

# Draft

## Review of proposed bill draft from Division of Water Resources Dealing with establishing a Water Bank (December 7, 2020)

(This bill draft has not been actually pre-filed and is a draft that has been circulated by the acting State Engineer on December 4, 2020)

**Throughout this evaluation, Nevada Farm Bureau policy positions have been incorporated to the specific section or subsection. In general I believe that Nevada Farm Bureau policy would have significant reservations against the absence of protections from the water bank system being used for interbasin transfers, contrary to Nevada Farm Bureau policy. There are also troubling details for how the bill seeks to change state water law, possibly for only making the banking program workable.**

Part 1 covers General Provisions through the details of Sections 1-5

Section 1 – Creates a chapter in NRS 533 for the Nevada Water Banking Act

Section 2 – This section covers 20 definitions of elements that fit into a system for water banking structure and operational actions.

Within this section there is a correlation of a public entity to apply to become a bank and elsewhere in the definitions (14) those considered to be recognized as public entities include the state, a state agency, a political subdivision or an agency of a political subdivision. A “record holder of a perfected water right” could also apply to be a water bank.

In definition #4, dealing with “Banked water right” it is spelled out that the meaning covers a water right or a portion of a water right, deposited in a water bank and for water that the State Engineer has authorized through an approved change application.

**Nevada Farm Bureau policy asserts that water rights enrolled in a water bank system must be maintained by the water right owner, who voluntarily participates under clearly defined terms that include the regular return of enrolled water to the agricultural property which has been temporarily idled. It should be included in this definition section that the State Engineer’s approved change application covers a temporary change with a defined period of time where the change is allowed. Elsewhere, in Section 7 (h), the required information for procedures of a Statutory Water Bank, time elements need to be spelled out to assure that the temporary change of a water right is not permanent and that the water right owner who makes the deposit maintains the ability to receive their deposited water back, after the identified time has elapsed.**

In definition #16, dealing with the “service area” it is spelled out that the service area means the geographic area where a water bank is approved to operate and operates. If the public entity were to be the state or a state agency – it seems possible that the “service area” could be the entire state.

**Under the provisions of Nevada Farm Bureau policy, which spell out critical provisions to be covered in authorization or establishment of a water bank system for agricultural water rights, local water banks must remain local in nature and cannot be used as a tool to facilitate transfer of water outside of a basin or an adjudicated river system. This policy would clearly take exception for a public entity of the state or a state agency from being allowed to have a service area which would exceed a basin or an adjudicated river system.**

**Nevada Farm Bureau policy also spells out a limitation that a water bank not be authorized to operate with co-mingled surface and groundwater water rights in a conjunctive management. Provisions need to be included which spell out this limitation even to the point of specific definitions being included for what type of water right can be included as a deposit (8). It is covered by Part 2, subsection 7 (e) (i) to restrict a water banking operation from co-mingling surface and groundwater rights in a conjunctive management approach.**

Section 3 – This section provides a Notice for a website to be created with the option for the State Engineer to create and oversee a website for making the public aware of the water banking information.

Section 4 – This section highlights the purpose for water banks that would be created through the action of implementing this proposed legislation.

Section 5 – This covers scope, mostly by limiting that only a bank that is approved under this act may avail itself of the statutory provisions that apply to a water bank. There seems to be an allowance made for persons to enter into agreements for the use of a water right that differs to the requirements of the Chapter of law that is being created to set up a banking system.

Part 2 covers Statutory Water Banks and is spelled out in the details of Sections 6 - 11

**The definition for what a “Statutory Water Bank” is or does is quite sketchy. The definition in Section 2 only states that a “Statutory Water Bank” is a bank established in sections 6-11, where there still isn’t a definition for what a “Statutory Water Bank” is or does. This detail is even more troubling when there isn’t a meaning for a “Contract Water Bank” (Part 3 – Sections 12-16) to know how the two types of “Banks” are different or what they do which might be separate from the other...**

Section 6 – This section covers the approval of a statutory water bank by the State Engineer. Of specific concern is subsection 3 of this section. “(3) A statutory water bank may be operated in a manner that does not strictly conform to priority of rights.”

**While subsection 3 of Section 6 might be interpreted to imply that water rights of various priorities might be co-mingled and those who use the water as a “borrower” (5) of the definitions section could have access to available water regardless of the priority status of deposited water rights (8) of the definition section, there needs to be a strict maintenance of priorities in some form.**

**Nevada Farm Bureau policy states that “all water rights enrolled in a water bank system must be maintained by the water right owner, who voluntarily participates under clearly defined terms that include the regular return of enrolled water to the agricultural property which has been temporarily idled.”**

Section 7 – This section deals with the details to be included with a Statutory Water Bank application.

