



Water Right Transfers, Water Banking, and Trust Legislative Report

Water Resources Program

Washington State Department of Ecology
Olympia, Washington

December 2022, Publication 22-11-023

Publication Information

This document is available on the Department of Ecology's website at:
<https://apps.ecology.wa.gov/publications/SummaryPages/2211023.html>.

Contact Information

Water Resources Program

P.O. Box 47600
Olympia, WA 98504-7600
Phone: 360-407-6872

Website¹: [Washington State Department of Ecology](http://www.ecology.wa.gov)

ADA Accessibility

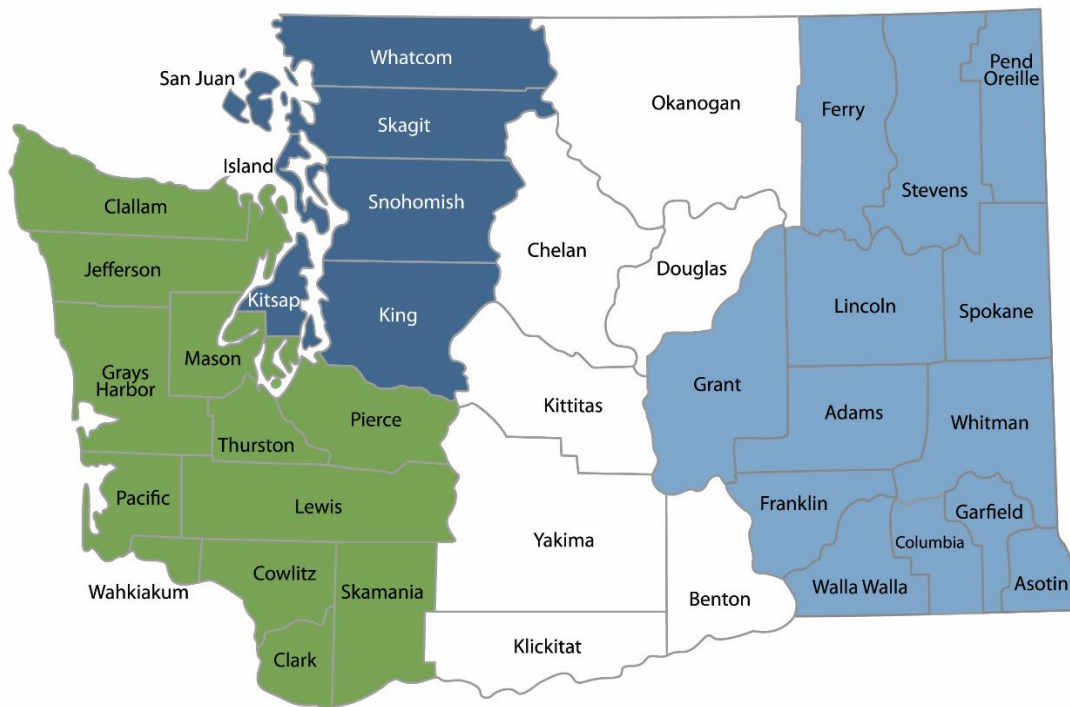
The Department of Ecology is committed to providing people with disabilities access to information and services by meeting or exceeding the requirements of the Americans with Disabilities Act (ADA), Section 504 and 508 of the Rehabilitation Act, and Washington State Policy #188.

To request an ADA accommodation, contact Ecology by phone at 360-407-6872 or visit <https://ecology.wa.gov/accessibility>. For Washington Relay Service or TTY call 711 or 877-833-6341. Visit Ecology's website for more information.

¹ www.ecology.wa.gov/contact

Department of Ecology's Regional Offices

Map of Counties Served



Southwest Region
360-407-6300

Northwest Region
206-594-0000

Central Region
509-575-2490

Eastern Region
509-329-3400

Region	Counties served	Mailing Address	Phone
Southwest	Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Mason, Lewis, Pacific, Pierce, Skamania, Thurston, Wahkiakum	PO Box 47775 Olympia, WA 98504	360-407-6300
Northwest	Island, King, Kitsap, San Juan, Skagit, Snohomish, Whatcom	PO Box 330316 Shoreline, WA 98133	206-594-0000
Central	Benton, Chelan, Douglas, Kittitas, Klickitat, Okanogan, Yakima	1250 W Alder St Union Gap, WA 98903	509-575-2490
Eastern	Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Lincoln, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman	4601 N Monroe Spokane, WA 99205	509-329-3400
Headquarters	Across Washington	PO Box 46700 Olympia, WA 98504	360-407-6000

Water Right Transfers, Water Banking, and Trust Legislative Report



Water Resources Program
Washington State Department of Ecology
Olympia, WA

December 2022 | Publication 22-11-023

Table of Contents

List of Figures and Tables	6
Figures.....	6
Tables	6
Executive Summary	7
Glossary	9
Introduction.....	10
Water Banking Grants Pilot Program	10
Successes	10
Applications for funding.....	11
Challenges	11
Actions Taken Under Existing Authority.....	12
Trust policy and guidance	12
Temporary donations	12
Website and transparency improvements	13
Developing Water Right Transfers, Water Banking, and Trust Recommendations	13
Tribal and stakeholder engagement	13
Results from policy concept evaluation	14
Recommended Legislative Actions.....	14
Continue funding the water banking grants pilot program	14
Water right ownership and sales disclosure	15
Extend public interest evaluations to surface water right changes	16
Concepts Warranting Further Analysis.....	17
Define public interest evaluation criteria in statute	17
Fee for transferring a water right out of its basin of origin	17
Limit enrollment time period and re-enrollment for temporary donations.....	18
Require a “cool-off” period for water right changes after a temporary donation is removed from the TWRP	19
Require a portion of the water rights used for water banking to be permanently dedicated for streamflow purposes	19
Regulate water bank prices like other water utilities	20
Implement fees for establishing a new water bank.....	21
Concepts Not Recommended At This Time	22

Requiring new water bank ownership to be public entities or public/private partnerships	22
Allow Ecology to restrict out-of-basin water right transfers in some basins through rulemaking	22
Establish a right of first refusal for out-of-basin water right transfers	23
Establish a mechanism for transferring water rights upstream	23
Implement a ban on out-of-basin transfers	23
Cap the size of water rights that can be temporarily donated into the TWRP	24
Restrict use of the TWRP to in-state entities	24
Direct Ecology to actively create and promote water markets	24
Concerns and Tradeoffs	25
Out-of-basin water right transfers	25
TWRP and speculation	26
Private ownership of water banks	27
Other Factors	27
Land ownership trends	27
Climate change	28
Protecting streamflow benefits of trust water rights	28
Appendix A. Full Budget Proviso Text	29
Appendix B. Data Analysis Tables and Figures	32
Out-of-basin water right transfers	32
TWRP donations: temporary and permanent	36
Water banks	38
Appendix C. Public Comments on the Draft Report	40

List of Figures and Tables

Figures

Figure 1. Downstream, Out-Of-Basin Water Right Transfer Compared To Inter-Basin Water Right Transfer	25
Figure B - 1. Total Volume of Out-Of-Basin Water Right Transfers in Washington State by Year (1995 to 2020).....	32
Figure B - 2. Total Number of Out-Of-Basin Water Right Transfers in Washington State by Year (1995 to 2020).....	33
Figure B - 3. Out-Of-Basin Water Right Transfers Map	34
Figure B - 4. Size of Temporary Donations	37
Figure B - 5. Time in Trust for Active and Expired Temporary Donations	38
Figure B - 6. Water Bank Volume by Ownership Type.....	39
Figure B - 7. Volume of Water Rights in Water Banks	39

Tables

Table 1. Expired Temporary Donations and Subsequent Water Right Changes	27
Table B - 1. Out-Of-Basin Surface Water Right Transfers: Summary Statistics	34
Table B - 2. Out-Of-Basin Surface Water Right Transfers: Basins with Greatest Loss by Volume	35
Table B - 3. Out-Of-Basin Water Right Transfers (2003 to 2020)	35
Table B - 4. Trust Water Rights Program: Donation by Type.....	36
Table B - 5. Expired Temporary Donations: TWRP Re-enrollment Status	36
Table B - 6. Expired Temporary Donations That Did Not Re-enroll: Subsequent Water Right Changes.....	36
Table B - 7. Water Bank Allocations by Ownership Type (January 2022).....	38

Executive Summary

The Legislature directed the Department of Ecology in the 2021 operating budget ([ESSB 5092 Section 302](#)) to 1) establish a water banking grants pilot program; 2) take actions under existing authority to improve transparency for water banks; and 3) refine recommendations to the Legislature to address concerns about out-of-basin water right transfers, water banking, and the Trust Water Rights Program (TWRP). This report provides updates on the work Ecology conducted under this proviso.

In November 2021, Ecology developed a water banking grants pilot program. As of October 2022, we have received three applications for grant funding:

- Chelan County was approved for funding on March 3, 2022.
- Okanogan Conservation District submitted an application on July 1, 2022, that is currently under review.
- Yakima County submitted an application on September 12, 2022, that is currently under review.

This past year, Ecology used existing authority to improve the transparency of the TWRP by:

- Creating [Policy 1010: Administration of the Trust Water Rights Program](#).²
- Updating our [Guidance: Adminstrating the Trust Water Rights Program](#).³
- Developing the [Request to Establish or Modify a Water Bank](#)⁴ form and updated the [Temporary Donation of a Water Right to the Trust Water Rights Program](#)⁵ form.
- Updating our [Trust Water Rights Program](#) and [Water Banks](#) web pages to be clearer, and easier to find.

To build on our previous analysis and outreach, we evaluated concerns about private speculation using the TWRP and water banks, the impacts of out-of-basin water right transfers, and investment in water rights. We identified and assessed potential policy changes to help address these concerns and met with Tribes and stakeholders to get feedback. Based on our evaluation, we recommend the Legislature consider the following:

- Continue funding the Water Banking Grants Pilot Program, consistent with Section 6029 of the Governor's FY 2023-25 Capital Budget proposal.
- Require that changes to water right ownership and sales be publicly disclosed and readily available.
- Extend public interest evaluations to surface water right changes.

During this process, we also identified the following policy concepts that would require further evaluation before they could be effectively implemented:

² <https://apps.wr.ecology.wa.gov/docs/WaterRights/wrwebpdf/pol1010.pdf>

³ <https://apps.ecology.wa.gov/publications/summarypages/2211012.html>

⁴ <https://apps.ecology.wa.gov/publications/SummaryPages/ECY070679.html>

⁵ <https://apps.ecology.wa.gov/publications/SummaryPages/ECY070488.html>

- Define in statute the criteria for public interest evaluations for water management decisions.
- Require a fee to be paid to local governments for out-of-basin water right transfers.
- Create time and re-enrollment limits for temporary donations.
- Require a “cool-off” period for temporary donations before a water right change.
- Require a portion of any water rights set aside for water banking be permanently dedicated to benefit streamflow.
- Regulate water bank prices and service terms, similar to the regulatory structure used for privately-owned and operated water utilities.
- Authorize Ecology to assess a fee to recover staff costs for review and approval of new water banks.

We also analyzed several other potential policy options to address the Legislature’s directive that we do not recommend for further consideration at this time. These concepts are discussed further in the report for informational purposes.

Glossary

Downstream, out-of-basin water right transfer – A change to a surface water right that moves its place of use downstream into a different Water Resource Inventory Area (WRIA). This type of water right transfer is distinct from so-called “inter-basin” transfers between independent watersheds, which would not be possible due to impairment of existing water rights in the basin of origin (for more information, see the graphic and explanation on page 24).

Impairment – To 1) adversely impact the physical availability of water for a beneficial use that is entitled to protection, including earlier filed applications, and/or; 2) prevent the beneficial use of the water to which one is entitled, and/or; 3) adversely affect the flow of a surface water course at a time when the flows are at or below instream flow levels established by rule.

Mitigation for out-of-stream uses – Measures that eliminate impairment to existing rights from a proposed water use.

Relinquishment – Reversion of an existing water right to the state due to nonuse. Relinquishment occurs when a water right has reverted to the state because of nonuse for five or more successive years after 1967 without sufficient cause that excuses the nonuse (see RCW 90.14.130 through 90.03.180). There can be full or partial relinquishment of a water right.

Temporary donation into trust – A water right that is voluntarily conveyed to Ecology without expectation of monetary compensation to be held and managed in the TWRP for a specified non-permanent period of time.

Tentative determination of extent and validity – A determination by Ecology of the extent and validity of an existing water right established pursuant to either RCW 90.03 or 90.44, or claimed pursuant to RCW 90.14. These determinations are tentative, as final determinations of the extent and validity of existing water rights can only be made by a Superior Court through a general adjudication of water rights.

Transfer into trust – The process of conveying a water right to the TWRP through donation, purchase, lease, or other means. With the exception of donations, these rights typically undergo a change to the purpose of use under RCW 90.03.380, including a tentative determination of extent and validity prior to being conveyed to the TWRP.

Trust Water Rights Program (TWRP) – A program created by the Legislature in 1991 to preserve water rights for existing and future needs. Water rights held in trust to benefit streamflows and recharge groundwater are not subject to relinquishment and retain their original priority date.

Trust water right – Any water right held by Ecology and managed in the Trust Water Rights Program.

Water bank – A mutually-agreed upon contractual arrangement comprised of: 1) transfer of legal interest in a water right to the state to be used as a mitigating right, and 2) an executed water banking agreement describing use of that water right through the TWRP to mitigate water resource impacts, future water supply needs, or any beneficial use under chapter 90.03, 90.44, or 90.54 RCW that would otherwise impair existing water rights.

Introduction

Section 302 of the 2021 (FY21-22) operating budget (ESSB 5092) directed the Department of Ecology (Ecology) to report to the Legislature on:

- The newly-created water banking grants pilot program.
- Actions taken under existing authority to modify the process for the review of water banks to ensure that key information is made available to the public.
- Recommendations on improving the state's framework for water banking, the Trust Water Rights Program (TWRP or “trust”), and out-of-basin water right transfers (See Appendix A. Full Budget Proviso Text).

The Legislature has already authorized Ecology in statute to use water banking statewide for the following purposes (RCW 90.42.100):

- To authorize the use of trust water rights to mitigate for water resource impacts, future water supply needs, or any beneficial use under chapter 90.03, 90.44, or 90.54 RCW, consistent with any terms and conditions established by the transferor, except that within the Yakima river basin return flows from water rights authorized in whole or in part for any purpose shall remain available as part of the Yakima basin's total water supply available and to satisfy existing rights for other downstream uses and users;
- To document transfers of water rights to and from the trust water rights program; and
- To provide a source of water rights the department can make available to third parties on a temporary or permanent basis for any beneficial use under chapter 90.03, 90.44, or 90.54 RCW.⁶

Water Banking Grants Pilot Program

Successes

Following the adoption of the 2021 legislative budgets, Ecology began to develop the framework for the new water banking grants pilot program. Since then we have:

- Identified Washington counties that are eligible for grant funding.
- Developed scoring criteria to evaluate grant applications.
- Compiled guidelines along with other Ecology grant support materials into a new [guidance](#)⁷ document for the public [launch of the program](#)⁸ in November of 2021.

We established the grant program on a first-come, first-served basis (rather than creating a deadline for submittal and competition) due to the short program timeline and the complex

⁶ RCW 90.42.100

⁷ <https://apps.ecology.wa.gov/publications/SummaryPages/2111023.html>

⁸ <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Water-banks/Water-banking-grants>

process for applicants to develop appropriate water banking plans. This has allowed us to concentrate our efforts on working closely with applicants to ensure grant agreements meet legislative requirements.

Applications for funding

Ecology conducted meetings with six county governments to discuss potential water right acquisitions under this program. We expect to receive at least five applications for pilot program funding before the end of the biennium. As of July 2022, Ecology has received three applications requesting a total of \$4,541,695 under this funding program:

1. **Chelan County:** Chelan County submitted an application in December 2021 proposing acquisition of three water rights in WRIs 45 and 47 to serve multiple purposes within a new, county-wide water bank. The application requested \$1,678,250. Although approved for funding the final grant agreement is still being negotiated.
2. **Okanogan Conservation District:** Okanogan Conservation District submitted an application in July 2022 proposing acquisition of a water right in the Methow River watershed (WRIA 48) to serve a new, county-wide water bank. The application requested \$863,445 and is currently undergoing evaluation and technical review by the Ecology team.
3. **Yakima County:** Yakima County submitted an application in September 2022 proposing acquisition of a water right and purchase of a mitigation allotment to expand their existing mitigation program into a county-wide water bank. The application requested \$2,000,000 and is currently undergoing evaluation and technical review by the Ecology team.

Challenges

Ecology identified the following challenges with the program:

- We received feedback from potential applicants that it is difficult to negotiate and establish a qualified “valid interest” in a water right acquisition because funding for that water right acquisition is contingent on acceptance of the grant application and a tentative determination that the water right is valid.
- Several potential applicants expressed interest in a more flexible standard for the one-third dedication of acquired water rights to permanent instream flows. Instead of requiring a dedication of each acquired water right, some potential applicants suggested dedicating a net one-third of all water rights acquired in order to maximize their out-of-stream mitigation value. Making that change to increase flexibility may have negative consequences on the streamflow benefits afforded from this provision.
- The proviso requires applicants to identify the proposed future uses for water rights they intend to mitigate with the acquired rights under this program. In some cases, it may be difficult to identify specific future uses to be served. Additionally, some potential

applicants have said that describing these water needs is unnecessary given that the general value of a water right for future mitigation is evident.

Actions Taken Under Existing Authority

In the 2021 operating budget, the Legislature directed Ecology to take action under existing authority to modify the process for the review of water banks and other improvements for processing trust water rights. These activities are a continuation of Ecology's implementation of recommendations from the [2020 Advisory Group on Water Trust, Banking, and Transfers](https://www.ezview.wa.gov/site/alias__1962/37617/advisory-group-water-trust-banking-transfers.aspx).⁹

Trust policy and guidance

On June 30, 2022, Ecology's Water Resources Program adopted a new policy and updated existing guidance on the administration of the TWRP. We received extensive comments from the public during two comment periods. These two documents are now available on our [Trust Water Rights Program](https://apps.ecology.wa.gov/publications/summarypages/2211012.html)¹⁰ and [Water Banks](https://apps.ecology.wa.gov/publications/summarypages/ECY070679.html)¹¹ websites:

- [POLICY 1010: Administration of the Trust Water Rights Program](https://apps.ecology.wa.gov/publications/summarypages/2211012.html).¹²
- [GUIDANCE: Administering the Trust Water Rights Program](https://apps.ecology.wa.gov/publications/summarypages/ECY070679.html).¹³

Policy 1010 addresses the Legislature's direction that key information about water banks be made available to the public. Prospective water bankers must now submit a [Request to Establish or Modify a Water Bank form](https://apps.ecology.wa.gov/publications/summarypages/2211012.html)¹⁴ that prompts Ecology to set up a meeting to discuss the proposal. This form requires a detailed proposal describing the new water uses that will be mitigated and the water right(s) that will be held in trust to mitigate those new uses. A summary of the water banking proposals selected for processing will be posted on our website for a 30-day comment period.

Policy 1010 also states specifically that water rights used for long-term or permanent mitigation of new out-of-stream uses must first undergo a tentative determination of extent and validity.

This policy does not address municipal water rights. We are continuing to work with Tribes and stakeholders to update the municipal water law policy to clarify specific attributes that apply to municipal water suppliers in the use of the TWRP.

Temporary donations

We created a more streamlined process for water right holders to donate water rights into the TWRP through use of the new form: [Temporary Donation of a Water Right to the Trust Water](https://apps.ecology.wa.gov/publications/summarypages/2211012.html)

⁹ https://www.ezview.wa.gov/site/alias__1962/37617/advisory-group-water-trust-banking-transfers.aspx

¹⁰ <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Trust-water-rights>

¹¹ <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Water-banks>

¹² <https://apps.ecology.wa.gov/docs/WaterRights/wrwebpdf/pol1010.pdf>

¹³ <https://apps.ecology.wa.gov/publications/summarypages/2211012.html>

¹⁴ <https://apps.ecology.wa.gov/publications/summarypages/ECY070679.html>

[Rights Program](#).¹⁵ This form can be submitted by email and is generally processed within a few weeks. We then notify the water right holder if their temporarily donated water right has been accepted into the Trust Water Rights Program.

Website and transparency improvements

We post a notice on our website any time a trust water right is created. We improved our website by making it simpler, clearer, and easier to find. The website also allows the public to review water banking proposals before the water banks are developed, as well as newly-executed water banking agreements. These documents are now posted on our [notices website](#)¹⁶ for a 30-day comment period.

Developing Water Right Transfers, Water Banking, and Trust Recommendations

The 2021 state operating budget directed Ecology to work with Tribes and stakeholders to “refine recommendations on improving the state’s framework for water banking, water trust, and water right transfers.” Specifically, these recommendations are intended to address “issues of private investment in water banking and the merits of incentives and regulations pertaining to the out-of-basin transfer of water rights.”

