

# Mary McCrea

These are my comments on Draft Findings and Potential Policy Tools-for Meeting 5.

Thank you for this chance to comment and all your work on this effort.

Mary

## Draft Findings and Potential Policy Tools – for Meeting 5

Advisory Group on Water Trust, Banking, and Transfers

DRAFT; June 22 2020

### Topic 1: Out-of-basin transfers

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#### Findings

- F.1.1 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. This depends upon water in Trust for instream flow being protected. The only place that is being done, on the eastside at least, is at Parker Dam on the Yakima. If this is incorrect, it is important for Ecology to say so. Otherwise, “boosting/benefiting instream flows” should not be used as the basis for a proposed policy or a reason to not recommend an idea put forward.
- F.1.2 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. That said, some basins can be grouped together and a solution applied to the group. For example, some basins need added protection against downstream out-of-basin transfers. These basins include those with no upstream source of water to replace that being transferred downstream. For these basins, a prohibition on transferring water downstream out of the basin is a necessary protection. We have 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. See, “Protection of Headwater Basins,” attached to this document.
- F.1.3 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. But it will save the opportunity for local farms. The outcome depends upon what restrictions are in place and what alternatives are provided the farmer re compensation for his/her water while keeping the water in the basin of origin. See, “Protection of Headwater Basins,” attached to this document.

~~F.1.3~~

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Potential Policy Tools

- P.1.1 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.

<b>Objective:</b> Increase the opportunity for water rights to stay in the basin of origin	
<b>Pro’s</b>	<b>Con’s</b>
Provides a mechanism to keep water rights in the basin of origin. <u>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.”</u>	Disclosure of the sale before the sale is final could complicate or derail the transaction
Increases local control	Lengthens the processing time for out-of-basin transfers
Could maintain economic benefits in the local community without affecting property rights. <u>This does not solve the problem of competing with buyers who want to move the water downstream and come to the table with lots of money. The competition and prices paid for water to be moved downstream will only increase in the future.</u>	Requires a new source of funding to implement. Without funding this could create process with no result <u>This one-size fits all policy is in conflict with F.1.2 above. While it may be a good tool for some WRIAs, we propose a different approach that addresses specific WRIAs with a common problem. See, Protection of Headwater Basins, attached to this document.</u>

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- P.1.2 Authorize Ecology to “close” a basin (or subbasin) to out-of-basin transfers through rulemaking.

<b>Objective:</b> Prevent out-of-basin transfers from those WRIAs that are most affected	
<b>Pro’s</b>	<b>Con’s</b>
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- <u>totally agree and this makes this proposal infeasible.</u>
	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

- P.1.3 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].

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

Ideas Not Recommended

- NR.1.1 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.

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 in this transaction was significant and points to the conclusion that the public interest, including the local public interest, should be a consideration when a party seeks to transfer water out of a basin.

Additionally, 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.

Significantly, 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 to create “[a] statutory provision for general public interest review of proposed changes of water rights as exists for applications for new appropriations of water.”

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.

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NR.1.2 Restrict the number of water rights that may be transferred for use out-of-basin from any one WRIA.

Reasoning: It is unclear how Ecology would determine the appropriate number of water rights (or the quantity of water) that can be transferred.

NR.1.3 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. This need not be administratively costly to Ecology depending upon how the easement program is set up. See, Protection of Headwater Basins, attached to this document.

## Topic 2: Transparency in water right sales

### Findings

- F.2.1 There was general sentiment among participants that the public notice requirements of sales and transfers are not the problem – rather, we should be concerned that transfer applications posted online are not visible enough to the general public (especially in the case of conservancy board applications).
- F.2.2 Increased knowledge of sales and prices could help to develop a more robust marketplace for trading water rights. *The question remains whether this is a desirable outcome. As one participant stated on the last call, “why can a use right be sold?” Others have reminded us all that water is a public resource. A question to be answered is whether the right to use a public resource includes the right to make the maximum amount of money from the sale of the use right? My answer is “no.”*
- F.2.3 The requirement to post notice of water right transfers in the newspaper is outdated. *Particularly in rural areas, newspapers still provide the only notice to many people.*
- F.2.4 There was common agreement that limiting who can buy a water right (such as prohibiting out-of-state entities) is unwise. See NR.2.1 for details.

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### Potential Policy Tools

- P.2.1 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. *Agree*

Objective: Improve transparency	
Pro's	Con's
Improves market transparency	Administratively costly for both the state and local governments
Could make more water rights available with knowledge of prices	Might increase the price of water, including the cost of water right acquisitions

- 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]. *In considering accessibility of information, Ecology should consider who is the audience. If it is consultants and attorneys, this kind of approach makes sense. If it is the public in general this approach falls short.*

Objective: Improve transparency	
Pro's	Con's
Improves access to information about water right transfers	Requires some administrative resources to implement

## Ideas Not Recommended

### NR.2.1 Limit who can buy a Washington water right.

Reasoning: First, participants noted that some out-of-state actors, like the Bureau of Reclamation, play an important role in water management in Washington. Second, some feared it could hinder water management in interstate basins. Third, most participants thought that any regulation limiting such entities would have easy workarounds and loopholes. Lastly, participants noted that anyone can buy land in Washington, and it would be incongruent to restrict who can buy water.

