Advisory Group on Water Trust, Banking, & Transfers

Meeting 3
Private investment and marketing of water rights (Part A):
Use of the Trust Water Rights Program
May 26, 2020
9:30am – 12:30pm
# Today's Agenda

<table>
<thead>
<tr>
<th>Time</th>
<th>Topic</th>
<th>Presenter</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:30 – 9:45</td>
<td>Welcome, review agenda &amp; objectives, introductions, summary of last meeting</td>
<td>Carrie Sessions</td>
</tr>
<tr>
<td>9:45 – 10:30</td>
<td>Background presentations: History and use of the Trust Water Rights Program (TWRP)</td>
<td>Susan Adams (WA Water Trust) Carrie Sessions</td>
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<tr>
<td>10:30 – 11:15</td>
<td>Discussion questions 1 &amp; 2</td>
<td>Dave Christensen</td>
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<tr>
<td>11:15 – 11:30</td>
<td>Break</td>
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<tr>
<td>11:30 – 12:25</td>
<td>Discussion question 3</td>
<td>Carrie Sessions</td>
</tr>
<tr>
<td>12:25 – 12:30</td>
<td>Wrap up, look ahead to next meeting, show and open the follow-up poll</td>
<td>Carrie Sessions</td>
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</table>
Today’s Objectives

1. Build upon the previous meetings by identifying specific concerns (or lack thereof) about private investment and marketing of water rights occurring through temporary donations into the TWRP.

2. Increase understanding of the history, functions, and use of the TWRP in Washington. Specifically, increase understanding of trust water rights, the different ways they are created (including temporary donations, leases, and transfers), and the ways they are used.

3. Gather feedback on whether changes to the Trust Water statutes, either clarifying or substantive, are needed to address concerns identified in the discussion.
Schedule of Meetings

1. **Kickoff** (April 16)

2. **Policy discussion**: Transparency in water right sales & out-of-basin transfers of water rights (May 7)

3. **Policy discussion**: Private investment and marketing of water rights (part A): Use of the state water trust (May 26)

4. **Policy discussion**: Private investment and marketing of water rights (part B): Water banking (June 10)

5. **Review session**: Draft policy options (June 30)

6. **Wrap-up**: Finalization of Advisory Group feedback (July 16)
Meetings on Private Investment & Marketing of Water Rights

**Meeting 3: Trust Water**
- Ways to put a water right into trust (definitions)
- Acceptable mitigation for out-of-stream uses
- Concerns over use of temporary donations

**Meeting 4: Water Banking**
- Banking and the public interest
- Transparency in water banking
- Administrative processes in water banking
WebEx Practice

