

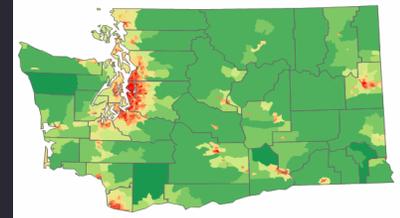
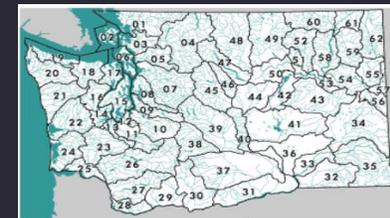
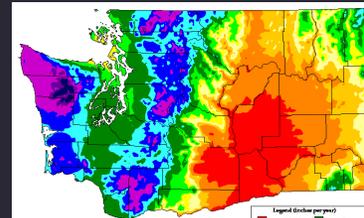
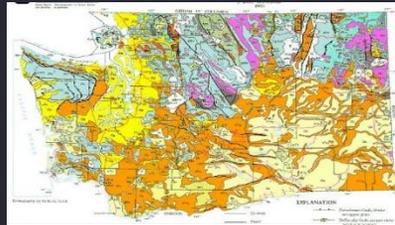
Advisory Group on Water Trust, Banking, & Transfers

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

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

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

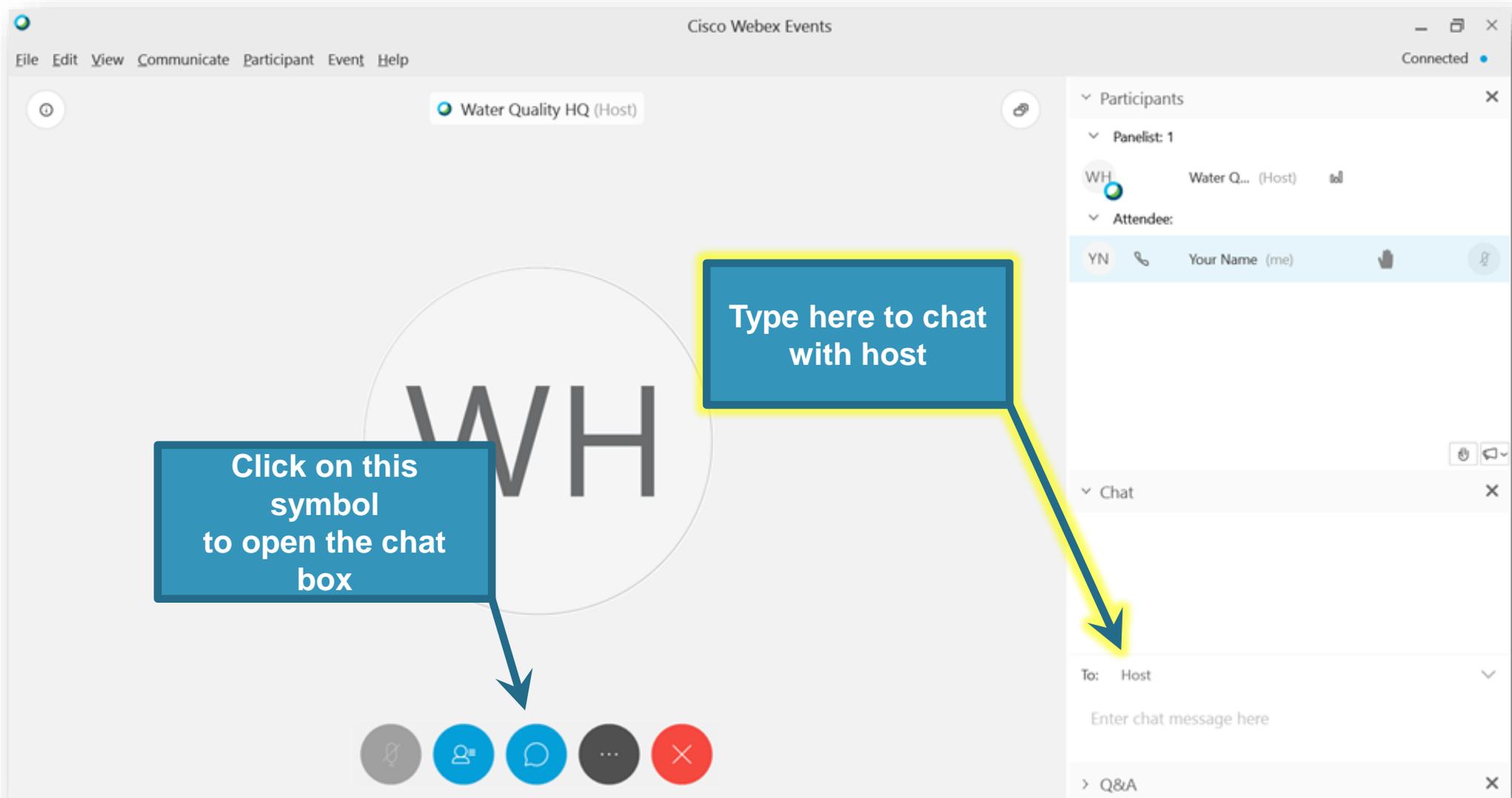
Meeting 3: Trust Water

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

