

Benton-Franklin Counties Water Conservancy Boards

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and Review by BCWCB-FCWCB Members

SUBJECT: BCWCB-FCWCB Review of SB-6494/HB-2603: Proposed
Legislative Changes to the Water Right Trust/Water Banking
Programs, with Impacts to Direct Water Right Change/Transfers

No regulation can increase the quantity of industry...It can only divert a part of it into a direction into which it might not otherwise have gone; and it is no means certain that this artificial redirection is likely to be more advantageous to society, than that which it would have gone on its own accord...I have never known much good done by those who affected to trade for the public good.

--Adam Smith, *Wealth of Nations*,
Harriman House (republished),
Great Britain, 1776

Water is a public resource...we have concerns about...practices that can lead to systemic removal of a valued resource from a community and inappropriate uses of a public resource, and potentially water market manipulation that can be destructive to the interests of everyone in the state of Washington.

--Paul Jewel, Policy Director,
WA State Assoc. of Counties,
Legislative Committee Comments
Olympia, January 2020

Resources are always being reallocated—the reallocation nature thereof, and underlying intentions for such, being the purview of resource economics and political advocacy.

Washington State water right reallocation occurs in three ways: by direct free market transactions; by the good intentions of legislators responding to the body politic; or by agency regulators confident in their notion of what best serves the public good.

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What Are the Issues, What Are the Objective of SB-6494/HB-2603?

The driving policy issues, and trailing questions, for the proposed Trusting/Banking legislation may be described accordingly:

1. Local economic impact concerns, loss of irrigated lands; replaced by what other economic activity?
2. Local land-use trade-off concerns (NIMBY); nothing in my community should change relative to “community values?”
3. Are the water right Trusting/Banking transfers transparent? Have local officials, others, been formally notified?
4. Is there a net economic loss to the state, under the present laws and water marketing transaction? What is the “public interest” here?
5. Water right marketing speculation; should independent third parties be allowed to buy water rights via the Trusting/Banking process?
6. Are private property right protections in place; can the state, or county, jurisdictions dictate who buys my water rights?

So, what are the primary objectives of the proposed legislation? Are the above issues real, legislative problems? Are the issues being responded to by the proposed changes in the new water bills—does this reveal the bills objectives?

And what does the proposed legislation accomplish relative to a state water policy change affecting the reallocation of water rights under Trusting or Water Banking; or affecting direct change/transfers?

The Proposed Water Code Changes, SB-6494/HB-2603:

Table 1 attached provides a more detailed technical summary of the bill changes to the water code. This is broken-down by section and is point-specific in nature, to be used as an index to reading the existing code and proposed bill changes. BCWCB-FCWCB text comments are included.

The following is noted relative to the above issues list:

1. In general, the bills “spill a lot of ink,” but make relatively few substantive changes to the existing water code pertinent to water Trusting/Banking. The most substantive change affects Water Conservancy Boards’ change/transfer authority.
2. The bills do not address specific local economic impacts, nor land-use changes. The existing code does not assess site-specific economic impacts from water right Trusting/Banking, nor from direct water right change/transfers. Public interest “tests” have limited application, per court (common law) direction.

3. The bills do specify taking into account “community needs” and the “public interest,” but it is unclear how the existing water code fails to do so. There is no additional bill elaboration.
4. The existing code provisions do provide for extensive public notice for water right change/transfers and Trust donations, and do solicit stakeholder/public comments.
5. There is no change to state-level requirements for economic impact assessment. It is implicitly assumed that Trusting/Banking will yield equal to or greater state-wide economic benefits, per the existing code—there are no prevailing opportunity costs.
6. The proposed changes essentially restate, or re-emphasize, the existing requirements for public notice and stakeholder review, that already exist in change/transfers and Trusting/Banking.
7. The proposed changes do not alter the exiting public interest test (or de facto test) surrounding water rights, to the extent applicable or directed by case law (available supply, beneficial use, non-impairment).
8. The proposed changes do not stipulate who can, or cannot, buy water rights, per the existing water code use requirements.
9. The proposed changes do not advance a change to the vested property right interests surrounding legally used water rights, per existing code parameters, and as recognized by the State Supreme Court.

Other Review Comments on Bill Changes:

Other bill changes include:

1. It is unclear whether, or why, a minimum five-year acquisition period is required for Trusting (90.42.020 revised)?
2. If a Trust water right donation does not imply extent and validity of the Trust portion of the right, but it must be based on consumptive use (90.42.100)?
3. Consultants will prepare Trust banking application submissions, working under Ecology supervision, paid for by the applicants.
4. The proposed change removes the authority of Water Conservancy Boards to designate instream flow purpose (Trust donations), separate from Water Banking. This limitation significantly affects change/transfers from being completed, as requested by applicants.