Tribal and stakeholder engagement

The work directed by the Legislature in the 2021 state operating budget was intended to build on the process completed in 2020 by Ecology’s Advisory Group on Water Trust, Banking, and Transfers.¹⁷ This prior process included Ecology convening multiple meetings with Tribes, local governments, environmental advocacy organizations, farming industry representatives, business interests, and entities involved in water banking.

In 2021, Ecology partnered with graduate students at the University of Washington Evans School of Public Policy & Governance to develop a [study on the impacts of out-of-basin water right transfers](#).¹⁸

We also engaged in another set of conversations with Tribes and water banking stakeholders in 2021 to further explore specific concerns about private investment in water rights, potential speculation using the trust water rights program and water banks, and the impacts of out-of-basin water right transfers. We analyzed information in our water right database and researched efforts in other states to address these concerns. These findings and a detailed explanation of the concerns driving this work were presented in an update to the House Rural Development, Agriculture, and Natural Resources Committee on November 19, 2021.

¹⁵ <https://apps.ecology.wa.gov/publications/SummaryPages/ECY070488.html>

¹⁶ <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Public-notices-comments>

¹⁷ <https://apps.ecology.wa.gov/publications/documents/2011091.pdf>

¹⁸ <https://apps.ecology.wa.gov/publications/documents/2111013.pdf>

In the summer of 2022 Ecology developed a number of [draft discussion papers](#)¹⁹ describing possible changes to statute that could help address existing concerns and conducted a series of meetings with Tribes and stakeholders to gather feedback on these ideas. Additionally, Ecology held a 30-day comment period to gather feedback from the public on the draft version of this report (all comments received are compiled in Appendix C). Input during these discussions and from the public comments were key considerations that we used to develop our recommendations.

Results from policy concept evaluation

We evaluated a number of concepts and divided them into three categories:

- Policy concepts that we recommend the for Legislature action.
- Policy concepts that warrant further analysis by the Legislature.
- Policy concepts that we considered, evaluated, and discussed with Tribes and stakeholders but do not recommend additional analysis at this time.

Ecology recommends the Legislature consider the following policy changes to address concerns regarding out-of-basin water right transfers, water banking, and the TWRP.

Recommended Legislative Actions

Continue funding the water banking grants pilot program

Recommendation: We recommend that the Legislature continue funding the water banking grants pilot program, consistent with Section 6029 of the Governor’s FY 2023-25 Capital Budget proposal.

The 2021 state operating budget proviso that funded this work (Section 302 of ESSB 5092) also created a water banking grants pilot program to fund the development of public or public/private partnership water banks to serve rural, headwater counties. This program provides valuable support for rural communities to compete in the water rights market and to secure local water availability in the future.

Locally-developed water banks can address multiple concerns regarding out-of-basin transfers, water banking prices, and private investment in water rights. This program is already operational and can continue to provide benefits with ongoing funding as more applicants are able to develop water banking proposals. We do not believe that the limited number of applications received to date shows a lack of interest, but instead reflects the complicated and time-intensive development process required for water banking projects. As a result, we expect this program to continue to garner new interest over time as potential applicants identify new acquisition opportunities.

¹⁹ https://www.ezview.wa.gov/site/alias__1962/37747/trust_transfers_water_banking_legislative_report.aspx

The feedback we received strongly supported this concept as an incentive-based approach with clear benefits for water availability. There was also support for the benefits to streamflow that the program would provide through the one-third dedication of acquired water rights for permanent instream flows requirement.

Water right ownership and sales disclosure

Recommendation: We recommend that the Legislature explore creating a statutory requirement that all water right sales or ownership changes must be reported to the state and made available for public view.

This recommendation would address concerns about private entities buying and owning large quantities of water rights that could lead to power over water supplies, influence on water prices in some areas, and opportunities for speculation.

Under current law, Ecology's ability to analyze water right ownership is limited because we do not collect water right sales data. We obtain updated water right ownership information only when a water right change application is filed or through an adjudication process. Even when water right sales and ownership changes are reported through the payment of the real estate excise tax (REET), this information is not centralized or readily available to the public. Further, when land is sold along with appurtenant water rights, the water rights are not often identified in the conveyance deed or REET. As a result, water right ownership data are outdated and neither Ecology nor the public have an accurate accounting of current investments in the state's water rights.

This recommendation to improve management of water right sales information could use existing processes for gathering water right information. For example, water right sales disclosure requirements could be aligned with those of land and mineral rights (RCW 82.45.035). County assessors' offices also collect land sale and ownership change information through the real estate excise tax process and report it to the Department of Revenue. This existing process could be used to capture water right sales and ownership information when water rights are sold. As a part of this process, the water right ownership information could be added to Ecology's existing online water rights database.

This is similar to an existing process in Montana, where the Department of Revenue reports on water right sale and ownership changes to the Department of Natural Resources and Conservation. Montana also requires that updated ownership information be submitted directly to their Department of Natural Resources and Conservation when a water right changes ownership without an accompanying land sale.²⁰

Improving the transparency and public accessibility of water right sales information will allow Ecology and the public to more thoroughly evaluate the potential effect of water right sales and ownership on their communities. This includes the ability of Tribes to assess the effects of water

²⁰ <http://dnrc.mt.gov/divisions/water/water-rights/water-right-ownership-updates#:~:text=Form%20No.%20642%2C%20Use%20this%20form%20for%20a,a%20deed%20or%20other%20recorded%20document%20of%20conveyance>

right sales and ownership on streamflows and other priorities. It will also enhance Ecology's ability to track and evaluate speculation and private investment concerns. Aligning water right sales disclosure requirements with those for other natural resources could be implemented without creating wholly new processes.

Feedback on this recommendation was generally supportive and emphasized a need for this information to be easily accessible to the public in a usable format.

Extend public interest evaluations to surface water right changes

Recommendation: We recommend that the Legislature explore requiring that the public interest be evaluated for surface water right change applications.

Ecology considers the public interest and public welfare in various situations involving water rights, including for applications for a new water right permit under RCW 90.03.290, and exercising a trust water right under RCW 90.42.050. Additionally, Ecology considers the public welfare for groundwater change applications. However, Ecology does not evaluate public interest in surface water right changes under RCW 90.03.380.

If the Legislature were to change statute to extend public interest policy evaluations to surface water right changes, there would be a consistent legal framework for evaluating both surface and groundwater right changes. This change may increase the amount of time Ecology needs to process these water right decisions. Depending on the public interest criteria that would be developed, these changes could also reduce water right flexibility by potentially making it harder to change or transfer surface water rights.

Overall, this recommendation has the potential to address concerns regarding out-of-basin water right transfers and potential speculation involving surface water right changes if those topics are considered as part of the public interest evaluation. This recommendation would also provide an opportunity to consider other factors in Ecology decisions on surface water right changes, including factors that overlap with Tribal interests (such as protecting streamflows).

There was mostly strongly support for extending public interest evaluations to surface water right changes as a matter of consistency and coherence. Concerns focused primarily on the likelihood that this recommendation would make surface water right transfers more difficult to complete.

Concepts Warranting Further Analysis

The following policy concepts have outstanding implementation questions due to a lack of complete information or uncertainty about their effectiveness and consequences. If the Legislature were to seek to modify statutes to implement these policy concepts, Ecology recommends that further analysis would be needed before they could be effectively implemented.

Define public interest evaluation criteria in statute

Consideration: The Legislature could define the public interest in statute and prescribe criteria for how to evaluate the public interest in water right decisions. A statutory definition could directly address the concerns we have heard about speculation, private investment, and impacts on local communities from surface water right transfers.

RCW 90.54.020 discusses general consideration of the public interest in water resources management. Ecology's Trust Water Rights policy (POL-1010) provides a public interest definition that received significant stakeholder and Tribal feedback. The policy states that public interest includes, "environmental impacts, with emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational, and economic effects; and impacts on publicly owned resources and facilities."

The comments we received emphasized the importance that a public interest definition has for future water right decisions. There was general support for further refining the public interest definition from the one currently in POL-1010. However, a broad group of Tribes and stakeholders expressed significant concerns about the complexity of defining the public interest and questioned whether the outcome would sufficiently reflect their interests. We also received comments stating concerns that a legislative process for defining the public interest may not provide for sufficient participation and input for Tribes and stakeholders.

Outstanding questions for implementing this concept include:

- How would a definition of the public interest or criteria for evaluating the public interest weigh the competing and strongly held interests?
- How can adequate input and participation by Tribes and stakeholders for defining public interest be ensured?

Fee for transferring a water right out of its basin of origin

Consideration: The Legislature could amend statute so that a local government (e.g., a city or county) would be compensated at the time a water right is transferred out of basin.

A fee could be levied by Ecology or another state agency, based on the volume of water being transferred out of basin (e.g., on a per acre-foot basis). Revenues from this fee could also fund

local water banks to secure other water rights for local supplies and protect against additional water rights being transferred out of their basin of origin.

A similar concept exists in Nevada law, where the county of origin for an out-of-basin groundwater right transfer can choose to impose a fee of \$10 per acre-foot for a water right transfer, or develop an alternative mitigation plan with the transferring water right holder. Mitigation plans of this type can include conditions such as reserving designated water rights in the county of origin or providing other compensation to the community. In each case, the state engineer has final approval of the fee or mitigation plan.²¹

Feedback on this recommendation was mixed, with some supporting this approach as an incentive-based concept that directly targets economic impacts of out-of-basin water right transfers while still allowing water use flexibility. However, others did not think this approach was sufficient as it still allows water rights to be transferred out of their basin of origin.

Outstanding questions for implementing this concept include:

- How much should be assessed to compensate for the economic impacts of these transfers? Significant analysis would be required to accurately determine the long-term economic impacts on local headwater communities.
- Would use of the fee be limited to addressing future water supply challenges in these headwater basins, or allow local governments to use the revenues for general governmental services?
- Would the fee apply to all out-of-basin water right transfers, including public entities (such as Ecology's Office of Columbia River)?

Limit enrollment time period and re-enrollment for temporary donations

Consideration: The Legislature could place a limit on how long a water right can be enrolled as a temporary donation and restrict the number of times it can be re-enrolled as a temporary donation.

This concept could help address use of the TWRP for speculation by limiting the ability of TWRP users to “park” a water right in temporary donation for an indefinite period in order to maximize its resale value. Re-enrollment limits would also be necessary to ensure that the same water rights are not continually re-enrolled when the temporary donation expires.

Although this concept could help prevent speculation using the TWRP, it could be a disincentive for all water right holders to use temporary donations. This could reduce the streamflow benefits of the TWRP as more water right holders would instead choose to use their water rights for out-of-stream purposes to prevent relinquishment. For this reason, feedback on this concept was mixed.

²¹ https://nevada.public.law/statutes/nrs_533.438

Outstanding questions for implementing this concept include:

- How would Ecology address requests to administratively split water rights to avoid the time and re-enrollment limits? Speculative users of the TWRP may attempt to circumvent this regulation by repeatedly modifying and re-enrolling their water rights.
- Would re-enrollment limits reset with a change in water right ownership?
- What length of time would best curb speculation risk and minimize impacts to the streamflow benefits from temporary donations?

Require a “cool-off” period for water right changes after a temporary donation is removed from the TWRP

Consideration: The Legislature could impose a “cool-off” period after a temporary donation expires, during which the water right’s attributes cannot be changed.

Instead, the water right would revert to its original purpose and place of use during this cool-off period. This would prevent speculators from quickly “flipping” water rights for short-term profit after taking advantage of the protection from relinquishment provided by the TWRP.

Although this concept could help prevent speculation using the TWRP, it could be a disincentive for all water right holders to use temporary donations. This could reduce the streamflow benefits of the TWRP as more water right holders would instead choose to use their water rights for out-of-stream purposes to prevent relinquishment. For this reason, feedback on this concept was mixed.

Outstanding questions for implementing this concept include:

- What length of time for the cool-off period would best curb speculation risk and minimize impacts to the streamflow benefits?
- How would Ecology implement this provision and ensure that a water right does not undergo a change during the proposed cool-off period?

Require a portion of the water rights used for water banking to be permanently dedicated for streamflow purposes

Consideration: The Legislature could amend statute to require that a portion of each water right used for water banking be permanently dedicated to benefit streamflow.

This requirement could be modeled on the current water banking grants pilot program, in which one-third of each water right that is acquired must be permanently dedicated to benefit streamflow. This change would help ensure that use of the state’s TWRP for water banking purposes balances public benefits for streamflow with potential private profits.

Feedback on this concept was mixed. Some voiced strong support for the potential streamflow benefits of this concept, while others thought the policy concept would discourage water

banking in general. Although the concept would improve streamflows, there were concerns raised about the ability to protect these potential instream flow trust water rights from junior users.

There were also some concerns about private property “takings” issues with this concept, but there is also the contrary opinion that it is legitimate for Ecology to negotiate conditions on voluntary bilateral agreements for the use of the TWRP for water banking (as stated in Ecology’s POL-1010).

Outstanding questions for implementing this concept include:

- What proportion of a water right used for water banking should be permanently dedicated for streamflow under this requirement?
- Would the streamflow dedication amount take into account potential water supply effects from climate change?
- Would the permanent streamflow dedication be assessed to each individual water right used for water banking, or from the total volume of all water rights held in a water bank at the water bank owner’s discretion?

Regulate water bank prices like other water utilities

Consideration: The Legislature could establish new state oversight over the prices charged by privately owned and operated water banks.

One concern about significant private investment in water banking is that it could result in consumers paying higher prices. Having a state entity regulate water bank prices, similar to the current oversight of privately owned and operated water utility prices, could help address this issue. For example, the Washington Utilities and Transportation Commission (UTC) is charged with ensuring fair pricing of private and investor-owned water utilities of certain sizes.

Currently, water banks report their prices to Ecology. We then aggregate and publish pricing and fee information for these water banks on Ecology’s water banking website (RCW 90.42.170).²² Ecology does not directly regulate the prices paid for mitigation from these water banks. In contrast, water utilities currently overseen by the UTC must receive UTC approval to adjust the rates they charge for water services, by showing that this additional revenue is necessary for safe and reliable service.²³

Direct regulation of water bank prices could better align the price that users pay for mitigated water supply with the cost of operating the water bank and prevent price gouging. No state agency currently plays this regulatory role for water banks. Assigning this new body of work to an existing agency with similar consumer protection regulatory oversight could help reduce the cost of implementing this concept.

²² <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Water-banks#searchbanks>

²³ <https://www.utc.wa.gov/sites/default/files/2021-02/Ratemaking%20Process.pdf>

There was general support for this concept because it could help prevent price gouging in communities with limited water supplies. There was agreement that certain water banks (particularly private water banks serving domestic and municipal uses) are akin to water utilities and that their pricing should be regulated similarly. Some thought that the policy outcome of preventing price gouging by water banks could also be accomplished by other market-based methods, such as establishing public water banks to compete with private water banks in areas with limited water supply.

Outstanding questions for implementing this concept include:

- If enacted, which state entity should take on this expanded regulatory responsibility?
- What commitment of staff time and resources is necessary to establish this new type of price oversight? What amount and type of training and rulemaking would it require?

Implement fees for establishing a new water bank

Consideration: The Legislature could adopt fees for Ecology to charge for the resources required to review water banking proposals and oversee implementation of water banking agreements.

Establishing a water bank is a complex process that requires negotiating a water banking agreement between Ecology and the water bank operator. Implementing these water banking agreements can require a substantial investment of Ecology staff time and resources, limiting our capacity to process other water banking requests.

Charging a fee that recovers Ecology's staff costs for processing and overseeing implementation of water banking agreements could be used to increase our staff capacity to review water banking proposals. Additional resources would provide benefits by ensuring consistent and effective water banking practices and procedures and reduce processing times for water banking proposals.

This concept received broad support because it could increase the efficiency of processing water banking proposals.

Key considerations and outstanding questions for implementing this concept include:

- How would the fee be structured? Should there be only an initial review fee, or also annual fees to fund staff time and resource requirements needed for monitoring and assisting water bankers in operating and reporting after water banks are established?
- Should public and non-profit entities be exempt from this fee?

Concepts Not Recommended At This Time

Ecology reviewed a number of policy concepts for potential legislative consideration, but does not recommend the Legislature consider these concepts for changes to statute at this time.

Requiring new water bank ownership to be public entities or public/private partnerships

Not currently recommended: This concept would restrict eligibility for using the TWRP to establish new water banks to public entities or entities engaged in formal partnership with a public entity (e.g., public/private partnership). This concept could help address concerns about private investment in water banking. This eligibility restriction is currently a requirement for applicants to the water banking grants pilot program.²⁴

This change would ensure that new water banks are created by entities that are responsible to the public and committed to helping manage the state's water resources. However, it would also reduce the amount of water supply made available through water banks by preventing the creation of new private water banks.

Feedback for this recommendation was mostly negative because it would decrease water availability. Additionally, others noted that public entities already play a large role in water banking and was therefore seen as unnecessary.

Allow Ecology to restrict out-of-basin water right transfers in some basins through rulemaking

Not currently recommended: This concept would provide Ecology clear authority to conduct rulemaking to restrict out-of-basin water right transfers originating from specific headwater basins. This concept would help address the impacts of downstream, out-of-basin water right transfers. However, rulemaking requires a substantial investment of staff time and resources. This concept would also reduce water right flexibility to meet changing demands and preclude any streamflow benefits that can occur in the intervening reach from downstream water right transfers.

Ecology has evaluated out-of-basin water right transfers and concluded that only a small number of these transfers have recently occurred (see Appendix B for details). We have determined that the benefits of restricting out-of-basin water right transfers would not justify the time and cost associated with the rulemaking process.

Feedback on this concept was mostly negative. There was opposition to losing the flexibility to transfer water rights out of their basin of origin to meet downstream water use needs. There was limited support for the basin-specific approach as well as concerns that it would take a long time to implement.

²⁴ Water Banking Pilot Grants: 2021-2023 Funding Guidelines (page 8):
<https://apps.ecology.wa.gov/publications/SummaryPages/2111023.html>

Establish a right of first refusal for out-of-basin water right transfers

Not currently recommended: A right of first refusal would allow local governments the opportunity to buy water rights proposed for out-of-basin transfer at a fair market price before the transfer occurs. This concept could help address the negative economic and water supply impacts of these transfers by ensuring an opportunity for local governments to keep existing water rights within their basin of origin. However, due to staff and funding limitations at the local government level, a right of first refusal may not be effective at keeping water rights in their basins of origin if local governments are unable to act on this acquisition opportunity. Additionally, there has been recent case law that creates uncertainty about the constitutionality of this proposal.

There was general opposition to this concept because of a lack of acquisition funding and constitutionality concerns.

Establish a mechanism for transferring water rights upstream

Not currently recommended: This concept would create a statutory mechanism to allow Ecology to approve upstream transfers of water rights to help address the loss of water availability in headwater basins due to downstream, out-of-basin water right transfers. However, this concept would create a substantial administrative burden to create a tracking system for these water rights to ensure that water rights issued in the intervening river reach (the portion between the old and new points of diversion/withdrawal) would not be impaired. This concept has the potential to reduce streamflow in some reaches. It may also be ineffective if entities in headwater basins do not have sufficient funding to acquire water rights and move them back upstream.

There was general opposition to this concept due to fears about streamflow impacts and the difficulty of implementing and tracking these upstream transfers.

Implement a ban on out-of-basin transfers

Not currently recommended: This concept would ban all out-of-basin water right transfers, either in specific basins or across the whole state. This ban would directly prevent any negative impacts from new out-of-basin transfers, but would also limit water supply flexibility and the potential streamflow benefits associated with downstream water right transfers.

Ecology evaluated the number of out-of-basin transfers. We did not find a large number of these transfers that have occurred recently (see Appendix B for more details). Therefore, the data do not justify a ban on all out-of-basin water right transfers.

Most feedback we received strongly opposed to this concept, but some supported it due to their concerns about the impacts of out-of-basin water right transfers in headwater basins.

Cap the size of water rights that can be temporarily donated into the TWRP

Not currently recommended: This concept would limit the total volume of a water right that can be temporarily donated into the TWRP. This cap would help address speculation limiting temporary donations to smaller amounts of water, reducing the potential negative impacts. However, requiring larger water rights to be used out-of-stream to protect them from relinquishment would reduce the streamflow benefits of the TWRP.

Most feedback opposed this concept due to its impact on streamflow and reduced flexibility of the TWRP. Additionally, it would be difficult to preclude certain workarounds, such as administratively splitting a water right into smaller amounts for the sole purpose of avoiding this cap.

Restrict use of the TWRP to in-state entities

Not currently recommended: This concept would require any entity using the TWRP for water banking purposes to be resident within Washington state. This change is intended to specifically target out-of-state investors and restrict their ability to engage in speculation and to profit off the state's water resources. However, the success of this concept is contingent upon the definition of a Washington state entity. This definition involves corporate law, which is outside of the expertise of Ecology and would be a difficult to implement.

There was strong opposition to this concept because there are too many possible loopholes and because they did not believe it would be effective at preventing speculation.