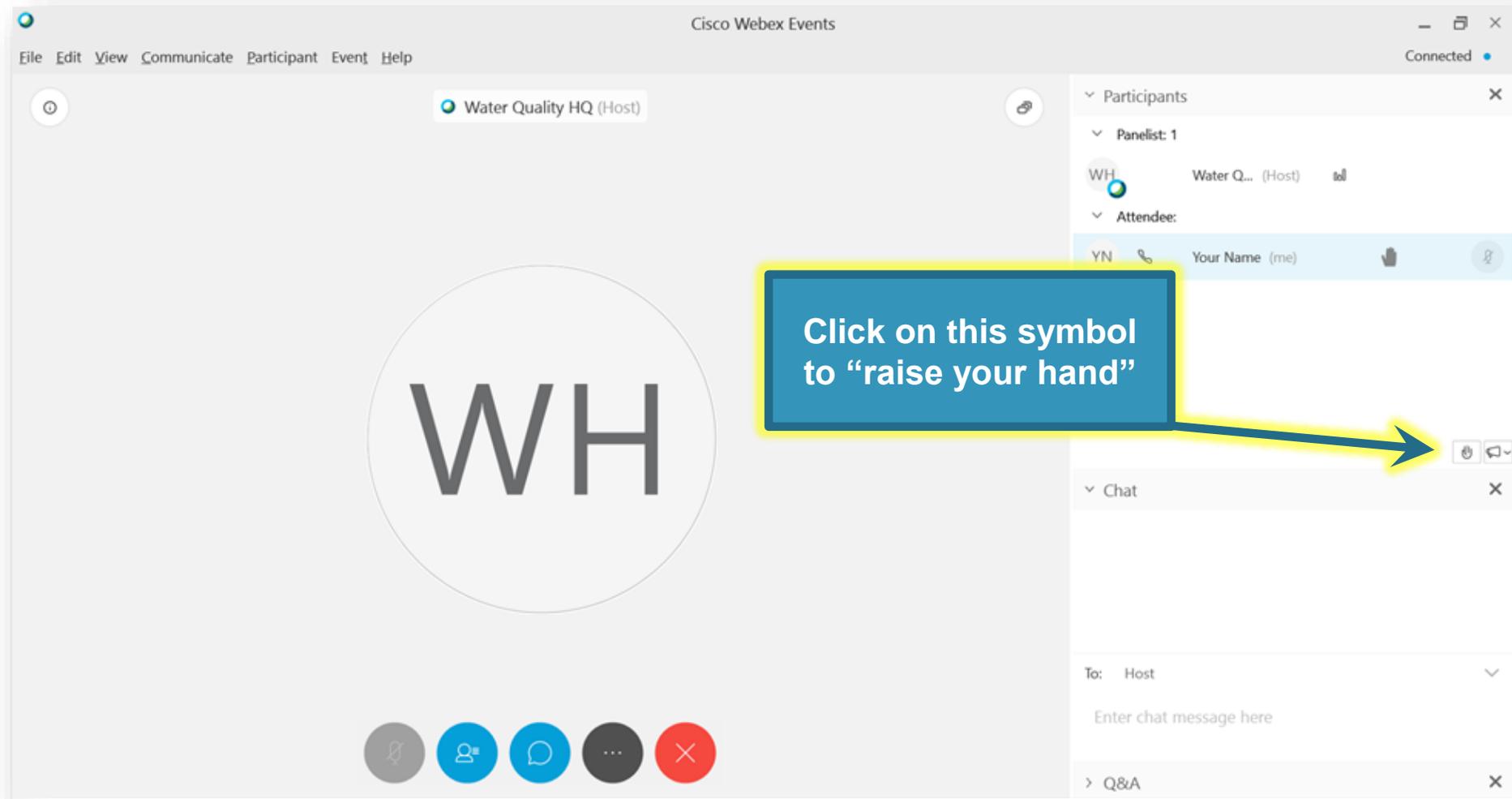
Meeting 4: Water Banking

- Banking and the public interest
- Transparency in water banking
- Administrative processes in water banking

WebEx Practice



WebEx Practice



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 Irrig. Dist.
- Sarah Ogier, Parametrix
- Tyson Oreiro, Ecology
- Tom Ostrom, Suquamish Tribe
- Mark Peterson, Crown
- Thomas Pors
- Scott Revell, Roza Irrigation District
- Brandy Reynecke, Ecology ERO
- Kristina Ribellia, Western Water Market
