

Emerging Issues on Water Trust, Banking, and Transfers
Background Document for the Advisory Group, Meeting 1: April 16, 2020

Overarching issue

Water transfers and water banking are critical tools to manage the beneficial use of water resources in watersheds with limited availability. Given this important role, it is vital that these tools are used to preserve water and natural resources, protect public health, and support our state's economic well-being.

There is growing concern that water banking and the trust water statutes are being used in ways not intended by the Legislature. Limited transparency when water banks are created, paired with unclear agency authority to approve new water banks, increases concerns about speculation. Additionally, unclear statutory language on the exercise of various types of water rights in trust has elevated fears that existing water rights and instream flows could be impaired. Finally, there are concerns that water right transfers occur without sufficient public notice and that transfers moving water out-of-basin can harm local communities.

Water transfers and water banking activity will likely increase in our state. As that happens, it's essential that we build a framework that supports transparent and effective use of the state water trust, water banking, and water transfers.

Background

The Water Resources Program has been studying water banking and potential misuse of the state's trust water statutes (chapter 90.42 RCW) for the last year. Our initial work convened an internal workgroup to examine these issues in other western states and in Washington; we also conducted tribal and stakeholder outreach to identify concerns and problems. News coverage in the *Seattle Times* (October 27, 2019) highlighted these issues through description of an investor acquisition of water rights in our state. The article escalated the concerns of legislators, tribal governments, local community leaders, and stakeholders and generated interest in addressing these issues in the 2020 legislative session.

The legislature debated several bills, including agency request legislation from Ecology (HB 2603 and SB 6494). In the end, the legislature did not pass any of these bills. Instead, they passed a budget proviso directing Ecology to lead a workgroup with tribes and stakeholders to further study the issue, then report findings and recommendations by December 1, 2020.¹

We intend to use Advisory Group meetings and discussions to inform the findings and recommendations we present to the Legislature. Specifically, we intend to examine and discuss the four topics below.

Sales of water rights

Water right holders may sell their right to use water to another entity. Ecology is not notified when this occurs. Sales may be reported to the Department of Revenue or county assessor's office for collection of the Real Estate Excise Tax; however, our understanding is that this may not be done consistently.

Ecology is notified when a water right holder wishes to change an attribute of the right, such as the place of use. In these cases, the water right holder applies to Ecology for a change to the water right.

Often, Ecology only learns of a water right sale after the transaction occurs, and only if the new owner applies to change an attribute of the right.

¹ [ESSB 6168 Sec. 302\(37\)\(a\)](#)

Out-of-basin water right transfers

“Out-of-basin transfers” typically refer to a change to a surface water right that moves the place of use downstream and out of the basin-of-origin. An example would be transferring a right from the Methow Valley for use in the Tri Cities.

Ecology evaluates applications for these transfers under RCW 90.03.380. One evaluation criteria is impairment. In many cases of downstream, out-of-basin transfers, Ecology does not find that impairment will occur and therefore must approve the transfer. However, if the water right holder later wants to move the place of use back upstream, potential impairment to other water rights and instream flows could occur, so Ecology would be required to deny the application.

A law passed in 2011 establishes that in counties east of the Cascades, Ecology has to notify the county commissioners for any out-of-basin transfer (RCW 90.03.380(10)(a)).

Some have raised concerns that out-of-basin transfers negatively impact local economies and therefore are detrimental to the public interest. Under current law, Ecology does not consider the public interest when evaluating changes to surface water.

Private investment and marketing of water rights through:

Use of the Trust Water Rights Program (TWRP)

The TWRP allows the owner of a water right to cease out-of-stream use without the risk of relinquishment by placing the right in the TWRP. Water rights in the TWRP benefit streamflows and groundwater recharge, while retaining their original priority date. The TWRP provides flexibility to:

- *Park* water rights: Individual water right holders can temporarily donate or park their water right when they are not using it to avoid relinquishment.
- *Bank* water rights: Water right holders can use the right to mitigate for other water uses into the future with no time limits for when new beneficial uses must begin.

The TWRP is inherently flexible; it allows water right holders to protect their water right from relinquishment for an indefinite amount of time and under few stipulations. Some have raised concerns that this flexibility enables speculation in water markets and runs counter to goals of beneficial use and public stewardship.

Water banking

Water banks are a tool to facilitate voluntary exchange of water rights from one use to another in areas of limited supply. Water banking can take many forms. Typically, water banks act as brokers that facilitate the pooling of water rights such that one right may be used to mitigate for multiple new uses.

Banking authority was established statewide in 2009 under chapter 90.42 RCW. This law authorizes use of trust water rights to provide mitigation for uses that would otherwise impair existing rights. To qualify for banking purposes, a water right must be changed to include mitigation as a purpose of use and held in the TWRP. Water rights used for mitigation purposes cannot cause impairment to existing rights, so the change(s) to place and purpose of use is evaluated under RCW 90.03.380. After a banking agreement is approved by Ecology, the water banking entity can provide credits to the user; Ecology may also issue new mitigated rights.

While many recognize the important role that water banks play in meeting critical water supply needs, some are concerned that banking is being used to further private interests over public benefit.