### NR.2.2 Provide advance public notice of sales including price disclosure.

Reasoning: This could set the expectation that Ecology or local governments could prevent a sale from happening, which they would not have authority to do. This also has high potential to disrupt sales.

### NR.2.3 Require that any water right sale be reported to county commissioners.

Reasoning: It is unclear what benefit would come from reporting all sales. It could also set the expectation that local governments could prevent a sale from happening, which they would not have authority to do.

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

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### Findings

- F.3.1 There is lack of consensus and common understanding of basic terminology of the trust program, including terms such as *temporary donation* and *transfer into trust*. The most important distinction between “types” of trust water rights is the intended end use of that water right – or more precisely, the role that Ecology will play in managing the right. This is not clear in statute.
- F.3.2 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. 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.3.3 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.
- 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. The TWRP enables speculation in water rights. 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.” “Anti-Speculation Doctrine,” 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 [out-of-stream] uses[.]” Nevada Law Journal at 998. The right to use water does not include the right to speculate 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. 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 on F.1.1, above. (Of note, 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. Strongly agree.

#### Potential Policy Tools

- P.3.1. 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.<sup>1</sup>

**Objective:** Create two categories of trust water rights to clearly differentiate their end use

<sup>1</sup> Note that flexibilities exist under chapter 90.38 RCW for the Yakima Basin that do not apply elsewhere in the state. Ecology is not currently considering any changes to chapter 90.38 RCW.



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. <u>Not a good reason not to do this. Almost everything having to do with water involves a lengthy and difficult process.</u>
Provides clarity on mitigating new uses and administrative processes	
Ensures that use of trust water rights will not impair existing rights	

- 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. Why must it be longer than 5 years?

<b>Objective:</b> Ensure that new mitigated uses will not impair existing water users or instream flows	
Pro's	Con's
Added clarity from the Legislature will increase certainty and reduce legal risk	Unclear whether this is necessary – Ecology believes we already have the statutory authority to require this
Ensures that use of trust water rights will not impair existing rights	

- P.3.3. Amend chapter 90.42 RCW to establish that any water right temporarily donated into the TWRP may not be used to mitigate for new or existing uses.

<b>Objective:</b> Ensure that new mitigated uses will not impair existing water users or instream flows	
Pro's	Con's
This distinction would help to keep track of which rights can be used for mitigation	Precludes flexibility. While most agreed that use of donations for mitigation is often inadvisable, many people noted that in some unique circumstances, it can be appropriate
Helps to prevent the scenario whereby a permanent use is mitigated by a temporary trust right	Precludes flexibility for mitigation during droughts

- P.3.4. Conduct rulemaking to define common terminology and administrative processes for trust water and water banking. [Note, Ecology could pursue this under existing authorities].

<b>Objective:</b> Clarify terminology	
Pro's	Con's
Increased clarity	Because of the unclear language in existing statute, a rule could be appealed by entities that disagree with the

	interpretation of the statute being clarified in rule. This creates some uncertainty going forward
Rulemaking process will allow for meaningful public process	Rulemaking is costly and time consuming for the agency
	With other rulemaking priorities, it is unclear when Ecology will have resources to undertake this rulemaking in the near term

#### Ideas Not Recommended

NR. 3.1. 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~~ buyer's intent – and trying to scrutinize someone's motives in using the TWRP would preclude creative solutions to help streamflows. This provision would help address speculation and treatment of 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. It is vague.

NR. 3.2. 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. Good idea- needs more consideration before tossing it out.

NR. 3.3. 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. 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

F.4.1 Water banks play a critical role in reallocating water between beneficial uses, including instream flows. Both public and private water banks play an important role.

