

Draft Discussion Paper: Limiting New Temporary Donations into the TWRP

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

Concerns exist that investors are temporarily donating water rights under the trust water right program (TWRP) to speculate with state water resources. Investment speculation does not align with the original intent of the TWRP (which was established to incentivize water conservation). To address potential investment speculation using temporary donations, new temporary donations could be subjected to limits. We evaluated three potential changes:

1. Setting a cap on the size of new temporary donations.
2. Establishing time and re-enrollment limits on new temporary donations.
3. For new temporary donations, establishing a period of time after a right is removed from temporary donation before that water right could be changed.

Each of these changes could limit the risk of investment speculation by adding time, quantity, and flexibility tradeoffs for new temporary donations. However, any limits enacted on the use of temporary donations in the TWRP would create a disincentive to enroll water rights in the TWRP. This would, in turn, reduce the use of the TWRP and reduce streamflow and groundwater preservation benefits provided by temporary donations.

Ecology does not currently have the authority to limit temporary donations in these ways. Therefore, any limits on temporary donations would require a statutory change by the Legislature to grant this authority.

Background

The legislature created the TWRP to address the unintended effect of relinquishment (“use it or lose it”) that may discourage water conservation¹. Water rights can be donated for instream flow or groundwater preservation purposes with a streamlined review process. Once enrolled in the TWRP, water rights are protected from relinquishment and the water remains instream². Ecology is generally required to accept the terms (e.g., time limit of the trust water right agreement) of the water right holder for a temporary donation and the water right holder can cancel a temporary donation at any time³.

However, there are concerns that this protection from relinquishment could also incentivize water right holders to enroll water rights as temporary donations for the sole purpose of investment speculation. Speculation could occur when a water right holder waits for the water right value to increase before

¹ Ecology, 2020. *The State Water Trust and Water Banking: History and Function*.

<https://apps.ecology.wa.gov/publications/documents/2011063.pdf?msclkid=ef2b88f9c19e11ecb533254550327d28>.

² RCW 90.42.040(6).

³ RCW 90.42.080(1)(b) – “the department shall accept the donation on such terms as the person may prescribe as long as the donation satisfies the requirements of subsection (4)... and the other applicable requirements of this chapter.”

pulling the right out of temporary donation to make a larger profit. In this scenario, the speculator’s primary motivation is maximizing private profit from the sale of the water right.

Discussion

Cap on the size of temporary donations

This change would place a limit on the quantity of water that can be used for new temporary donations. Larger water rights would be limited to the temporary donation quantity under the cap. This cap could help address investment speculation using the TWRP because a smaller amount of water would be eligible for the TWRP’s protection from relinquishment, reducing potential profits and thus reducing incentives to speculate.

To better understand how water right holders were using temporary donations in the TWRP, we evaluated water rights from 2003 to 2019. Based on that evaluation, we determined that temporary donations averaged 3,018 acre-feet per year (AFY). However, the median temporary donation (meaning half are above and half below) was 72 AFY. This indicates that most of the water rights that have been used for temporary donation are typically small (75% are less than 241 AFY), and a few very large water rights skew the average upward (see Figure 1)⁴. Note that the largest temporary donation was 968,698 AFY. Therefore, capping the quantity of water that could enroll as a temporary donation into the TWRP would affect few donations, and potentially reduce speculative incentives substantially.

Figure 1. Size of Temporary Donations

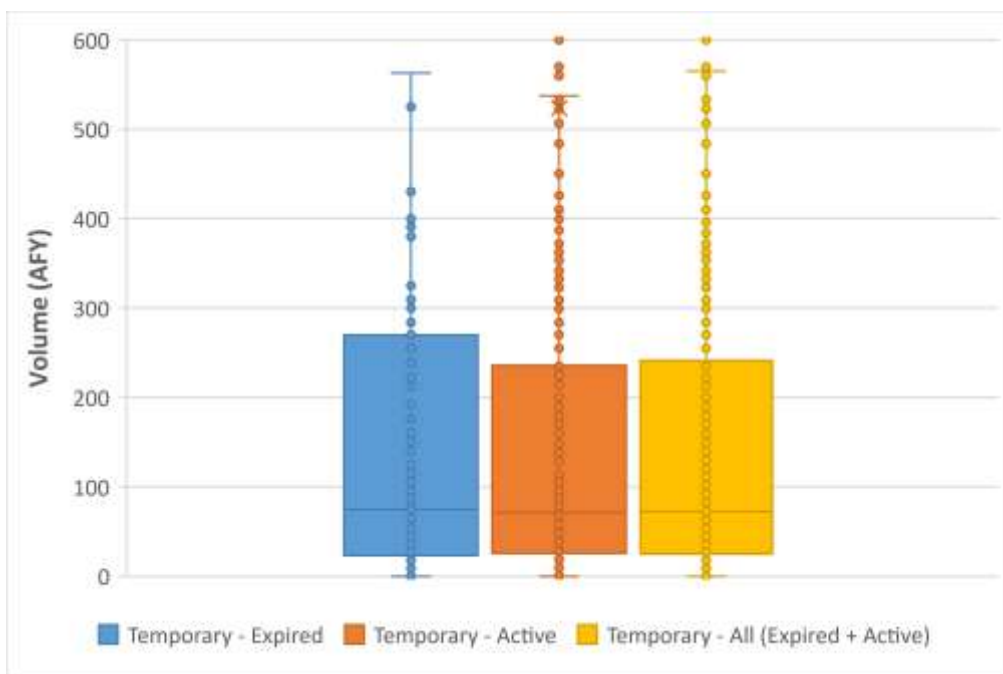


Figure Notes: Additional data points above 600 AFY are not depicted in this graph. The filled in box represents size of the middle 50% of temporary donations. The median is depicted by the horizontal line in the filled in box.