Section 7 may be the key which distinguishes the difference between the two types of water banks (Statutory and Contract). A Statutory Water Bank is based on the formation of the “founder(s)” having a perfected water right (Section 7, subsection 1). A Contract Water Bank is sought to be approved by a public entity (Section 13, subsection 13).

The requirement of who can form a Statutory Water Bank prohibits the United States or an agency of the US to be able to file an application.

Subsection 1 (d) identifies a proposed service area for the Statutory Water Bank.

**Under the provisions of Nevada Farm Bureau policy, local water banks must remain local in nature and cannot be used as a tool to facilitate transfer of water outside of a basin or an adjudicated river system. We would insist that there be language to prohibit a service area which would exceed a basin or an adjudicated river system.**

Subsection 1 (e) identifies the requirement for identifying the type of deposited water rights that the Statutory Water Bank will accept. Subsection 1 (e) sub (i) makes it clear that a Statutory Water Bank may not accept deposits of both surface water rights and groundwater rights.

Subsection 1 (e) sub (ii) singles out that if the Statutory Water Bank applicant is an applicant of a “perfected water right is of the type accepted by the Statutory Water Bank. It does not seem to cover any similar requirement if the “applicant” is a public entity. There doesn’t seem to be any explanation for what the requirements will be for a public entity.

Subsection 1 (h) identify the required information to be provided for a Statutory Water Bank application in describing the procedures that they will operate. There is no indication of the time-limits associated with the terms of how deposited water rights are held in the Statutory Water Bank or how long the borrower will be able to use the deposited water.

**Nevada Farm Bureau policy asserts that water rights enrolled in a water bank system must be maintained by the water right owner, who voluntarily participates under clearly defined terms that include the regular return of enrolled water to the agricultural property which has been temporarily idled. Section 7 (h), should include the required information for procedures of a Statutory Water Bank, time elements to spell out that the temporary change of a water right is not permanent and that the water right owner who makes the deposit maintains the ability to receive their deposited water back, after the identified time has elapsed.**

Section 8 spells out the directions to the State Engineer when receiving an application for a Statutory Water Bank, including in subsection 4 the provisions for requiring a Notice to be made for a public meeting on the application.

Section 9 covers public comments and the Public meeting that is Noticed. **It doesn't say where the Public meeting will be held, but perhaps should be held in the Service Area that we believe should be based on groundwater basins or with the area of an adjudicated river.**

Section 10 covers the final steps in reviewing the formation process for a Statutory Bank.

Section 11 covers the details for what is required to amend an application for a Statutory Bank, including the steps of repeating sections 7-10 for dealing with an application amendment.

Part 3 covers sections 12-16 regarding Contract Water Banks

**The definition for what a “Contract Water Bank” is or does is quite sketchy. The definition in Section 2 only states that a “Contract Water Bank” is a bank established in sections 12-16, where there still isn't a definition for what a “Contract Water Bank” is or does. This detail is even more troubling when there isn't a meaning for a “Statutory Water Bank” (Part 2 – Sections 6-11) to know how the two types of “Banks” are different or what they do which might be separate from the other...**

Section 12 follows all the same “approval” elements as is the section (6) which correlates to the “Statutory Water Bank” including subsection (3) that allows a water bank to operate in a manner which “does not strictly conform to priority of rights.”

**While subsection 3 of Section 12 might be interpreted to imply that water rights of various priorities might be co-mingled and those who use the water as a “borrower” (5) of the definitions section could have access to available water regardless of the priority status of deposited water rights (8) of the definition section, there needs to be a strict maintenance of priorities in some form.**

**Nevada Farm Bureau policy states that “all water rights enrolled in a water bank system must be maintained by the water right owner, who voluntarily participates under clearly defined terms that include the regular return of enrolled water to the agricultural property which has been temporarily idled.”**

Section 13 may be the key which distinguishes the difference between the two types of water banks (Statutory and Contract). A Statutory Water Bank is based on the formation of the “founder(s)” having a perfected water right (Section 7, subsection 1). A Contract Water Bank is sought to be approved by a public entity (Section 13, subsection 13).

In the requirements there is another difference between a “Statutory Water Bank” and a “Contract Bank”. Section 7 requirements for what has to be covered in the application, a “Statutory Water Bank” has to report on how the founders are going to determine and fund the administrative costs. There isn’t any such detail provided for how a “public entity” is going to handle this matter (if there is one).