Click on this symbol to open the chat box

Type here to chat with host
WebEx Practice

Click on this symbol to “raise your hand”
Participants in Today’s Meeting

• Susan Adams, Washington Water Trust
• Reetwika Basu, Washington State University
• Justin Bezold, Trout Unlimited
• Henry Bierlink, Ag Water Board of Whatcom County
• Amy Boyd, Cowlitz Indian Tribe
• Chuck Brushwood, Okanogan County Water Conservancy Board
• Megan Cardenas
• Tyson Carlson, Aspect Consulting
• Joseph Carroll, Attorney
• Alan Chapman, WRIA 1 Planning Unit
• Jay Chennault, Associated Earth Sciences, Inc.
• Dave Christensen, Department of Ecology
• Bill Clarke
• Kathleen Collins, WA Water Policy Alliance
• Joe Cook, Washington State University
• Stuart Crane, Yakama Nation
• Carol Creasey, Clallam County
• Amanda Cronin, AMP Insights
• Mark Crowley, Kittitas County Conservation District
• Seth Defoe, Kennewick Irrigation District
Emily Dick, Washington Water Trust
Jeff Dickison, Squaxin Island Tribe
Nathan Draper, Irrigation District
Andy Dunn, RH2 Engineering
Peter Dykstra, Plauche and Carr LLP
Chris Elder, Whatcom County Public Works
Karen Epps, Senate Committee Services
Kevin Eslinger, Kittitas Reclamation District
Luke Esser, Kalispel Tribe
Nelson Falkenburg, Department of Fish and Wildlife
Mugdha Flores, Ecology
William Foster, City of Seattle
Peggen Frank, Contract Lobbyist
Keith Goehner, State Rep
Jack Goldberg
Dan Haller, Aspect Consulting
Justin Harter, Naches-Selah Irrigation District
Ray Hartwell, Summit Conservation Strategies
Jim Hay, Robinson Noble, Inc.
Corina Hayes, WA Department of Health
Mike Hermanson, Spokane County
Chris Hyland, WWWMP
Paul Jewell, Washington State Association of Counties
Steve Jilk, Public Utility District #1 of Whatcom County
Al Josephy, Ecology
Alyssa Jumars, Ag coordinator
Isaac Kastama, Wakima Basin Joint Board
Patricia Kirk, Ecology
John Kounts, Washington PUD Association
Jessica Kuchan, Confluence Law, PLLC
Ashutosh Kumar, Washington State University
Yoshi Kumara, House of Reps
Ilene Le Vee, ranch/farmland owner
Amber D. Lewis, Suquamish Tribe
Chris Liu
Kelsey Mach, Landau Associates
Sarah Mack, Tupper Mack Wells PLLC
Chris Marks, Confederated Tribes of the Umatilla Indian Reservation
John Marsh, Cowlitz Indian Tribe
Larry Martin, Attorney
Mike Martinez
Kerrie Mathews, Bureau of Reclamation
David McClure, Klickitat County
Paul McCollum, Port Gamble S'Klallam Tribe
Mary McCrea, Methow Group
Tom McDonald, Cascadia Law Group
Doug Miller, Klickitat PUD
Cassandra Moore, Pierce County - Planning and Public Works
Jamie Morin, Confluence Law, PLLC
Thomas Mortimer, Attorney
Tom Myrum, Washington State Water Resources Association
Mary Neil, Muckleshoot Indian Tribe
Mark Nielson, Franklin County Water Conservancy Board
Jay OBrien, Oroville-Tonasket Irrg. Dist.
Sarah Ogier, Parametrix
Tyson Oreiro, Ecology
Tom Ostrom, Suquamish Tribe
Mark Peterson, Crown
Thomas Pors
Scott Revell, Roza Irrigation District
Brandi Reynecke, Ecology ERO
Kristina Ribellia, Western Water Market
Saundra Richartz, Senate Republican Caucus
Laura Robinson, Upper Columbia United Tribes
• Trish Rolfe, Center for Environmental Law & Policy
• Katherine Ryf, Landau Associates, Inc.
• Susan Saffery, City of Seattle, Seattle Public Utilities
• Jesse Salomon, Washington State Senate
• Mike Schwisow, Washington State Water Resources Association
• Norm Semanko, Parsons Behle & Latimer
• Suzanne Skinner, WWT
• Jeff Slothower, o
• Glen Smith, Washington State Ground Water Association
• Danielle Squeochs, Yakama Nation
• Marie Sullivan, CTUIR lobbyist
• Arden Thomas, Kittitas County
• Bill Trueman, Skagit PUD
• Mary Verner, WA Dept of Ecology Water Resources
• Bruce Wakefield, Colville Tribes
• Jacquelyn Wallace, Trout Unlimited
• Jim Weber, Center for Environmental Law and Policy
• Noah Wentzel, Ecology
• Jeanne White, Methow Conservancy
• Daryl Williams, Tulalip Tribes
• Michael Wolanek, City of Arlington
• Jonathan Yoder, Washington State University
Summary of Last Meeting

• Focused on transparency in water right sales and out-of-basin transfers.

• 150 participants

• Meeting notes, recording, presentation, and survey results are posted on our [webpage](#).

• We are synthesizing our takeaways from the meeting and will present them at Meeting 5.
Background
Susan Adams, Washington Water Trust
Trust Water Rights Program: Flexible Streamflow Solutions

Susan Adams, Executive Director
TRWP History & Overview

- Background on trust water rights and the TRWP
- The types of acquisitions that end up in the TWRP
- Water banking
- Potential impediments to goal of the TWRP—restoring flows and flexible water management
What Does the TRWP Solve?