⁴ These are estimates only. Some temporary donations do not have a listed volume or only list the number of irrigated acres associated with the water right place of use instead of the annual quantity of water in AFY.

Establish time limits on temporary donations

This change would set a maximum period of time that new water rights could be enrolled in the TWRP as a temporary donation. This would be coupled with restrictions on the re-enrollment of previously enrolled temporary donations that expired.

Establishing a maximum period of time for temporary donations could address water right holders using the TWRP for the sole purpose of waiting for the water right value to increase before selling the water right. A limit on the number of times that a water right could be used for temporary donation would also be necessary for a properly functioning maximum time limit. This would ensure that the same water rights are not continually re-enrolled after hitting the time limit, which could make the maximum time limit ineffective.

To better understand how water right holders were using temporary donations in the TWRP, we evaluated water rights from 2003 to 2019 (see Figure 2). Based on that evaluation, water rights that had been temporarily donated into trust and have since expired spent an average of 2.7 years in the TWRP. Only 16% remained in the TWRP for longer than 5 years. Water rights that are still enrolled as temporary donations have been enrolled for an average of about 5 years.⁵

Figure 2. Time in Trust for Active and Expired Temporary Donations



⁵ *Water Trust, Banking, and Transfers in Washington State: Findings and Recommendations Informed by Ecology's Advisory Group on Water Trust, Banking, and Transfers*. November 2020. Publication 20-11-091.

We also evaluated re-enrollment and determined that 100 (30%) of the 336 temporary donations that expired from the TWRP between 2003 and 2021 were re-enrolled into the TWRP. These 100 water rights that re-enrolled totaled 1,022,000 AFY⁶, which is about half (48%) of the quantity of all the temporary donations that expired from the TWRP during this time.

Table 1. Re-Enrollment Status of Temporary Donations

Temporary Donations – Expired	# of Water Rights	Volume (AFY)
Did Re-Enroll	100	1,022,000¹
Did Not Re-Enroll	236	1,105,762

¹ This number is only an estimate of the volume re-enrolled as a temporary donation in the TWRP and reflects the volume of the water right that originally expired. It is possible that a different volume for that same water right could have been re-enrolled (e.g., the right was split and only a portion of that volume was re-enrolled).

Establish a minimum period of time after a right is removed from temporary donation in the TWRP before that water right could be changed

This potential legislative recommendation would restrict water right changes to create a “pause” for any water right changes for a period of time (e.g., 2 years) after the water right was removed (or expired) from temporary donation in the TWRP. Temporary donations that expire automatically revert back to their previous attributes (e.g., place and purpose of use) before they were donated into the TWRP. This change would require the water right to be used for its previous purpose or place of use for a time instead of immediately being eligible for a change to a new purpose or place of use.

To engage in investment speculation using temporary donations in the TWRP, a speculator needs to be able to make enough profit from the sale of the water right to justify the amount of time it sits unused in trust. Instituting a pause before the water right could be changed and sold could decrease the return on investment and thus the speculative value of a water right.

From 2003 to 2021, a total of 336 water rights (representing 2,127,762 AFY) expired from temporary donation. Of these water rights, 121 rights (representing 51,183 AFY) went through a change in some water right attribute after expiring from temporary donation (see Table 2).

⁶ This number is only an estimate of the volume re-enrolled as temporary donations in the TWRP and reflects the volume of the water right that originally expired. It is possible that a different volume for that same water right could have been re-enrolled (e.g., the right was split and only a portion of that volume was re-enrolled).

Table 2. Types of Changes for Expired Temporary Donations

Temporary Donations – Expired & Not Re-Enrolled in the TWRP	# of Water Rights	Volume (AFY)
<i>Donations that Changed Attributes</i>		
Only Split	10	10,507
Only Purpose of Use Changed	30	4,209
Only Place of Use Changed	4	14,147
Only Ownership Changed	9	774
Multiple Changes	68	21,546
Subtotal of Donations that Changed Attributes¹	121	51,183
<i>No Changes/Reverted to Original Attributes</i>	115	1,054,579

¹ Two large water rights totaling 1,898,352 AFY were excluded from this analysis. One of these rights was re-enrolled in the TWRP as a permanent donation and the other is related to non-consumptive hydro-power generation.

Implications of these potential legislative recommendations

The implication of any change that limits temporary donations into the TWRP would be to limit the benefits to streamflow and groundwater preservation that occur when a water right is temporarily donated into the TWRP.⁷

Any reduction in incentives for temporary donations into the TWRP, limiting which water rights would qualify, or how long a temporary donation could remain in trust would likely result in short-term streamflow reductions. Water right holders would be required to use their water rights for out-of-stream uses or risk relinquishment. Additionally, these changes might reduce incentives for large-scale water conservation, which was the original primary purpose of the TWRP.

Furthermore, allowing Ecology, instead of the water right holder, to set the terms (e.g., time limit) of a temporary donation into the TWRP could increase the regulatory and administrative burden of using temporary donations and reduce the flexibility of the program to meet water right holder's desires. This could act as another disincentive for use of the trust program that would result in further reduction of its streamflow benefits.

⁷ As of November 2021, there were 539 water rights in temporary donation in the TWRP totaling 262,233 AFY (approximately 362 cubic feet per second).