

## Draft Discussion Paper: Address Out-of-Basin Water Right Transfers

**NOTE:** This paper was created only for the purposes of generating discussion to inform potential legislative recommendations. None of the topics described are proposed or endorsed by Ecology.

### Summary

Downstream, out-of-basin transfer of existing water rights is permitted under Washington law and provides a useful mechanism to provide water supplies for new uses. However, major concerns have been raised in recent years about the potential impacts of these transfers on the upstream communities where they originate. It is usually very difficult to reverse these transfers or otherwise transfer water rights back upstream. As a result, these transfers often represent a permanent loss of water rights in basins with instream flow regulations. This also could have negative secondary effects on the local economy and way of life in these upstream communities.

A variety of changes could be made to address the negative effects of out-of-basin transfers ranging from incentive-based to specific controlling regulations. From least restrictive to most restrictive, the changes we have evaluated include:

- Extend and continue funding the water banking pilot grant program<sup>1</sup>.
- Establish a right of first refusal for local governments on out-of-basin transfers.
- Establish a mechanism to allow for water rights transferred downstream to be moved back upstream.
- Allow rulemaking to close some basins to out-of-basin transfers.
- Ban all out-of-basin transfers.

Each of these changes would address some degree of the potential negative impacts associated with out-of-basin transfers to different extents and would have different tradeoffs.

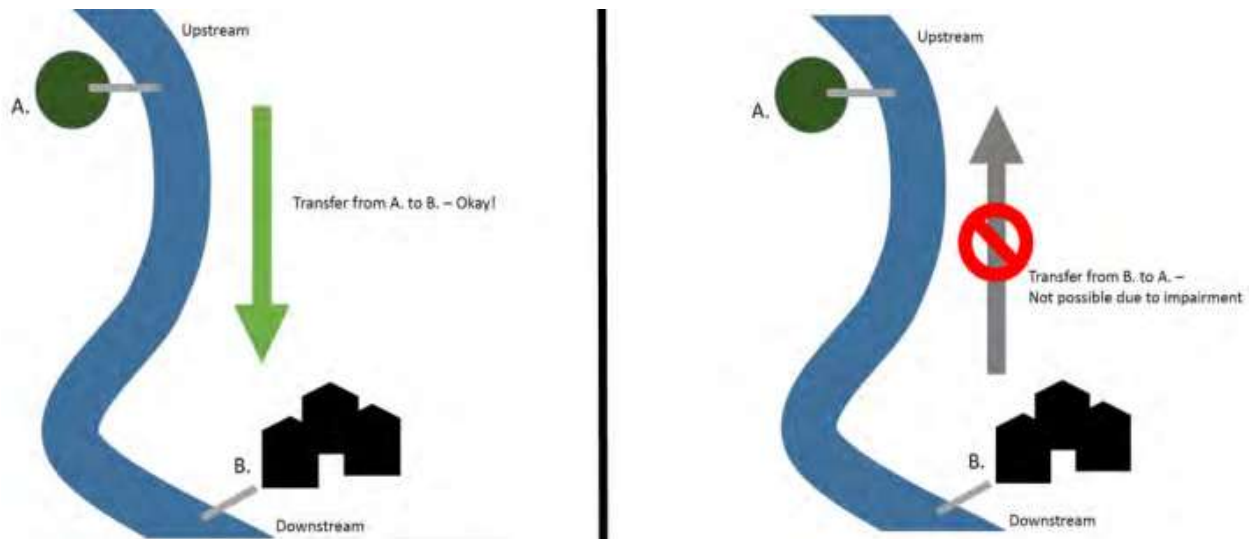
### Background

Downstream water right transfers along flow-regulated reaches will result in a neutral or positive impact on the water supply along the intervening reach. However, upstream water right transfers result in the reverse, leaving less water in the stream for a longer distance. Therefore, downstream water right transfers are unlikely to result in impairment of other rights, whereas upstream water right transfers are highly likely to result in impairment. As a result, downstream transfers are often irreversible, and senior out-of-stream uses that leave a basin cannot later be returned to their original place of use (see Figure 1).

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<sup>1</sup> <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Water-banks/Water-banking-grants>.

**Figure 1. Downstream vs. Upstream Transfers**



Meanwhile, many rural communities located in headwater basins in Washington are dependent on limited water rights to support agriculture-based local economies. Given the one-way nature of downstream, out-of-basin transfers, some residents foresee a future in which large amounts of these water rights have been transferred downstream, leading to the fallowing of large areas of agricultural land and removing their productive output from the local economy. As agricultural productivity declines, there may also be impacts to secondary industries (such as processing facilities). Declining land values may also lead to a reduction in tax revenues available for local governments. Finally, over the long term, water rights simply may not be available to mitigate for other new local uses (such as municipal and rural domestic drinking water supplies). However, it is still not clear how much water would have to be transferred out of a basin to incur these negative effects.

Out-of-basin transfers of water rights provide a valuable tool to supply new downstream uses that may provide substantial benefits. These downstream transfers also generate habitat improvements by protecting water for streamflow in the intervening stream/river reach between the old and new places of use. The clear economic value of these transfers is attested by their occurrence; despite significant transaction costs, the transaction itself indicates that the seller of the water right gains more through the sale than the ongoing use of that water, and that the buyer expects to yield greater economic output from that water at the new location than the old.

We evaluated available data on out-of-basin transfers from 2003 to 2020 and found that 50 direct out-of-basin transfers occurred, involving 7,902 AFY of water. Although fewer (25) out-of-basin transfers occurred via water banking, this method of out-of-basin transfers accounted for substantially more water (35,364 AFY) (see Table 1).

