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See attached file.

Comments on Water Trust, Banking, and Transfers in Washington State; Findings and Recommendations Informed by Ecology's Advisory Group on Water Trust, Banking, and Transfers

These comments are provided by Mary McCrea and Lorah Super, who worked on proposed legislation for the 2020 session and are doing the same for the upcoming session. Mary is a retired attorney who focused on water rights in Eastern Washington in private practice. Prior to that, she represented Ecology in the Yakima Adjudication as an Assistant Attorney General. Lorah is the Program Director for the Methow Valley Citizens Council. We thank you for the opportunity to comment on the final report. We appreciate the efforts of Ecology staff in facilitating the online meetings.

Executive Summary: While we recognize the constraints due to Covid-19, if Ecology does not offer potential legislation to protect headwater basins from out-of-basin transfers, the legislature should enact a moratorium on out-of-basin transfers until legislation is in place to protect that water.

Legal background: Water right sales & transfers, the Trust Water Rights Program, and water banking

Water right sales and transfers: The report states: “[i]n addition to the public notice requirements applicable to all change applications, a law passed in 2011 requires Ecology to notify the county commissioners for any out-of-basin water rights transfer in counties east of the Cascades (RCW 90.03.380(10)(a)).” This requirement was an acknowledgement by the legislature, 9 years ago, that transfers out of county in eastern Washington raise additional concerns for the basin of origin. Proposed legislation on out-of-basin transfers is a logical next step to this concern.

The Trust Water Rights Program: The report states: “[w]ater rights held in trust benefit streamflows and groundwater recharge, while retaining their original priority date.” This statement is made in numerous forms throughout this report. Although it was the intent of the TWRP to benefit instream flows, it is widely recognized that most water rights transferred to trust are not protected based on their priority date. Rights that are junior to the trust water right are withdrawn to the detriment of instream flows. We recognize it is extremely difficult to protect trust water rights as instream flow, and that Ecology has neither the staff nor the technical ability to do so. Given this, neither an applicant nor Ecology should be able to claim a benefit to instream flow as a justification for a transfer of a water right to trust, particularly transfers out-of-basin.

Water banking: The report states: “[t]he water banking statutes enable use of trust water rights to provide mitigation for new and existing uses that would otherwise impair existing rights.” This is one, but not the only, use of water banks. Water banks may also be used to hold water in trust for instream flows pending the purchase of the right by another user for out-of-stream purposes.

Findings

Out-of-basin water right transfers: The report states: *“Downstream, out-of-basin transfers of water rights can be a valuable tool for providing water for new uses while also boosting instream flows (in those cases where the water stays instream before being withdrawn downstream).”* In the parenthetical phrase Ecology subtly acknowledges that instream flows are “boosted” only where water transferred to trust for instream flows stays instream down to the new point of diversion or withdrawal. As discussed above, water that is temporarily in trust does not in reality necessarily benefit instream flow (except in the Yakima Basin where instream flows are protected by regulation based at Parker Dam).

1. *“The needs of each basin are unique. It will be difficult (and may be unwise) to seek one solution that fits all basins.”* We agree one solution cannot fit all basins. However, there are groups of basins that share significant common characteristics and a single legislative approach would address problems in those basins. Specifically, basins in the upper Columbia River Basin have (1) rural economies that depend upon agriculture, (2) do not have any upstream sources to replenish water transferred downstream out of the basin, (3) are feeling the effects of a changing climate that results in less snowpack and lower water levels in late summer/fall, and (4) have been identified by the Legislature in 2011 as needing extra protections through notification of any proposed out of county transfers. Legislation to limit out-of-basin transfers from seven Water Resource Inventory Areas that fall into this group would offer a single solution for this carefully prescribed group.

