Cache Valley — south of Logan and near the cities of Paradise, Hyrum, Wellsville, and Mendon. This area is extensively irrigated but is also witnessing rapid municipal growth. The Little Bear River and its tributaries are the principal drainages. The river drains approximately 185,000 acres and is impounded by Hyrum Reservoir near Hyrum, Utah. Monthly flows of the Little Bear River are typical for a snowmelt driven river system in the Western US, with a spring runoff peak and monsoon rainstorms in late summer. Annual streamflow volumes in the Little Bear River show a long-term average (1992-2022) of 61,000 acre-feet per year.

Geography

Conservancy District

Initially, the Cache Water Conservancy District volunteered Cache Valley as a pilot area to explore whether water banking could address local issues such as inadequate late-season irrigation water, growth within ditch systems, and scattered water owners. The Cache Water Conservancy District offered to spearhead and coordinate meetings to explore water banking.

Local Issues

Several local water needs were investigated. In particular, there was interest in exploring whether irrigation companies in Southeast Cache Valley could be “knitted together” to facilitate deliveries across a broader service area. As the process and discussions progressed, it became clear that there was a mismatch of supply and demand — everyone wanted water at the same time. It was determined that without a clear and available supply to meet demand, a water bank organized under the Utah Water Bank was likely not the best fit.

Federal Involvement

However, the discussions in Cache Valley were ultimately fruitful as two of interested entities, Hyrum Irrigation Company and the Wellsville-Mendon Conservation District, determined that they had the right configuration of supply and demand to create a late season rental pool in Hyrum Reservoir. Hyrum Reservoir is a federal facility and to ensure no Federal water contracts were needed to execute this concept the parties invited the US Bureau of Reclamation to the discussion. It was determined that since both entities were members of the Southern Cache Valley Water Users Association, the entity that held the Federal Warren Act contract to store privately held water rights in the federal facility, a new federal contract was not needed. The members could simply trade their storage allocations amongst themselves.

Lease Agreement

The discussion resulted in the Hyrum Irrigation Company and the Wellsville-Mendon Conservation District entering into a two-party water lease agreement. The terms of the agreement generally set an annual process for how Hyrum Irrigation Company was to alert Wellsville-Mendon as to whether they had surplus late season water to lease and at what price. Since the water was being delivered to the same Place-of-Use and for the same Nature-of-Use — irrigation — no Change Application changing the parameters of Hyrum Irrigation Company’s water rights was needed. Accordingly, the administrative burden of the lease pool was relatively small.

Results

While the Cache Valley pilot area did not result in the creation of a Utah Water Bank, it was a successful pilot project and produced several valuable lessons informing broader water marketing strategies. It also resulted in a working water leasing contract that provides a template for other parties looking to arrange a similar water transaction. Due to dry conditions, water was not leased in 2022; with record-setting snowfall, it is expected that water will run in summer 2023. The local stakeholders were happy with the results of the effort and the Cache Valley now has an additional tool to meet local water demand.

PRICE AREA PILOT PROJECT/CARBON CANAL COMPANY WATER BANK

Geography

The Price River Basin is a significant drainage basin of the Wasatch Plateau and Book Cliffs in east-central Utah. The Basin covers approximately 1,900 square miles, varying from mountainous landscape to desert canyons. The Price River flows from Scofield Reservoir near the headwaters down to a confluence with the Green River and ultimately to the Colorado River. Monthly flows of the Price River are typical for a snowmelt driven river system in the Western US, with a spring runoff peak and monsoon rainstorms in late summer. Annual streamflow volumes in the Price River show a long-term average of 79,000 acre-feet per year; however, more recent data since 2001 shows a reduced flow volume of 52,000.