- Prior appropriation often means over appropriation
- Beneficial use requirement and fear of relinquishment can be a disincentive to voluntary conservation--TWRP rewards conservation
- Provides a mechanism to acquire senior water rights and protect them for instream flow
Authorizing Statutes: TWRP

- Yakima Basin TWRP adopted 1989. RCW 90.38
- Statewide TWRP adopted 1991. RCW 90.42
- Trust water is exempt from relinquishment
- Retains original priority date
- Temporary or permanent
- Legislative funding began in 2003 ($1-3 million/biennium)
Placing Water in the TWRP

- Ecology acquires water rights through:
  - **Donation**—easiest to accomplish
    - Parking lot to avoid relinquishment
    - Ecology accepts with no extent & validity requirement
    - Little scrutiny or DOE management (monitoring)
  - **Lease/purchase**—high degree of flexibility
    - Ecology may accept
      - Extent and validity required
  - **Other means**
    - Water banking agreements
    - Irrigation Efficiencies Grant Program (IEGP)
    - Dry-year leasing, crops switches, source changes
Extent & Validity
Verifying Wet Water

- Adjudicated certificate (where available)
- Meter records (best source—but rate)
- Pump records—convert from KWH used and pump specs
- Cropping/seed receipts
- Photographs of water use
- Affidavits of water use

Technology is helping. . .

- Season of use aerial imagery (multiple years)
- Soil humidity measurements
Restoring Flow Without Drying Agriculture
## Acquisition Program Results 2006-2017

<table>
<thead>
<tr>
<th>Agreement type</th>
<th>Funded amount</th>
<th>Primary Reach</th>
<th>Secondary reach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diversion reduction</td>
<td>$1,868,188</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>IEGP</td>
<td>$16,200,218</td>
<td>Yes</td>
<td>Possible</td>
</tr>
<tr>
<td>Lease</td>
<td>$20,716,975</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Other</td>
<td>$21,742,587</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Purchase</td>
<td>$25,654,930</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>$84,314,710</strong></td>
<td>811,389 acre-feet/year*</td>
<td>26,749 acre-feet/year</td>
</tr>
</tbody>
</table>

*Not all permanently in stream*
Fallowing agreements during salmon critical periods
Source switches to groundwater
Irrigation efficiencies (IEGP)
Buying the “odd bits” of ag land
Drought forbearance agreements
Split-season leases
Conservation easements
Donations
Water Banking: Redistributing Liquid Assets

- All mitigation banks use Trust Water Rights Program
- Supply: Need water rights that are:
  - Senior to unfulfilled juniors downstream
  - Upstream of new uses
  - Similar timing and consumptive profile to new uses (exempt wells require year-round availability)
- Demand:
  - Create and sell mitigation credits for new uses
  - Dungeness alone has a restoration component
  - Administration—expensive and ongoing
Complexity in Application

- Lack of Water rights certainty
  - Adjudicated basins v. unadjudicated
- Funding for mitigation favored over restoration (maintaining rather than improving conditions)
- Climate change uncertainty impacting farmers
- Donation Program intended temporarily protect, while sometimes used to “rehydrate” Dry Rights
  - Lundgren transfer in the Methow
  - Wall Street speculation pricing restoration out
Thank You

Susan Adams, Executive Director

206.755.7162
susan@washingtonwatertrust.org
More Background

Definitions and data
“Types” of Trust Water Rights

RCW 90.42.020 (5): "Trust water right" means any water right acquired by the state under this chapter for management in the state's trust water rights program.

Different means of conveyance:

• Temporary donation
• Acquisition (lease or purchase)
• Other means
Temporary Donations

• Provides protection from relinquishment – “parking lot”.

• Ecology shall accept the donation on terms prescribed by the donor.

• The amount of water cannot exceed the highest use within the last 5 years.
  • “5 year look back”, not a full extent & validity.
Processing Temporary Donations

1. **Request:** A water right holder submits a Temporary Donation Form to us.

2. **Review:** We review the most recent five years of beneficial use to determine the quantity available for donation.

3. **Execute:** We issue a letter stating that the water right is in trust and protected from relinquishment.

4. **Removal:** The water right holder may remove the right from trust at any time and resume use as before the donation.
Acquisitions – Leases & Purchases

• The State pays for the water right.
  • Can serve instream or out-of-stream uses.

• Purpose of use is changed under RCW 90.03.380.
  • Requires determination of extent and validity.