**Table 1. Out-of-Basin Transfers (2003 – 2020)**

WRIA	Direct Transfers		Water Bank Transfers	
	<i># of Transfers</i>	<i>Qa (AFY)</i>	<i># of Transfers</i>	<i>Qa (AFY)</i>
23 – Upper Chehalis	1	26		
30 – Klickitat	2	193		
32 – Walla Walla			8	4981
34 – Palouse	2	184		
35 – Middle Snake			2	302
36 – Esquatzel Coulee	4	1426	1	716
37 – Lower Yakima	1	42	1	484
39 – Upper Yakima			5	2565
40 – Alkali-Squilchuck	3	164		
42 – Grand Coulee			1	25,000
43 – Upper Crab-Wilson	1	56		
44 – Moses Coulee	1	352	1	85
45 – Wenatchee	1	51		
46 – Entiat	1	140		
47 – Chelan	2	64		
49 – Okanogan	11	1843	4	894
50 – Foster	4	1216		
52 – Sanpoli			2	337
53 – Lower Lake Roosevelt	1	218		
54 – Lower Spokane	2	310		
55 – Little Spokane	1	60		
58 – Middle Lake Roosevelt	1	87		
59 – Colville	10	1266		
60 – Kettle	1	204		
<b>Total</b>	<b>50</b>	<b>7,902</b>	<b>25</b>	<b>35,364</b>

## Discussion

### Extend and continue funding the water banking pilot grant program

Due to the economic factors described above, it is difficult for water users in headwater basins to compete in an open marketplace when water rights are bought and sold. Therefore, in 2021, the state legislature funded a new Ecology pilot grant program intended to fund water right acquisitions for public and semi-public entities to develop new water banks that only serve the basin where the water right originates. This proposal would extend the existing pilot program and provide ongoing funding for these water right acquisitions with the goal of providing a level playing field for local governments to retain water rights in headwater basins.

This provides several benefits. For one, it builds on a program that is already in operation, and could be extended with fewer resources and time than would be needed for the creation of a new program or initiative. It also incentivizes local action and participation in water rights markets, and promotes development of local resources for new development. Finally, as an incentive-based option, this

proposal does not impose new restrictions on the private use of existing water rights, and likewise does not involve Ecology picking winners and losers in the water rights market.

However, this proposal is only as effective as the degree of interest by local public entities in running water banks. The legislature is only funding Ecology to help set up the water banks, not to find water rights for the banks. Furthermore, water right transactions are often negotiated with limited public visibility, and local governments may not always have the ability to connect with interested sellers before water rights are sold downstream. Ecology will continue to provide assistance as requested, but the outcome of the program impact cannot yet be determined.

### **Establish a right of first refusal for local governments on out-of-basin transfers**

This change would intervene at the point of sale of a downstream water right transaction and provide local governments, non-profits, and/or water banking entities with an opportunity to match the buyer's price.

While simple in its description, this proposal may be ineffective in practice. In many cases of downstream, out-of-basin water right transfers, a water right may be bought by the downstream purchaser years prior to any application to transfer that water right to the new place of use. This makes it very difficult to identify the appropriate opportunity for the local government to be given the right of first refusal. On the other hand, some bad-faith actors may intentionally arrange sales of water rights to downstream locations at inflated prices in an attempt to price gouge in a small water rights market. Finally, even if local entities have interest and funding to match a purchase, it may be difficult for these entities to act in a timely manner on this purchase opportunity.

### **Establish a mechanism to allow for water rights transferred downstream to be moved back upstream**

This change would specifically address the problem that water rights in flow-limited basins can in general only be transferred downstream without impairing existing rights. If effectively implemented, a mechanism for upstream water right transfers would give water users in headwater basins the ability to access water rights that have previously been transferred out of that same basin. As a result, water rights for new uses in that headwater basin would not be impacted by future out-of-basin water right transfers.

The primary concern with this proposal is that, under current authority, it would incur a substantial administrative cost to create and implement an efficient tracking system for these water rights to ensure that there is no impairment to senior rights. The presence of existing rights in the intervening reach would require Ecology to provide a detailed accounting of both the instream and out-of-stream components of the downstream water right to make a determination that the water is still available at the upstream location. This may be difficult due to changing water availability with climate change and if there have been any water rights that have been subsequently issued in that reach.

However, even if the administrative challenge of this proposal is resolved, it will not help resolve the core economic realities that underlie the incentive for downstream water right transfers. If water users in headwater basins are unable to afford to transfer water rights back upstream, this proposal will have no appreciable effect.

### **Allow rulemaking to close some basins to out-of-basin transfers**

This change would amend state law and create authority for Ecology to prohibit future out-of-basin water right transfers in specific basins through rulemaking. As a direct and permanent regulatory intervention, this would be an aggressive option for tackling the concerns that have been raised.

All rulemaking is controversial and costly. In addition, it is unclear what criteria would be used to necessitate such a rulemaking. If rulemaking were to be based on negative social and economic impacts from an out-of-basin water right transfer, Ecology would be citing untested reasons for rulemaking through existing authorities (that focus on ecological or hydrological factors). The creation and implementation of such a rule would also take years, and would not provide an expeditious action to address the issue of out-of-basin water right transfers.

Moreover, due to the diversity of criteria and factors involved, it would be unlikely that the benefits of such a rule would outweigh the costs, which is a requirement for the adoption of any new rule.

### **Ban all out-of-basin transfers**

This policy proposal would simply impose a statewide ban on downstream, out-of-basin transfers of water rights. This is the most aggressive potential response to the issue of downstream, out-of-basin water right transfers, and would require the state legislature to change statute. The challenges to this approach are similar to rulemaking discussed above. In both cases banning entirely a valuable tool for water supply flexibility on the basis of vague and potentially arbitrary criteria, all for the purpose of protecting against currently unquantified impacts in a handful of headwater basins.