

Topic 1: Out of Basin Transfers

Findings

1. Out-of-basin transfers are a valuable tool for providing water to new uses and boosting instream flows. Often, they provide much needed flexibility for water management. *

Comment: Benefits to instream flows depend on documentation and protection of water in Trust for instream flow. We are not aware of a place where flows are documented and protected outside of the Yakima basin. Until flows are protected, “Benefiting instream flows” should not be used as a finding supporting a proposed policy.

2. The needs of each basin are unique – it will be difficult (and likely unwise) to seek one solution that fits all basins. For example, some basins could see greater ecological or economic impacts of water moving downstream than other basins. Management considerations are also basin specific, like whether instream flows are met in the basin-of-origin or whether the basin-of-origin is closed.

Comment: We agree. Taking it further, we support identifying basins with similar conditions that make them more or less vulnerable to cumulative local impacts from out of basin transfers. Basins that are more or less vulnerable will lend themselves to a different suite of solutions. For example, basins with no upstream source of water to replace downstream transfers need added protection against those types of transfers. For these basins, a prohibition on transferring water downstream out of the basin is a necessary protection, particularly in combination with tools and incentives to maintain market flexibility and landowner options. Our working group in Okanogan County has identified seven WRIAs in eastern Washington that (1) have an instream flow rule, and (2) have no upstream source of replacement water, where a prohibition on out of WRIA transfers is appropriate and necessary.

3. When water rights cannot be transferred back upstream, out-of-basin transfers can result in loss of jobs and revenue to the county of origin, which can have larger economic consequences on the state. Some participants expressed that limiting these transfers could prevent these economic losses. Others argued that most out-of-basin transfers are driven by greater macro-economic trends, such as loss of the family farm. They expressed that restricting the sale of water is not going to save local farms.

Comment: We respectfully disagree with the last statement and believe it should be stricken from the findings as it does not reflect our experience of a rural agricultural county. Remember, not all basins are alike, and neither are all farmers. While we agree that many out of basin transfers are driven by macroeconomic trends that put small farmers at a disadvantage in both the agricultural and water marketplaces, these trends alone are not going to stop people from farming, because our communities wish to maintain self-sufficiency and enjoy a rural lifestyle, even if it takes place at a smaller scale than in parts of the state where industrial scale agriculture rules.

Lack of available water, especially the foreclosure of future options for young people who may want to farm, is a major hindrance to the future vision of our communities. Our communities have every right to maintain their vision of small farms, and future options to farm. Our Okanogan County working group has addressed the notion of finding ways to compensate irrigators for keeping their water in the basin, and other tools that would work to protect headwater basins while allowing flexibility and preserving future options

Potential Policy Tools

1. Provide state and local governments the “right of first refusal” before a water right may be sold for transfer out of the basin of origin. Governments would have a set duration of time to act on the sale.

Objective: Increase the opportunity for water rights to stay in the basin of origin	
Pro’s	Con’s
Provides a mechanism to keep water rights in the basin of origin. Comment: Tribes and non-profits should be included in the right of first refusal. Add “sold or leased for more than one year for transfer out of basin.”	Disclosure of the sale before the sale is final could complicate or derail the transaction Comment: Disclosure can be addressed through separate legislative action if this is deemed a restriction on the overall effectiveness of this action.
Increases local control	Lengthens the processing time for out-of-basin transfers
Could maintain economic benefits in the local community without affecting property rights. Comment: This does not address the problem of local governments, Tribes, or NGO’s in economically “poor” regions who would be competing with buyers who have infinite resources to move the water downstream. The competition and prices paid for water to be moved downstream will only increase in the future under current growth and climate projections. This solution may be helpful but is not enough to stand alone.	Requires a new source of funding to implement. Without funding this could create process with no result Comment: This one-size fits all policy is in conflict with F.1.2 above. We propose an approach that addresses specific WRIAs with a common problem.

2. Authorize Ecology to “close” a basin (or subbasin) to out-of-basin transfers through rulemaking.

Objective: Prevent out-of-basin transfers from those WRIAs that are most affected	
Pro’s	Con’s
Basin-specific approach	Rulemaking is costly and time consuming for the agency
The rulemaking process would consider public comment	With other rulemaking priorities, it is unclear when Ecology will have resources to undertake this rulemaking in the near term Comment: We agree and this makes this proposal infeasible.
	Would need clear criteria for what would justify this rulemaking – this could be difficult to articulate and/or measure
	Even with authority to adopt rules with this standard, rulemaking requires that the benefits outweigh the costs and it’s unclear whether that would be the case

3. Create an administrative tool or implement a process/procedure such that a water right may be moved back upstream without a finding of impairment to intervening users. [Note, Ecology could implement this within existing authority].