- Sandra 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

An aerial photograph of a stream flowing through a lush, green forest. The water is a light, milky brown color, and numerous bright red fish are scattered throughout the stream, particularly in the shallower, sandy areas. The surrounding vegetation is dense and vibrant green.

Trust Water Rights Program: Flexible Streamflow Solutions

Susan Adams, Executive Director



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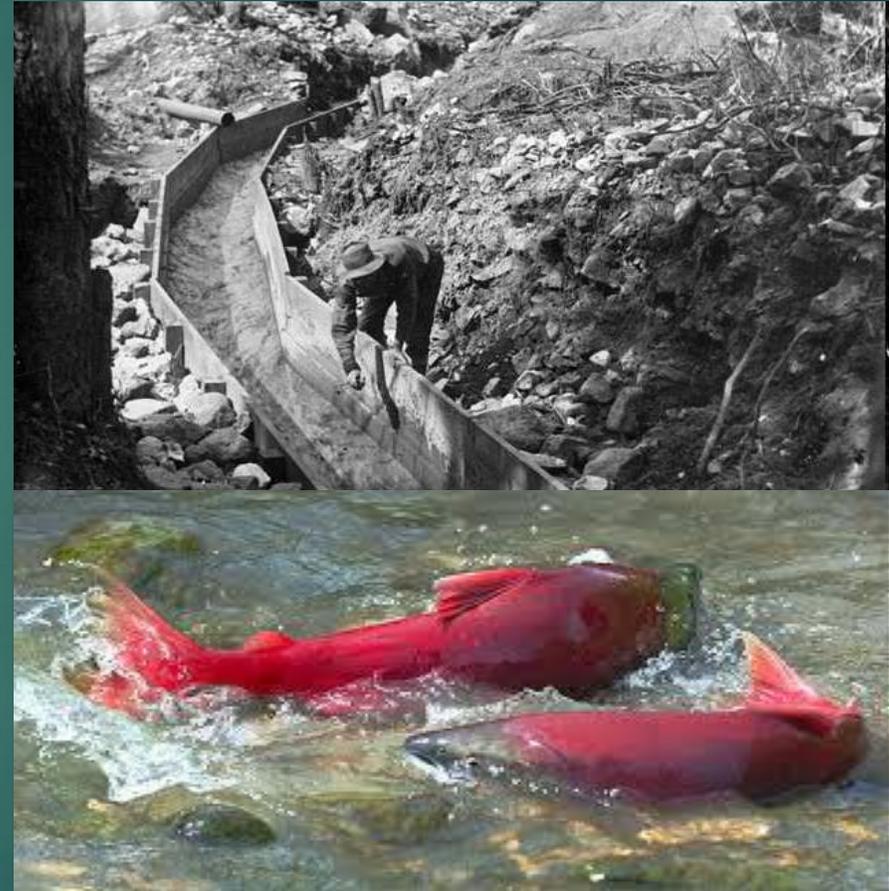
TRWP History & Overview