Direct Ecology to actively create and promote water markets

Not currently recommended: This concept relies on the theory that increasing water rights and promoting water banking markets would improve the efficiency of such markets through competition. To implement this concept Ecology could be granted new authorities by the Legislature to take a more substantial role in creating and promoting water markets throughout the state. This role could include creating and operating centralized trading platforms for water rights, creating basin/region specific standards to expedite certain water right transactions, and actively taking part in water right price discovery and research throughout the state.

Promoting water markets would significantly change Ecology's role. It would require substantial staff time and resources beyond our current capabilities, potentially resulting in negative impacts to existing water right processing and other services. Additionally, these changes are not guaranteed to effectively reduce or eliminate concerns regarding speculation, out-of-basin water right transfers, or private investment in the state's water rights and in some cases may exacerbate these concerns.

Feedback on this concept was mixed. Some wanted more efficient approval of water right changes. Others were concerned that additional emphasis on promoting water markets would further commoditize the state's water resources, creating more opportunities for private profiting at the expense of public benefits.

Concerns and Tradeoffs

Throughout Ecology’s outreach and engagement process, we heard a number of concerns about the negative effects of private investors acquiring and selling water rights. Specifically, these concerns related to out-of-basin water right transfers, speculation using the TWRP, and privately owned water banks. A more detailed explanation of these concerns and the tradeoffs of making changes to address them are described below.

Out-of-basin water right transfers

Concern: As discussed above, an out-of-basin water right transfer refers to a change of the original point of diversion or withdrawal for a water right to a new location in a different downstream watershed in a different Water Resource Inventory Area (WRIA). These water right transfers typically move a water right from an upstream waterbody (e.g., a tributary) downward through the confluence of the next connected waterbody (e.g., the main stem of the river).

Other types of transfers (sometimes called “inter-basin transfers”) move water rights across basins that involve two independent waterbodies. Inter-basin transfers are generally not approved in Washington because such a transfer would create an impairment, and thus are not a consideration in this report. Figure 1 depicts the difference between an allowed downstream, out-of-basin water right transfer and an inter-basin water right transfer.

Figure 1. Downstream, Out-Of-Basin Water Right Transfer Compared To Inter-Basin Water Right Transfer



When a water right’s point of diversion or withdrawal is transferred to a downstream basin, the resulting change in usage may result in negative impacts to local communities in the water

right's basin of origin.²⁵ This is due to the fact that, once transferred downstream, it is very difficult to transfer a water right back upstream without impairing other water rights. As a result, these transfers often represent a permanent loss of their associated economic productivity in the basin of origin.

However, downstream out-of-basin water right transfers also provide valuable water use flexibility throughout the state and can provide streamflow benefits.²⁶ The streamflow benefits occur because the water that was previously used at the original, upstream place of use now stays in a longer stretch of the river as it travels downstream to the new place of use.

Since 2003:

- The majority of the volume of water transferred out of basin in Washington has been transferred through Ecology's water banks on the Columbia River.
- The amount of water transferred out of basin accounts for a small percentage of the total certificated surface water rights in their basin of origin (ranging from 0-4 percent of the total certificated surface water rights in those basins) (see Appendix B for more details).²⁷

TWRP and speculation

Concern: Water rights are protected from relinquishment and provide streamflow benefits while enrolled in the TWRP. The protection from relinquishment has raised concerns that private investors may buy water rights and hold them in the TWRP for the sole purpose of selling them for a profit in the future. Additionally, we have heard concerns about allowing the unperfected portions of municipal water rights (which already have protection from relinquishment) to use the TWRP. Incentivizing use of this state-run program and a publicly owned resource for private profit and potential speculation is not considered to be in alignment with the original intent of the TWRP.

Ecology's databases are not designed to track information that could specifically identify speculative activity. Therefore, based on the available data in Ecology's water right databases, we cannot determine if speculation is occurring using the TWRP.

Our analysis determined that 36 percent of the water rights that expired from temporary trust donations since 2003 subsequently went through a water right change. This could indicate activities associated with selling the water rights occurred. However, these rights represented only a small volumetric portion of the water removed from temporary donation (about five percent).

²⁵ https://fortress.wa.gov/ecy/ezshare/ocr/crpag/3-09_Protecting_Rural_NE_Wa_economies_report.pdf

²⁶

https://www.ezview.wa.gov/Portals/_1962/Documents/watertrust/Sales%20and%20Transfers%20Background%20Paper.pdf

²⁷ Donations (temporary and permanent) to the TWRP are not included in this accounting of out-of-basin water right transfer activity.

Table 1. Expired Temporary Donations and Subsequent Water Right Changes

Action After Expiring From Temporary Donation	# of Water Rights	Volume of Water (acre-feet/year)
Re-enrolled as a Temporary Donation	100	1,022,000 ¹
Did Not Re-enroll and Changed Attributes	121	51,183
Did Not Re-enroll and Did Not Change Attributes	115	1,054,579

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).

Additionally, most temporarily donated water rights in the TWRP are small (median of 72 acre-feet per year) and remain in trust for a limited time (an average of 2.7 years for past temporary donations and 5 years for currently-enrolled temporary donations). (See Appendix B for more details.) Taken together, this information does not support the conclusion that the TWRP has contributed to large scale speculation.

Private ownership of water banks

Concern: Ecology's water banking program provides benefits by making water available to new users in areas where new water supplies are otherwise limited. It also gives flexibility to water bank owners by allowing a water right to mitigate new uses over time while protecting that water right from relinquishment. Ecology has heard concerns that water banking may allow private entities to gain influence over water availability and prices in some areas. There are also concerns that private entities are benefiting from this state-run program, using publicly owned resources without any guarantee of public benefit. While the majority of the water banks in the state were created by private entities (53 percent), about three quarters of the quantity of water rights are held in water banks owned by Ecology or other public and non-profit entities. (See Appendix B for more details.). The potential effects on water availability and price from private ownership and influence is difficult to determine with available information.

Other Factors

Land ownership trends

Concerns about private investment in the state's water resources are inherently connected to broader trends in land ownership, particularly agricultural land. Many of the state's water rights are tied to agricultural lands that may be increasingly sold to large agricultural corporations²⁸ or

²⁸ <https://www.ers.usda.gov/amber-waves/2020/february/consolidation-in-us-agriculture-continues/>

finance companies as investments.²⁹ These larger economic trends in agricultural consolidation and land investment may be a main driver for some of the more specific concerns about water right transfers, water banking, and the TWRP. Although Ecology regulates these specific functions and programs, these larger economic trends exceed our authority to regulate or evaluate broad new policy responses.

Climate change

We have had extensive discussion of the impacts of climate change on the state's water resources in the advisory group process. We received yet more input in comments on the draft of this report. As downstream out-of-basin water right transfers and the use of the TWRP involve water rights that have already been authorized for use, we do not consider the use of the TWRP for water banking to compound climate change impacts related to instream water resources. Downstream out-of-basin water right transfers and temporary donations into the TWRP do not increase water use, but instead provide streamflow benefits. These types of water right transfers should provide a buffer against potential reduction in summer flows that may be exacerbated by climate change.

Protecting streamflow benefits of trust water rights

Concerns have been raised, especially in the comments on the draft of this report, about the capability for Ecology to protect trust water rights acquired explicitly to improve streamflow through lease, purchase, or other means. This issue is difficult to address broadly. Ecology's authority to protect acquired instream flow water rights is subject to the priority system, existing instream protections (such as adopted instream flow rules), and specific hydrogeology for the specific stream or river reach.

Conclusion

In response to the 2021 Operating Budget proviso, Ecology has created a TWRP policy, updated the TWRP guidance, and implemented a number of changes to our forms and website to improve transparency and public information around water banks. We have also developed a water banking grants pilot program that has received three applications. Finally, we engaged extensively with Tribes and stakeholders to evaluate possible actions the Legislature could take to improve the state's framework for water banking, the TWRP, and out-of-basin water right transfers.

²⁹ <https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2021/06/23/mormon-church-group-outbids-bill> and <https://landreport.com/2021/01/bill-gates-americas-top-farmland-owner>

Appendix A. Full Budget Proviso Text

CAPITAL BUDGET – SHB 1080

Sec 3112 – ECY – Page 175

The appropriation in this section is subject to the following conditions and limitations:

(1)(a) The appropriations in this section are provided solely for the department to administer a pilot grant program for water banking strategies to meet local water needs.

(b) \$2,000,000 is provided solely for qualified applicants located within the Methow River Basin.

(2)(a) Grant awards may only be used for:

- (i) Development of water banks in rural counties as defined in RCW 82.14.370(5);
- (ii) Acquisition of water rights appropriate for use in a water bank including all costs necessary to evaluate the water right for eligibility for its intended use; and
- (iii) Activities necessary to facilitate the creation of a water bank.

(b) For applicants located outside of the Methow River Basin, grant awards may only be used for the development of water banks in rural counties that have the headwaters of a major watershed within their borders and only for water banking strategies within the county of origin. For purposes of this section, "major watershed" has the same meaning as shoreline of statewide significance in RCW 90.58.030(2)(f)(v) (A) and (B).

(3) Grant awards may not exceed \$2,000,000 per applicant.

(4) For the purposes of a grant pursuant to this section, a water bank must meet water needs, which include, but are not limited to, agricultural use and instream flow for fish and wildlife. The water bank must preserve water rights for use in the county of origin and for permanent instream flows for fish and wildlife through the primary and secondary reaches of the water right.

(5) To be eligible to receive a grant under this section, an applicant must:

- (a) Be a public entity or a participant in a public-private partnership with a public entity;
- (b) Exhibit sufficient expertise and capacity to develop and maintain a water bank consistent with the purposes of this appropriation;
- (c) Secure a valid interest to purchase a water right;
- (d) Show that the water rights appear to be adequate for the intended use; and
- (e) Agree to have one-third of any water right purchased with the funds appropriated under this section to have its purpose of use changed permanently to instream flow benefiting fish and wildlife.

OPERATING BUDGET – ESSB 5092

Sec. 302 – ECY – Page 316-318

(31) \$40,000 of the general fund—state appropriation for fiscal year 2022 is provided solely for the department to:

(a) Develop recommendations and implement actions under existing authority to modify the process for the review of water banks to ensure that key information is made available to the public. The changes should consider requirements such as:

(i) A description of a proposed banking and operations plan, including the needs and customers the bank intends to serve, the geographic area to be served, the portfolio of available mitigating rights and their allowed uses, any anticipated change in use of available mitigating rights, any limitations the bank intends to impose in offering water rights for use, and anything else the department deems necessary to promote transparency and the public interest;

(ii) Reporting requirements that include any changes in the intended customers or needs being serviced by the bank, any change in the geographic area to be served, any anticipated change in the use of available mitigating rights, any change in limitation the banks intends to impose in offering water right for use, and any other change the department deems necessary to promote transparency and the public interest; and

(iii) Reporting requirements for publishing each change and providing notice to pertinent parties and soliciting public comment.

(b) The department must build off its work directed under chapter 357, Laws of 2020 to refine recommendations on improving the state's framework for water banking, water trust, and water right transfers. Recommendations should address issues of private investment in water banking and the merits of incentives and regulations pertaining to the out-of-basin transfer of water rights. In refining its recommendations, the department shall consult with Tribes and consider input from stakeholders with expertise in water banking.

(c) By December 31, 2021, the department shall update the appropriate committees of the legislature on its progress on refining policy recommendations under this section, including any recommended statutory changes, and on the status of the pilot grant program established under subsection (32) of this section.

(d) By December 1, 2022, the department shall submit a report to the appropriate committees of the legislature on work conducted pursuant to this section and on the pilot grant program established under this section. The report should include but is not limited to a summary of water banking activity funded including success and challenges, a summary of outcomes of the pilot grant program, a summary of actions taken under current authority, and policy recommendations. The policy recommendations may also come in the form of agency request legislation.

(32) \$4,500,000 of the general fund—state appropriation for fiscal year 2022 and \$4,500,000 of the general fund—state appropriation for fiscal year 2023 are provided solely for the department to administer the pilot grant program for water banking strategies to meet water needs as described in this section. Within available appropriations, grants must be awarded to qualified applicants according to (c) of this subsection. Grant awards must be limited to not more than \$2,000,000 per applicant.

(a) Grant awards may only be used for:

- (i) Development of water banks in rural counties as defined in RCW 82.14.370(5) that have the headwaters of a major watershed within their borders and only for water banking strategies within the county of origin. A major watershed has the same meaning as shoreline of the state in RCW 90.58.030(2)(f)(v) (A) and (B);
- (ii) Acquisition of water rights appropriate for use in a water bank including all costs necessary to evaluate the water right for eligibility for its intended use; and
- (iii) Activities necessary to facilitate the creation of a water bank.

(b) For the purposes of a grant pursuant to this section, a water bank must meet water needs, which include but are not limited to agricultural use and instream flow for fish and wildlife. The water bank must preserve water rights for use in the county of origin and for permanent instream flows for fish and wildlife through the primary and secondary reaches of the water right.

(c) To be qualified for these funds, an applicant must also show:

- (i) That the applicant has sufficient expertise and capacity to develop and maintain a water bank consistent with the purposes of this appropriation;
- (ii) That the applicant has secured a valid interest to purchase a water right;
- (iii) That the water rights appear to be adequate for the intended use;
- (iv) That the applicant agrees to have one-third of any water right purchased with the funds appropriated under this section to have its purpose of use changed permanently to instream flow benefiting fish and wildlife; and
- (v) That the applicant is a public entity or a participant in a public/private partnership with a public entity.

(33) \$500,000 of the general fund—state appropriation for fiscal year 2022 and \$500,000 of the general fund—state appropriation for fiscal year 2023 are provided solely for the department to:

- (a) Establish and administer a pilot grant program for implementing water banking strategies to meet local water needs;
- (b) Review water banking grant applications submitted under this section, including evaluation of water right suitability; and
- (c) Develop and finalize water banking agreements, trust water right agreements, and other necessary legal instruments with entities selected to receive grants under this section.

Appendix B. Data Analysis Tables and Figures

Out-of-basin water right transfers

Analysis of out-of-basin water right transfers included a detailed search using the Water Right Tracking System (WRTS). A set of queries from WRTS was conducted to generate a list of water right changes and their parent right records. By comparing location data between the right before and after its change, we were able to assess which rights had moved out-of-basin, from one Water Resource Inventory Area (WRIA) to another.

Some basins did not show any out-of-basin water right transfer activity even when there had been significant concerns over these transfers occurring. This is likely due to the following factors:

1. Transfers occurred over long distances **within** a WRIA.
2. Water rights that were temporarily donated to the TWRP or used to develop a water bank were mistaken for out-of-basin transfers.
3. Applications for proposed out-of-basin water right transfers may have been widely publicized and discussed that were never authorized.

Figure B - 1. Total Volume of Out-Of-Basin Water Right Transfers in Washington State by Year (1995 to 2020)

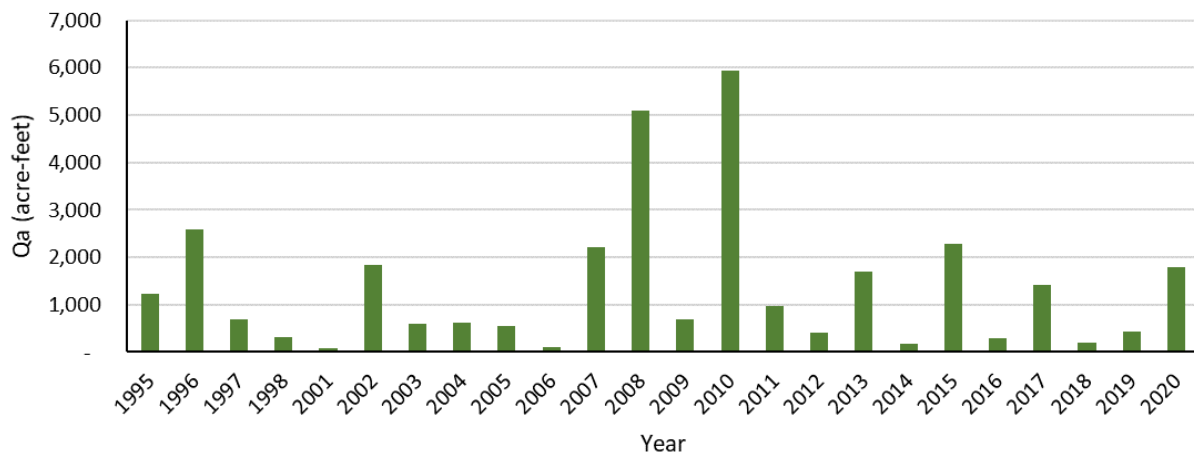


Figure Note: water rights transferred over multiple occasions in a single year were only counted once for that give year.

Figure B - 2. Total Number of Out-Of-Basin Water Right Transfers in Washington State by Year (1995 to 2020)

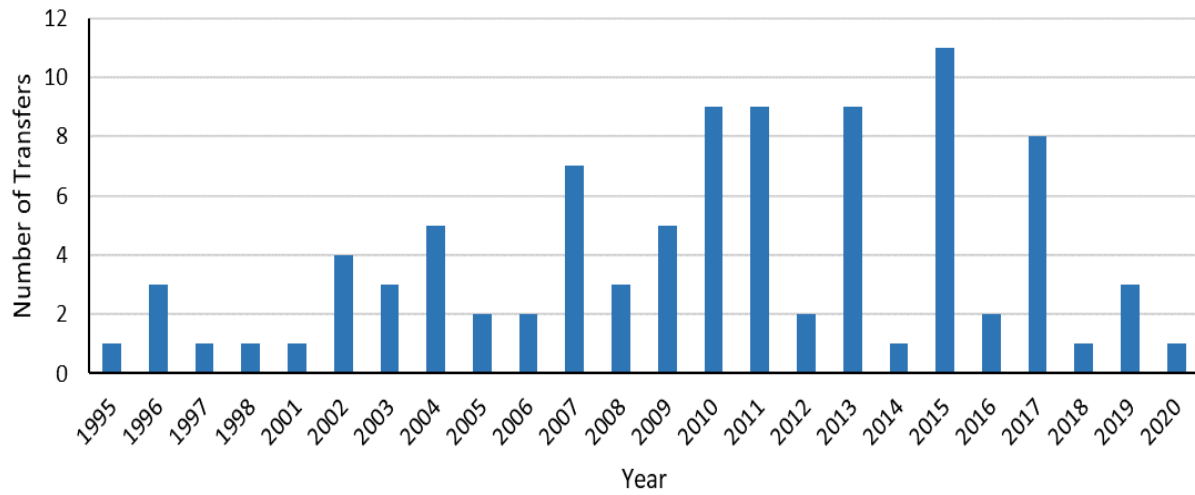


Figure B - 3. Out-Of-Basin Water Right Transfers Map

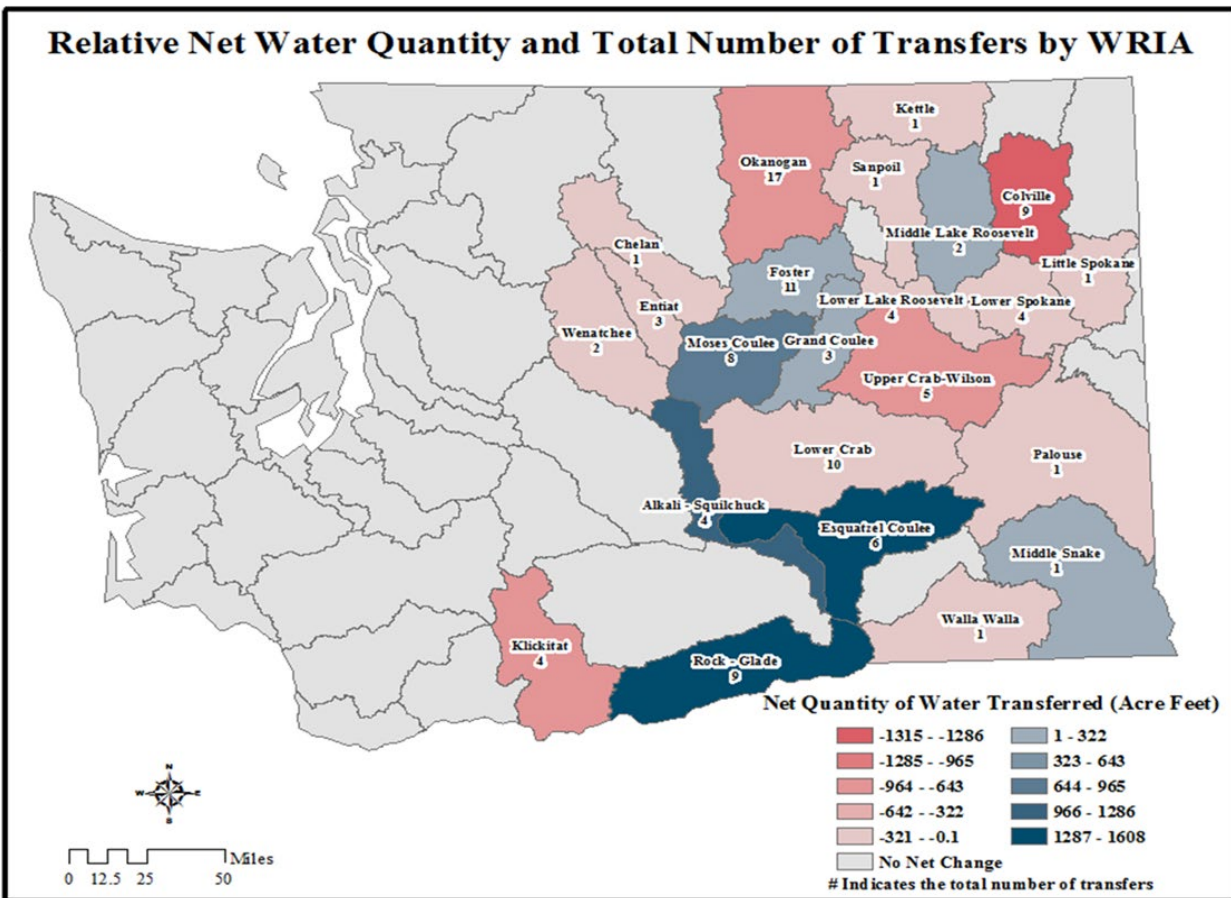


Figure Note: The number shown for each WRIA indicates the total number of rights that moved into and/or out of that WRIA. The color of the WRIA indicates the net volume of water associated with the transferred rights.