**This difference would seem to be an appropriate place to further limit the “public entity” to avoid the state or a state agency from being allowed to be involved and take what is supposed to be “local” to a statewide basis. Anything which would allow for not having limitations of a single groundwater basin or an adjudicated river could be used as a tool to facilitate interbasin transfers in an unlimited fashion.**

Sections 12 and 14-16 cover all the same details and requirements **(with all the same shortcomings)** for “Contract Water Banks” as “Statutory Water Banks” in Sections 6-11...**the worst part is there is no way to know what a “Contract Water Bank” is or does or how it is different from a “Statutory Water Bank”**

Part 4 covers sections 17 & 18 regarding annual reports from the water banks

Section 17 – This section on the reporting requirements includes a subsection 4, which identifies 10 specifics for their required reports that cover detailed amounts of water charged for loaned water rights and other similar aspects. A “Contract Water Bank,” operated by a public entity has none of these requirements or information that is necessary to provide.

**While there is probably a good reason for how little detail is required by a Contract Water Bank, operated by a public entity, there seems to be a need for that to be better explained and justified, if there should be an allowance for a Contract Water Bank, operated by a public entity, in the first place.**

Section 18 – This section deals with water bank noncompliance and revocation of an application.

Part 5 covers sections 20 & 21 regarding deposits (banking water and delivery of loaned water)

Section 19– This section deals with banking water.

Subsection (1) involves that a water right may be deposited with a water bank pursuant to an approved change application filed Pursuant to NRS 533.370.

**This provision, without the limitations that have been highlighted to this point could be the deciding factor for Nevada Farm Bureau’s total opposition to the legislation. NRS 533.370 includes the ability for interbasin transfers (Section 3 of NRS 533.370). Without clearly limiting the restriction on banking to be used as a tool for transfers of water rights outside of a groundwater basin or an adjudicated river, Nevada Farm Bureau policy is opposed.**

Subsection (2) speaks to a limitation on a change application, with a limitation that doesn’t exceed the use of a water right, that has been placed in a bank, beyond December 31, 2031. At the very most this would cover something not more than 10 years, if the deposit was established on December 31, 2021.

**It seems that a better way of dealing with the timeframe could be defined in terms of the number of years for what the terms of a transfer might be? This might also be interpreted to set up a possible sunset provision?**

Subsection (3) describes that a banked water right is excused from the beneficial use requirements of NRS 533.035 - *Beneficial use: Basis, measure and limit of right to use*; NRS 533.045 - *Right to divert ceases when necessity for use does not exist*; NRS 533.060 - *Right to use limited to amount necessary; loss or abandonment of rights; no acquisition of prescriptive right; reservation of rights by State*; and, NRS 534.090 - *Forfeiture and abandonment of rights*.

**Depending on perspective and how these sections of statutes are considered, there may be points of protection for the water rights of the water right owner who is making a deposit? There is at the very least the need for careful consideration for how these “exemptions” could be applied.**

Subsection (4) – this seems to take away the ability of informal water leasing practices that have been operating to this point. Under the details covered in this subsection it would seem that anything other than water being deposited or leased through an authorized bank would not be allowed?

Subsection (5) – this subsection provides that an entity which is authorized to condemn a water right can’t do a condemnation while they are leasing the water right they might want to condemn or do so within five years after the water leasing agreement has expired.

**This offers some protection for a water right owner to get their water right back from a government agency/entity who is planning to use condemnation as the means to take water away from a private water right owner (although it might take some of the elements of “voluntary” participation away for a depositor to get involved with depositing a water right?).**

Section 20 – This section covers the delivery details for water rights that are loaned through a water bank.

Subsection (4) requires that a water bank keep a daily accounting of loaned water rights.

Subsection (6) might be considered an important point in that it requires that a water bank to be responsible for all distribution costs assessed for delivery of a banked water right.

## Part 6 covers sections 22 & 23 regarding reports from the State Engineer

Section 22 – This section covers the bi-annual reports that the State Engineer is required to report to the Nevada Legislature, due no later than December 31 of the even year (before the Nevada Legislature meets in the odd year). These details could include a recommendation for doing away with the sunset (covered in Part 6-Section 23...December 31, 2031) or extending the continuation of the Nevada Water Banking Act. The details are also supposed to give an update on what is working – or not working as well as describing whatever justification would cover the recommendation for continuing or discontinuing the operations of the Act.