BCWCB-FCWCB Recommendations:

There are some key policy factors that should be recognized or adopted:

1. Within the state water right system for changes/transfers, Trusting, and Banking there is very little that the legislature can do about localized economic impacts that would not significantly usurp private property rights; and the changes would likely

negatively affect net state economic impacts. Water does freely move toward higher value; regulated markets can functionally extract value from a community's economic benefits and production.¹

2. Water right donations for either instream flows (Trusting) or water Banking should be subject to RCW 90.03.380 requirements. The existing ACQ requirements should be applied universally and consistently; or the ACQ requirement should be eliminated from RCW 90.03.380 (to one year peak consumptive use).
3. It is unsound water resources policy to do anything to limit or disrupt the existing authority of the Water Conservancy Boards; particularly where many point-to-point water right changes/transfers include instream flow purposes designations. Nor do water right holders always seek to process water rights through water Banking. Water rights can be given an instream flow designation, then later used for other purposes, after being processed by the Water Conservancy Boards.
4. If local county and legislative leaders are concerned about “community needs” and local public interests, then they should be turning to their respective Water Conservancy Boards for oversight, not a centralized state water Banking structure. The Water Conservancy Boards formation was primarily created for water marketing facilitation at the local level.
5. In addition to providing public/stakeholder notice, some Water Conservancy Boards already provide change/transfer notices to county commissions. This practice should be adopted by all Water Conservancy Boards, and it does not require new legislative guidance or authority. It only requires an informal agreement—a joint memorandum of understanding--among the Boards and the WRP-Ecology director.

¹ This factor is arguably observable in the state's existing “regulated” markets for new exempt wells, extracting net financial benefits from local and state economies; and it is elaborated on more broadly by Mazzucato, *The Value of Everything*, Public Affairs, NY, 2018, where economic rents (unearned income) can extract value from an economy, that could be used in other productive, internal enterprises.

Table 1. BCWCB-FCWCB Review of SB-6494

<u>RCW 90.42.010 Findings-Intent</u>	<u>SB-6494</u>	<u>BCWCB-FCWCB Comments</u>
Broad policy statement supporting water right change/transfers, water conservation programs, etc.	No change.	No change noted.
Statement of support for water banking as a function of water Trusts.	No change.	No change noted.
Water right changes/transfers must not impair other water rights due to changes to return flows.	No change.	No change noted.
-----	Text additions. The states water Trust program should serve "community needs."	How does the existing Trust program fail to meet community needs?"
-----	Transparency must allow for an expression community needs.	There already exists significant public comment and stakeholder contact under the WCB process.
<u>RCW 90.42.020 Definitions</u>	<u>SB-6494</u>	<u>BCWCB-FCWCB Comments</u>
General definitions for Trusting.	Text additions.	Some changes.
Conserved water may be used for Trusting, based on net water savings (no impairment).	No change.	No change noted.
-----	Water rights Trusted must be for a period of more than five years--per a Trust water right agreement.	This is inconsistent or unclear.
<u>RCW 90.42.030 Water Conservation-Trusting</u>	<u>SB-6494</u>	<u>BCWCB-FCWCB Comments</u>
The State may fund water conservation projects to obtain public benefits.	No change.	No change noted.
Net conservation savings for state funding must be determined prior to funds release.	Redrafted text, same effect.	Redraft has same effect.
-----	RCW 90.03.380 is not applicable to State funded and acquired Trust water rights, from conservation.	No RCW 90.03.380 (ACQ) requirement for net conservation savings retained by the State.
State may receive Trust water rights from Irrigation districts, as long as financial integrity is maintained.	No change.	No change noted.
<u>New Code Section Added, Section 5</u>	<u>SB-6494</u>	<u>BCWCB-FCWCB Comments</u>
-----	Trust water rights may be consigned/acquired by the State, on a temporary or permanent basis.	Appears to be redundant to existing code.

-----	The State may be use Trust water rights for instream flows or other beneficial uses (purposes).	Appears to be redundant to existing code.
-----	RCW 90.14.140 and 90.14.230 are not applicable to State held Trust water rights.	This is already part of the existing code, change is unclear.
-----	The State may Trust a water right from another state for instream flow purposes.	Change is noted.

<u>SB-6494</u>		
-----	The State may purchase water rights for instream flow purposes--the right will be limited to instream flows	This authority already exists (RCW 90.90).
-----	The State purchase of water rights for Trusting must be consistent with approved watershed plans.	Direction already exists in code.