Reference: UW Evans School Student Consulting Lab Report
(<https://apps.ecology.wa.gov/publications/documents/2111013.pdf>).

Table B - 1. Out-Of-Basin Surface Water Right Transfers: Summary Statistics

Statistic	Out-of-Basin Water Right Transfers as a Percent of WRIA's Certificated Surface Water Rights
Min	0%
Median	0.6%
Average	1.0%
Max	3.3%

Table Note: Only includes water rights lost to out-of-basin water right transfers.

Table B - 2. Out-Of-Basin Surface Water Right Transfers: Basins with Greatest Loss by Volume

WRIA	Volume of Surface Water Rights Transfer Out-of-Basin (AFY)	Percent of WRIA's Certificated Surface Water Rights
54 – Lower Spokane	157	1.7%
60 – Kettle	204	1.8%
30 – Klickitat	1,102	2.5%
59 – Colville	1,221	3.4%

Table Note: Only includes water rights lost to out-of-basin water right transfers.

Table B - 3. Out-Of-Basin Water Right Transfers (2003 to 2020)

WRIA	Direct Transfers		Water Bank Transfers	
	# of Transfers	Volume (AFY)	# of Transfers	Volume (AFY)
23 – Upper Chehalis	1	26		
30 – Klickitat	2	193		
32 – Walla Walla			8	4,981
34 – Palouse	2	184		
35 – Middle Snake			2	302
36 – Esquatzel Coulee	4	1,426	1	716
37 – Lower Yakima	1	42	1	484
39 – Upper Yakima			5	2,565
40 – Alkali-Squilchuck	3	164		
42 – Grand Coulee			1	25,000
43 – Upper Crab-Wilson	1	56		
44 – Moses Coulee	1	352	1	85
45 – Wenatchee	1	51		
46 – Entiat	1	140		
47 – Chelan	2	64		
49 – Okanogan	11	1,843	4	894
50 – Foster	4	1,216		
52 – Sanpoli			2	337
53 – Lower Lake Roosevelt	1	218		
54 – Lower Spokane	2	310		
55 – Little Spokane	1	60		
58 – Middle Lake Roosevelt	1	87		
59 – Colville	10	1,266		
60 – Kettle	1	204		
Total	50	7,902	25	35,364

Table Note: WRIAs not shown in this table did not indicate any out-of-basin water right transfer activity based on the data and methods used in the by Ecology's Advisory Group on Water Trust, Banking, and Transfers (<https://apps.ecology.wa.gov/publications/documents/2011091.pdf>).

TWRP donations: temporary and permanent

Analysis of both permanent and temporary donations into the TWRP included a detailed search using the WRTS database. Determining types of changes required analyzing ROEs and identifying identical, parent, and/or child records. The results of this analysis point to the use(s) of water rights after the TWRP as an indicator of possible speculation, but do not directly show intent, speculation, and/or any socio-economic conditions in which a water right has changed.

Table B - 4. Trust Water Rights Program: Donation by Type

Trust Type	# of Water Rights	Volume (AFY)
Permanent Donations	537	961,235
Current Temporary Donations	539	262,233
Expired Temporary Donations	336	2,127,762 (or 229,411) ¹

¹ Total excluding two rights that are outliers: one re-enrolled in the TWRP as a permanent donation and the other is for a non-consumptive hydro-power generation project. These two rights combined total a volume of 1,898,352 AFY.

Table B - 5. Expired Temporary Donations: TWRP Re-enrollment Status

Temporary Donations – Expired	# of Water Rights	Volume (AFY)
Did Re-enroll	100	1,022,000 ¹
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).

Table B - 6. Expired Temporary Donations That Did Not Re-enroll: Subsequent Water Right Changes

Temporary Donations – Expired & Not Re-Enrolled in the TWRP	# of Water Rights	Volume (AFY)
<i>Water Rights 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 Water Rights that Changed Attributes	121	51,183
<i>Water Rights that Did Not Change Attributes</i>		
No Changes/Reverted to Original Attributes	115	1,054,579

Figure B - 4. Size of Temporary Donations

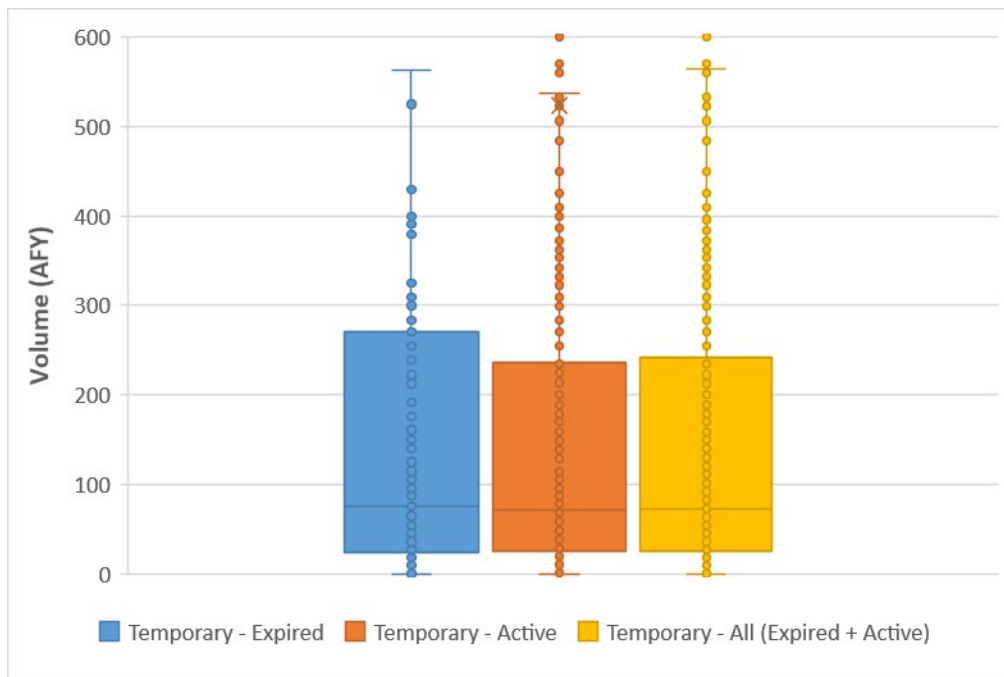


Figure Notes: Additional data points above 600 AFY are not depicted in this graph. The filled in box represents size of the middle 50 percent of temporary donations. The horizontal line in the filled in box depicts the median.

Figure B - 5. Time in Trust for Active and Expired Temporary Donations



Reference: Ecology's Advisory Group on Water Trust, Banking, and Transfers
(<https://apps.ecology.wa.gov/publications/documents/2011091.pdf>).

Water banks

Information in this section was developed based on Ecology's Water Bank Quantity Summary³⁰ updated in January of 2022.

Table B - 7. Water Bank Allocations by Ownership Type (January 2022)

Type of Water Bank	# of Banks	Initial Volume (AFY)	Allocated Volume (AFY)	Remaining Volume (AFY)
Ecology – Office of Columbia River	3	34,616	22,756	11,860
Ecology – Other	6	7,195	4,354	2,841
Other Public & Non-profit	6	45,226	21,672	23,554
Private	17	29,605	12,957	16,221
Total	32	116,642	61,739	54,476

³⁰ <https://apps.ecology.wa.gov/docs/WaterRights/wrwebpdf/BankBalances.pdf>

Figure B - 6. Water Bank Volume by Ownership Type

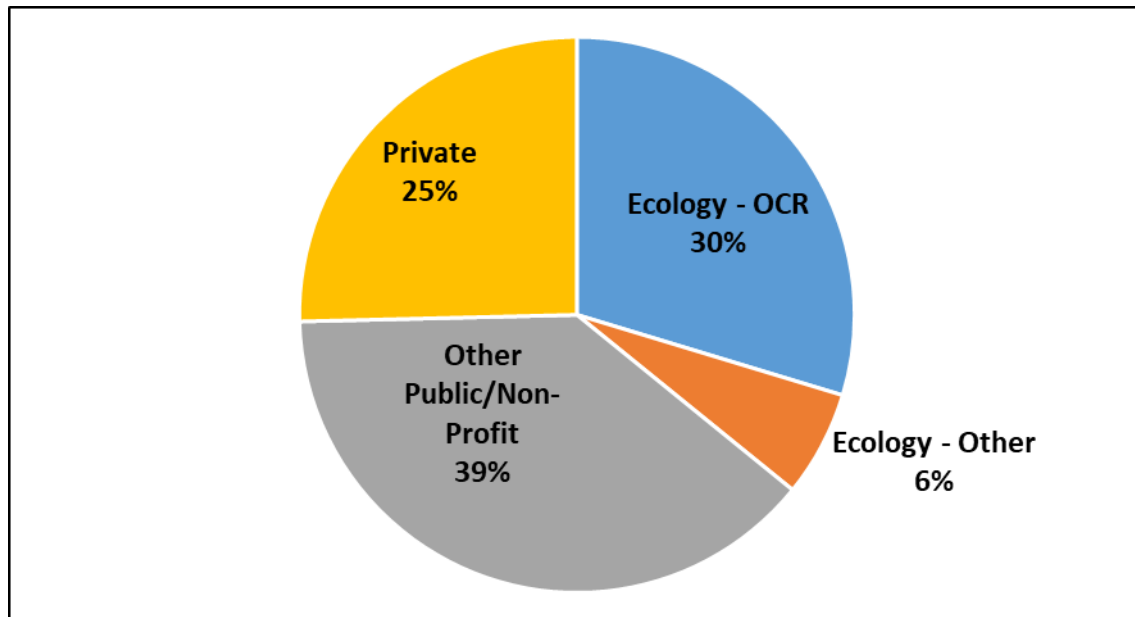
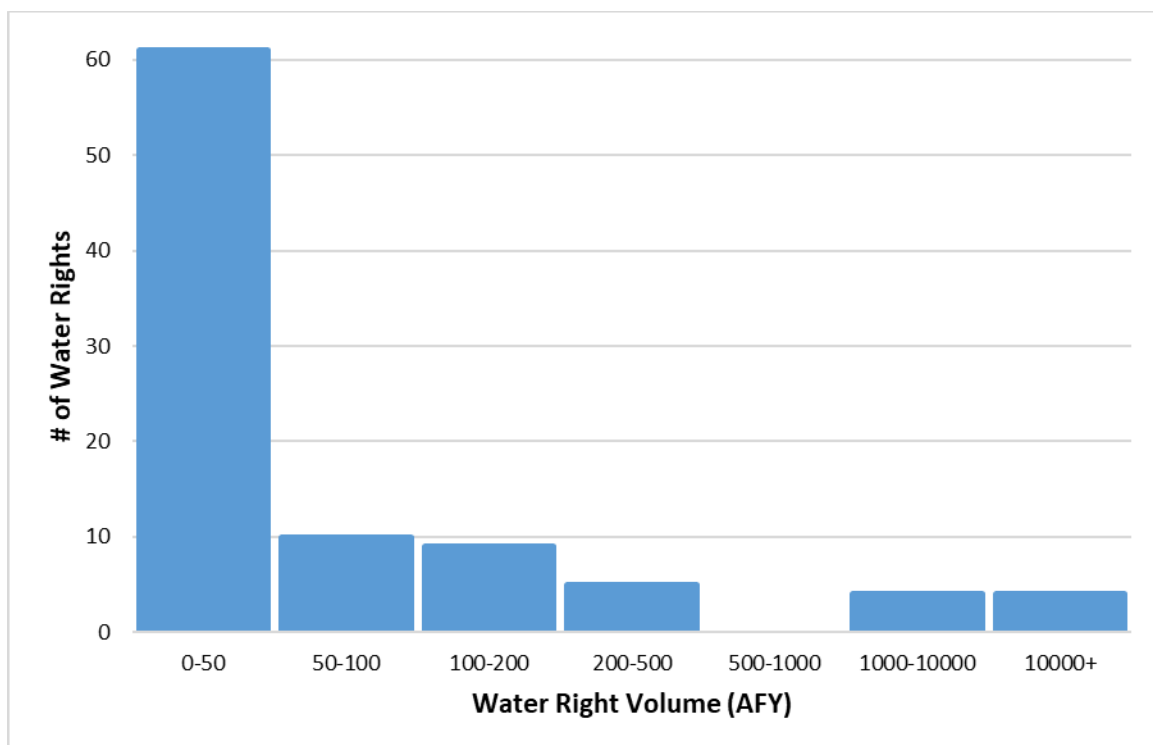


Figure B - 7. Volume of Water Rights in Water Banks



Appendix C. Public Comments on the Draft Report

Ecology received 20 comments. We have compiled comments here. The comment period was open August 5 through September 6, 2022.

List of commenters

Page number	Name
C-2	Jess Hersch
C-3	Bill Clarke
C-5	Confederated Tribes of the Colville Reservation
C-9	Muckleshoot Indian Tribe
C-12	Seattle Public Utilities (SPU)
C-14	Methow Valley Citizens Council
C-18	Mary McCrea
C-25	Swinomish Indian Tribal Community
C-28	Benton County Water Conservancy Board and Franklin County Water Conservancy Board
C-31	Center for Environmental Law & Policy
C-34	Public Utility District No. 1 of Chelan County
C-40	Natalie Waid
C-41	Confluence Law
C-44	Port Gamble S'Klallam Tribe Natural Resources Department
C-69	Sarah Mack
C-72	Selah-Moxee Irrigation District
C-76	Squaxin Island Tribe
C-80	Washington State Water Resources Association
C-84	Yakima Basin Joint Board
C-88	Northwest Solutions

Jess Hersch

All unused water rights, municipality and corporations/business revert back to a public water bank.

A reasonable rate for all one time sale cost is set by a water bank to help cover administration costs of the bank. Water sale/lease should never be for profit it's a basic need.

All watersheds establish max water withdrawal with a buffer for droughts, Monitored by water table in wells.

Max population is set by max water withdrawal and change GMA to support rural building say 5 acres per parcel, this of course depends on dry or wet locations.

All water rights stays with in each watershed.

Discourage corporate farms/,business from crops/products using water for products used outside of the states.

We must protect the farmer.

Work on exempt well statis. If an extreme drought happen theirs will be the first shutoff.

Encourage water conservation.

Everyone needs a place to live, but a area can only suport so many people.

Comment on Draft Legislative Report on Water Right Transfers, Water Banking, and Trust

The Draft Legislative Report on Water Right Transfers, Water Banking, and Trust, as well as Ecology's POL-1010 do not correctly define "Water Bank" or "Water Banking" compared to the statutory definition in RCW 90.42.100. Specifically, the Draft Legislative Report defines "water banking" as follows:

Water banking – A mutually-agreed upon contractual arrangement comprised of: 1) transfer of legal interest in a water right to the state to be ***used as a mitigating right***, and 2) an executed water banking agreement describing use of that water right through the TWRP ***to mitigate water resource impacts***, future water supply needs, or any beneficial use under chapter 90.03, 90.44, or 90.54 RCW that would otherwise impair existing water rights.

(emphasis added)

POL-1010 includes the following definitions of "Water Banking Agreement" and "Water Bank"

Water banking agreement – A specific type of trust water right agreement for the establishment and operation of a water bank that constitutes the contractual basis ***for managing mitigating rights*** between Ecology and the water right holder.

Water bank – A mutually-agreed upon contractual arrangement comprised of:
1) transfer of legal interest in a water right to the state to be ***used as a mitigating right***, and

2) an executed water banking agreement describing use of that water right through the TWRP to ***mitigate water resource impacts***, future water supply needs, or any beneficial use under chapter 90.03, 90.44, or 90.54 RCW that would otherwise impair existing water rights.

(emphasis added)

That is, every type of water banking activity identified in Ecology's definitions involves "mitigation" of some sort. In contrast, the definition in RCW 90.42.100 includes water bank purposes that do not involve "mitigation." "Water banking may be used . . . [t]o provide a source of water rights the department can make available to third parties on a temporary or permanent basis for any beneficial use under chapter 90.03, 90.44, or 90.54 RCW." RCW 90.42.100(2)(c). While water rights mitigation is one allowed purpose within the water banking sections of the trust water program statutes, water banking can also be used for reallocation of water rights where no mitigation is involved.

An example of this is the water bank operated by the Snoqualmie Valley Watershed Improvement District, that involves allocation of water rights to farmers through seasonal changes in place of use. Similarly, the Watershed Improvement Districts in Whatcom County are developing a water bank proposal that would focus on reallocation of irrigation water rights.

Neither of these water bank concepts involves mitigation, but rather are focused on transferring water rights to the Trust Water Program to protect them from relinquishment, and reallocating them to other farmers. While “mitigation” may be one purpose of the Trust Water Program and of water banking, it is not the only purpose and so Ecology’s documents should be consistent with statutory definition.

And while using the Trust Program for “mitigation” can be a necessary and sometimes good thing, mitigation is not universally a good thing. This is because “mitigation” in Washington State generally has meant the loss of irrigated farmland as those water rights are used for water banking to support rural development. Water banking functions like water right transfers that keep water rights in agriculture, rather than losing them to mitigation, are an important strategy to preserve irrigation water rights that should not be excluded from Ecology’s definitions or descriptions of water banking purposes.

Confederated Tribes of the Colville Reservation

Attached are the comments from the Confederated Tribes of the Colville Reservation.

August 30, 2022

Mary Verner
Water Resources Program Manager
Washington State Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-6872

Submitted via online portal

Re: Confederated Tribes of Colville Reservation Comments on Draft Water Rights, Water Banking, and Trust Legislative Report

Dear Ms. Verner:

The Confederated Tribes of the Colville Reservation (“Colville Tribes”) hereby comments on the *DRAFT Water Right Transfers, Water Banking, and Trust Legislative Report*, Publication 22-11-023 (Aug. 2022) (“Draft Report”) prepared by the Washington State Department of Ecology (“Ecology”). As discussed below, the Colville Tribes’ comments generally fall into three categories: (1) Ecology must analyze impacts to tribal communities; (2) Ecology must either close all basins with unquantified tribal water rights or require tribal consent prior to authorizing any out-of-basin transfer; and (3) any public interest evaluations by Ecology must consider impacts to tribes.

I. INCLUDE ANALYSIS OF IMPACTS TO TRIBAL COMMUNITIES

First, as a general matter, Ecology must analyze the potential impacts of the water banking, water trust, and water right transfer programs on tribal communities and tribal rights and interests. The Washington State Legislature directed Ecology to consult with Indian tribes when refining its recommendations on improving these programs, but the Draft Report is totally silent on tribal concerns and fails to assess effects on tribes.

Indeed, last year, Ecology partnered with the University of Washington Evans School of Public Policy & Governance to study the impacts of out-of-basin water right transfers, and the resulting report acknowledges that the analysis was limited by “a paucity of tribal perspectives.” *Evaluating the Impact of Out-of-Basin Water Rights Transfers in Washington State* at 63, Publication 21-11-013 (June 2021) (“Out-of-Basin Transfer Report”). The report therefore concluded that “future analysis should consider the explicit economic, environmental, and social impact of water rights transfers on Indigenous nations and communities across Washington State.” *Id.* Yet, neither the Draft Report nor the recent policy and guidance documents released by Ecology addresses such impacts. See, e.g., POL-1010, *Administration of the Statewide Trust Water Rights Program* (June 30, 2022); Guidance, *Administering the Trust Water Rights Program*, Publication 22-11-012 (June 2022).

This is unacceptable, and the Colville Tribes cannot and will not support any of the state programs or Ecology’s recommendations to the Legislature in the absence of such analysis.