Water Bank

Carbon Canal Company Contract Water Bank

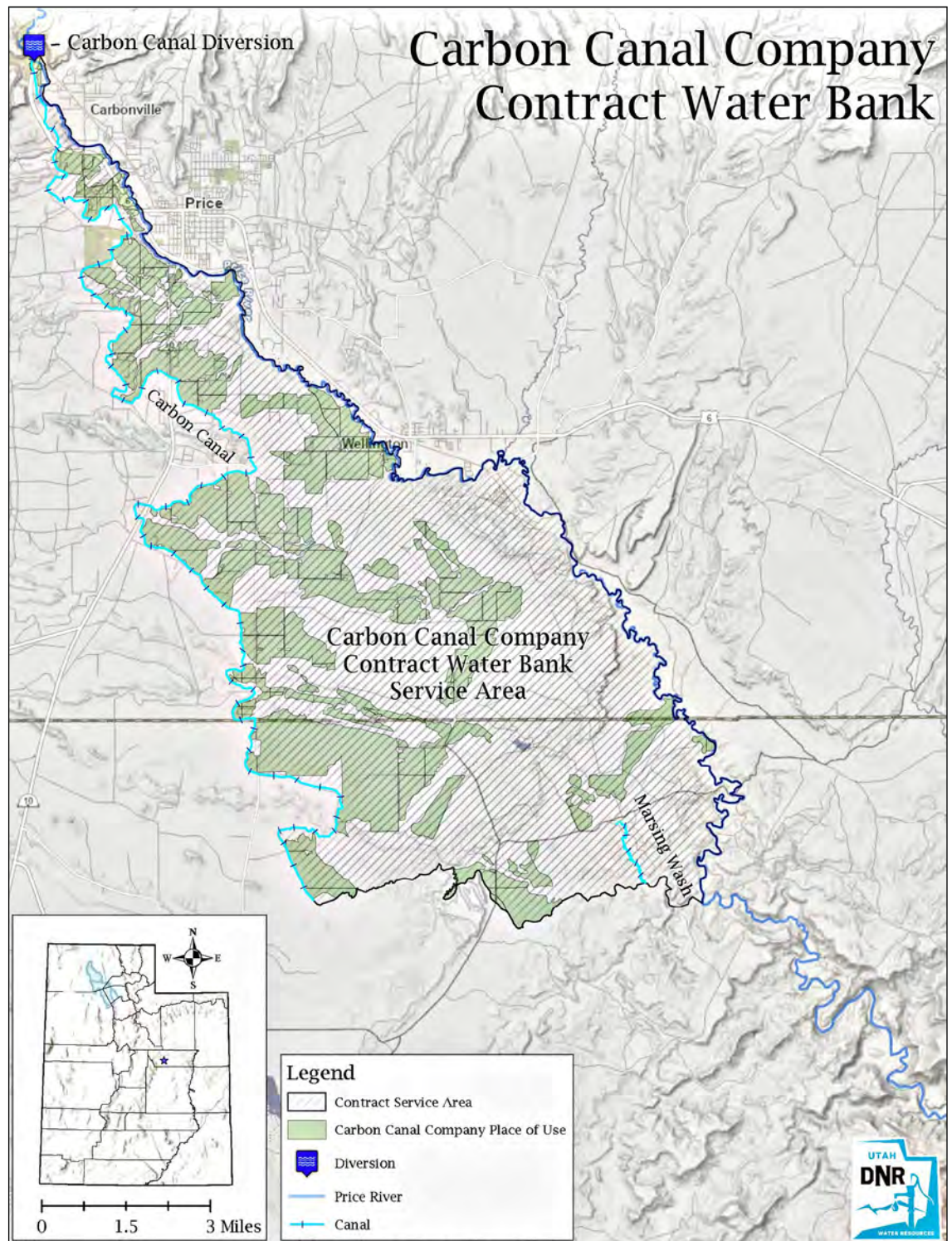


Figure 2.

The Price area was chosen as a pilot project because local water users had previous experience with water marketing activity. For example, the Price River Water Users Association runs an annual water auction that makes water rights held by PacifiCorp and recently retired from a local coal plant available for lease. Similarly, the Carbon Canal Company previously participated in the System Conservation Pilot Program (SCPP). SCPP was a four-year pilot program (2015-2018) designed to explore potential solutions to address declining water levels in Lakes Mead and Lake Powell and the potential for long-term drought in the Upper Colorado River Basin. Water users in the area participated in a successful fallowing program under SCPP.

