

**Advisory Group on Water Trust, Banking, and Transfers**  
**Meeting 3, May 16**  
**9:30 am to 12:30 pm**

**Meeting Notes**

**Welcome, review agenda & objectives, introductions, summary of last meeting**

*Carrie Sessions*

**Background presentations: History and use of the Trust Water Rights Program (TWRP)**

*Susan Adams, Washington Water Trust*

*Carrie Sessions*

[Presentation available [here](#)]

**Discussion Part A**

*Moderator: Dave Christensen*

**Participants:**

Bill Clarke

Tyson Carlson

Adam Gravley

Jeff Slothower

Dan Haller

Sara Mack

Dan Von Seggern

Ilene Le Vee

Peter Dykstra

Mark Peterson

**Discussion Questions and Comment Summary:**

*Question 1: Do you agree with the definitions outlined in Ecology's presentation? How do you see these differently?*

- 90.42 does not adequately define "transfer" but is used very generally; 90.03.380 uses "transfer" much more technically; statutes need to be clarified and aligned on this usage
- "Transfer" indicates change of ownership whereas "change" only indicates an amendment to water right attributes; not enough clarity on what "transfer into trust" means in a technical sense
- "Purpose of use" under TWRP donations is really only reported in order to meet statutory trust requirement; the real purpose is just protection from relinquishment
- 90.42 does not define enough terms and existing definitions are too general and/or vague
- Underlying purpose of use defines the status of a trust water right much more than intention; for example, a farmer who needs temporary protection as a cropping decision is going to be

directed into a donation, whereas a farmer putting water into trust as the result of a conservation project is going to be directed into a transfer

- Ecology's definitions on mandatory acceptance of donations is too broad; 90.42 only dictates that the department *must* accept donations for the purposes of instream flow and groundwater preservation but is silent about other uses
- Vague statutory definitions have led to wide differences of opinion on precise meanings among stakeholders; further confused by the fact that donations, changes, and transfers are often complementary steps in a more complicated water right-related project
- Trust water rights may be generally grouped between those quantified with a five-year lookback and those quantified under a full 90.03.380 extent and validity review
- Ecology's role in the transaction also partially defines the right; is the right being deeded to Ecology or does title remain with the original water right holder?
- Grouping trust water rights into two discrete categories misses the more subtle variations in how different types of rights function with trust; for example, municipally-acquired agricultural water rights; anything that touches municipally water supply management should be considered as a somewhat distinct category
- The same is true of agricultural rights especially concerning conservation projects
- Rights are further defined by the right's eventual status when it exits or is removed from trust
- Categorizing trust water rights as either donations or transfers is an oversimplification; not all donations are subject to a five-year lookback, some receive full extent and validity if they are already subject to an extent and validity exemption
- The motive to avoid relinquishment should not be a qualification on trust water rights because there is still an environmental benefit
- Permanent donations provide a higher degree of predictability in flows and availability of potential mitigation; therefore the distinction between temporary and permanent donations is useful for planning purposes

*Question 2: Do you think chapter 90.42 RCW provides sufficient direction and sideboards as to what type(s) of trust water rights should be used to mitigate for new uses? For example, temporary donations into trust are not required to undergo a tentative determination of extent and validity. Are there circumstances when temporary donations can (and should) be used for mitigation?*

- Need to be very limited in the use of temporary trust rights for mitigation because mitigation needs to be provided over the long term; Ecology has been right to try to prevent any use of temporary donations for mitigation because of this inherent risk; however, the use of temporary donations for mitigation is not technically forbidden by the statute
- The suitability of a trust water right for mitigation is also dependent on what type of use it is being mitigated; there may be scenarios where use of a temporary right for mitigation may allow a project to bridge to a permanent mitigation source that isn't available yet
- It would be very difficult to cut off existing mitigated uses if their mitigation disappeared; much easier and safer to simply forbid it
- Perhaps donations could be allowed for mitigation if Ecology subjects it to full extent and validity (which is within existing authority)

- There may be tools from wetland and stream mitigation services that could be laid into current trust water system without legislation in order to shift the risk from the buyer to the seller of mitigation
- There are benefits to water right holders to retain some control over the water right through a permanent donation rather than simply deeding it to Ecology
- Because it is so difficult to cancel usage once it is established, mitigated uses need to receive mitigation that is guaranteed in perpetuity; otherwise the risk is accrued to streamflows