II. CLOSE ALL BASINS WITH UNQUANTIFIED TRIBAL WATER RIGHTS OR REQUIRE TRIBAL CONSENT FOR OUT-OF-BASIN TRANSFERS

Second, absent tribal consent, Ecology must not allow the transfer of water out of any basin, county, or WRIA where unquantified tribal water rights exist. The Colville Tribes has senior but unquantified water rights and is deeply troubled by Ecology's apparent disregard for such rights in approving out-of-basin transfers near the Colville Indian Reservation in streams to which it claims water rights. *See* Petition to Washington Department of Ecology by Confederated Tribes of the Colville Reservation to Commence a General Adjudication of the Water Rights of the Confederated Tribes of the Colville Reservation Including All Surface and Groundwater Rights (Aug. 30, 2019). The Okanogan River basin (WRIA 49), for example, has the highest level of transfer activity in the entire state. Draft Report Appendix B fig. B-3 at 25; Out-of-Basin Transfer Report at 44-48. In addition, the Okanogan Conservation District has applied to acquire water rights in the Methow River watershed (WRIA 48) to serve a new, county-wide water bank, and Ecology is currently evaluating the application. Draft Report at 7. In doing so, however, Ecology must consider the Colville Tribes' outstanding claims.

Whenever unquantified tribal water rights may be affected by a proposed transfer, Ecology must obtain the consent of the interested tribe. Alternatively, Ecology must close a basin to out-of-basin transfers if unquantified tribal water rights exist within the basin.

III. PUBLIC INTEREST EVALUATIONS MUST CONSIDER IMPACTS TO TRIBES

Third, any statutory or administrative criteria for "public interest" evaluations must require consideration of impacts to tribal communities. Ecology recommends statutory criteria and points to the list of potential considerations in its new policy document for administering the state trust water rights program, Draft Report at 11, but that list is silent on impacts to tribes. *See* POL-1010 sec. 1 ("Public interest . . . considerations should include environmental impacts, with emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational, and economic effects; and impacts on publicly owned resources and facilities.").

While "environmental justice" considerations may encompass some tribal concerns, the Colville Tribes' sovereign rights and interests in land and water, which predate Washington statehood, are much more than environmental justice concerns. It is in the public's interest to respect tribal sovereignty and to foster good relations between tribal and non-tribal neighbors and communities.

IV. CONCLUSION

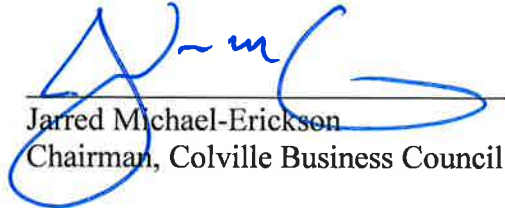
In sum, the Colville Tribes is greatly concerned that Ecology did not analyze the effects of the state water banking, water trust, and water right transfer programs on Washington tribes, particularly those lacking decreed or otherwise unquantified water rights. To prevent adverse impacts to such tribes, Ecology must either close any water basin where unquantified tribal water rights exist or require the express consent of such tribes prior to any out-of-basin transfers. In

Mary Verner
August 30, 2022
Page 3

addition, any public interest evaluations conducted by Ecology must consider impacts to tribal communities and their sovereign rights and interests in land and water.

Thank you in advance for taking the Colville Tribes' concerns seriously. The Colville Tribes looks forward to continued consultations with Ecology on this important matter.

Sincerely,



Jarred Michael-Erickson
Chairman, Colville Business Council

cc: Robin McPherson



MUCKLESHOOT INDIAN TRIBE

Fisheries Division

39015 - 172nd Avenue SE • Auburn, Washington 98092-9763
Phone: (253) 939-3311 • Fax: (253) 931-0752



Comments on Ecology's DRAFT Water Right Transfers, Water Banking, and Trust Legislative Report, August 2022

Sept. 1, 2022

Thank you for the opportunity to review and comment on the DRAFT Water Right Transfers, Water Banking, and Trust Legislative Report. In general, we are disappointed to see that the recommendations do nothing to control pricing or to ensure that any benefits are returned to the public or to treaty Tribes. Private speculation concerns have not been addressed and continue to be a major concern to the Tribe. We are also concerned that any simplification of the trust donation and banking process will lead to less stringent reviews by Ecology of the extent and validity of donated water rights.

Our more specific comments are below under the Headings in the Draft Report.

Definitions

The Impairment definition is too broad and differs substantial from that for current case law – one molecule versus “adversely affect”. That puts the burden on the fish resources to show harm which puts tribes at a severe disadvantage which raises environmental justice issues as well.

Under Challenges or Tribal and stakeholder engagement

Ecology's Advisory Group on Water Trust, Banking, and Transfers held meetings during the peak of the Covid-19 pandemic during the summer of 2020. Many tribes were unable to provide staff to attend. In fact, Carla Carlson was planning to participate for Muckleshoot but was furloughed for 4 months. The epidemic should be mentioned as a factor for lack of participation by important stakeholders so it is not assumed that everyone was at the table.

Recommended Policy Concepts in 2022 Report

Continue funding the pilot water banking grant program

We do not oppose continued funding for the pilots as long as the affected federally recognized treat Tribe(s) are in support.

Water right ownership and sales disclosure

We agree with the recommendation that the Legislature create a new statutory requirement so

that all water right sales or changes in ownership be reported to the state and that this information is made easily available for the public to access.

Public interest evaluations: further define the criteria in statute and extend them to surface water right changes

We oppose the recommendation that the Legislature define the public interest in statute and prescribe criteria for how to evaluate the public interest in water right decisions. We are concerned that the Legislature will choose to make the definition and criteria a balancing issue such that a private interest is equal to or greater than the public good or tribal treaty rights. We strongly support the recommendation that the Legislature reinstate the requirement that the public interest be evaluated for ALL surface water right change applications.

Concepts warranting further analysis

Fee for transferring water rights out-of-basin

We oppose transferring water rights out-of-basin and especially for transferring to a different WRIA. Many WRIA's are in totally separate drainage systems and such transfers would impair a new water body or new reach, especially for groundwater rights where it is not clear what reach is impacted or to what extent. The only exemption to our opposition would be when the affected Tribe or Tribes agrees with it. We fail to see how assessing a fee is a remedy.

Limit enrollment time period and re-enrollment for temporary donations

We support this concept where the Legislature could place a limit on how long a water right can be enrolled as a temporary donation and restrict the number of times it can be re-enrolled as a temporary donation. We oppose the purchase of water rights for speculative purposes as that is not in the public interest. We strongly disagree with the notion that trust water rights should be privatized and believe that the State should not be concerned that non-speculators would be a disincentive from placing rights into trust. The State should be more concerned on protecting instream flows to uphold tribal treaty rights.

Require a "cool-off" period for water right changes after a temporary donation is removed from the TWRP

We support a pause when a donation is removed and further request that more time passes before that donation can be removed. As it stands now, removals can occur almost immediately with notice to Ecology. That does not provide time for notice to Tribes. That notice should be mandated.

Require a portion of the water rights used for water banking to be permanently dedicated for streamflow purposes

We support this recommendation and believed it should be included as a recommendation now.

Regulate water bank prices like other water utilities

We support this recommendation to regulate private investment in water banking to prevent consumers from paying higher prices and causing a bidding war. Water is a public resource and not a private commodity. We suggest this be recommended now.

Concepts not recommended at this time

Implement a ban on out-of-basin transfers

We support a ban on out-of-basin transfers. We suggest this be recommended now. Ecology refers to the University of Washington Evans School of Public Policy & Governance study as justification for rejecting a ban; that is only 54 such transfers have occurred. Ecology should disclose that the study did not look at out-of-basin transfers for the Methow or Yakima basins, so 54 is likely a significant underestimate.



Date: September 2, 2022

To: Washington State Department of Ecology

From: Seattle Public Utilities (SPU)

**Re: DRAFT Water Right Transfers, Water Banking and Trust Legislative Report,
Publication 22-11-023**

To Whom It May Concern:

Thank you for the opportunity to provide comment on the Draft Legislative report on Water Right Transfers, Water Banking and Trust in Washington State. We appreciate the work and consideration for previously submitted public comments that underlies this report. We submit the following comments for consideration and review:

- In the description of POLICY 1010, under the section titled “Actions Taken Under Existing Authority” (beginning page 7), we suggest that a sentence be added to the end of this section with the language from the POL 1010 that there are specific provisions for municipal water rights in regards to mitigation that this policy does not address. For example (suggested additions italicized):

“Policy 1010 also states specifically that water rights used for long-term or permanent mitigation must first undergo a tentative determination of extent and validity. *Municipal water rights have unique attributes and allowances under the Municipal Water Law that are not addressed in this policy. Specific provisions that apply to municipal water rights in regard to mitigation and water banking may be addressed in POL 2030, the Municipal Water Law Policy and Interpretive Statement.*”

SPU is providing a temporary donation from the City of Seattle’s Cedar River Storage and Diversion Claim to the State Trust Water Right program to benefit the Cedar River. The majority of SPU’s water supply is provided via the Cedar River Claim. A new requirement of tentative determination of extent and validity of the Cedar Claim would be a major undertaking for the City and might be viewed as a risk to its Claim. This requirement would create a barrier to temporary donation. SPU is interested in maintaining policy conditions and considerations that minimize the risk of early tentative determination of its claim and facilitates temporary donation to the State Trust Water Right program.

- If the recommendation to the Legislature that “public interest” is defined in statute (page 11) moves forward, SPU requests that you explicitly recommend that there must be further, robust

consideration of how to define the term. It would need to be fully vetted in organized collaboration with major stakeholders, including Tribes and municipalities. This recommendation would rightfully necessitate additional time and resources for establishing such a critical definition that could potentially impact determination of all future water rights. For example (suggested additions italicized):

“We recommend that the Legislature 1) *allocate funding to create an advisory group that informs the need to* specifically define the public interest in statute and prescribe criteria for how to evaluate the public interest in water right decisions”

- In the same section referenced above (recommendation to define public interest and prescribe criteria for how to evaluate public interest in water right decisions (page 11)), we suggest the addition of “public benefits” as a term in addition to public interest and public welfare in the first sentence of the last paragraph on page 11. This specific term is used in the referenced RCW 90.42.050. We further suggest repeating the carve out for municipal water rights to this recommended policy concept to clarify public benefits associated with drinking water supply and public interest for streamflow.
- In concepts warranting further investigation, Ecology is explicit that some stakeholders did not support limiting the enrollment time period for temporary donations (page 13). SPU supports the concept that there is no limitation to the enrollment period for temporary donation so that it can continue to provide streamflow benefits to the Cedar River through existing policy structure, as described above.

Methow Valley Citizens Council

Please see the attachment for comments from the Methow Valley Citizens Council

Methow Valley Citizens Council



Board of Directors

Maggie Coon
Chair

Tom Jones

Vice Chair

Julie Palm

Secretary

Peter Bauer

Treasurer

Leki Albright
Easton Branam
Hillary Ketcham
Melanie Rowland
John Sirois
Alexa Whipple

PO Box 774
Twisp, WA 98856
www.mvccitizens.org
509 997-0888

September 2, 2022

Dear Ecology Water Resources staff and Legislators,

Thank you for the opportunity to participate in Ecology's process to address concerns about water rights speculation, out of basin transfers, water banking and the Trust Water Rights Program (TWRP). The Methow Valley Citizens Council (MVCC) raises a strong community voice to protect the natural environment and rural character of the Methow Valley.

We appreciate the critically important nature of the work Ecology is doing on behalf of all Washingtonians to proactively address these challenges, which are impacting states throughout the western US. We believe that the stakeholder-based process was a fruitful start, and hope that the Legislature can take action on several of the solutions analyzed, whether or not they were formally recommended by Ecology.

MVCC supports the three policies Ecology recommends to the Legislature.

The pilot water banking program is a positive step towards helping communities keep water in the watershed and provide greater local input in water management. Requiring that changes to water right ownership and sales be publicly disclosed is one step towards addressing the serious issue of private investment in a public resource. Perhaps the most significant policy Ecology recommends for immediate action is for the Legislature to define the criteria for public interest evaluations in water management and extend this analysis to surface water right changes.

We strongly urge the Legislature to take immediate action to adopt policies that create time and re-enrollment limits for temporary donations and cap the size of temporary donations to the TWRP.

This is one of six policies that Ecology recommends for further legislative analysis. Time and re-enrollment limits would be a strong step towards addressing the vulnerability of the TWRP to speculation and private investment for private monetary gain. We also believe capping the size of water rights that can be temporarily donated to the TWRP is another necessary action to help reduce use of the TWRP for speculation.

We strongly urge Ecology to submit agency request legislation for funding a study of how water transferred to the TWRP for instream flows can be protected so that it remains instream.

Repeated claims in the report about the "streamflow benefits of the TWRP" deserve thoughtful analysis to ensure that the TWRP is meeting its original intent and contributing in a measurable way to maintaining adequate streamflows.

Methow Valley Citizens Council

The TWRP is a flexible and innovative program that we support because it creates incentives and opportunities for augmenting streamflows. However, the streamflow benefits of the TWRP are nearly impossible to quantify because Ecology has not to this point connected the dots between water placed in stream and its protection from downstream diversion. At the same time, Ecology recognizes the need for more robust data about the TWRP, and shares concerns that the program might not be meeting its original intent. The agency stated that “[i]ncentivizing private investment and profit from this state-run program (TWRP) and a publicly owned resource does not align with the original intent of the TWRP.” Ecology also recognized “[i]t is difficult to determine with the available data if speculation is occurring using the TWRP and to what extent this might be happening.” (p. 19).

Allowing the agency sufficient funding to accomplish this important analysis could lead to a breakthrough in resolving concerns about speculation, as solutions once thought to impede the “streamflow benefits of the TWRP” might turn out to be viable after all.

We strongly urge Ecology to immediately incorporate current science about the likely impacts of climate change to different watersheds in regions across the state, to further inform the recent analysis and recommendations. We also request that in considering Ecology’s Report and their recommendations, the Legislature take climate change impacts into account.

We were surprised to find that Ecology failed to consider climate change and its impacts on our state’s water supply in its analysis, despite an abundance of watershed-specific studies available through the UW Climate Impacts Group and other agency sources. These sources suggest that climate impacts will be experienced differently throughout the state, and could affect individual watersheds’ susceptibility to the impacts of out of basin water transfers. We request that the agency immediately include readily available information into the current report, where it can be used for further analysis by the Legislature.

We strongly urge the Legislature to direct Ecology to carefully identify vulnerable watersheds that may be suitable for near-term action to ban out-of-basin water right transfers.

Early in the process, Ecology committed to avoid treating all watersheds in the state the same in their analysis. According to Ecology, *“The needs of each basin are unique – it will be difficult (and likely unwise) to seek one solution that fits all basins. For example, some basins could see greater ecological or economic impacts of water moving downstream than other basins. Management considerations are also basin specific, like whether instream flows are met in the basin-of-origin or whether the basin-of origin is closed.”*

As stewards of a vulnerable watershed, we strongly agree with an approach that allows for identification of unique traits that make some places more susceptible to harm. We propose Ecology and the Legislature:

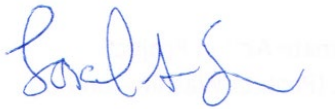
- *Define “headwater basin”(e.g., no upstream source of water to replace that transferred downstream, basins whose year-round supply depends on mountain snowpack, places where climate impacts will exacerbate streamflow issues)*

Methow Valley Citizens Council

- *Identify where the headwater basins are located*
- *Provide the relative flows in those basins versus the receiving basin*
- *Consider the large impact on the headwater basin v. the small (minute) benefit to the receiving basin*
- *Permanently ban out-of-basin transfers in the identified basins*
- *Support water banks to allow for transfer within identified basin*

Thank you again for the opportunity to participate in the process leading up to these final comments. We hope that there will be continued opportunities to engage and provide our perspective from the headwater basins along the east slopes of the North Cascades.

Sincerely,



Lorah Super
Program Director
Methow Valley Citizens Council

Mary McCrea

See uploaded file.

Comments on Ecology's Draft Report to the Legislature, Water Right Transfers, Water Banking, and Trust- August 30, 2022

Thank you for the opportunity to provide comments on Ecology's Draft report.

My name is Mary McCrea and I have been involved in stakeholder input to Ecology throughout this process and the agency's 2020 Advisory Group. I am a former Assistant Attorney General and represented Ecology in the Acquavella adjudication. In my last number of years of private practice, I lived in the Methow Valley and represented individuals regarding water rights. I also represented Trout Unlimited in their work involving the Trust Water Right Program. It is from this perspective that I make these comments.

We are coming to the end of another hot summer. Almost daily there are news articles about drought across the west and around the world, lack of adequate water, and desperate changes in water management to try to provide water for cities and agriculture, not to mention fish species. We all know that climate change is happening now and we know the forecast in our state is for less snow, more rain, and earlier runoff- all leading to lower water levels in mid to late summer when farmers and fish need it most.

With this backdrop, it borders on unbelievable that Ecology carries on with business as usual, leaving small headwater watersheds unprotected from out-of-basin transfers and the Trust Water Right Program vulnerable to speculation and treatment of water as a commodity open to the highest bidder rather than the public resource it truly is. And it is simply astonishing that there is no consideration or discussion of climate change in this document. None.

Ecology's Report is in response to the legislature's direction to Ecology to, among other things, "refine recommendations to the Legislature to address concerns about out-of-basin water right transfers, water banking and the TWRP." (Ecology Draft Report, p.3) The Legislature expressly invited Ecology to submit "policy recommendations ... in the form of agency request legislation." Operating Budget-ESSB 5092, Sec, 302(31)(d). Ecology states that it built on its previous analysis and "evaluated concerns about private speculation using the TWRP and water banks, the impacts of out-of-basin water right transfers, and investments in water rights." (Report, p.3)

And what did the agency conclude? That it "is difficult to determine with the available data if speculation is occurring using the TWRP" and that the benefits to local communities from restricting out-of-basin transfers are outweighed by "potential streamflow benefits." (p. 17, 19) (Emphasis added)

Rather than suggesting immediate action on six policy concepts, Ecology recommended further legislative analysis in order to "resolve significant policy disagreements between stakeholders[.]" Ecology conducted lengthy stakeholder discussions as part of the 2020 Advisory Group and built on that work at the direction of the Legislature in 2021. There comes a time when it is Ecology's role to take the comments from the tribes and stakeholders and make definitive recommendations to the Legislature. We could talk for the next ten years trying to resolve disagreements. We don't have that kind of time.

Policy proposals for the Legislature's consideration regarding water management require bold changes now based on current and future conditions, not meek suggestions based on incomplete data about what has happened in the past.

Ecology's analysis underlying the agency's recommendations contains a number of serious flaws. My comments focus on the following.

Ecology's analysis is flawed because it:

1. *Treats all watersheds in the state the same,*
2. *Relies on benefits of instream flows that do not exist,*
3. *Fails to do a thorough evaluation of speculation using the TWRP,*
4. *Relies on weak data, and*
5. *Completely disregards the impacts of climate change.*

Because of this weak analysis Ecology's recommendations fall short of providing the Legislature with informed guidance on what steps need to be taken now to strengthen water management in our state, particularly in the face of climate change.

From my perspective, the Legislature should take the following actions:

1. Ban out-of-basin transfers in previously identified vulnerable watersheds.
2. Enact all measures to reduce speculation using the TWRP now.
3. Require Ecology to submit agency request legislation for funding a study of how water transferred to the TWRP for instream flows can be protected so that water remains instream.
4. Require Ecology to submit agency request legislation for funding to improve its database on water right transfers.

1. Ecology's analysis treats all watersheds in the state the same for purposes of weighing benefits of actions versus perceived downsides.

Ecology has taken the approach of treating all watersheds in the state the same in its analysis. This approach directly contradicts the agency's position in an earlier document where Ecology stated:

F.1.2 *The needs of each basin are unique – it will be difficult (and likely unwise) to seek one solution that fits all basins. For example, some basins could see greater ecological or economic impacts of water moving downstream than other basins. Management considerations are also basin specific, like whether instream flows are met in the basin-of-origin or whether the basin-of origin is closed.*

The Methow Valley Citizens Council (MVCC) commented and agreed with Ecology's viewpoint, as do I. MVCC even offered criteria for Ecology to identify clearly vulnerable watersheds where out-of-basin transfers should be avoided:

- ***We strongly recommend that Ecology pursue legislation to ban out of basin transfers in specific, clearly identified vulnerable watersheds. Legislation would:***
 - *Define a headwater basin (e.g., no upstream source of water to replace that transferred downstream. Impacts/risk likely to increase with climate change)*
 - *Identify where the headwater basins are located*
 - *Provide the relative flows in those basins versus the receiving basin*

- *Consider the large impact on the headwater basin v. the small (minute) benefit to the receiving basin*
- *Permanently ban out-of-basin transfers in the identified basins*
- *Support water banks to allow for transfer within identified basins (CITATION)*

Despite Ecology's earlier accurate assessment that each basin is unique and may require different policy protections, Ecology has reverted to a one size fits all approach. I urge the Legislature to ask Ecology what happened to its correct conclusions above? Why the dramatic shift in approach?

Failure to recommend different policy changes for different groups of watersheds falls far short of satisfying the legislature's directives.¹

2. Ecology's analysis repeatedly relies on the "benefits of instream flows" to justify proposed inaction or delays in implementing actions to address out-of-basin transfers and speculation. Water transferred downstream to a new location or to the TWRP for instream flows is not protected from diversion by other water users and does not remain instream.