- ▶ 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-- TRWP 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

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

Not all permanently in stream

Tools of the Program

- ▶ Following 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
 - ▶ *Rettowski v. Ecology*, 122, Wn. 2nd 219 (1993)
 - ▶ “Streamlining Water Rights Adjudications” (2003)
- ▶ 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
 - ▶ *Crown West Realty, LLC v. PCHG*, 7 Wash. App. 710 (2019)
 - ▶ Lundgren transfer in the Methow
 - ▶ Wall Street speculation pricing restoration out

Thank You

Susan Adams, Executive Director

206.755.7162

susan@washingtonwatertrust.org



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WATER TRUST**

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

"Type"	Action By Ecology	Change under RCW 90.03.380?	Deeded to ECY?
Temporary Donations	Letter of Acceptance	No	No
Acquisitions - Leases	Executed Lease Agreement	Usually	No
Acquisitions - Purchase	Executed Purchase and Sale Agreement	Yes	Yes
"Other means"	Executed Agreement or MOA	Usually	Depends

“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!

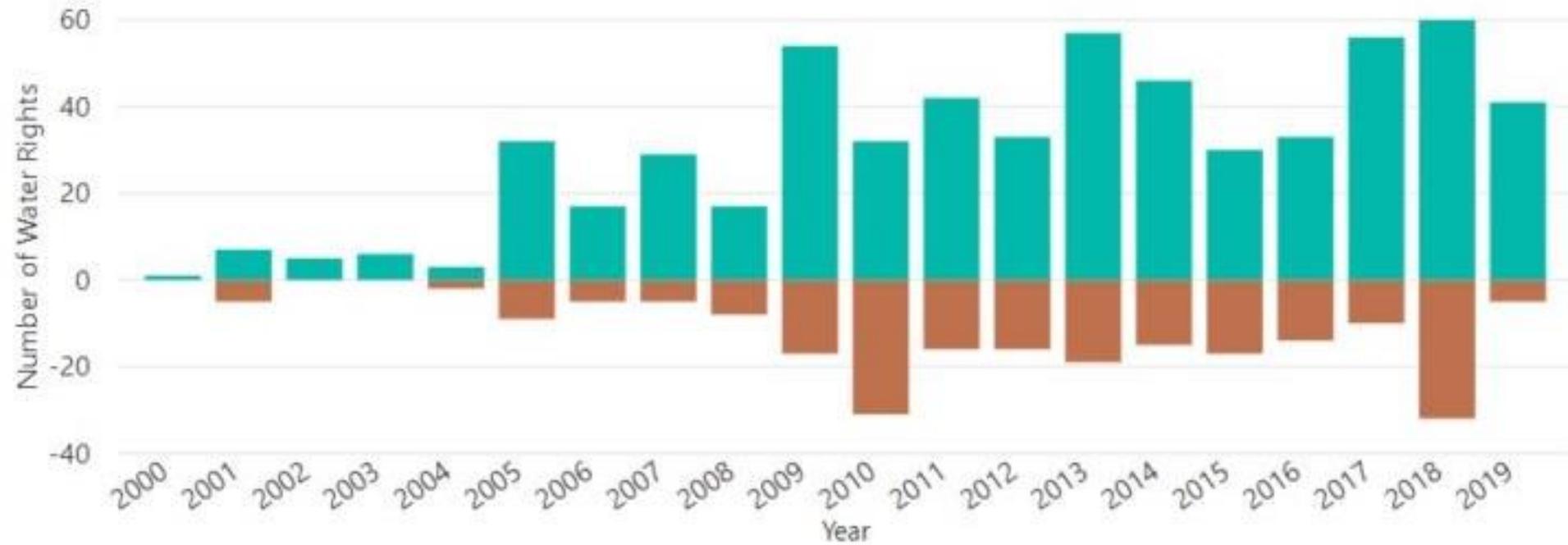
Summary (cont.)