Objective: Create greater flexibility such that out-of-basin transfers are no longer “permanent” and may be transferred back upstream	
Pro’s	Con’s
<p>Increased flexibility to move water rights back upstream after they have been transferred downstream.</p> <p>Comment: Upstream transfers of water previously moved downstream out of basin will not be economically feasible in most situations.</p> <p>Upstream transfers within a single basin are an important tool in basins that we propose for closure to out of basin transfers.</p>	<p>Could be costly, time consuming, and complicated to implement</p>
<p>Potential impacts on the local economy due to downstream transfers could become reversible</p>	<p>Moving a right back upstream after an extended period of time may result in ecological impacts, especially given the impacts of climate change</p>

Policy Tools Not Recommended

1. Require that before the place of use of a water right may be transferred to a downstream WRIA, Ecology must determine that the change will not be detrimental to the public interest.

Reasoning: Many participants expressed concern that a public interest test is too nebulous and subjective. Further, it is unclear at what geographic scale would be appropriate to measure the impacts – at a county level, regional, or statewide? There was also concern that using a public interest test could start to value some beneficial uses over others, which participants largely thought was unwise. Lastly, there was some sentiment that the heart of the problem lies in loss of economic opportunities for farming in upstream communities – and preventing a water right from moving downstream will not incentivize people to keep farming; thus, the policy tool is misplaced.

Comment: Whether Ecology should consider the public interest when deciding whether a water right can be transferred out of its original WRIA is a decision that should be taken seriously. The importance to the public of such transfers is demonstrated by the experience in the Methow Watershed. When Crown Columbia came to the Methow and sought to buy and transfer 33 cfs out of the watershed, the community responded at great cost. Local citizens, including the Chewuch Canal Company (CCC) who would have been directly affected by the transfer, attended 14 Okanogan Water Conservation Board meetings. Some of the meetings were attended by over 50 concerned citizens and agencies. It was a 90-mile round trip to Okanogan where the meetings were held. CCC incurred over \$25,000 in legal fees and other costs opposing this out of basin transfer. The public interest should be a consideration when a party seeks to transfer water out of a basin.

A requirement for a public interest review is not a novel idea in Washington water law or to Ecology. See, RCW 90.42.040; 90.44.100; 90.03.290; and 90.44.540. A public interest test need not be “nebulous;” it depends upon whether Ecology chooses to define the term in rule. The agency can also identify categories of concerns that will be considered. Ecology’s discretion in deciding what is in the

public interest allows the agency to be responsive to changing environmental, economic, and social priorities. As we move further into the era of climate change and the effects on water supplies, this will become increasingly important.

It makes no sense to require a public interest/public welfare review for new water right applications and groundwater changes but not for surface water right changes. The Macdonnell report to the State Legislature on interbasin transfers in 2008 included a recommendation for “[a] statutory provision for general public interest review of proposed changes of water rights as exists for applications for new appropriations of water.”

Most single water right transfers out of basin may not be economically significant in that they come from a portion of an agricultural use. However, many of these over several years begins to have a cumulative effect which must be considered. This is the ‘death by a thousand cuts’ proverb in Eastern Washington agriculture. Unrestricted, the transfer of smaller water rights will result in a day when one single, small water right transfer, will result in the fundamental and deleterious impact to the economy of the community and county from which the water came.

Finally, the reasoning that preventing water from moving downstream won’t “incentivize people to keep farming” misses the point. If the water leaves the WRIA it simply will not be available for anyone to use for farming or any other beneficial use ever again.

2. Create a revolving loan fund to purchase water rights for use in the basin of origin. Authorize easements on a water rights that stipulate they may not be transferred for use out of the basin.

Reasoning: Would be administratively very costly. In addition, the availability of water rights for acquisition may be more of the limiting factor than funding.

Comment: Bear in mind that other state agencies might have a role in proactive measures such as programs to purchase rights, or restrictive covenants to rights – the Washington State Conservation Commission, through their Office of Farmland Preservation, comes to mind, given the productive role that agency plays in concert with DOE with many conservation programs. Such a program does not need to be administratively costly depending upon how the program is set up. Please see our concepts in Protection of Headwater Basins, attached to this document.