Throughout its draft report, Ecology incorrectly asserts that the benefits of instream flows outweigh the benefits of proposed changes in policy. For example, Ecology recognizes that out-of-basin water right transfers "may result in negative impacts on the communities in the basin of origin" because it is "very difficult to transfer a water right back upstream.... As a result, these transfers often represent a permanent loss of their associated economic productivity in the basin of origin." (p.19).

Ecology acknowledged the real harm from out-of-basin transfers and yet declined to protect vulnerable watersheds because of the unsubstantiated benefits of water instream. "However, out-of-basin water right transfers ... can provide streamflow benefits in the intervening stream reach between their origin and new place of use." (p.19). Ecology repeatedly relies upon the idea that streamflow benefits actually result from water transfers downstream or placement in the TWRP. These are paper benefits not wet water benefits.

¹ There are 62 WRIsAs (Water Resource Inventory Areas) in Washington State. They range from large watersheds, e.g., Skagit, to small watersheds, e.g., Methow. The Skagit gets up to 100" of precipitation at Marblemount. The Methow gets 14" of precipitation in the valley. The Skagit has large reservoirs of water in Ross Lake and Diablo Lake to rely upon. The Methow has mountain snowpack and precipitation in the valley as the source of its water. The list goes on.

Water management should not be the same for watersheds on the Olympic Peninsula as it is for watersheds on the west side of the Cascades or the small headwater watersheds of eastern Washington. Ecology should acknowledge the differences and group similar watersheds together for purposes of analyzing appropriate actions. At the very least, the agency should explain why it has shifted course so dramatically in the final months of its assessment.

In order for there to be streamflow benefits from a water right transfer or a donation to the TWRP, (1) the water must no longer be used at the previous place of use, and (2) the right must be protected instream from diversion by other water right holders.

It is a straightforward matter to monitor that the water is no longer used at the previous place of use. It is extremely difficult, and currently impossible to ensure the water is protected instream from its previous point of diversion downstream to its new point of diversion or indefinitely downstream.²

Ecology is aware that water is not protected instream. Stakeholders are aware that water is not protected instream. Yet necessary changes in law and policy are repeatedly dismissed because they would reduce the benefits of water instream- benefits that do not exist. This misuse of information to justify inaction must stop.³

3. Ecology's analysis fails to present a thorough examination of speculation using the TWRP

Over the course of many group discussions with Ecology over the last 2 years, one of the main concerns voiced about the TWRP is that it allows speculation by private investors using a public resource. In the last two legislative sessions legislators have raised similar serious concerns as well as alarm that the TWRP allows treatment of the state's publicly owned water as a private investment.

Ecology recognized the TWRP can be currently be used for speculation by users 'parking' a water right in temporary donation for an indefinite period in order to maximize its resale value." (p. 13). The agency also recognized that "Incentivizing private investment and profit from this state-run program (TWRP) and a publicly owned resource does not align with the original intent of the TWRP." (p. 19).

Yet Ecology rejected a policy that it acknowledged would "help address speculation (a cap on the size of water right donations that can be temporarily donated to the TWRP) finding it "would reduce the streamflow benefits of the TWRP." (p. 17)

Ecology also declined to recommend immediately putting a time limit on a water right in trust, another action that Ecology recognized would help address speculation, because it could reduce the streamflow benefits of the TWRP. (p. 13) Rather than calling for immediate action to limit the time a water right can be temporarily placed in trust, Ecology called for more study. (p. 19). Again, Ecology made no agency

² The one exception to water not being protected instream is the fully adjudicated Yakima Basin.

³ Ecology has been offered an opening for a first step in addressing this significant issue. In the legislation directing Ecology's current work, the legislature stated that "policy recommendations may also come in the form of agency request legislation." Operating Budget-ESSB 5092, Sec, 302(31)(d). This is an open invitation for Ecology to take on the lack of protection of water rights instream, an invitation Ecology has seemingly declined.

It is imperative for Ecology to request funding for an analysis of how water rights instream can be protected. Understanding how to do this is fundamental to the TWRP. Understanding how to protect water instream is absolutely essential to future water management in our state. Without it, critical water management policies will continue to be based on a false assumption. We cannot afford to let this continue, particularly when we face the impacts of climate change on our water supply.

request for funding to strengthen their data collection to help them make more informed decisions regarding the use of the TWRP for speculation.

Ecology's analysis of the critical issue of speculation is lacking and of little help to the Legislature.

4. In making recommendations regarding out-of-basin transfers Ecology relied on incomplete and misleading data.

Ecology did not recommend restricting out-of-basin water right transfers either through rulemaking or legislative action. The agency based their decision, in part, on data on recent water right transfers (p. 16, 17) and in essence concluded that out-of-basin transfers are no big deal. That idea was voiced by a number of stakeholders during this process. Simply put, they are wrong.

For some watersheds out-of-basin transfers are a very big deal. These are watersheds reliant on snowpack for much of their water supply, which will diminish with climate change; watersheds that have no upstream source of water once their water is transferred out of basin, and watersheds where a relatively small amount of water represents a big hit to the water supply.

Failure to include transfers to the TWRP is one of the reasons the Methow, WRIA 48, is not included in the list of WRIAs with out-of-basin transfers, Table B-3, even though it has had a number of transfers to the TWRP.⁴ Direct out-of-basin transfers and transfers to the TWRP create a cumulative impact on communities that should be recognized and addressed with specific policy solutions.

Another reason the Methow is not included in Table B-3 is because the community was able to fight off an application to permanently transfer 33 cfs out of the basin.⁵

Ecology's reliance on incomplete and misleading data undermines its recommendations to the Legislature on out-of-basin transfers.

⁴ As we have discussed previously with Ecology, the out-of-basin transfers listed in the tables do not include transfers to the TWRP. Transfers to the TWRP also result in a loss of out-of-stream water use in the basin of origin. Ecology makes an oblique reference to the omission of transfers to the TWRP with the Table Note that the table "only includes water rights lost to out-of-basin water right transfers." Table B-1, B-2.⁴

⁵ Local citizens, including the Chewuch Canal Company (CCC) who would have been directly affected by the transfer, attended 14 Okanogan Water Conservancy Board meetings in opposition to the application. Some of the meetings had over 50 concerned citizens and agencies in attendance. It was a 90-mile round trip to Okanogan where the meetings were held. CCC incurred over \$25,000 in legal fees and other costs successfully opposing this out of basin transfer.⁵ It should not fall to local communities to fight off such transfers. This is something the legislature can address for the groups of watersheds requiring such protection.

5. Any current report that fails to seriously consider the impacts of climate change on our water supply is of little value to the Legislature.

How can Ecology draft a report to the Legislature in 2022 regarding Water Right Transfers, Water Banking and Trust and not analyze or even mention the impacts of climate change on water supply? How? What value do their recommendations have?

Consideration of climate change is especially important in making recommendations on out-of-basin transfers. By way of example, in the Methow watershed climate change is predicted to decrease the snowpack in the mountains and cause earlier runoff in the spring. The result will be lower flows in mid to late summer. The future available water supply will be reduced at a time it is most needed, impacting the local economy and food security by cutting off small farmers. Transfer of any water out of the watershed will have an even bigger impact than it does now.

Climate change should also be considered in analyzing speculation using the TWRP. Who does this state want to own the water rights when water becomes more scarce and higher temperatures require more water use?

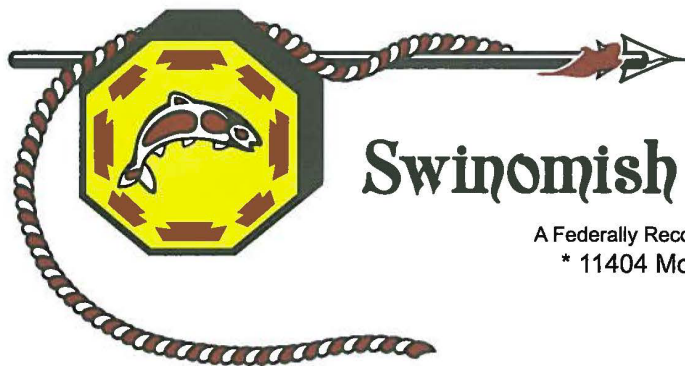
We need to be forward looking and anticipate the future that climate change is bringing for our water. The time for bold action is NOW.

In sum, the recommendations to the Legislature should include the following actions:

1. Ban out-of-basin transfers from vulnerable watersheds.
2. Enact all identified measures to reduce speculation using the TWRP now.
3. Require Ecology to submit agency request legislation for funding a study of how water transferred downstream or to the TWRP for instream flows can be protected so that it remains instream.
4. Require Ecology to submit agency request legislation for funding to improve its database on water right transfers and the TWRP.

Sincerely,

Mary McCrea



Main Office: 360.466.3163
Facsimile: 360.466.5309

Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

August 25, 2022

Washington State Department of Ecology
Mary Verner, Water Resources Program Manager
Via email

Re: Comments on Ecology's Draft Legislative Report on Water Right Transfers, Water Banking, and Trust

Dear Mary,

The Swinomish Indian Tribal Community (Tribe) submits these comments on the Department of Ecology's Draft Legislative Report on Water Right Transfers, Water Banking, and Trust (Draft Report).

1. The Draft Report states that, among the actions taken under existing authority, Ecology adopted a policy (Policy 1010) and an updated guidance document on the administration of the Trust Water Rights Program (TWRP). The Draft Report should note that Policy 1010 did not address the use of dormant municipal water rights (*i.e.*, rights that have not been put to beneficial use for a period of five years or more) for water banking or mitigation under the TWRP, and that the use of such rights for water banking or mitigation raises substantial concerns. The Tribe's concerns about the use of such rights for water banking or mitigation under the TWRP are discussed in its September 17, 2021, and April 27, 2022, comments on Ecology's draft policy, which are attached hereto.

2. The Draft Report recommends that the Legislature 1) specifically define the public interest in statute and prescribe criteria for how to evaluate the public interest in water right decisions, and 2) require that the public interest be evaluated for all surface water right change applications. The Draft Report should note that Ecology included the following definition of the public interest in Policy 1010:

Public interest – The consideration of impacts to the public at large that would result from the creation and operation of a water bank. General guidelines for consideration of the public interest are set forth in the water resources fundamental in RCW 90.54.020. As applicable, considerations should include environmental impacts, with emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational, and economic effects; and impacts on publicly owned resources and facilities.

Ecology’s existing definition of the public interest should provide a starting point for the Legislature’s consideration of whether, and if so how, to define the public interest in statutes. It should therefore be included in the Draft Report. The Tribe generally supports Ecology’s existing definition, but the second sentence should be revised to make clear that public interest considerations include protection, restoration, and recovery of all species of fish harvested in treaty fisheries, not just those that are threatened and endangered. The Tribe also supports Ecology’s recommendation that the Legislature require that the public interest be evaluated for all surface water right change applications.

3. In its discussion of concepts warranting further analysis, the Draft Report states that the Legislature could amend statute to require a portion of each water right used for water banking be permanently dedicated to benefit streamflow. It states that this requirement could be modeled on the current pilot water banking grant program, in which one-third of each water right that is acquired must be permanently dedicated to benefit streamflow and that this change would help ensure that use of the state’s TWRP for water banking purposes balances public benefits for streamflow with potential private profits. The Draft Report notes that stakeholder feedback on this concept was mixed with some voicing strong support and others expressing concern about private property “takings” and discouraging water banking in general. The Draft Report then identifies three key considerations and outstanding questions for implementing this concept: (1) what portion of a water right would be permanently dedicated for streamflow under this requirement; (2) whether the streamflow dedication amount would take into account potential water supply effects from climate change; and (3) whether permanent streamflow dedication would be assessed to each individual water right used for water banking or from the total volume of all water rights held in a water bank at the water bank owner’s discretion.

The Tribe recommends that the Draft Policy include this concept in its recommended policy concepts. Deferring legislative consideration of this concept will allow the continued establishment of water banks with *no* water being dedicated the benefit streamflow. There is no serious “takings” concern because water right holders have no property right to use the State’s TWRP without complying with statutory requirements governing the program. The Legislature could adopt the one-third requirement already used in the pilot water banking grant program and

then refine it over time as additional information on the effects of climate change becomes available.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amy Trainer", followed by a horizontal line.

Amy Trainer, Environmental Policy Director
Swinomish Indian Tribal Community

Benton County Water Conservancy Board Franklin County Water Conservancy Board

DATE: September 6, 2022

TO: Ms. Mary Verner, Program Manager WRP-Ecology
Mary.verner@ecy.wa.gov
Mr. Dave Christensen, Senior Policy Advisor, WRP-Ecology
Dave.christensen@ecy.wa.gov
Mr. Austin Melcher, Environmental Planner, WRP-Ecology
Austin.melcher@ecy.wa.gov

cc: Eastern WA County Commissioners
Eastern WA Water Conservancy Boards
Office of the Governor, Senior Staff
Office of DNR Commissioner, Senior Staff

FROM: BCWCB-FCWCB Members
dolsenecon@aol.com, mark-nielson@franklincd.org

SUBJECT: Joint BCWCB-FCWCB Response to Ecology Legislative Recommendations
For Water Right Transfers, Water Banking, and Trust Water Rights

To be succinct, the Water Conservancy Boards oppose the WRP legislative “package:” the 2023 legislative recommendations, and further analysis and concepts elements. Portions thereof will undoubtedly appear in a 2023 legislative bill.

The attached comments are in response to your August 8, 2022, WRAC meeting presentation, with a request for comments by September 6, 2022. The timing of this “comment period” strongly suggests to us that Ecology staff really do not want much review or comments.

As the attached response comments convey, there are multiple technical, policy, and legal problems at play. The Ecology package ignores the overall opinion, if not consensus, that emerged from the 2020 workshop process, engaging multiple stakeholders and other participants. And it is a strange mix of ignoring provisions/factors that are already “on the books,” like public notices for water right change/transfers; and raising highly contentious issues like “redefining” public interest (tests) for change/transfers. And limited funding issues should be handled through specific capital budget requests.

Attachment

Foundational Issues Responding to Ecology's Proposed Legislative Changes to the Trust Water Rights Program, September 2022

The proposed, Water Resources Program (WRP)-Ecology legislative recommendations for Trust Program water rights will erode private property rights (vested interest in water rights) and distort functioning water right markets between willing buyers and sellers. It is the agency's attempt to assert more bureaucratic control over free market transactions, and to redirect such toward Ecology staff's "enlightened" vision of social/environmental justice.

Where Are These "Problems/Issues" Coming From?

- The WRP-Ecology, needs to identify specifically who/what is raising the issues/problems posed by Ecology's "recommendations." Water right holders—specific names?
- These recommendations appear to be fabricated by staff (and/or consultants), not primary water rights holders; or a large majority of those who participated in the previous 2020 workshop review. The Ecology staff apparently have decided to ignore the presented facts at the workshop review and create their own version of reality.

Ecology's Objective Is Unsound "Critical Water Theory."

- Ecology staff recommendations effectively verify an obsession for "Critical Water Theory," where every conceivable action is used to diminish existing water rights, disrupt private sector water marketing, and place unrestrained, unaccountable control over water resources management (memorandum to Dir. Mary Verner, September 10, 2021). Of course, only state technocrats know what is best for water resources management.¹
- In the past year, this factor was demonstrated by CRO's (and AAGs) completely unlawful attempts to block the Plymouth water rights change/transfers (BCWCB); and ERO's (and AAGs) unrealistic attempt to use "speculation" as an excuse to block City of Pasco change/transfers (FCWCB) from Burbank Irrigation District. In both cases, Superior Courts ruled against Ecology, but local court rulings have no respect from Ecology's AAGs²
- WRP-Ecology's mindset is that "making money" from water market sales is "just not right." Private sector transactions are not in the best interest of "the state."
- The desire to now redefine a "public interest" test for water right change/transfers is totally disingenuous and seeks to strip away basic citizen rights to property and the protection thereof. Here again, the bureaucratic machine seeks to manipulate long-agreed-to

¹ For example, the BCWCB recently has learned a great deal from Alan Reichman, Ecology's lead water Assistant Attorney General. We learned that demonstrated water conservation savings for perfected permits could not be appropriated (retained) by water right holders who paid for and implemented the programs. We learned that Trusted water right certificates could not be conveyed to other parties via administrative divisions (Ecology's version of a quit claim deed for filing purposes). We learned that Family Farm Act water rights could not be banked (Lower Columbia River) and used for OCR mitigation permits by parties that qualified as FFA entities, and who actually owned the subject water right for banking.

² We watched Alan inform a Franklin County Superior Court Judge that his ruling would be meaningless no matter how he ruled, Ecology would oppose it and go to the Appeals Court.

principles for what constitutes the public interest, by trampling private property rights and legitimate water markets.

Ecology's Concern Over "Lost" Water Assets for Sub-Basins Cannot Be Justified.

- Ecology's 2020 water trusting-marketing review did not yield evidence of economic harm to the sub-basins where (very limited) change/transfers occurred.
- It became clear that Ecology staff wanted to dictate what was a "good" change/transfer versus a "bad" change/ transfer. It was probably best to keep uneconomical farm operations in place, where forty-acres and a mule added pastoral beauty to humble communities. These types of changes often involve a transition to higher value activity.

Ecology's New Definition for "Speculation" Is Ministry of Truth Double-Speak.

- There is no legal definition or standard to support Ecology's flirtation with a new speculation doctrine.³
- An attempt by the WRP to suggest that taking water rights out of Temporary Trust, and then selling them, is "speculation" is embarrassingly dishonest; it is the absurdity of Orwellian bureaucrats obsessed with control to establish "their" new regime.
- To suggest that water rights taken out of Trust should be "taxed" reflects no understanding of the fact that the assets have already been taxed, will be taxed again by water users, and is another example of the agency pretending to be Robin Hood. And would Ecology use the new tax fund for economic development? How?

Ecology Needs to Stay Out of Water Markets:

- Effective water markets are already assisted by Water Conservancy Boards, where local jurisdictions work with buyers and sellers to accomplish transactions. The single largest impediment to local water markets is Ecology.
- Suggesting that an agency with no water market experience, no direct accountability, and self-generated ethical standards should oversee water markets is pure nonsense.

Lying to Ecotopia.

- There is no Ecotopian bliss to be achieved by invoking 1984-like measures into Trust water rights management or enabling a staff-attorney obsession to instill their own version of a social justice. Sound market choices, with real social benefits, will be destroyed; and empty-gesture environmentalism will be substituted for meaningful actions.
- Perhaps the best social focus for legislative action should be on reforming the WRP-Ecology, making significant organizational changes, to actually advance meaningful water resources management. Perhaps that should take precedence for a legislative agenda.

³ But we keep learning more from Alan Reichman. How could we have known that the Burbank Irrigation District's transfer of certificated water rights to Pasco, consistent with the existing muni-code and previously transactions, had now become a premeditated speculation ploy. We learn so much.

Center for Environmental Law & Policy

Thank you for the opportunity to submit comments on this Draft Report. Attached is the Center for Environmental Law & Policy's comment.



Water Resources Program
WA State Department of Ecology
(360)407-6872

September 1, 2022

Thank you for the opportunity to provide comment on the Draft Water Resources Report to the Legislature. CELP has members across the state, and we are very invested in positive legislation to improve the efficiency, quality, and proactiveness of water resource management across Washington. To that end CELP is generally supportive of the Draft Report to the Legislature. We appreciate the time that Ecology took to meet with a variety of stakeholders, including CELP, to discuss each of the proposed recommendations. Ecology has appropriately sorted the majority of the policy concerns into recommended, needs more consideration, and not recommended however we feel that the public interested evaluations portion of the Report needs clarification. There is also a minor change that Ecology should make regarding the challenges identified in the section reporting on the Pilot Water Banking Grants Program.

Portions of the Draft Report that should remain in the Final Report

The following portions of the Draft Report are clear and will likely help the Legislature make decisions that will improve Washington's water resource management. CELP strongly supports Ecology leaving these sections in the Final Report to the Legislature.

- Report on Actions Taken Under Existing Authority
- Recommended Policy Concepts concerning the continued funding of the pilot water banking grant program and the disclosure of water right ownership
- Concepts warranting further analysis – all of these concepts are well described with the considerations laid out clearly for the Legislature's attention

Improving the Public Interest Evaluations Portion of the Report.

The section of the Draft Report titled "Public interest evaluations: further define the criteria in statute and extend them to surface water right changes" does a disservice to the Legislature by combining and intertwining two separate policy concerns. The first concern is Ecology's request that the Legislature defines the public interest in statute. The second concern is Ecology's request that the Legislature require that the public interest be considered for all surface water right changes. We understand that these two policy concerns both involve the public interest, but they are two separate issues, and we think that Ecology should represent that in the Report by discussing them separately. The requirement that the public interest be evaluated for all surface water right changes is critical to future water resource management in the state. It should be given its own section in the Report so that the Legislature can understand its importance and consider it separately from any other policy concern.