Since the initial SCPP program had concluded, local water users were interested in testing Utah’s new Water Banking Act to see if a water bank could be used as a more permanent water marketing tool. The parties — Trout Unlimited, The Nature Conservancy (TNC), the Utah Division of Wildlife Resources,

SCPP Program

<p>Water Bank Fallowing Program</p>	<p>Price River Water Users Association (who did not ultimately participate), and the Carbon Canal Company — sought to explore a voluntary and compensated fallowing program that would meet the dual goal of: 1) improving stream flows in the lower Price River to support recovery of threatened and endangered fish species; and 2) to provide local irrigators an alternative source of revenue while protecting their water rights from abandonment.</p> <p>As there was already pre-existing water marketing activity in the area, the early discussions in the Price Area centered on whether those activities could be transitioned into a water bank under the Utah Water Banking Act. For example, TNC already had an agreement in place to lease the tail water from the Carbon Canal Company and send that water to Marsing Wash, a nearby TNC wetland project. Similarly, there was discussion about whether a future project to pipe the Carbon Canal Company earthen ditches could be used as a source of water for a water bank.</p>
<p>Refining Scope</p>	<p>These conversations were incredibly helpful in determining what the scope and scale of a Utah Water Bank could be. Ultimately, in consultation with the Utah State Engineer, it was determined that only the consumptive portion of a water right could be leased in a Utah Water Bank and that water would most easily be made available through a fallowing program.</p>
<p>Leasing Process</p>	<p>Having set the boundaries for what kind of water could be leased through a Utah Water Bank, the parties next endeavored to draft a contract outlining how water leasing between the parties was to occur. Since Carbon Canal Company is a shareholder owned mutual irrigation company, it was determined that the leasing arrangements would be made directly with the Company and not individual shareholders. If individual shareholders wanted to participate, they needed to work through Company and could not individually lease to the interested lessees.</p> <p>To facilitate the transaction, the parties included provisions establishing a Water Bank Management Committee and Manager and established duties between the parties. The parties organized the transaction by setting a series of dates by which the parties would exchange critical information.</p>
<p>Marketing Timeline</p>	<p>The Information Exchange Dates are:</p> <p>December 1: The Bank Manager sends an “Interest Statement” to Carbon Canal Company Shareholders (not obligate participation) that asks Shareholders to identify the number of shares they are willing to lease/deposit into the Bank, acres they wish to fallow, and a lease price the Shareholder will accept.</p> <p>January 1: The Bank Manager prepares a summary of the Interest Statements.</p> <p>January 15: Lessees determine the “Annual Lease Price” they are able to lease water at and inform Carbon Canal Company.</p> <p>February 1: Shareholders submit a “Deposit Form” indicating number of Shares they want to deposit/lease at the Annual Lease price set by the Lessees. Carbon Canal Company reviews and approves the Deposit Forms and endorses the amount of water available for lease that year.</p> <p>February 21: The Bank Manager informs lessees of the number of Deposited Shares available for lease for the calendar year.</p> <p>March 1: Lessees inform Carbon Canal Company of the number of shares the shareholders each will lease. They provide the proposed delivery point for the Annual Lease Shares. Parties execute a lease form for the Annual Lease Shares. Carbon Canal Company adjusts the amount of the water its members receive under their shares throughout each Irrigation Season based on water availability.</p> <p>Irrigation Season Begins: If not all water is leased, Bank Manager notifies Shareholders that their Deposited shares were not leased and Shareholder can use the water as before for irrigation.</p> <p>November: The Bank Manager reviews water accounting and prepares annual Board of Water Resources Reporting.</p> <p>December 15: The depositor/shareholder receives the Annual Lease Price, minus operating costs (10%).</p>
<p>Contract Bank</p>	<p>Once the parties completed their leasing contract, the Project Team worked with the parties and the Price River Watershed Conservation District (a local public entity who offered to act as the water bank applicant as required by statute) and Utah Division of Water Resources staff to create a Contract Water Bank Application form and approval process. As this water bank approval process was new and novel, it was determined to model the process as closely as possible to the existing Board of Water Resources loan program process to which water users and the Board of Water Resources are familiar. For example, the forms visually look similar. Staff at the Division of Water Resources will first work with the applicants on the application and provide a recommendation to the Board, and the application can rely on an attorney letter certifying that the application meets the requirements of the statute lessening the burden on the Board to make legal determinations. This formal process and Contract Water Bank Application is approved and ready for public use.</p> <p>The other important aspect of the Price Area pilot project/Carbon Canal Company Water Bank is that it was the first water bank Change Application in the State of Utah. This presented a number of new challenges.</p>