Topic 2: Transparency in Water Right Sales

Findings

- F.2.3 The requirement to post notice of water right transfers in the newspaper is outdated.

Comment: Particularly in rural areas, newspapers still provide the only notice to many people, and the advertising supports local papers. We support exploring additional notice options to include while keeping the tradition of using local newspapers.

Potential Policy Tools

1. Align disclosure laws for water rights sold separately from land with the laws for land sales. Require that water right sales (and prices) are reported to the state and made publicly available.

Comment: We agree with this policy tool.

- P.2.2 Make water right transfer application information more accessible to the public through administrative improvements. Post water right change applications in an integrated, publicly-accessible GIS interface. [Note, Ecology can implement this within existing authority].

Comment: In considering accessibility of information, Ecology should consider the audience and ensure that the information is accessible to a diversity of the public, not limited to consultants and attorneys.

Topic 3: Private investment & marketing of water rights – Use of the Trust Water Rights Program (TWRP)

Findings:

1. The flexibility of the trust program is one of its greatest assets. Limiting its flexibility by clarifying certain definitions and processes could hamper creative water solutions. Several participants expressed that for them, the value of flexibility outweighs any potential concerns over “abuse” of the TWRP.

Comment: We are concerned about the disproportionate regard for “flexibility” and “creativity” at the possible expense of transparency and accountability. We are aware of schemes that have wasted taxpayer time and public as well as private resources in the name of “flexibility” and “creative solutions,” so are necessarily wary of holding these terms above reproach. As long as any changes to the statute to prevent abuse are targeted at the problem, it should not affect flexibility for legitimate uses.

- F.3.2 There is broad agreement that a water right being used for mitigation should first undergo a tentative determination of extent and validity. While there was general sentiment that Ecology already has the statutory authority to require this, there was not consensus.

Comment: We agree that a water right, especially a temporary donation to the TWRP, being used for mitigation should first undergo a tentative determination of extent and validity.

- F.3.4 There was not consensus on whether the TWRP enables speculation in water rights and if so, whether it is even a problem. Further, there was not common understanding on the meaning of “speculation”. It was unclear whether reaching a common understanding would be instructive or not.

Comment: Speculation is a well-defined term: “[t]he buying or selling of something with the expectation of profiting from price fluctuations.” (Black’s Law Dictionary.) “Speculators in water do not acquire water rights for the purpose of immediately utilizing the water by applying it to beneficial use, but rather with the hope that water values will increase over time, allowing the water rights holder to sell those rights in the future for a substantial gain while locking up the resource from contemporaneous uses in the meantime.” Nevada Law Journal, Vol. 8:994, 1006 (2008). The TWRP enables speculation by allowing water rights to be put into trust for lengthy periods of time without any identified out-of-stream end use. See, e.g., Crown Columbia’s application to transfer 33 cfs of water from the Chewuch River to trust for up to 29 years. The argument that instream flows benefit from the water remaining in trust is false. See comments to F.1.1, above. “The anti-speculation doctrine curbs the worst potential abuses of market forces by forcing transacting parties to articulate how and when the water will be applied to actual, beneficial uses[.]” Nevada Law Journal at 998. Abuse of the TWR Program *does* enable speculation with a public resource.

F.3.5 Most participants were not concerned over use of the TWRP in ways that yield private profit. They contend that as long as the rights are being beneficially used (including for instream flows), the intent behind the use nor the owner should matter – if someone happens to profit from keeping a water right in the TWRP, then that’s a win-win. This is especially true because use of the TWRP often yields streamflow benefits.

Comment: Again quoting from the Nevada Law Journal at 999, “[t]he type of privatization that raises concerns in the water world is that which involves placing the assets—the resource itself—in the hands of profit-driven firms, thereby interfering with the ability of residents and local governments to manage their own [water] supplies, as decision-making becomes less transparent and opportunities for meaningful participation become less available.” See also comment to F.1.1. The average annual flow of the Columbia River at Wells Dam is 88,818 cfs. Even had Crown Columbia been successful in transferring 33 cfs from the Chewuch River downstream to the Columbia, any “streamflow benefits” claimed would be illusory.

F.3.6 Some participants, however, expressed concern over the scenario whereby a person buys a water right with no plan to put it to beneficial use themselves (other than instream flows), but rather with the intent of reselling the water later at a higher price. They view this as speculative and concerning.