Additionally, CELP believes that Ecology's recommendation that the Legislature define the public interest in statute is a bad recommendation. Between RCW 90.54.020 and multiple court decisions CELP feels that Ecology has the information and authority it needs to determine for itself what the public interest is in each scenario that it comes across. If the Legislature defines the public

interest with more “specific criteria” it will remove the intentional flexibility that the current system gives Ecology. Currently Ecology has deference and authority to use its superior knowledge regarding water resources in the state to determine on a case-by-case basis what does and does not serve the public interest. Furthermore, this recommendation will likely create legislation that is highly controversial. CELP worries that by including this recommendation Ecology risks the Legislature dismissing all of Ecology’s recommendations in order to avoid a prolonged conflict in both committee and on the floor. This would be a shame as the other three recommendations that Ecology is making all greatly benefit the state’s water resources. Ultimately, it would benefit the strength of the Report to remove this recommendation and barring that it should be broken out into a separate section from the recommendation that the public interest apply to all surface water right changes.

Minor Change to the Report on the Pilot Water Banking Grants Program

In the section of the Draft Report that is reporting on the Pilot Water Banking Grants Program there should be some clarification regarding one of the challenges that Ecology has identified. The second challenge describes how several stakeholder groups expressed interest in changing the requirement that one-third of the water rights acquired are dedicated to instream flow. Yet the Draft Report fails to mention that some stakeholder groups prefer that the one-third requirement remains as it is, on each water right acquired rather than on the net acquired water. By only describing a portion of the stakeholder groups rather than both sides this section makes this challenge seem easily repaired and could prompt the Legislature to make the change without fully understanding the full picture.

Conclusions

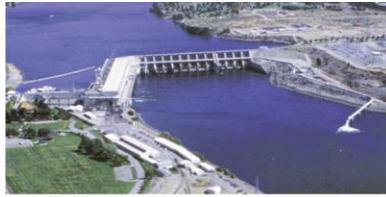
Overall, this Draft Report presents the Legislature with information about the current status of the water resources in the state. Yet, it fails to clearly articulate the recommendation regarding the public interest considerations without muddying the issues. CELP would like to see changes made to the public interest considerations in the Final Report to the Legislature. Thank you for considering these comments

/s Margaret Franquemont

Legal and Policy Director
Center for Environmental Law & Policy
85 S Washington St Ste 301
Seattle, WA 98104
Mfranquemont@clep.org

Public Utility District No. 1 of Chelan County

Please see attached PUD comments on Ecology's draft TWRP, many of which were inadequately addressed in Ecology's final policy.



PUBLIC UTILITY DISTRICT NO. 1 of CHELAN COUNTY

P.O. Box 1231, Wenatchee, WA 98807-1231 • 327 N. Wenatchee Ave., Wenatchee, WA 98801

(509) 663-8121 • Toll free 1-888-663-8121 • www.chelanpud.org

September 17, 2021

Submitted via Electronic Public Comment Portal

Department of Ecology

Water Resources Program

Re: Comments from Public Utility District No. 1 of Chelan County on Department of Ecology's Draft Policy and Interpretive Statement on the Administration of the Statewide Trust Water Rights Program (Ecology Publication #21-11-017)

To Whom it May Concern:

Public Utility District No. 1 of Chelan County (District) appreciates the opportunity to review and comment on the Washington State Department of Ecology's (Ecology) Draft Policy on Administration of the Statewide Trust Water Rights Program, and the Draft Request to Establish or Modify a Water Bank. Overall, we urge Ecology to abandon this draft "interpretive statement" approach. Instead, Ecology should either conduct rulemaking under the Administrative Procedure Act (APA) or propose legislative amendments to the applicable statutes.

- 1. General Comment on Purpose and Application of Draft Policy Statement:** In lieu of this policy and interpretive statement, Ecology should seek legislative clarity on these issues or should promulgate a rule that is consistent with its statutory authority. This policy implements new criteria on public interest, requirements to require portions of valid water rights to be dedicated instream as a condition of water banking, and requirements to leave portions of a valid right "in-basin" as a condition of water banking. These are sweeping new criteria that should be legislatively determined. Water banking is one of the only ways new projects can succeed and the District is concerned that the policy, as written, does not reflect the full values of the regulated community, nor will it have sufficient public scrutiny and transparency through the APA rulemaking process for Ecology to thoughtfully consider the range of perspectives and priorities affected by the Trust Water Rights program.
- 2. Application, Draft Policy Page 1:** While there are notable differences between the statewide trust statute (Revised Code of Washington (RCW) 90.42) and the Yakima basin trust statute (RCW 90.38), the bulk of this policy actually addresses areas of commonality between the two statutes. The District does not have assets in the Yakima basin, but as a rule we favor consistency and simplicity in administration of the water code. We question whether continuing to perpetuate different standards in the trust program is consistent with legislative intent.

3. **References, Draft Policy Page 1:** Ecology’s existing trust water right program guidance (GUID) 1220, is not referenced explicitly in the document. Is this the “Trust Water Rights Guidance (forthcoming Fall 2021)” that Ecology references on page 1? Additionally, the Draft Policy (POL) explicitly includes as references RCW chapter 90.38 and POL 2030, but confusingly suggests in the “Application” section that the Draft Policy does not apply to Yakima basin trust water rights or municipal water suppliers’ trust water rights.

4. **Section 1: Definitions, Draft Policy Page 1:**

- a. **Donation:** This policy appears to subsume donations within the definition of a gift, which does not appear to be consistent with the current GUID 1220. This is perpetuated on page 2 where the statutory reference substitutes donation for the statutory language of “gift”. If Ecology believes gifts and donations are the same thing, it should create better clarity on why this is the case. If they are different, they should not be used interchangeably in the policy. Under the statutory framework, the term “gift” is used in the context of a permanent donation that may be deductible for federal income tax purposes. See RCW 90.42.080(7) and 90.38.020(5). To the extent any definition of “donation” is necessary, it seems more consistent with the statute to define it simply as “a water right contributed by the water right holder to Ecology without monetary compensation.” Additionally, the adjective “non-permanent” in the proposed definition of “temporary donation” is both superfluous and confusing (as in “a specified non-permanent period of time”). In the statutory context, the meanings of “temporary” and “permanent” donations are clear and can be derived by resort to standard dictionary definitions (see, e.g., RCW 90.42.080(9)); to the extent that a definition of “temporary donation” is necessary, it seems more consistent with the statute to define it simply as “a donated water right held in the TWRP for a specified period of time with an identified end date.”
- b. **Mitigation:** The definition of “Mitigating rights” contains a circular use of the word “mitigation” (“water rights . . . that . . . serve as mitigation to allow out-of-stream uses of water”). The defined terms relating to “mitigation” include “long-term mitigation” and “permanent mitigation” but do not include any definition of “temporary mitigation” – which is part of the definition of “long-term mitigation.” The concept of water right mitigation is too important to be defined in a “policy and interpretive statement.” (See, e.g., RCW 90.94.090.) The scope, framework, and appropriate uses of mitigation should be addressed either by the Legislature or by Ecology in a formal rulemaking under the APA.
- c. **Water bank and water banking purposes:** Ecology’s proposed definitions are not consistent with the statute. RCW 90.42.110(2) and 90.42.120 indicate the Legislature’s intent that “water banking” involves transfer and use of a water right (or portion thereof) by a third party. Ecology’s proposed definitions are far too broad, in that they would characterize as “water banking” any use of a water right for mitigation – for example, a water right acquired and/or held by an applicant and offered as mitigation for a new water right sought by that applicant. To the extent there is confusion about the appropriate scope of “water banking” under the Water Code, this is an excellent example of the need for legislative clarity.

5. **Section 3: Establishing a Trust Water Right, Draft Policy Page 3:** This description ignores the circumstance addressed in RCW 90.42.080(1)(b), under which Ecology “shall accept” a donation by a holder of a surface or groundwater right for instream flows or preservation of surface or groundwater resources. Ecology does not have discretion to withhold its “agreement” in those circumstances.
6. **Section 4: Water Banking, Draft Policy Pages 3-8:** See comments on the proposed definitions above. “Any use of the TWRP to mitigate water uses” is far too broad, because it would encompass use of the TWRP by a water right holder to mitigate its own water uses. The legislative intent is for “water banking” to provide opportunities for third parties to obtain rights to use water. Ecology suggests it has the authority to deny an applicant the right to create a water bank based on the word “may” in RCW 90.42.110(1), but does not set out any process by which an applicant denied such processing can be heard. Presumably, Ecology should issue an Administrative Order if it makes such a determination? Or would Ecology instead process the application to a denial? Or would Ecology simply refuse to allow the applicant access to the cost-reimbursement program? This persists in Subsection 2, where Ecology describes what it will do if a water bank application is accepted (following internet notice) but is silent on what will happen if Ecology “declines a water banking request” or “decides to defer a decision to a later date.” Would an applicant have a right to appeal? What would they appeal? How would they appeal a “deferral” to a later date? The only recourse in Ecology’s draft policy appears to be for the applicant to “modify and resubmit” their proposal. This does not appear consistent with Ecology’s statutory duties to process applications under the Water Code. See *Hillis v. Ecology*, 131 Wash.2d 373 (1997); WAC ch. 173-152.
7. **Subsection 4(2): Administrative Capacity, Draft Policy Page 4:** There is an implication that Ecology will regulate new water bank formation based on staff capacity. This is concerning as it could preclude establishment of new water banks that would clearly serve the public interest, simply because Ecology has inadequate staff resources. An analogy exists in water right application permitting where Ecology has chronically suffered from lack of staff to process new applications. The answer however is not to refuse to process an application; rather, applications must be processed in priority and can use cost-reimbursement to accelerate their processing when appropriate. This policy suggests that Ecology could simply refuse to review applications for new banks based on staff capacity. That is inconsistent with the agency’s authority and legislative intent as expressed in the cost-reimbursement statute.
8. **Subsection 4(2): Alignment with Program priorities, Draft Policy Page 4:** We agree that Ecology should recognize a set of priorities for water bank creation when it’s using Ecology staff as the primary processing route, similar to how Ecology processes priority applications according to the Hillis Rule (WAC ch. 173-152). However, water banks that are not the highest priority for use of Ecology staff processing should still have a permitting avenue (cost-reimbursement). Further, the criteria that Ecology cites in these 3 example bullets do not align with the range of priorities Ecology has already adopted in rule (WAC 173-152), and the draft policy fails to address inconsistencies with Ecology’s water right processing rule.
9. **Subsection 4(2): Potential impairment of the public interest, Draft Policy Page 4:** Ecology devotes only one bullet with no criteria to the “public interest” test required for creating a water bank. The Legislature has established a general declaration of fundamentals in RCW 90.54.020 that should be the starting point in evaluating whether exercise of a trust water right would impair the public interest. In light of Ecology’s draft decision on U.S. Golden Eagle/Darrington, it appears that legislation or rulemaking is necessary to address the full range of public interest criteria that Ecology will rely on in making a “public interest” determination for a trust water

right. Absent legislation or APA-compliant rulemaking, Ecology staff will not have appropriate guidance to make consistent decisions and the regulated community will have no predictability as to appropriate uses of water banking. This overall confusion will cause significant inefficiency in creating new water banks.

10. Subsection 3: Agreements, Protect against the impairment of the public interest, Draft

Policy Page 5: Ecology appears to suggest that it could require a portion of a valid water right to remain instream or be maintained for use by others in the basin-of-origin as a condition of creating a new water bank. This conflicts with the Legislature's express direction to Ecology in RCW 90.03.380(6) that: "No applicant for a change, transfer, or amendment of a water right may be required to give up any part of the applicant's valid water right or claim to a state agency, the trust water rights program, or to other persons as a condition of processing the application." Any amendments to this prohibition or exceptions specific to trust water rights/water banking agreements must be enacted by the Legislature.

11. Section 4(6): Water Right Changes to Create Mitigating Rights, Draft Policy Page 6: There is no statutory authority for Ecology to require a change in purpose of use or to require a water banking agreement in order for a water right holder to use an existing water right as instream flow mitigation to offset the impacts of a new appropriation. The trust water right statute allows a water right holder to donate all or a portion of its right to the TWRP to assist in providing instream flows. Ecology must accept such a donation, and RCW 90.03.380 does not apply. RCW 90.42.080(1)(b), (5). A water banking agreement is neither appropriate nor required in such a circumstance. Ecology's draft policy is inconsistent with the applicable statutes. Additionally, the provisions in RCW 90.66.065 probably require legislative amendments to enable effective use in the TWRP of water rights established as family farm permits. Finally, the same opportunities for appeal identified in the draft policy for applications should be extended to water bank requests in order to afford applicants with certainty and due process.

12. Section 7: Water Conservancy Boards, Draft Policy Page 7: Ecology's discretion whether to establish and hold a trust water right is not unlimited. Ecology's review of a Water Conservancy Board decision must be based on consistency with state water law. A water banking agreement is not required or appropriate for all trust water right transfers.

13. Water Bank Request Form, Page 2, Section 2.4: Given the importance of the new public interest criteria by which water bank requests will be judged, we believe this section should elicit a much broader set of standard information from the applicant. Requests could include:

- a. Is the water bank consistent with an adopted watershed plan that is the expression of the public interest in the locality?
- b. How many river mile reaches will benefit from the bank?
- c. Will the bank benefit endangered species?
- d. Will the bank benefit a declining groundwater area?
- e. Will the bank create new jobs?
- f. Will the bank increase local sales or property tax revenue?
- g. Will the bank aid in developing storage facilities in keeping with RCW 90.54.020(4)?
- h. Will the bank assist in providing safe and adequate potable domestic supply in keeping with RCW 90.54.020(5)?
- i. Will the bank aid in creating public water systems in keeping with RCW 90.54.020(8)?
- j. Will the bank assist in ensuring environmental justice?
- k. Will the bank assist in preserving valid water rights?

Department of Ecology
September 17, 2021

Ecology is placing great weight in this policy on negotiating trust water right agreements. Concurrent with this effort, the District is aware that Ecology is developing a new trust water right agreement template with terms that effectuate this policy. Given the inconsistencies with applicable statutes and the ambiguity in this policy, the District urges Ecology to utilize the rulemaking process to allow a full and thoughtful review of the agency's proposals and its new draft trust water right agreement.

Thank you for considering our comments.

Sincerely,

D. Marcie Clement
Water Resources Program Manager
Marcie.clement@chelanpud.org
(509) 661-4186

Natalie Waid

For the following section (pg.10) under 'Water right ownership and sales disclosure

We recommend that the Legislature create a new statutory requirement so that all water right sales or changes in ownership be reported to the state and that this information is made easily available for the public to access.' Requesting clarity on defining 'ownership' and if changes in ownership can be explicitly defined for owned water rights, leased lands where water rights exist which may change operators or land use purposes and if this would fall under this criteria of reporting/notification pathways.



Jessica Kuchan
direct 206.502.4403
kuchan@confluencelaw.com

Jamie Morin
direct 206.502.4405
morin@confluencelaw.com

September 6, 2022

Submitted through Public Comment Form wr.ecology.commentinginput.com

Mary Verner
Water Resources Program
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503

RE: Comments to Draft Legislative Report on Water Right Transfers,
Water Banking, and Trust Water Rights Program

Dear Mary:

Thank you for the opportunity to provide comments to Ecology's Draft Legislative Report on Water Right Transfers, Water Banking, and Trust Water Rights Program. Confluence Law, PLLC, represents a variety of clients on matters relating to water resources. We provide these comments based on our own experiences and concerns and not on behalf of any client.

**Ecology's Water Right Transfers, Water Banking, and Trust Legislative Report
Pilot Water Banking Grants Program**

We support Ecology's recommendation to continue funding the water banking grant program. We believe there is a need for this funding source. As Ecology explained in its report, water rights purchase and sale agreements can take time to negotiate. Public and public/private partnership water banks need a reliable funding source when water rights become available. We do note that the requirement for a qualified "valid interest" in a water right is indeed an impediment for making a grant request, and that some modification to that provision would benefit public entities seeking to acquire water rights for banking purposes.

Water right ownership and sales disclosure

We believe Ecology's recommendation to develop and track water right ownership and sales disclosure needs additional development. We are concerned that Ecology's

recommendation does not fully utilize existing sources of information, including excise tax affidavits, and recommends a program for which the agency has not fully analyzed the purpose and need. Under Washington law, an excise tax affidavit is required for the transfer of water rights that are sold separately from formerly appurtenant land. There is no current requirement for notification to Ecology of water rights sold appurtenant to land. We recognize the desire to have notice of water rights transfers. However, the water code requires notice of proposed water rights changes and Ecology provides notice of its decisions. Furthermore, under RCW 90.03.380, water rights, unless expressly withheld by the Grantor in a deed, transfer with the appurtenant land.

Ecology's recommendation would create a complex system in which each county would be required to identify when land is sold with water rights, and Ecology would need to intake and process all this information in a timely manner. Currently, Ecology's backlog of processing applications, administrative divisions, and other water rights-related actions is extensive. We question whether Ecology has the staff capacity to develop and implement such a new program. This recommendation should be included in the "Concepts Warranting Further Analysis" section of the Report.

Further Definition to Public Interest

We believe Ecology's recommendation to define the term "public interest" needs to be approached with a view of the many important uses of water in our state. If the Legislature intends to define "public interest" in an upcoming session, the term needs to be defined in a way that recognizes the importance of water in our state for ecology, human consumption, and irrigation purposes.

Limiting New Temporary Donations into the TWRP

Ecology's draft discussion paper suggests that the Legislature should prohibit the change of a water right for two years after donation into the Trust Water Right Program. We question this suggestion because it addresses just 5 percent of the water rights that have been donated to the Trust Water Rights Program and will have the unintended consequence of reducing the use of the Program. In Table 2, water rights that represent approximately 5 percent of the total volume of water donated to the Trust Water Rights Program and not re-enrolled were changed. The vast majority of the water rights donated to the Trust Water Rights Program reverted to the original attributes.

Water rights donated to the Trust Water Right Program are water rights that have been put to beneficial use. Requiring a "cooling off period" to prevent a water right donated to the Trust Water Rights Program from being changed for two years would result in fewer transfers to the Trust Water Rights Program. Water rights holders may elect to continue to use the water right on the appurtenant land, rather than donate the water rights, diminishing the opportunity for instream benefits donations may provide.

Facilitate Efficient Water Markets and Water Right Transfers with a New Regulatory Structure

We believe Ecology should consider existing working groups and watershed groups to address the need to provide more transparency in available water rights and the impacts of water rights transfers. Ecology has focused on state agency-driven regulation of the market to address a need for transparency and the concern over water right speculation. A state-administered central trading platform is not likely to understand local relationships and availability; it will be seen with suspicion in many communities. Additionally, a state-administered program dictating the location, use, and price of water rights sales would be difficult to create and directly impact water rights holders. We believe Ecology's approach would be impossible to implement because water right transfers and impacts have highly local impacts.

The facilitation of effective markets and transparency of water rights transfers in watersheds should be developed from a local watershed group level. The Legislature has enabled the development of watershed planning groups and entrusted those groups to develop addendums to watershed plans for certain watersheds under Chapter 90.94 RCW. Additionally, with the Legislature's support through the Water Banking Pilot Grants, many counties are able to develop local water banks to help meet the long-term water needs for communities. Furthermore, the Yakima River Water Transfer Working Group has been an example of a collaborative and transparent process for water rights transfers in the Yakima River Basin. Providing more transparency for water rights transfers should focus on involving local governments and citizens in understanding the implications of potential water rights transfers; it should originate at the watershed level.

Thank you for the opportunity to comment. We support the State's Trust Water Rights Program and the opportunities it affords our state for ways to meet its long-term water resource needs. We look forward to working with Ecology to find solutions to these complex issues.

CONFLUENCE LAW, PLLC

//Signed electronically

Jessica Kuchan, Attorney at Law

//Signed electronically

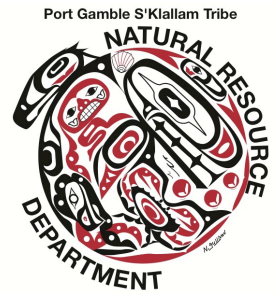
Jamie Morin, Attorney at Law

Port Gamble S'Klallam Tribe Natural Resources Department

Please see attached letter.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



September 6, 2022

VIA ONLINE PUBLIC COMMENT FORM

Water Resource Program
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504–7600
(360) 407-6872

Re: Comments Regarding Ecology’s Draft *Water Rights Transfers, Water Banking, and Trust Legislative Report*

The Port Gamble S’Klallam Tribe (“Tribe”) provides the following comments on the Washington Department of Ecology’s (“Ecology”) draft *Water Rights Transfers, Water Banking, and Trust Legislative Report* (“Report”), dated August 2022.

The Tribe is a federally recognized tribe with reserved aboriginal fishing rights under the 1855 Treaty of Point No Point. 12 Stat. 933; *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978). Since time immemorial, the Tribe and its members have held deep ancestral ties to their traditional use areas, including both the Tribe’s current reservation and its off-reservation usual and accustomed fishing and hunting grounds. Based on the Tribe’s unique historic relationship with and knowledge of these areas and their natural resources, the Tribe regularly participates in state administrative processes to ensure that tribal interests are accounted for and protected in state environmental decision making.