Water Bank

New Process

First Bank

Though the State Engineer had been involved in the discussions, distributing the consumptive portion of a water right in an area with limited telemetry and little existing flow data proved to be difficult to assess and slowed the approval process. Additionally, while the parties to the contract and the Project Team did significant outreach to the local community to explain the water bank application and process, the Change Application still received almost 80 protests (all but five being a form letter opposing the water bank on general concerns that it would hurt the community and not citing the Change Application criteria under Utah Code Ann. 73-3-8). Ultimately, the parties were able to quell local fears and address the few substantive concerns. However, the process was useful in identifying that both the State Engineer and interested parties needed more information about the water bank approval process and where to express their concerns or ask questions.

The Carbon Canal Company Contract Water Bank is now the first fully approved water bank in the State of Utah. Unfortunately, the Change Application was not approved in time to run water during the 2023 season but it is likely the parties will seek to do so during the 2024 season.

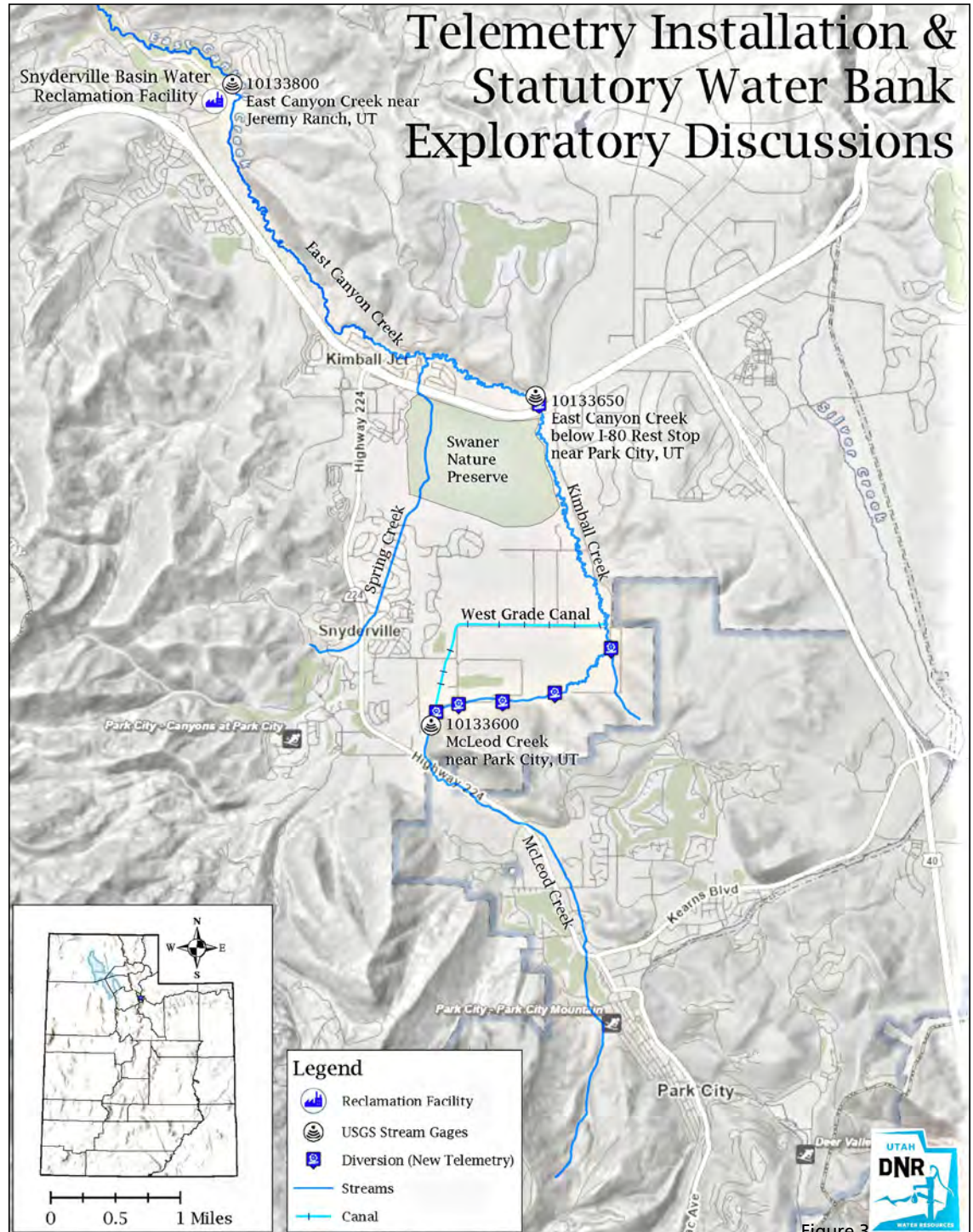


Figure 3

**Water Bank
Environmental
Water**

SNYDERVILLE BASIN PILOT AREA

The Snyderville Basin is a valley in Summit County, Utah, adjacent to Park City and the eastern margin of the Wasatch Range. Many Park City residents live in the Snyderville Basin. Snowmelt from the Wasatch Range and precipitation are the primary source of water for the region. Rapid residential and commercial development are placing increased demands on the groundwater resources in the area and increased groundwater withdrawals could affect appropriated surface water resources.

The initial desire was to explore creating a Statutory Water Bank to facilitate instream flows for fish flows and water quality in East Canyon Creek during critical low flows in late summer. Interested Stakeholders included: Weber Basin Water Conservancy District, Swaner Preserve and EcoCenter, the Audubon Society, Mountain Regional Special Service District, Trout Unlimited, Snyderville Reclamation District, and Park City Municipal Corporation.

Telemetry

The project team helped organize and facilitate substantial multi-party stakeholder discussions on the potential of increasing instream flows through a water bank. Stakeholder discussions soon led to two distinct tracks of discourse: 1) water supply and technical questions as to whether there was enough information to understand the needed steam flows to ensure the Statutory Water Bank was meeting its goals; and 2) how to form a Statutory Water Bank.

