

Tom McDonald

Hi,

Great job you are doing. I am attaching some comments below.

Thanks for the opportunity.

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

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 is only true if the water placed into instream flows is being protected from diversion by junior water rights.**
- 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. **I agree.**
- 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. **Water rights should be able to be moved back upstream. The question is whether a different water right can be moved upstream and maintain its priority date as long as the total amount of water moved upstream does not exceed the total amount of that was transferred out of the basin for out of stream uses, water banks etc. If this is worth discussing, I would not include in the calculation water moved out of basin that was placed in permanent trust only for instream flows.**

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.

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. If you are going to include this type of oversight, it should include Tribes and non profits	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	Requires a new source of funding to implement. Without funding this could create process with no result

P.1.2 Authorize Ecology to “close” a basin (or subbasin) to out-of-basin transfers through rulemaking. **This has a lot of cons, but it should be kept as an option in amending any instream flow rules. This movement of water, especially from the rural areas to the urban communities has been an issue all over the west especially the southwest, and the state governments have had more oversight on when and how it can occur to address the rural area concerns.**

Objective: Prevent out-of-basin transfers from those WRIs 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
	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]. **See my comment on F.3.**

Objective: Create greater flexibility such that out-of-basin transfers are no longer “permanent” and may be transferred back upstream	
Pro’s	Con’s
Increased flexibility to move water rights back upstream after they have been transferred downstream	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. **As a matter of policy, I believe considering the public interest in any of Ecology’s approvals of water use is important. While a perfected water right is a property right for the authorized use and appurtenant to the place of use where it is beneficially used, it is a public resource and if the person wants to change that use, it should be looked at as ground water changes are done which includes review under the four part test as in the case of an original permit. Ecology is tasked to implement the test in manner that will not result in the stated objections.**

- 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. **I worry about making this finding. This should be looked at as a good idea for future consideration. The availability of water rights is not relevant in my opinion as to whether a fund should be created.**

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.

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

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 publically available.

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].

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: Frist, 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)

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. **I am also not concerned about abuse, but I do believe the the terms in the existing statute are not clear and this is an opportunity to arrive at terms that are consistent and defined.**
- 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. **I believe that anyone putting a water right into the trust program is speculating with the water unless it is put in the trust to be immediately used as mitigation for a new water right. The question is whether this is a problem. It is not necessarily speculating in manner that violates the anti-speculation element of the prior appropriation doctrine. But it begs the question of whether there should be some level of limitations on the length of the water right in trust without being used. Active water banks may not be an issue. Water rights parked in the trust for the long term may be looked at differently.**
- 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.
- 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.

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.¹ **I believe this makes sense if the Trust program is truly going to be revamped to have a most efficient process.**

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
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. **Any trust water right for any amount of time should go through an extent and validity analysis. What I would like to see is the look back being no longer than 20 years in regard to determining whether there has been 5 years on noncontinuous use. This is of course a change to RCW 90.14.**

Objective: 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. **I disagree. I have clients that have temporary trust water rights that they use for mitigation. It is important to them that they can get the water right back at the end of a lease. I disagree that this just sets up a situation that the mitigated use will continue after the temporary trust expires. I do not believe this will be an issue if proper conditions and monitoring are in place. Of course, the mitigated use can only be for uses that do not require permanency such as domestic supply.**

¹ 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.

Objective: 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].
 Rather see this in the statute.

Objective: 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 intent – and trying to scrutinize someone’s motives in using the TWRP would preclude creative solutions to help streamflows.

- 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.

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. **It may be helpful to have language in the statute that allows Ecology to start placing limits if the water right is in trust for over a certain amount of time and considering factors such as the size of the trust water right.**

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.² The prospectus would be made available for public comment. **Agreed but need to have details of what is required. Will Ecology approve it? From the discussion, it does not appear to. If not, why have it other than transparency. What is Ecology going to do with the comments? Will the terms in the prospectus be binding conditions for the water bank? What if the banker operates the bank inconsistent with the prospectus?**

Objective: Increase transparency on water banking activity	
Pro’s	Con’s
Requires bankers to engage with Ecology early in the process	Accepting and reviewing a prospectus may give the false expectation that Ecology 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. **Yes**

Objective: Minimizes the public resources that are spent towards an activity that could mostly yield private gain	
Pro’s	Con’s
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.³

Objective: Prevent price discrimination	
Pro’s	Con’s
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	

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

³ Meaning that the bank could not deny providing mitigation to any customer in their defined service area.

- 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). **Perhaps if consistent with some of the standards for prioritizing water rights under the Hillis rule.**

Objective: Dedicate state resources to banks that will have the greatest impact	
Pro's	Con's
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.

Objective: Provide greater consumer protections in banking agreements	
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.] **This is another requirement that has no consequences unless Ecology can take action on the comments, such as under a public interest criteria. Why raise expectations of those commenting.**

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.