

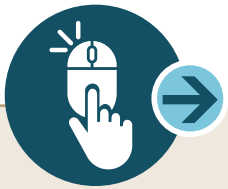
Most importantly, the ubiquitous nature of the discussion created a community of engaged participants. The extensive efforts led to widespread buy-in and acceptance from the water user community. By the time the final Water Banking Act Bill (SB 26) was voted on in the 2020 Legislative Session, discussed below, it only received one “no” vote.

## The Utah Water Banking Act

The efforts of the Stakeholder Working Group resulted in the creation of the Utah Water Banking Act. The Utah Water Banking Act 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 addressed the different policy priorities noted above. 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 Resource as a Utah Water Bank and thereafter extend defined benefits under the Act. Importantly, local water users strongly desired autonomy in designing their own leasing arrangements. 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. It is approved as long as the Water Bank Application meets the statute’s criteria.

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



**Visit us**  
to learn more  
about The  
Utah Water  
Banking Act.



## Contract Water Banks

Understanding that most water leasing occurs under independent lease contracts between discreet parties, the Stakeholder Working Group created a means to recognize similar contracts as a Utah Water Bank and be extended the benefits of the Water Banking Act. The applicant must be a public entity to be eligible to be approved as a Contract Water Bank. This requirement is to prevent water speculation, provide a public process for interested parties to review the contract at the entity level, and 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 bank's 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 rights holders.

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.



## 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 to facilitate leases between generally unknown parties. The Statutory Water Bank may act as a “middleman” in a local area, connecting those 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. An excellent example of how Utah envisions a Statutory Water Bank would be the Idaho Department of Water Resources Water Supply Bank; except in Utah, the entity running the Statutory Water Bank could be either a local public entity or a private entity.

Applicants for a Statutory Water Bank must own a perfected water right within the Bank’s proposed service area. Since the participants in a Statutory Water Bank are likely to be unknown, as opposed to discreet parties to 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 firm reliance on private non-profit irrigation companies, which use Articles and Bylaws to govern operations, Statutory Water Banks will establish the criteria in organizational documents. Based on early experiences piloting the Water Banking Act, discussed below, it is anticipated that Statutory Water Banks may develop slower 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

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

To deposit water rights into the water bank, the water bank and water right owner must 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 adding “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’s service area. This concept is similar to the treatment of water rights approved for use in an irrigation company or municipal service area. Water users should engage the State Engineer early in their discussions to expedite the Change Application process.



**APPLICATION FOR PERMANENT CHANGE OF WATER**  
STATE OF UTAH

Received by: \_\_\_\_\_  
File No: \_\_\_\_\_  
Received: \_\_\_\_\_

For the purpose of obtaining permission to make a permanent change of water in the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Utah Code § 73-3-3 Annotated, as amended.

\*WATER RIGHT NO. \_\_\_\_\_ \*APPLICATION NO. \_\_\_\_\_  
Change are proposed as (check those applicable)

point of diversion  place of use  nature of use  period of use  well system  storage

1. OWNER INFORMATION County Tax ID \_\_\_\_\_  
Name(s) \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_  
Phone Number \_\_\_\_\_

2. \*PRIORITY OF CHANGE: \_\_\_\_\_ \*FILING DATE: \_\_\_\_\_  
(In this change application's "Priority")

3. RIGHT EVIDENCED BY: \_\_\_\_\_  
Prior Approved Change Applications for this right: \_\_\_\_\_

\*\*\*\*\*HERETOFORE\*\*\*\*\*

4. QUANTITY OF WATER: \_\_\_\_\_ cfs and/or \_\_\_\_\_ ac-ft.

5. SOURCE: \_\_\_\_\_

6. COUNTY: \_\_\_\_\_

7. POINTS OF DIVERSION: \_\_\_\_\_  
Description of Diverting Works: \_\_\_\_\_

8. POINTS OF REDIVERSION  
The water will be redistributed from \_\_\_\_\_ at a point: \_\_\_\_\_  
Description of Diverting Works: \_\_\_\_\_

9. POINTS OF RETURN  
The water will be returned to the natural stream source at a point(s): \_\_\_\_\_

\*These items are to be completed by the Division of Water Rights

Permanent Change



- **Forfeiture Protections**

Water rights approved or used in a water bank are protected from forfeiture. Forfeiture protection was one of the primary requests of water users and intended to incentivize the use of water banks and accommodate changing conditions. As noted above, forfeiture protection also places agricultural uses on an equal footing with municipal services 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 allowed 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.

- **Environmental Flows**

In 2020, when the Water Banking Act was passed, Utah had a very limited in-stream 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 as one of the objectives of water banks as facilitating “water quality improvement” and a “healthy and resilient natural environment.” These provisions were intended to act as a workaround to the restrictive instream flow statute by allowing the use of the water rights for instream flow and environmental purposes.



- **Sunset Period**

The Water Banking Act is intended to be a pilot effort to test water banking concepts. If not renewed by the State Legislature, it will sunset in 2030. Whether the State of Utah determines it is prudent to renew the Water Banking Act will depend on the extent to which it is used as a tool by water users and whether they find it useful.

The Water Banking Act results from thousands of hours of Stakeholder labor and dedication. It is specifically designed to 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, by 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.