In terms of the technical questions, the group explored several sources of water as potential depositors into the bank: surplus import water from Park City; private rights and a potential future Spring Creek water treatment plant and pump project; and larger conservation measures. However, the group found it difficult to get traction on securing any sources of water without installing additional telemetry to ensure the leased water was actually increasing instream flows. In response, the Project Team began working with the State Engineer and funded six new telemetry sites along East Canyon Creek: Quarry Mountain, JH Bailey, West Grade, Osguthorpe, Ranch Creek 3, and Glenwild. With this information local stakeholders will for the first time be able to measure flows in East Canyon Creek to an accuracy needed to facilitate a water lease for instream flows.

**Transaction
Activities**

Regarding establishing a Statutory Water Bank, the Project Team supported the group by facilitating a discussion about what the Water Banking Act required to satisfy the Statutory Water Bank requirements. The Project Team identified three categories of activities that would need to occur: activities that are required by the Water Banking Statute, tasks that are implicit for successful water transactions but are not required by the statute, and tasks that are not necessary to facilitate a water transaction but are helpful or useful. The Project Team then created a survey that asked each of the stakeholders to assess whether they had expertise to complete the identified task, how many hours it would take to complete the identified task, and what level of investment they had from taking that task on. The results of the survey were incredibly informative as it was determined that each of the interested stakeholders wanted to participate in and support a Statutory Water Bank but no stakeholder had the resources to spearhead creating a Statutory Water Bank. With a fuller understanding of time and costs, the local stakeholders decided not to commit to develop a formal Statutory Water Bank.

**Understanding
Needs**

While no formal Statutory Water Bank was formed, the Snyderville Pilot Project was very successful in better understanding the needs to develop such a water bank. Additionally, with the installation of telemetry the parties will have the raw data available to test instream flow conditions and seek sources of supply. For now, the local stakeholders will use the new telemetry stations and explore private leasing activities under Utah’s new instream flow statute.