	Temporary Donations	“Transfer into Trust” *
Use or objective	Relieve from relinquishment	Mitigate new water uses
Change in purpose of use?	No	Yes under RCW 90.03.380
Examination of the water right quantity	“5-year lookback”	Extent and validity

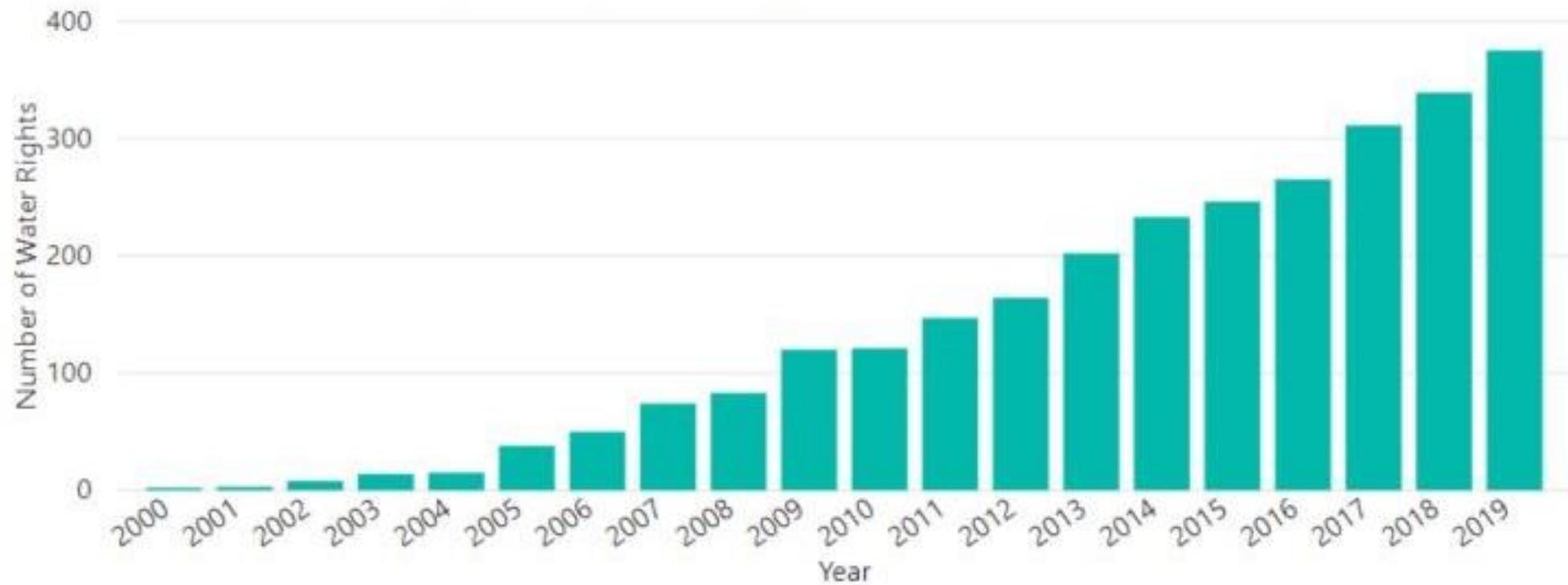
* This label is not widely supported as the correct terminology. Discussion is needed to determine the correct verbiage.

