

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. **I agree in principle, but I am not aware of any significant “out-of-basin” transfer activity, because of impairment considerations.**
- 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.
- 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. **Are “out-of-basin” transfers the issue, or downstream vs. upstream transfers? Economic losses in rural agricultural areas are attributable to many larger trends and economic pressures. We are not going to resolve them by prohibiting water right transfers. For some farmers, the opportunity to market their water rights is the only thing of value they have left. If protecting viable agriculture is the goal, then the State should develop different tools to do that directly. If the inability to transfer water rights upstream is the problem, perhaps the solution lies in changing the applicable standards for evaluating water right transfers – as opposed to artificial constraints on transferring water rights downstream.**

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. **It is unclear why this tool would be helpful to local governments unwilling (due to politics) or unable (due to lack of funding) to exercise their existing condemnation authority over water rights.**

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	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. **Ecology’s scarce rulemaking resources should be allocated to other more pressing issues. “Closure” is a blunt – and overused – instrument that forecloses the individualized considerations/investigations that should occur under the Water Code.**

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
	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]. **If Ecology already has the authority to do this, and isn’t using that authority, why are additional administrative tools necessary? Again, you need to clarify whether you are addressing downstream-to-upstream transfers generally or upstream “out-of-basin” transfers specifically.**

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. **Agree that this should NOT be recommended; the public interest test would become even more politicized and arbitrary than it already is.**

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.

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. **Unclear how this would operate consistent with the Wash. Constitution’s prohibition on gift of public funds. I also wonder whether an “easement” that restricts where water can be transferred has any value, given Ecology’s existing authority and practice to rely on impairment to deny out-of-basin transfers.**

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

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). **I think all water right applications should be available online, not just conservancy board applications; and they should be permanently available (not just during the comment period) so they can be researched.**
- 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. **Some combination of online posting and local newspaper publication should be adopted, to take into account the needs of rural communities reliant on newspapers and with more limited internet access.**
- 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. **Aren't they already reported to the State through the REET filings? What other disclosure laws for land sales are you referring to?**

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]. **If Ecology has this existing authority, I support making all water right applications accessible online.**

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. **Another concern is the tariff war effect: encouraging reciprocal actions by other states that would disadvantage Washington residents from engaging in out-of-state investment or business activity.**

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. **We do not require advance public notice of land sales; water rights should not be treated any differently.**

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. **I suspect this would be EXTREMELY unpopular in the counties where concern about “out-of-county” transfers is highest.**

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. **There appear to be misunderstandings (on the part of many advisory group participants and some Ecology staff in the regional offices) of what the TWR program does. It is a mistake to conceive of the TWR program as simply a vehicle to avoid relinquishment. The other side of the coin is that providing an exemption from relinquishment is an INCENTIVE for water right holders to temporarily put their water rights into the TWR program – which is something we should encourage because all TWR placements – temporary and permanent – benefit the resource through cessation of diversions/withdrawals. Ecology itself has made administrative policy decisions – not based**

- in the statute – that constrain its role in managing TWRs and the usefulness of the TWR program (for example, not allowing temporary transfers into trust of water rights still in permit status). Perhaps Ecology should clarify those judgment calls so the Legislature can decide if Ecology is correctly interpreting and applying the 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. **So-called “abuse” of the TWR program has not been explained or documented.**
- 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. **When a temporary TWR is removed from trust it undergoes an extent and validity review in connection with any application to transfer it to a new use. With limited exceptions, any TWR donation cannot exceed the maximum use within the immediately preceding 5-year period.**
- 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. **Attempting to address “speculation” in the context of TWR is counter-productive and probably a fool’s errand. Are we seriously going to carve out water rights as an aspect of human economic activity in which people are not allowed to make money? The Washington Supreme Court has expressly ruled that the existing permitting regime set out in the Water Code precludes speculation. Therefore, layering on additional extra-statutory prohibitions (including notions grounded vaguely in the prior appropriation doctrine or western water law generally) is unwarranted. If a water right holder chooses to benefit the resource by temporarily placing a water right into the TWR, people obsessing about increased future sale values of the water right are losing sight of what’s important: the benefit to the 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.
- 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. **We allow this with land. And buildings. And businesses. And**

mineral rights. There is no principled distinction based on water being a public resource; a lot of privately-held land can be traced to a public resource distributed by the federal government via patents.

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 This idea misunderstands the concept of mitigation. The “purpose of use” of a TWR is instream flow enhancement or groundwater preservation (where there is no hydraulic connection to streamflow). MITIGATION is not a “use” per se; it is the linkage of one water right as an offset to the impacts of another water right. There is a separate ongoing effort to develop water resource mitigation policies and standards. That effort should be allowed to conclude before deciding that changes to the TWR program are warranted. The TWR program should not be hijacked to impose obstacles to mitigation.

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. Unclear why this is necessary in view of Ecology’s existing authority to investigate proposed mitigation offsets. Is there any evidence that unreviewed TWRs are being accepted as mitigation? Is there any evidence that Ecology is protecting (i.e., enforcing senior TWRs against junior water users) unreviewed TWRs? There is no justification for imposing new restrictions on the TWR program before the Joint Legislative Task Force can conclude its work on water resource mitigation.

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

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.

Ensures that use of trust water rights will not impair existing rights	
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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. **This would be very short-sighted, and seems to undermine the entire concept of water banking. Nonprofits have successfully used temporary leasing arrangements involving multiple property owners to create more water in streams and for agriculture. It's like a laddered CD arrangement, in which some water goes in each season and some water is taken out, and the net "deposit" each season can be used to offset out-of-stream uses or enhance instream flows.**

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].

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.

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. **It would also be**

appropriate to focus on the role of Ecology in creating scarcity conditions in the first place which make water banks necessary. Perhaps Ecology should revisit its basin regulations with long-standing stream closures (many of which were simply carried forward from decades-old WDFW requests, which did not anticipate their conversion into basin-wide groundwater prohibitions due to the combined effect of the Postema and Foster decisions).

- 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. This might be a helpful tool where a water banking system is inextricably linked to a regulatory closure or restriction on new water rights/exempt wells. Perhaps Ecology should develop the banking framework/standards and identify mitigation water right deposits in conjunction with promulgation of a basin rule or amendment.

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.

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

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 **This concept should accommodate limited-purpose water banks (e.g. agricultural drought relief; new residential exempt wells; etc.). Also, conferring a serving area on a particular bank does not prevent price gouging; it might increase the opportunity for it. Any “duty to serve” should be narrowly drawn to prevent unfair business competition (denying service to competing developers) without foreclosing flexibility to meet local needs.**

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	

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). **Ecology already has authority to prioritize basin rulemaking efforts, and water banking should be folded into this activity.**

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. **The “risk” is unclear here. Particularly if a water right “deposit” in a water bank is vetted appropriately, why should Ecology in effect prohibit a portion of that deposit from being**

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

used as a mitigation offset? Nonprofits are already using this approach voluntarily; local governments and private water banks should be free to use it too – but mandating it seems unjustified.

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.]

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.