• Leases are executed through a lease agreement with Ecology.
  • Different requirements for leases under 5 years and over 5 years.

• Purchases are executed through a Purchase and Sale Agreement and are deeded to Ecology
“Other Means”

Any contract in which Ecology agrees to hold and manage a water right in trust.

- Water banking agreements
- Water right swaps
- Agreements to not divert
- Other creative contracts
## Summary

<table>
<thead>
<tr>
<th>“Type”</th>
<th>Action By Ecology</th>
<th>Change under RCW 90.03.380?</th>
<th>Deeded to ECY?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Temporary Donations</td>
<td>Letter of Acceptance</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Acquisitions - Leases</td>
<td>Executed Lease Agreement</td>
<td>Usually</td>
<td>No</td>
</tr>
<tr>
<td>Acquisitions - Purchase</td>
<td>Executed Purchase and Sale Agreement</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>“Other means”</td>
<td>Executed Agreement or MOA</td>
<td>Usually</td>
<td>Depends</td>
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“Transfers into Trust”

• Used throughout chapter 90.42 RCW, but not defined.
• Disagreement and confusion on the meaning.
• Our interpretation:
  • Common description of what should be described as “held in the TWRP through X means for the purposes of X.”
  • Purpose of use is changed to *instream flows* (and maybe *mitigation*) under RCW 90.03.380.
• A change to instream flows does not create a trust water right!
**Summary (cont.)**

<table>
<thead>
<tr>
<th>Use or objective</th>
<th>Temporary Donations</th>
<th>“Transfer into Trust” *</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reprieve from relinquishment</td>
<td>Mitigate new water uses</td>
<td></td>
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</table>

| Change in purpose of use? | No | Yes under RCW 90.03.380 |

| Examination of the water right quantity | “5-year lookback” | Extent and validity |

* This label is not widely supported as the correct terminology. Discussion is needed to determine the correct verbiage.
Cumulative Active Water Right Donations

Year:
- 2000
- 2001
- 2002
- 2003
- 2004
- 2005
- 2006
- 2007
- 2008
- 2009
- 2010
- 2011
- 2012
- 2013
- 2014
- 2015
- 2016
- 2017
- 2018
- 2019

Number of Water Rights:
- 0
- 100
- 200
- 300
- 400
## Time in Trust (cont.)

<table>
<thead>
<tr>
<th>Temporary Donations</th>
<th>Total #of Rights</th>
<th>Median years in Trust</th>
<th>90% of rights are in Trust for less than X years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expired</td>
<td>226</td>
<td>2</td>
<td>5.6</td>
</tr>
<tr>
<td>Active</td>
<td>326</td>
<td>4.4</td>
<td>10.6</td>
</tr>
</tbody>
</table>
Questions?
Fishbowl Discussions

1. Listen to the discussion.
2. Raise your hand to join the discussion group. The moderator will add you.
3. Stay in the group for ~5 minutes.
4. The moderator will rotate you out.
Discussion 1: Definitions and Mitigation

Bill Clarke, Attorney
Tyson Carlson, Aspect Consulting
Adam Gravely, Van Ness Feldman
Jeff Slothower, Attorney
Discussion Questions - #1

1. Do you agree with the definitions outlined in Ecology’s presentation? How do you see these differently?
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?
Break
Discussion 2: Temporary Donations

Lisa Pelly, Trout Unlimited
Kathleen Collins, Water Policy Alliance
Chuck Brushwood, Okanogan Co. Conservancy Board
Sarah Mack, Tupper Mack Wells PLLC
Discussion Questions

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.
   
a. Do you believe that the TWRP enables private investment and speculation in water?
   
b. Do you believe that the environmental benefits outweigh speculative concerns?
   
c. 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?
Next Meeting

• Policy discussion
• Private investment and marketing of water rights (part B): Water banking
• June 10, 9:30am to 12:30pm
• Via WebEx
Forum for Written Input

• eComments form available on our webpage
  • Comments will be accessible to everyone

• Post-meeting survey, to complete by Thursday COB.
  • https://www.surveymonkey.com/r/advisory3
Thank You!

Contact: Carrie Sessions, Carrie.sessions@ecy.wa.gov, (360) 742-6582