Learning Curve

The Pilot Project’s activities over the last three years have been incredibly helpful in not only informing the application of the Utah Water Banking Act but also the broader goals and content for the Statewide Water Marketing Strategy Report.

Water Marketing Milestones and Tools, Tips, and Tricks

The efforts of the Project Team are broader than just exploring the Utah Water Banking Act. The goal of the Statewide Water Marketing Strategy Report is to include recommendations about water banking, but also provide thoughts and recommendations about supporting greater water marketing in the State of Utah. As part of this effort, the Project Team has learned that for many water users starting to explore water marketing activities can be overwhelming. To assist water users the Project Management has organized its recommendations and the Statewide Water Marketing Strategy Report around five key milestones needed to navigate water marketing.

Water Bank**Key Players****Supply & Demand****Transport****Template Lease****Forms****Key Milestones:**

PEOPLE: To have a successful conversation about water marketing, participants needed to not only identify those who wanted water and those who had water, but also key supporting players like attorneys, Regional State Engineers, and key decision makers. It was also critical to identify who had the interest, resources, and capacity to participate in the discussion and to identify a champion of the effort.

MARKETS: Essential to any water marketing activity is understanding whether there is a need for a potential water market to exist. Does the region have the right match of willing lessees and lessors (i.e., the basic components of supply and demand). The Project Team has distilled a series of key questions for water users to ask to determine if a viable water market exists.

LOGISTICS: The next critical step in the process is to assess the ability and means of moving water between potential lessors and lessees. This analysis includes assessing the physical means of moving water, the legal constraints of participating water rights, and governance issues that might impact the movement of water.

TRANSACTIONS: A market transaction is the formal recognition of the who, what, where, when, and how water is going to move between parties and can take many different forms. Most market transactions will contain several key elements such as the means of pricing, timing and availability of water, and governance issues. The Project Team has prepared a template lease that includes many of these terms that can be adapted for local uses.

APPROVALS: Even if the parties have agreed on their market transaction, often additional approvals are needed to realize their goals. The Project Team has worked with the Utah Board of Water Resources to have final approved Water Bank Application forms and to create an administrative process for Water Bank Approvals. Most leasing transactions in Utah will also require a Change Application be filed with and approved by the Utah State Engineer.

The Project Team will be releasing its Statewide Water Marketing Strategy Report in the fall of 2023. The Report will include summary information similar to this article but also include specific activities, tasks, and resources to assist water users exploring water marketing and further unpacking the five Key Water Marketing Milestones.

Conclusion

The Water Banking Act is the result of hundreds of hours of stakeholder labor and dedication. It is designed to specifically address the needs and wants of the water user community. Championing the central tenets of voluntary, temporary, and local, the Act is meant to be an engine of local change and activity. It is anticipated that in leaving most of the control to water users, no two water banks will look the same. It is an exciting chapter of Utah water law that promotes pragmatic solutions, strengthens local ties, and invites creativity.

For Additional Information:

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Please continue to watch for more information at <https://water.utah.gov/water-marketing/>

Emily Lewis assists clients in navigating complex water problems. She advises individual water right owners, water conservancy districts, municipalities, mining companies, and mutual shareholder irrigation companies. Her strategic projects practice extends to innovative policy work and specialty project management. She presently acts as the Utah Water Banking Project Manager and hosts Ripple Effect – A Podcast Putting Water in Context.

Robert DeBirk's practice focuses on water, natural resources and environmental law. Mr. DeBirk clerked with the Salt Lake City Attorney's Office from 2018 to 2021, assisting the Department of Public Utilities with water law and water quality matters, including the ongoing General Adjudication before the Third District. In addition to water and natural resource issues, Mr. DeBirk assisted Salt Lake City in land use and planning items ranging from updating groundwater source and watershed protective ordinances to creating assistance programs for low-income residents. Mr. DeBirk graduated from the University of Utah's S.J. Quinney College of Law in 2021. Before attending the College of Law, Mr. DeBirk spent a decade acting as a Policy Director for Utah based organizations focusing on legislative relations, land use planning, and air quality.