<u>RCW 90.42.040 Trust Water Rights Program</u>		
-----	The State may acquire surface/groundwater rights, consistent with approved watershed plans.	Change need is unclear.
-----	The purposes of state acquired trust water rights may be changed to other purposes.	Change need is unclear.
-----	The State may issue certificates for permanent and non-permanent Trust donations.	Change noted.
-----	The Trust water right shall not impair the public interest.	Change noted.
-----	A Trust water right used by the state for consumptive purposes may be subject to RCW 90.03.380.	Change noted.
-----	The State shall issue public notice to all parties.	Change noted.
-----	State funded water conservation projects are not subject to RCW 90.03.380.	Change noted, unclear.
-----	A portion of a water right not being Trusted is not subject to extent and validity analysis.	Change noted.

<u>SB-6494</u>		
-----	The State may Trust/acquire a water right under a short-term lease.	Change noted, existing authority.
-----	The water right Trust lease may not cause impairment.	Change noted, existing authority.

 The water right Trust lease must serve the public interest. Change noted, existing authority.

 Trust lease does not imply extent/validity of the water right; but Trust must be based on consumptive use. Change is inconsistent or confusing.

RCW 90.42.080 Trust Water Rights Program **SB-6494** **BCWCB-FCWCB Comments**

The State may acquire surface/groundwater rights for instream Trusting (instream flows-no mitigation). Rescinded. Redrafted text, same effect. Change noted.

The Trusting may be permanent or temporary. Rescinded. Redrafted text, same effect. Change noted.

Trusting portion of right must be based on beneficial use during the previous five years. Rescinded. Redrafted text, same effect. Change noted.

The instream Trusting of a right must reflect beneficial use but is not subject to RCW 90.03.380. Rescinded. Redrafted text, same effect. Change noted.

Instream flow Trusting qualifies for IRS tax donation benefits (contributions). Rescinded. Redrafted text, same effect. Change noted noted.

Trust water right must not create impairment. Rescinded. Redrafted text, same effect. Change noted.

 Trust water right action must receive public notice. Change noted, existing authority.

New Code Section Added. Section 11 **SB-6494** **BCWCB-FCWCB Comments**

 An application for water right Trust banking must be submitted to the State. Change noted, new change.

 Information requirements for application. Information is similar to any change/transfer action.

 A water banking agreement must be prepared between the State and Trust donor--use provisions. Change noted, existing authority.

RCW 90.42.100 Water Banking **SB-6494** **BCWCB-FCWCB Comments**

The Department may authorize Trust water rights for water banking purposes. Text change, same effect. Change noted.

Water banking may be used for future water supplies or mitigation water. Text change, same effect. Change noted.

Water banking may be used on a temporary or permanent basis. No change. No change noted.

Water banking shall not cause impairment to other water rights.	Text change, and change supports "community needs."	How does the existing Trust program fail to meet community needs?"
The Department shall provide public notice of water banking to local-federal entities and Tribes.	Text rescinded.	Change is unclear.
<u>RCW 90.42.110 Water Banking-Transfers Into.</u>		
The Department may review water right applications for change/transfer into the water bank.	Text rescinded.	Change noted relative to other changes (information).
All submissions into the water bank must be reviewed per RCW 90.03.380 standards (ACQ value).	Text changes, same effect; and the Department will process applications under cost-reimbursement.	Consultants will prepare the Trust banking application submission, working under Ecology supervision.
The Trust donation is subject to future use evaluation, based on "reasonably foreseeable" use standards.	No change.	No change noted.
<u>RCW 90.42.120 Water Banking-Transfers Out.</u>		
The Department may transfer a water bank donation to another party.	No change.	No change noted.
The Department transfers to another party must be subject to RCW 90.03.380 (ACQ value).	No change.	No change noted.
The transfer requires proper assignment of ownership for use of the right.	No change.	No change noted.
The transfers requires a report of examination confirming the legitimacy of the transfer.	No change.	No change noted.
<u>RCW 90.42.130 Water Banking Review.</u>		
The Department shall seek input from stakeholders for implementing water banks for new water supplies.	No change.	No change noted.
<u>RCW 90.80.055 Water Conservancy Boards</u>		
Water Conservancy Boards may make instream purpose changes, consistent with Trust practices and notification.	Change eliminates WCB authority for instream change/transfers.	The change effectively interferes with an ability of the WCB to make point-to-point C/Ts; substantially limits local control over C/T decisions.