Comment: We strongly align with the participants who expressed concern.

Potential Policy Tools

1. Amend chapter 90.42 RCW to differentiate between water that is put in trust for the purpose of instream flow enhancement and protection from relinquishment versus water that is placed in trust to be used as mitigation.¹

Objective: Create two categories of trust water rights to clearly differentiate their end use	
Pro’s	Con’s
Will clarify both Ecology’s administrative role and the water right holder’s long-term intentions for use	Lack of consensus on terminology and proper distinctions indicates this could be a difficult and potentially lengthy process. Comment: This is not a good reason not to do this. Almost everything having to do with water involves a lengthy and difficult process, and adding clarity is worth the time and effort.

- P.3.2 Clarify in chapter 90.42 RCW that any water right being used for permanent mitigation or mitigation lasting longer than 5 years must first undergo a tentative determination of extent and validity.

Comment: We wonder where the “longer than 5 years” originated, and why that’s a useful starting place for considering extent and validity requirements. Temporary donations considered for mitigation should all undergo extent and validity, if accepting temporary donations for mitigation makes sense (there is reason to believe that it does not).

Ideas Not Recommended

1. Limit use of the TWRP such that that individuals who buy a water right must plan to put the water to beneficial use themselves.

Reasoning: Many participants expressed that limiting use the trust program is unwarranted and inadvisable. They warned that we cannot know the buyers intent – and trying to scrutinize someone’s motives in using the TWRP would preclude creative solutions to help streamflows.

Comment: Limiting the use of the TWRP to this requirement would help address speculation and the practice of treating a public resource like a private commodity. The reason for not recommending a suggestion because it “would preclude creative solutions to help streamflows” needs more explanation. See our comments on F.3.1.

2. Limit the number of trust water rights that can be removed from trust in any given year.

Reasoning: We have not seen that water being withdrawn from trust has caused streamflow problems. Also, it would be difficult to determine the appropriate number of water rights that could be removed. If the limit were based on geographic distribution, it would be difficult to track administratively.

Comment: Good idea- This idea addresses the concern that if transfers and use of the TWRP to manage our public water supply is entirely market-dependent, then transfers will increase in pace and scale as prices go up, leading to undesirable situations. Constraining that tendency by introducing limits is worth investigating.

3. Restrict how long a temporarily donated water right may remain in trust.

Reasoning: Precludes flexibility. Data shows that most rights are in the TWRP for 5 years or shorter, so any limit above that timeframe would have limited utility.

Comment: Flexibility is not an end unto itself. See our comment on F.3.1. While it might be of limited utility at this time, it is a utility we need in the future. Basing decisions on what is currently happening ignores future increased water demands and less supply from a changing climate. Again, this limitation on time in Trust would help reduce speculation. A water right is not meant to be held by a buyer for years (e.g., 29 years requested by Crown Columbia for Chewuch River water) while others are denied new water rights.

Topic 4: Private investment & marketing of water rights – Water banking

Findings

No Comments

Potential Policy Tools

1. Require that prospective bankers submit a “water banking prospectus” in which they outline their business plan.² The prospectus would be made available for public comment.

Comment: We agree that this would be another tool to use in reducing speculation using a public resource.

Attachment:

PROTECTION OF HEADWATER BASINS: a proposal from Okanogan County

Introduction

Water rights are private property rights to use water that may be transferred under the authority of RCW 90.03.380 or RCW 90.44.100. Transfers of water rights used for irrigated agriculture from one WRIA downstream to another WRIA can have serious adverse impacts on the WRIA of origin, including impacts on agriculture and community sustainability, and water available for future appropriation. (Protecting Local Economies, Lawrence J. MacDonnell, Report to the Legislature, State of Washington, November 30, 2008). This is particularly true where water from the WRIA flows into the Columbia River and there are no upstream sources of water to replace the water transferred out.

To protect agricultural water supply, rural economies and the local public interest in these headwater basins, and in recognition of the private property interest in water, we are proposing legislation that:

- (1) prohibits out-of-WRIA transfers,
- (2) allows for upstream transfers under specified conditions, and
- (3) funds a local water bank to purchase water from agricultural producers in exchange for compensation and a lease-back to continue to use the water at its current place of use.