“If water rights transferred downstream cannot be transferred back upstream, out-of-basin water right transfers may foreclose the potential for new out-of-stream uses in the basin of origin, which limits the capacity for future economic growth. Some participants expressed that limiting downstream, out-of-basin water right transfers could prevent these economic losses. Others argued that these transfers are driven more by greater macro-economic factors, such as commercial agricultural enterprises outcompeting traditional family farms. They voiced concern that limitations on agricultural water marketing could place an undue burden on farmers seeking to capitalize on a major asset.” Out-of-basin transfers not only “limit[s] the capacity for future economic growth,” they limit the opportunity for future use of the water for smaller scale agriculture and sustainable rural communities. The idea 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.

Additionally, the emphasis on capitalizing on “a major asset” can and should be viewed from the perspective of capitalizing on a public resource at the expense of communities in the basin of origin.

2. We strongly agree that “long-term goals to reduce downstream and out-of-basin transfers may require outside or state-level investment in local water banking programs or partnerships to “level the playing field.” Legislation to limit out-of-basin transfers in headwater basins in the upper Columbia Basin should include local agricultural water banks funded by the legislature and operated by the Conservations Districts.

Water Right Sales

6. *“Increased knowledge of water right 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 during Ecology meetings, “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? Our answer is “no.”

Use of the Trust Water Rights Program

12. *“There was no consensus whether or not the TWRP enables speculation in water rights and, if so, whether this activity constitutes a significant problem. Moreover, there was no common definition for ‘speculation’ accepted by the group.”*

We firmly believe that 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. As Ecology acknowledges, instream flows benefit from the water remaining in trust only *“in those cases where the water stays instream before being withdrawn downstream.”* That is the exception rather than the rule.

“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. Having no limit on the length of time a water right can remain in Trust opens the door to speculation with a public resource. That water should be available for out-of-stream uses, not “protected” while the market price for water increases. Speculation is well-defined and is illegal with respect to water rights.

13. *“Most participants were generally not concerned over use of the TWRP in ways that yield private profit, so long as the water is put to beneficial use. They expressed that the private use of water inherently supports public 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.”

Water banking

18.b. *“Other participants argued that while monopolistic behavior can be worrisome, increased regulation is not warranted. They said the solution to monopolies would be to reduce barriers to entry and increase competition.”* We need to be reminded that water is a public resource. A free-wheeling market driven by competition does not have as an objective the sound management of a public resource and should be regarded with caution.

21. *“Participants generally agreed that additional resources for implementation of the TWRP would benefit state water management.”* We strongly agree. Ecology is asked to do the very difficult but essential job of protecting the public’s water resources while being chronically underfunded and under staffed.

Ecology recommendations requiring statutory changes

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

- *“Potentially, it does not provide enough support for headwater basins; instead, some maintain there is a need for a moratorium on downstream, out-of-basin water right transfers from selected WRIsAs.”* Authorization for upstream transfer of water previously moved downstream and a moratorium on downstream out-of-basin transfers from selected WRIsAs are not mutually exclusive but can actually work in tandem as two parts of the solution. Legislation to address the problems in headwater basins should include both concepts.

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.

We support Ecology's plan to address public interest in water right changes to transfer water downstream and out of the basin. The requirement for a public interest review is not novel to 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." The agency can 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 that "[a] statutory provision for general public interest review of proposed changes of water rights as exists for applications for new appropriations of water."

The importance to the public of water right transfers out of the original WRIA 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.

Ideas considered but not recommended

Use of the TWRP

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

We believe there should be a restriction. A 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.

In closing, we request the legislature take action to protect headwater basins in the upper Columbia Basin to prevent the permanent loss of water, particularly for agriculture. Local agriculture helps small communities remain viable, with access to local food. Irrigated fields are an important protection from wildfires. As we have seen in the Methow, fire burns up to irrigated green fields and stops. While it may continue to burn around that area, the livestock and buildings within the irrigated area are protected. Wildfires are predicted to get worse in the years ahead and this protection will become even more valuable. As climate change continues, late season stream flows will be reduced and water supply for use in the WRIs for agriculture and instream, flow will be in short supply. If we don't act now, the future of these rural areas is dim.

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