

**Water Trust, Banking, and
Transfers in Washington State**

Findings and Recommendations Informed by Ecology's
Advisory Group on Water Trust, Banking, and Transfers October 2020

We appreciate this comprehensive review of the Trust Water Resources Program and find it unfortunate that no tribal representative was able to participate in the Advisory Group this summer due to budget shortfalls associated with COVID-19 requiring staffing furloughs and resources devoted to the coincident work on the Watershed Restoration and Enhancement Committees for WRIAs 8, 9, and 10. We offer these comments and look forward to continuing to work with Ecology on this issue.

GENERAL COMMENTS

We are quite concerned with the use of the TWRP to yield private profit that markets future water supply. Water is a public resource and not a commodity to gamble away to the highest bidder. The original intent of the trust program was to ensure that water savings and conservation did not diminish the right. That should continue to be the purpose along with providing near term local water supply. Temporary trusts should not extend over the long term and the selling price should not provide a soaring profit to the seller. It is the public's and tribes' resource. Furthermore, water banks should be operated only by non-profit groups.

We prefer that water in the trust program stay instream, since it is very likely that water was not available at the time the right was issued. Streams and rivers in the state are generally over-appropriated and declining flows and salmon runs have resulted. Water remaining instream should be the "first call" on any rights in the program.

We strongly believe that a "Sullivan Creek Fix" is desperately needed and support Recommendation #12 but encourage Ecology to expand it to ALL surface water right changes. We are curious why Ecology has only recommended this action as it relates to out-of-basin transfers. Ecology's statutory recommendations in this document should prioritize this much needed measure.

COMMENTS ON FINDINGS

For out-of-basin water right transfers, we agree that the needs of each basin are unique and that it would be difficult to find one solution that fits all basins. However, it is crucial for Ecology to seek solutions that protect instream flows and tribal treaty rights. We do not see how out-of-basin transfers can do anything but result in more harm to salmon and other public and tribal resources and therefore oppose those transfers unless the affected tribe(s) support it.

We disagree that water rights should be open to out-of-state buyers, unless they are purchased solely for permanent instream flows.

We acknowledge that the flexibility of the TWRP is one of its greatest assets; however, more sideboards are needed because the current program can indeed result in continued erosion of instream flows and treaty rights to adequate flows for salmon. We do not hold the same view as the Advisory Group that limiting the flexibility of the TWRP could hamper creative water solutions.

We strongly disagree with the statement in bullet #19 that “When writing instream flow rules, Ecology should consider how the regulation may enable or hinder market conditions conducive to water banking and/or speculative or monopolistic activity.” Here again, water is seen as a market commodity and not as a public and tribal resource. Dwindling salmon runs would likely often be considered lower in value when put to such a standard. Existing statutory instream flows are already set too low to support all species and life stages of salmon.

COMMENTS ON ECOLOGY RECOMMENDATIONS

1. Establish that a water right transferred downstream may later be moved back upstream.

Any type of generalization like this should be made with caution. A thorough review of hydrogeology, hydrologic, and aquatic conditions must be made. Complex hydrogeology and the presence of losing and gaining streams requires careful reviews of groundwater and surface water right transfers either upstream or downstream. However, in general, we do not support transferring a right upstream to its original withdrawal locations.

2. to 6. We generally support these recommendations.

7. In policy, clarify that any water right used for long-term or permanent mitigation must first undergo a tentative determination of extent and validity.

We believe existing policy requires this but agree further clarification is warranted.

8. to 11. We generally support these recommendations.

Concepts for future legislative evaluation

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

As stated above, this change should be recommended for ALL surface water right changes and transfers. Furthermore, the argument among the Advisory Group that the “public interest” is not defined and too complex is without merit. Ecology currently makes that determination on ground water right transfers and did so for surface water rights before case law changes. We also believe the argument that applying the public interest test would pit beneficial uses against each other is also without merit. That is a separate statutory test and as long as there is adequate public and tribal input and the Water Code protections are not further diminished; the application of the public input to all surface water transfers, concerns over any “unfair” weighting of a beneficial use to another should be reduced.

13. Establish that before a water right may be sold for transfer out of the basin of origin, state, local, and tribal governments, and non-profits are provided a “right of first refusal.”

We agree that this “right” should be granted, but generally oppose transfers out of the basin unless the affected tribe supports it.

Ideas considered but not recommended

15. Authorize Ecology to “close” a basin to out-of-basin transfers through rulemaking

We disagree that Ecology should exclude this option. Especially since it has not yet received input from the public and tribes.

17. Limit who can buy a Washington water right to Washington residents and entities.

Again, we are concerned with Ecology’s view on this and think it should be further assessed and discussed with tribes. Federal agencies are not precluded from purchasing rights and perhaps a restriction should be placed on out- of- state for profit private buyers.

18. Provide advance public notice of sales including price disclosure.

We believe this should be re-considered as a recommendation as it promotes transparencies.

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

We support this recommendation and believe Ecology should include it. Temporary donations should only be in effect for 2 to 5 years; especially in light of changing climate conditions. If a buyer is not found, it should stay instream.