- F.4.2 There was general agreement among participants that it can be concerning when a bank that provides water to meet basic health needs gains disproportionate market power or becomes a monopoly. However, participants debated whether the appropriate remedy is through carrots (incentivizing competition) or through sticks (increased regulation).
- Some participants expressed that there should be greater government regulation of water banks providing water for public health and safety (like in-home use). Though there was no clear recommendation on what that that regulation should entail, some participants recommend learning lessons from oversight of public utilities.
  - Other participants argued that while monopolistic behavior can be worrisome, increased regulation is not warranted. They expressed that the solution to monopolies would be to reduce barriers to entry as to increase bank competition. They expressed that rather than regulating the marketplace, Ecology should be positioned to support more banks.
- F.4.3 Rather than focusing on whether and how we should increasingly regulate water banking, we should focus on how the state can better support banking where it can play a critical role in addressing public health and safety and other water supply challenges.
- F.4.4 Many participants expressed that transparency in water banks helps to ensure equity and fairness, especially regarding prices that banks charge customers. Several thought that the bill passed in 2016 (SB 6179) resulted in significant improvement and that no further action is needed at this point.
- F.4.5 Many participants thought it would be appropriate for water banks to pay the full administrative cost of bank establishment.
- F.4.6 Staffing and capacity limitations at Ecology result in lengthy processing times for water bank agreements and related water right change applications. It may also contribute to lack of consistency in practices, resulting in uncertainty for clients. Additional resources for implementation of the TWRP would benefit state water management.

#### Potential Policy Tools

- P.4.1. Require that prospective bankers submit a “water banking prospectus” in which they outline their business plan.<sup>2</sup> The prospectus would be made available for public comment. [Yes, this is another tool to use in reducing speculation using a public resource.](#)

<b>Objective:</b> Increase transparency on water banking activity	
<b>Pro's</b>	<b>Con's</b>
Requires bankers to engage with Ecology early in the process	Accepting and reviewing a prospectus may give the false expectation that Ecology

<sup>2</sup> Information such as: intended uses and customers, and the suitability of the mitigating water right to meet those uses.

	would immediately begin working on establishing the bank
Provides transparency to the public on a water bank's plan	
Public comment could inform the terms and conditions of the water banking agreement	

P.4.2. Authorize Ecology to recover the administrative costs of developing water banks.

<b>Objective:</b> Minimizes the public resources that are spent towards an activity that could mostly yield private gain	
<b>Pro's</b>	<b>Con's</b>
User pays; the burden is on the banker	Rulemaking may be needed to establish the cost and administrative process
Additional resources for ECY to help with permitting	

P.4.3. Amend chapter 90.42 RCW to establish that water banks must define their service area and then have a "duty to serve" within that area.<sup>3</sup>

<b>Objective:</b> Prevent price discrimination	
<b>Pro's</b>	<b>Con's</b>
Ensures that a customer is not denied service or charged a different rate based upon who they are	Places an additional restriction and limitation on water banks
Could decrease the number of banks established to serve the same customers	

P.4.4. Amend chapter 90.42 RCW to establish that Ecology may prioritize working on water banks serving the greatest public need (such as public health and safety or creating a new water source in a basin).

<b>Objective:</b> Dedicate state resources to banks that will have the greatest impact	
<b>Pro's</b>	<b>Con's</b>
Allows Ecology to spend resources where the bank will yield the most benefit	Could be seen as picking "winners and losers." If Ecology deprioritizes an application, it may be years before we process it
	Unclear that new statutory authority is needed to pursue this

P.4.5. In rulemaking, clarify Ecology's authority to provision certain water bank activities, such as specifying a duty to serve or requiring that a portion of water remain instream, in water banking agreements and trust water right agreements. Use these provisions to shift risk away from the state and mitigation user and onto the person providing the mitigation right.

<b>Objective:</b> Provide greater consumer protections in banking agreements
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<sup>3</sup> Meaning that the bank could not deny providing mitigation to any customer in their defined service area.

Pro's	Con's
Provides clear authority for more specific provisions in water banking agreements that address level of service and operational issues	Oversight of these provisions would require additional resources at Ecology
Provides a way to address unique issues in each water bank development with lower legal risk of being arbitrary and capricious	Rulemaking is costly and time consuming for the agency
	With other rulemaking priorities, it is unclear when Ecology will have resources to undertake this rulemaking in the near term

P.4.6. Require that draft water banking agreements are posted for public comment before finalized. [Note, Ecology could pursue this under current authorities.]

Objective: Increase transparency and opportunity for public comment	
Pro's	Con's
Increased transparency	Will lengthen the time it takes to develop water banking agreements
Give the public greater input on the terms and conditions placed on a water bank	

#### Ideas Not Recommended

NR.4.1. In addition to requiring a water banking prospectus: Establish in statute that Ecology may deny a proposal to establish a new water bank.

Reasoning: There was strong feedback from participants that doing so would be seen as "picking winners and losers", which participants thought would be inappropriate.

#### Attachment:

#### **PROTECTION OF HEADWATER BASINS 6-19-20**

##### **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 in identified WRIsAs,
- (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 WRIsAs:
  - 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 43.83B.405.
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 WRIsAs listed in section 1 to establish a local water bank for purchase of agricultural water rights.

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### **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 nearly 2,000 acre-feet since 2003.) 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 government 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 the right 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 tentative 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 (Qi (instantaneous (flow)) and Qa (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.
- A water right, when not in use in whole or in part, would be managed by the water bank.