PROHIBITION ON OUT-OF-WRIA TRANSFERS

Proposed Legislative Language

1. Ecology and County Water Conservancy Boards, authorized under Chapter 90.80 RCW, shall not approve any application for an out-of-WRIA transfer of all or a portion of a water right from the following WRIAs:
 - a. WRIA 45-Wenatchee,
 - b. WRIA 46-Entiat,
 - c. WRIA 48-Methow,
 - d. WRIA 49-Okanogan,
 - e. WRIA 55-Little Spokane,
 - f. WRIA 57-Middle Spokane, and
 - g. WRIA 59-Colville.
2. The prohibition on out-of-WRIA transfers would not apply to:
 - a. water permanently transferred to the Trust Water Rights Program for the purpose of instream flow,
 - b. water temporarily transferred to Trust for instream flow for a period of 5 years or less, provided the water once removed from Trust is beneficially used in the WRIA where it was used prior to the transfer, or
 - c. water temporarily transferred out of a WRIA if a drought declaration is made under **RCW _____**.
3. The prohibition would also not apply to existing contractual obligations of Ecology's Office of the Columbia River.
4. In order to address the potential financial impact on individual producers from a prohibition on out-of-WRIA transfers, the legislature will appropriate \$_____ to each of the WRIAs listed in section 1 to establish a local water bank for purchase of agricultural water rights.

UPSTREAM TRANSFERS

In some of the WRIsAs included in this proposed legislation, significant quantities of water have already been transferred downstream out of the WRIA. (E.g., WRIA 49 Okanogan _____ acre-feet since _____.) For all WRIsAs where an out-of-WRIA transfer would be prohibited going forward, there is a need for the flexibility to transfer water more freely within the WRIA, including upstream, to allow for water to be used where needed.

Proposed Legislative Language

1. Upstream transfers may be allowed in WRIsAs covered by this section under the following conditions:
 - a. The transfer is within the mainstem of the primary river in the WRIA, or
 - b. The transfer is in a tributary and the water being transferred was used in the tributary prior to being transferred downstream.
 - c. The transfer is to a new point of diversion at or downstream of the original point of diversion for the water right.
 - d. The maximum quantity of water transferred upstream does not exceed the amount historically used in that stream reach.

2. In order to protect instream flows, any right transferred upstream shall have a priority date that is junior to instream flows set by rule. The right will retain its original priority date as to other rights for out-of-stream uses. If instream flows are not being met, Ecology shall first regulate all other water rights junior to the instream flow. If this regulation does not result in instream flows being met, Ecology may then regulate any water right that has been transferred back upstream.

3. No changes under this section may impair existing water rights, including instream flows.

VOLUNTARY SALE OF WATER RIGHT TO LOCAL WATER BANK

The state or a non-profit entity would purchase valid water rights from a willing farmer at fair market value and place the right in a basin-specific agricultural water bank. The beneficially used portion of the water right, or a portion thereof, would then be leased back to the farmer [likely at little to no cost] for continued use by the farmer or current property owner in perpetuity. If, at any point in time, the water leased back to the farmer is no longer needed or is nearing the time for relinquishment, the water is returned to the agricultural water bank and can be re-appropriated for other agricultural uses within the previously approved area of use [and with Ecology approval].

- To ensure public benefit, all water rights purchased under this program would have to undergo a validity and extent review to confirm that the right is real wet water prior to initiating transfer proceedings through the Water Conservancy Board.
 - Local entity, trained in agricultural water law and relevant case law, would perform beneficial use review to meet a “highly likely” standard of validity and extent.
 - Formal validity and extent review by Ecology through the water right change process.
- Water right remains attached to the land it was purchased from, unless the farmer no longer needs (as much) water or the land is sold and the new owner no longer wishes to irrigate for agricultural purposes.
- The water bank manages against relinquishment with the contractual assistance of the current landowner/water right [user]. This would be accomplished by either:
 - Water right put to beneficial use for agriculture, in whole or in part; or
 - Statutory protection from relinquishment through the water bank.

- Retain quantity on-farm (Q_i (instantaneous (flow)) and Q_a (total quantity)) for highest crop-water duty and an existing or future efficiency AND increased evapotranspiration due to climate change and efficiency.
- Remainder of the consumptive portion of the valid water right may be available for other agricultural uses within the WRIA. Non-consumptive water savings from conservation efforts would be placed into the state's Trust Water Rights Program for instream flows and/or other non-consumptive conservation related uses.