Yearly Donations and Expirations

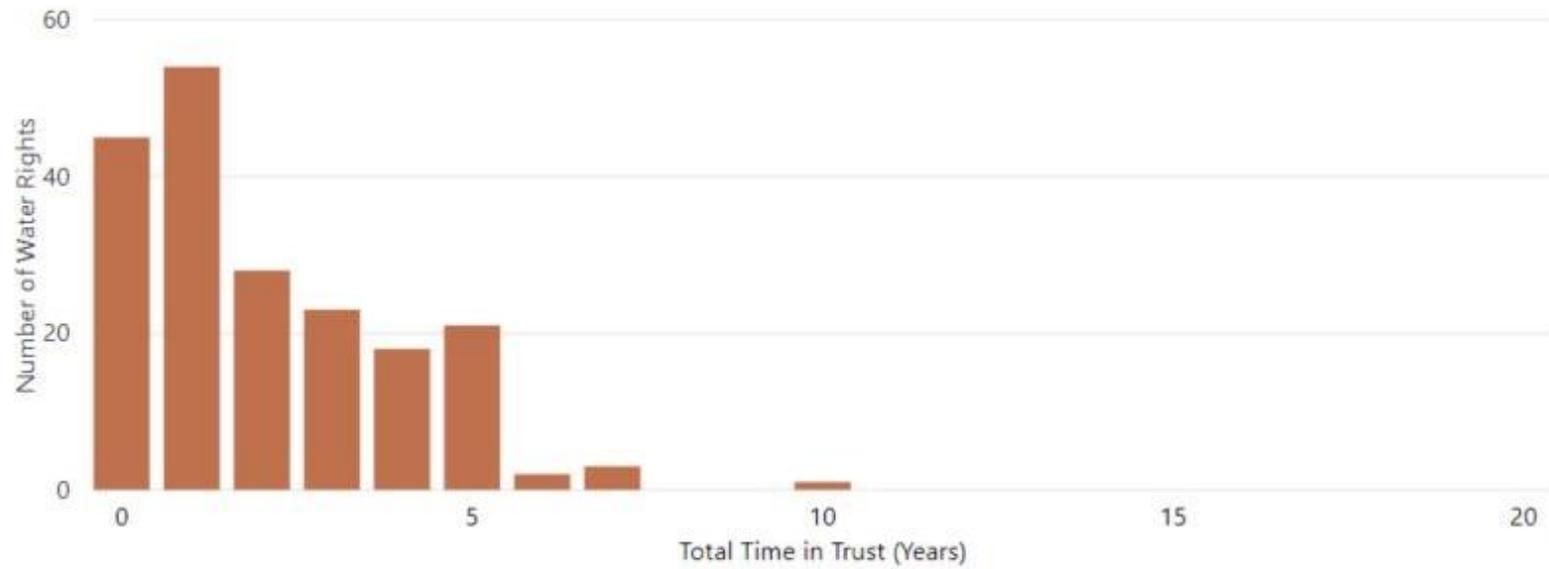
● Expirations ● Donations



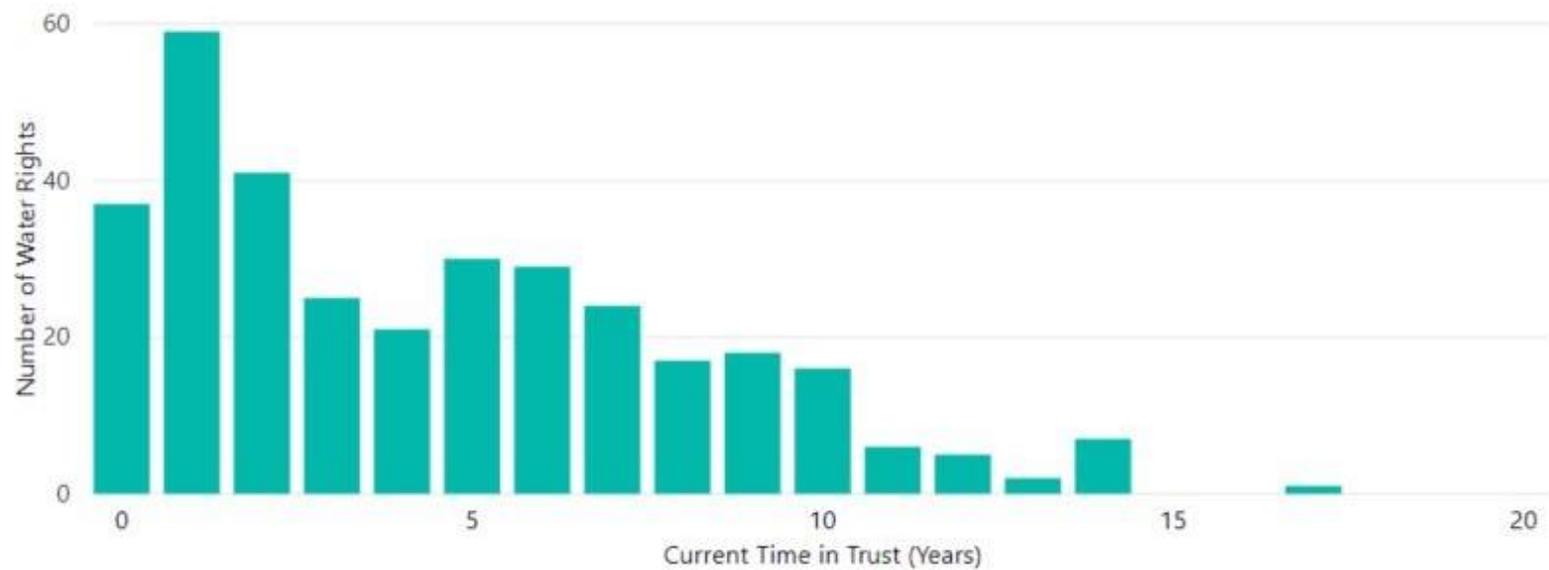
Cumulative Active Water Right Donations



Time in Trust: Expired Donations



Time in Trust: Active Donations



Time in Trust (cont.)

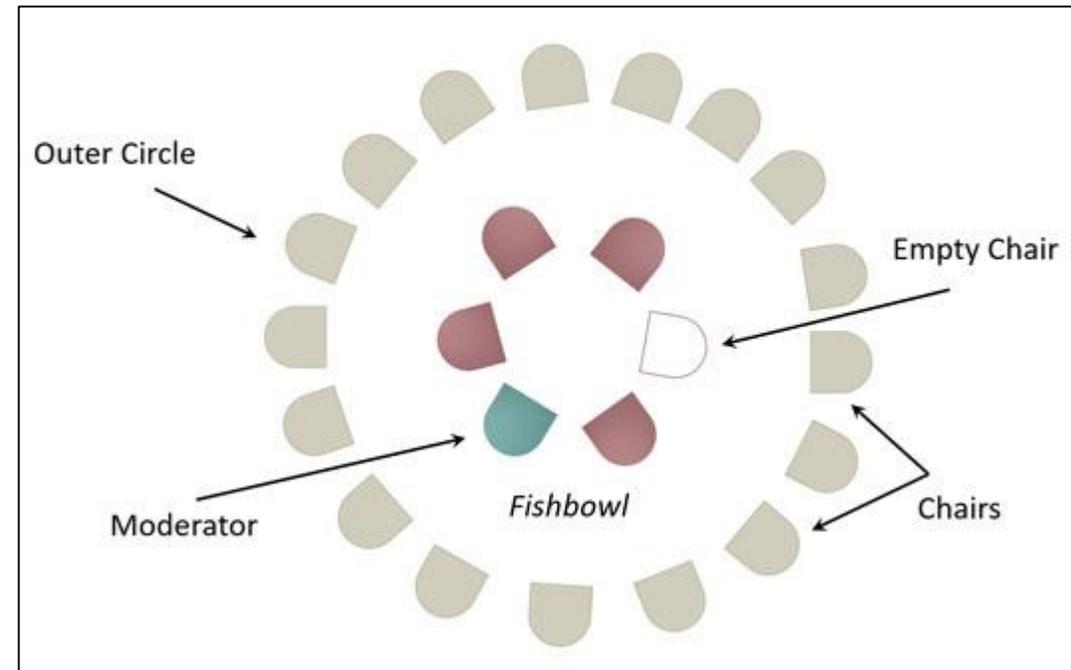
Temporary Donations	Total #of Rights	Median years in Trust	90% of rights are in Trust for less than X years
Expired	226	2	5.6
Active	326	4.4	10.6

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?

Discussion Questions - #2

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