**Break**

**Discussion Part B**

*Moderator: Carrie Sessions*

**Participants:**

Lisa Pelly  
 Kathleen Collins  
 Chuck Brushwood  
 Sarah Mack  
 Peter Dykstra  
 Sen. Jesse Salomon  
 Paul Jewell  
 Daryl Williams  
 Mary McCrea  
 Dan Von Seggern

**Discussion Questions and Comment Summary:**

*Question 3: Temporary donations under the TWRP are inherently flexible – water rights can remain in trust indefinitely and under terms prescribed by the water right holder. Do you believe that the TWRP enables private investment and speculation in water? Do you believe that the environmental benefits outweigh speculative concerns? If you are concerned about private investment and speculation, do you think additional restrictions, like time limits or fees on temporary donations, would help to address your concerns?*

- The importance and value of the TWRP is its flexibility; putting more limitations on the program will simply make it less useful
- Private investment may be occurring through the TWRP, but because the TWRP is intended to serve a variety of purposes it is not the fault of the program if this occurs
- The original purpose of TWRP was simply to encourage conservation and has since been expanded for other purposes; donation/transfer into trust process has more process than has been described during this discussion
- Need more information on volume of water rights in trust, not just quantity
- The TWRP's flexibility is very important and should be preserved
- The terms "speculation" and "private investment" are not describing inherently bad uses of water rights or TWRP and does not require major statutory changes; perhaps some room for transparency improvements

- Speculation is not really the problem because the water code prevents the dictionary version of speculation; the real problem is monopolistic behavior and market manipulation
- Often we simply use the term “speculation” to mean behavior we don’t like; the bigger problem is probably “hoarding” or “investment and holding”; statutory responses to this problem are likely to cause more problems than the problem itself ; hoarding itself may not be such a bad thing if it generates environmental benefits
- The mechanics of the TWRP can be intimidating to water right holders so it is valuable for users to be able to test out different ways of using the program over the short term in order to find the best outcome
- “Private investment” should not be used pejoratively, it still results in productive beneficial use of the water resource
- If water is going to beneficial use, the intent should not matter and the identity of the purchaser should not matter
- Limitations on purchase by out-of-state entities is likely to be both ineffective and counterproductive
- Private investment can work effectively in tandem with public projects to provide water supply improvements and increase the productive use of existing supplies
- Conservation programs in the Teanaway using temporary donations freed up large supplies of water for private trading, resulting in better use of water and putting water to new instream and out of stream uses
- The status quo is working for almost everyone, we should be very reluctant to make major changes
- *Question for the panel: what would a legislative proposal look like that would address issues of hoarding and monopolization?*
- Blatant examples of market manipulation using the TWRP have occurred recently in some areas; the concern is not about *who* is buying water rights, it’s about *what* is being done with the water underlying the use of the TWRP; skeptical that time limits or fees will achieve any purpose; there is room for discussion of public interest because water rights are not exactly a private property right; there is a public resource benefit component to water rights management
- Discrimination against out-of-state investment is further complicated by the role of federal investments in streamflow benefits; generally would be very difficult to monitor and will make it more difficult to fund projects that benefit both instream resources and out of stream uses
- Most of the problems of market manipulation can be potentially prevented by greater restrictions on the establishment of trust water right agreements through existing authority
- Hoarding through the TWRP can occur when an investor is simply adding a water right to an investment portfolio to then resell in the future; this needs to be prevented
- One potential sideboard to protect instream flows would be to limit the amount of water that can be removed from TWRP each year; could also potentially discourage private investment for resale by restricting the liquidity of the asset
- It could be possible in the future to put so many rights into the TWRP that marginal instream flow benefits are quite low, in which case we would need to encourage that rights be removed
- There might be a potential distinction to be made in private investments that pursue beneficial uses and private investments that are simply intended for resale

- The biggest threat from private investment is the potential for securitization of the water rights, this absolutely needs to be prevented
- Making money from the purchase of a water right is not a bad thing; there's no effective way to objectively discriminate between people's intentions when purchasing a water right

**Wrap up, look ahead to next meeting, and open post-meeting survey**

*Carrie Sessions*