

WATER RESOURCES
Utah/Instream Flows/Water Banking & Leasing

November 26, 2018
Special Report #2323

On November 14, the Utah Legislature's Natural Resources, Agriculture, and Environment Interim Committee discussed and approved a draft joint resolution, introduced by state Senator Jani Iwamoto, supporting the further study of water banking and instream flows in Utah.

In 2017, the legislature considered S.B. 214, "Public Water Supplier Amendments," to expand the instream flow provisions under Utah Code Ann. §73-3-30, to allow municipal suppliers to hold water rights for instream flow purposes. This stirred up considerable controversy in the water community. The current version of the statute limits instream flow rights to the Utah Division of Wildlife Resources and the Utah Division of Parks and Recreation, and (since 2008) a non-profit organization that specifically promotes fishing. Only a handful of instream flow rights have been perfected. Public water suppliers often hold water rights for long periods of time before they are needed and diverted from the stream, and the proposed bill would have allowed them to put their water rights to public use by providing for instream flow. However, the junior priority water users downstream, including agricultural irrigators, have benefitted from the unused municipal water as it continues to be available for diversions. Additional concerns were raised by the agricultural community about perpetual and mandatory protection of species habitat causing temporary transfers to become permanent, complications created by private instream flow rights and changing definitions of beneficial use, and policies to use increased instream flow to meet water quality demands.

The legislature determined that the instream flow issue was complex and needed input from stakeholders before any changes could be made to the statute to expand the list of who can file for instream flow rights. The legislature instead passed a substitute bill, requesting the Executive Water Task Force and Water Development Commission to study the application process for instream flows, and present their findings to the legislature.

Senator Iwamoto reported the findings of the Executive Water Task Force over the past eighteen months. She said they initially studied what other states like Colorado and Idaho have done with instream flow programs to identify what approach would be most appropriate for Utah. Early discussions tackled issues such as how to address agricultural concerns and how to keep transaction costs low, and considered water banking as an ideal tool to facilitate greater use of instream flows. After considering the issue, the Task Force formed a Water Banking Study Committee. The study committee includes fifty diverse stakeholders volunteering their time, comprised of legislators, the State Engineer's Office, the Utah Department of Agriculture, local municipal water suppliers, water attorneys, the Central Utah Water Conservancy District, the Utah Farm Bureau, Trout Unlimited, the Audubon Society, and The Nature Conservancy.

These legislative efforts coincided with recommendations from Governor Gary Herbert's (R-UT) State Water Strategy Advisory Team to develop tools like water banking and water leasing to protect instream flows and facilitate temporary water transfers. The 2017 Recommended State Water Strategy states: "A water bank is an institution that exists to facilitate the temporary transfer of water. If a bank were in place, rights to the water could be banked for another water user in the region to buy or lease. A benefit of a water bank includes more transparency in terms of both transactions and costs. Banked water could be available for agricultural, environmental, M&I [municipal and industrial], or other purposes. These banks allow water users to put unused water into the bank in years when they do not need it (without it counting against them for purposes of forfeiture 'use it or lose it') and, conversely, to go to the bank to lease additional water when they need it for any lawful purpose."

Senator Iwamoto said that the Water Banking Study Committee recently considered existing Utah laws and identified pilot programs at the watershed level that can be done in Cache County and on the Provo River. They are looking at the feasibility of the pilot programs, using state legislative appropriations and federal grants to fund the necessary manpower to implement the programs.

Steve Clyde, a water attorney at Clyde Snow and member of the Water Banking Study Committee, testified on the need for legislative support to move the water banking study and the State Water Strategy forward. Surface or groundwater storage will be necessary to hold banked water so that it remains available

within the watersheds to withdraw as needed from the water bank. In response to questions from the interim legislative committee, Clyde acknowledged that banking water usually involves evaporative losses from surface storage that would need to be taken into account. He said the political and environmental reality is that Utah probably will not build a lot of new surface storage; however, existing reservoirs have excess storage capacity at times that could hold banked water and they are looking to better use the available storage. "And we can store in the ground. We know from groundwater recharge and recovery projects that have been done that groundwater can be injected through wells. It's a very efficient means of storing water without having to build very expensive surface storage that is more environmentally damaging."

Utah's State Water Strategy emphasizes the need to maintain agriculture. Clyde said: "Eighty percent of our existing water rights are held in the agricultural community. Unlike other western states, we don't want to see the buy and dry approach prevail....," where farms are left fallow and water is taken into urban centers. Water banking allows us to look at our limited shared resources and competing demands, he said, including environmental flows that did not have a seat at the table when all the water was appropriated, and more flexibly accommodate those needs. Water banking, together with other mechanisms, allows for voluntary market-based transactions. The water priorities and property rights are still recognized and protected from forfeiture, but water conservation, crop rotation, lined ditches, and other agricultural efficiencies can free up water for alternative temporary uses. At the same time, split-season or long-term water leases can provide a revenue stream that pays for things like drip irrigation, and banking allows farmers to temporarily forego use and lease their water without losing their water rights or adversely impacting their operations.

Clyde noted that it will be important to keep an eye on those agricultural efficiencies and water transfers. "One man's waste is another man's water right." We have to protect return flows and downstream interests as well. "You can force efficiency upstream, but it has a ripple effect all the way down the system." The State will need to address this as a longer-term policy issue, including how to compensate those who may be impacted by upstream conservation efforts, perhaps providing incentives for those downstream to implement conservation strategies to deal with reduced water quantities.

Even with aquifer storage and recovery, the effects of the changed timing or location of water use need to be taken into account. The study committee is looking at an abbreviated process for change applications at the State Engineer's Office. If it takes two years to approve an application to store or lease water, the seasonal benefits of water banking would be lost. At the same time, the water rights of others still need to be protected. The State Engineer has the administrative expertise to evaluate those applications and protect all water rights that could be impacted by water banking and leasing.

Clyde reported that the study committee is in the process of drafting proposed legislation, but it probably will not be ready until the 2020 general session.

Rep. Susan Duckworth added that the Water Development Commission had an opportunity to review the proposed resolution. She noted that this process has had a lot of public input and vetting among stakeholders. "It's a step in the right direction for water users."