The Tribe appreciates Ecology’s solicitation of public comments in its effort to improve the Report. The Tribe supports several of Ecology’s recommendations, but the Tribe also has some significant concerns regarding the Report, which are explained in more detail below.

A. Any Statutory Definition of “Public Interest” Should *Not* Reference “Beneficial Use,” But *Should* Include the Protection of Tribal Water Rights, Prioritization of Increasing Water Supply, and Consideration of Climate Change.

The Report recommends that the Legislature (1) “specifically define the public interest in statute and prescribe criteria for how to evaluate the public interest in water rights decisions,” and (2) require that the public interest be evaluated for all surface water right change applications.” (Report at 11.) The Tribe supports both of these recommendations. However, the

Tribe strongly recommends that the Legislature *not* to adopt the definition of “public interest,” that is currently used by Ecology, as described in the Report and in POL-1010.

As the Tribe explained in more detail in its prior comments on a draft of PL-1010 submitted on September 17, 2021, which are attached as Exhibit A, the Tribe remains concerned that Ecology’s definition of “public interest”—which references the “water resource fundamentals” in RCW 90.54.020—incorrectly conflates “public interest” with “beneficial use.” This is problematic because the beneficial uses of water identified in RCW 90.54.020 includes many uses of water that are not necessarily in the public interest. Equating these concepts is also contrary to existing Washington case law. *See Swinomish Indian Tribal Cmty. v. Washington State Dep’t of Ecology*, 178 Wash. 2d 571, 587, 311 P.3d 6, 13 (2013) (en banc) (explaining that public interest is not equivalent to beneficial use).

Ecology’s definition of “public interest” also does not adequately take into consideration important public interests in preserving and protecting instream flows.¹ In particular, consumptive uses—such as temporary or permanent mitigation of water use for new private development, for new water-intensive agriculture, and for water uses likely to diminish water quality—should be given lower priority under a public interest analysis. A definition that places instream and consumptive water uses on equal footing ignores the reality of increasing severe water shortages across the state and misses an opportunity to meet or restore minimum flows.

Ecology’s definition of “public interest” also does not adequately account for the effects of climate change, which bear heavily on water supply in Washington state.² To inform its public interest review, Ecology should take into consideration projected impacts of climate change on the waterbody or aquifer for which the trust water right action is proposed. With this information, Ecology could decide to condition the approval of a new mitigated water right on the reservation of a portion of the right for instream flows to compensate for water shortages from climate change, rather than approving the mitigated water right for the same amount previously used by the water right holder.

A final problem with Ecology’s definition of “public interest” is that it presumes that certain local or regional planning documents, such as water supply plans, water conservation plans, Ecology administrative rules, and local land use plans and development regulations are in the public interest. While such presumption will likely expedite Ecology’s processing of trust water rights, it may also lead to superficial examination of these documents, some of which may be outdated or insufficiently protective of the public interest. Moreover, the Policy does not specify how to rebut the presumption that these documents are in the public interest. Instead,

¹ For example, in Water Resource Inventory Area (“WRIA”) 14 and 15, U.S. Geological Survey monthly stream flow data shows that Goldsborough Creek has failed to meet June minimum flows 2018-2020, 2013-2016, and 2005-2009; that is, minimum flows were not met 11 of the last 15 years. For August, Goldsborough Creek failed to meet minimum flows for *all* recorded years 2005-2020. For September, minimum flows were not met in Goldsborough Creek 2015-2020 and 2005-2009. Similarly, in WRIA 15, many streams are fully closed to further appropriation and many others are closed for the summer months. Yet, increased demand on water resources continues in WRIs 14 and 15. *See also Saving Water in Washington*, available at <https://www.epa.gov/sites/default/files/2017-02/documents/ws-ourwater-washington-state-fact-sheet.pdf>.

² *See, e.g., id.*; Water Supplies and Climate Change, available at <https://ecology.wa.gov/Air-Climate/Climate-change/Climate-change-the-environment/Water-supply-impacts>.

applicants should be permitted to demonstrate consistency with these plans, but not be afforded an automatic presumption that consistency equates to satisfaction of the public interest.

If the Legislature does define “public interest” by statute, the Tribe recommends that the definition should:

- Expressly provide that preserving and protecting the water rights of Indian tribes in the State of Washington is in the public interest. Indian tribes are senior water rights holders with extensive experience in stewarding water resources, and it is therefore in the public interest to preserve and protect tribal water rights. It is also important that the considerations of “public interest” not be limited to the interests of non-Indian citizens and entities within the state.
- Prioritize uses of water that result in a net increase in water supply, which will help address extreme drought conditions and unmet and unenforced minimum flows in many basins across the state.
- Require that consideration of the public interest account for the impacts of climate change.

Importantly, any definition of “public interest” adopted by the Legislature should *not* equate public interest with “beneficial use.”

B. Ecology Should Further Consider Restricting Out-of-Basin Transfers, Particularly Where the Federally Reserved Water Rights of Indian Tribes Could be Impaired.

In the Report, Ecology states that it does not recommend that the Legislature consider authorizing Ecology to restrict out-of-basin water rights transfers in some basins through rulemaking. (Report at 16.) Ecology also does not recommend that the Legislature ban out-of-basin transfers in specific basins. (Report at 17.)

The Tribe does not agree with these recommendations and instead recommends that Ecology undertake further analysis as to whether limitations on out-of-basin transfers would help to protect the federally reserved water rights of Indian tribes in Washington. As Ecology is aware, out-of-basin transfers are very difficult to reverse and thus can result in a permanent loss of water rights. The Tribe is particularly concerned that out-of-basin transfers could permanently impair the federally reserved rights of Indian tribes due to Ecology’s existing and erroneous policy of not considering unadjudicated federally reserved rights as “existing rights.” *See* Attachment 1 to Exhibit A.

As explained in more depth in the Tribe’s September 17, 2021, comments on PL-1010, many actions under the Trust Water Rights Program require Ecology to determine whether a proposed action will injure or impair “existing rights.” *See e.g.*, RCW 90.42.100(3)(a) (prohibition on using water banking to “cause detriment or injury to existing rights.”); RCW 90.42.040(4) (trust water rights only authorized on a determination that “existing rights” will not be impaired); RCW 90.03.380 (a change to a water right is permitted if such change can be made

without causing detriment or injury to a trust water right); RCW 90.03.290(3) (appropriation of new water rights requires finding that application will not “impair existing rights”).

Unfortunately, Ecology continues to proceed with decisions of lasting impact on the State under the flawed premise that it lacks the authority to consider the impairment of federally reserved water rights of Indian tribes that have not been adjudicated as “existing rights” under *Rettkoski v. Dep’t of Ecology*, 122 Wash. 2d 219, 228, 858 P.2d 232, 237 (1993). As Ecology has been advised several times by Washington tribes, this policy is incorrect under both federal and state law. *See* Exhibit A at 2–9; *see also* Swinomish Indian Tribal Community Comments to Ecology’s Advisory Group on Water Trust, Banking, and Transfers (Nov. 10, 2020).

Indian tribes, including tribes in Washington, possess federally reserved water rights which are governed by federal law, and which cannot expire or be forfeited for non-use. While the exact quantity of many tribes’ reserved water rights has not been adjudicated, the quantity of water reserved is intended to “satisfy the future as well as the present needs of the Indian reservations,”³ and is not dependent on or capped at a tribe’s historic or current use. Federal law recognizes these water rights as existing even if they have not been adjudicated, as evident from cases in which courts have enjoining water uses that interfere with federally reserved rights without quantifying the amount reserved.⁴

The Washington State Supreme Court has long affirmed these principles of federal reserved water rights. In *Dep’t of Ecology v. Yakima Reservation Irrigation Dist.*, 121 Wash. 2d 257, 274, 301 (Wash. 1993) (en banc), for example, the Court affirmed a water right for irrigation purposes and water rights necessary to fulfill treaty fishing rights and held that these rights are “perpetual and is not limited by the beneficial use doctrine under state law.” In *In re Yakima River Drainage Basin*, 177 Wash. 2d 299, 309-11 (Wash. 2013), as corrected (May 22, 2013), the Washington State Supreme Court confirmed the Yakama Nation’s reserved rights to “sufficient water to meet the present and future needs of its reservation,” which include “agriculture based activities and fishing,” as well as “a right that dates from time immemorial to adequate water to sustain fish and other aquatic life in Ahtanum Creek.” The court further recognized that these rights are not subject to appropriation or disposal under state law. *Id.* at 313.

The Washington Court of Appeal has also recognized that federally reserved water rights are “existing rights,” even if those rights have not been adjudicated or quantified. *See Vander Houwen v. State, Dep’t of Ecology*, 170 Wash. App. 1009, *8 (Wash. Ct. App. 2012); *Kennewick*

³ *Arizona v. California*, 373 U.S. 546, 600 (1963), judgment entered sub nom. *Arizona v. California*, 376 U.S. 340 (1964), amended sub nom. *Arizona v. California*, 383 U.S. 268 (1966), and amended sub nom. *Arizona v. California*, 466 U.S. 144 (1984); *see also United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956) (finding that Indian water rights may “grow to keep pace with development” on the reservation).

⁴ *See, e.g., Cappaert v. United States*, 426 U.S. 128, 138 (1976) (affirming decision enjoining diversions of water that would lower the groundwater level in in Devil’s Hole below a level necessary to preserve fish to protect water right reserved by the United States, but not quantifying the right); *Winters v. United States*, 207 U.S. 564, 575-578 (1908) (enjoining diversions of water from the Milk River, but not quantifying the federal reserved water right of the resident Assiniboine or Gros Ventre Tribes); *Joint Bd. Of Control of Flathead, Mission & Jocko Irr. Dist’s v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987) (holding that even where a tribe’s water rights are unquantified, the Bureau of Indian Affairs has a duty to distribute project water fairly among other irrigators after the tribe’s rights were protected).

Public Hospital District v. Pollution Control Hearings Board, 126 Wash. App. 1030, *4 (Wash. Ct. App. 2005); *see also The Tulalip Tribes of Washington v. Dep't of Ecology*, 2002 WL 1650503, *8 (PCHB No. 01-06, Apr. 17, 2002). The Washington Administrative Code also expressly includes federally reserved rights within the definition of “existing rights.” *See, e.g.*, WAC 173-518-030 (“[e]xisting water right’ includes ‘federal Indian and non-Indian reserved rights’”), 173-546-030(9) (same), 173-545-030(8) (same); *see also* WAC 173-531A-030 (“Nothing in the chapter shall be construed to lessen, enlarge, or modify existing rights acquired by appropriation or by other means, including federal reserved rights.”) (emphasis added); WAC 173-503-070 (“[e]xisting water rights” include “federal Indian and non-Indian reserved rights”); WAC 173-546-010 (same); WAC 173-549-060(1) (same).

The *Rettkowski* decision itself also affirmed that Ecology is authorized to “tentatively determin[e] whether there are existing water rights with which the proposed use will conflict.” 122 Wash. 2d at 228. The Court clearly differentiated between tentative determinations which it determined Ecology has authority to issue, and final determinations of water rights, including a determination of priorities, which require a general adjudication that is beyond Ecology’s power. *Id.* at 227 n. 2. And subsequent Washington case law has affirmed that Ecology can make tentative determinations of water rights to make injury and impairment determinations. *See Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash. 2d 769, 772 (Wash. 1997) (en banc); *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wash. 2d 118, 127 (Wash. 1999) (en banc); *Public Utility District No. 1 of Pend Oreille County v. State*, 146 Wash. 2d 778, 794 (Wash. 2002) (en banc); *Cornelius v. Washington Dep't of Ecology*, 182 Wash. 2d 574, 630 n. 21 (Wash. 2015) (en banc).

In sum, Ecology’s policy of not considering federally reserved water rights as “existing water rights” is contrary to existing federal and state law and is not supported by the *Rettkowski* decision upon which Ecology relies. The unfortunate result of Ecology’s policy is that Ecology is more likely to approve actions that could injure or impair tribe’s federally reserved water rights. In particular, transfers of water rights out-of-basin that occur without consideration for tribal water rights may violate the tribes’ federal reserved water rights for consumptive on-reservation uses or non-consumptive instream uses.

The Tribe would therefore recommend that Ecology further consider its policy of not considering federally reserved water rights as “existing rights,” and engage in consultation with Indian tribes in Washington on this issue. Additionally, since Ecology’s policy is based on a claimed lack of authority under *Rettkowski*, Ecology should consider whether it needs to make a recommendation to the Legislature to statutorily authorize Ecology to consider the federally reserved water rights of Indian tribes, including unadjudicated and unquantified rights, as “existing rights.”

The Tribe would additionally recommend that Ecology consider limiting or banning out-of-basin transfers in certain basins where the federally reserved water rights of Indian tribes could be impaired. Such restrictions would prevent irreparable harm to tribal water rights within Washington. Ecology has expressed concerns that rulemaking limiting out-of-basin transfers would require “a substantial investment of staff time and resources.” (Report at 16.) But those concerns are substantially outweighed by the possibility of irreversible damage to tribal water

rights, as well as the potential costs of litigation that would result from impairment of tribal water rights.

Lastly, the Tribe also strongly opposes any out-of-basin transfers that are closed to new appropriations or where instream flow rules are exceeded and would recommend that Ecology further consider recommending that the Legislature implement such a ban or authorize Ecology to do so. It is illogical to allow water to be permanently removed from basins where water resources have already been determined to be so limited that no new appropriations are allowed or where instream flow rules are already exceeded.

C. Other Comments

Water Right Ownership and Sales Disclosures: The Tribe supports Ecology's recommendation that "the Legislature create a new statutory requirement so that all water right sales or changes in ownership be reported to the state and that this information be made easily available for the public to access." (Report at 10.) This recommendation would increase public access to important information about water in the state, and it would also help provide Ecology with additional information regarding the state's water resources. The Tribe additionally agrees with the feedback that Ecology has received from other stakeholders that this information needs to be made easily accessible by the public in a useable format.

Limitation on Time Period for Temporary Donations: Ecology's Report recommends further analysis of a legislative limit on how long water rights can be enrolled as a temporary donation. (Report at 13.) The Tribe agrees that further analysis of this issue is warranted. Ecology currently defines a "temporary donation into trust" to mean that a water right is held in the TWRP "for a specified non-permanent period of time." (Report at 5.) This definition is overbroad because it could include a donation for a period of 100 years or more, which is effectively permanent. In addition, since trust water rights may be donated on a temporary, but recurring basis, Ecology should identify the total number of years after which a donation becomes "permanent." Such limitation is particularly crucial in circumstances in which mitigated out-of-stream uses rely on donated water to avoid a full tentative determination. Otherwise, Ecology could run afoul of the prohibition on the use of water banking to the detriment of existing water rights under RCW 90.42.100(3)(a).

Requirement that a Portion of Water Rights Used for Water Banking be Permanently Dedicated for Streamflow Purposes: Ecology's Report also recommends further consideration of a statutory requirement that a portion of each water right used for water banking be permanently dedicated to benefit streamflow. (Report at 14.) The Tribe supports further consideration of ways in which water banking could be used to benefit streamflow.

CONCLUSION

The Tribe appreciates the opportunity to comment on the Report and hopes that the foregoing recommendations will be taken into consideration.

Sincerely,



Paul McCollum
Director, Natural Resources Department
Port Gamble S'Klallam Tribe

cc: Steven Moe, Legal Counsel, Port Gamble S'Klallam Tribe
Claire Newman, Kanji & Katzen, P.L.L.C.
Jane Steadman, Kanji & Katzen, P.L.L.C.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



September 17, 2021

VIA ONLINE PUBLIC COMMENT FORM

Washington State Trust Water Rights Program
Attn: Mary Verner, Program Manager
300 Desmond Dr. Southeast
Lacey, WA 98503

RE: Comments Regarding Ecology's Policy and Interpretive Statement on the Administration of Statewide Trust Water Rights Program

The Port Gamble S'Klallam Tribe ("Tribe") provides the following comments on Ecology's Policy and Interpretive Statement on the Administration of Statewide Trust Water Rights Program ("TWRP", "Policy"). The Tribe is a federally recognized tribe with reserved aboriginal fishing rights under the 1855 Treaty of Point No Point. 12 Stat. 933; *United States v. Washington*, 459 F.Supp. 1020, 1039 (W.D. Wash. 1978). Dating to time immemorial, the Tribe and its members have held deep ancestral ties to their traditional use areas including both the Tribe's current reservation and its off-reservation usual and accustomed fishing and hunting grounds. Based on its members' unique historic relationship with and knowledge of these areas and their natural resources, the Tribe regularly participates in state administrative processes to ensure that tribal interests are accounted for and protected in state environmental decision making.

The Tribe appreciates Ecology's solicitation of public comments in its effort to improve the TWRP. As explained further below, however, the Tribe is concerned that the Policy permits Ecology to disregard tribes' federal reserved water rights, contrary to federal and state law, and considers "public interest" in a manner inconsistent with state law, among other serious concerns raised by the Policy. To avoid costly disputes over federal reserved water rights, adequately protect the public interest, and conserve limited water supply, the Tribe requests that Ecology modify the Policy consistent with the following comments.¹

¹ The Application section of the Policy states: "Municipal water rights have unique attributes and allowances under the Municipal Water Law that are not addressed in this policy. Specific provisions that may apply to municipal water rights in regard to mitigation and water banking may be addressed in POL 2030, the Municipal Water Law Policy and Interpretive Statement." It is somewhat unclear whether Ecology intends the Policy to apply to any aspect of municipal water rights. The Policy itself does not address or reference municipal water rights at all. The Tribe understands the "Application" Section, quoted above, to mean that the Policy is not intended to apply to municipal water rights, or their attributes, such as exemption from relinquishment. Therefore, these comments do



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



A. The Policy Should Define Existing Rights to Include Tribes' Federal Reserved Water Right in Conformity With Federal and State Law.

Many actions under the TWRP require Ecology to determine whether the proposed action will cause injury or detriment to or will impair “existing rights” (collectively, “injury/impairment determination”), such as authorization of or a change to a trust water right. *See e.g.*, RCW 90.42.100(3)(a) (prohibition on using water banking to “cause detriment or injury to existing rights.”); RCW 90.42.040(4) (trust water rights only authorized on a determination that “existing rights” will not be impaired); RCW 90.03.380 (a change to a water right is permitted if such change can be made without causing detriment or injury to a trust water right).

These protections for existing rights within the TWRP statute are an extension of long-standing protections for existing rights under Washington law, which were adopted even before the State’s enactment of the Water Code in 1917.² When it adopted the system of prior appropriation as law, the legislature was careful to explicitly protect existing rights: “[n]othing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.”³ Neither the federal courts nor the Washington state courts have held that “existing rights” do not include unadjudicated federal reserved water rights. Only two state courts have even addressed the phrase “existing rights,” and neither precluded federal reserved water rights from its ambit or even addressed the question at all.⁴

Ecology addresses injury/impairment determinations under several Sections of the Policy, including Sections 4(2), 4(3), and 4(4).⁵ Regarding its injury/impairment determination under

not address the intersection between TWRP and municipal water rights. If the Policy is intended to apply to municipal water rights in any way, Ecology should clarify to which aspects of municipal water rights they apply and permit the Tribe to supplement these comments.

² *Proctor v. Sim*, 134 Wash. 606, 615–16 (1925) (discussing the protection of “existing rights” of riparian owners under Washington law prior to and through the enactment of the 1917 Water Code).

³ RCW 90.03.010.

⁴ The Washington Supreme Court has considered the definition of “existing rights” in two cases, both concerning riparian rights. In *Botton v. State*, 69 Wash. 2d 751, 758 (Wash. 1966) the Court inquired, “What, then, are ‘the existing rights’ of the appellants as riparian owners which are to be considered as vested rights and may not be interfered with? Our answer is that it is the right to the beneficial use of such portions of the waters of the lake as are either directly or prospectively, within a reasonable time, proper and necessary for the irrigation of their lands and for the usual domestic purposes.” *Id.* In *Proctor*, the Court defined an existing right as “the right to the beneficial use of such portions of the waters of the lake” which are within a reasonable time, as necessary for irrigation and domestic use. 134 Wash. at 615. These definitions of existing riparian rights would not apply to the separate category of federal reserved water rights exempt from state law. *See also State, Dep’t of Ecology v. Acquavella*, 112 Wash. App. 729, 732 (Wash. Ct. App. 2002) (holding that the phrase, “subject to existing rights,” refers to water rights acquired before 1917).

⁵ Section 4(2) of the Policy states:



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



RCW 90.03.380 (as well as under RCW 90.03.290(3)), Ecology recently stated in an email to tribes that it will not consider tribes' unquantified federal reserved water rights because, according to its interpretation of *Rettkoski v. Department of Ecology*, "if an asserted tribal reserved right is to be considered in the context of an impairment claim, that would require the de facto adjudication of that claim"; therefore, Ecology lacks authority to "consider the impairment claim because to do so, the agency would essentially have to validate, or adjudicate the claimed treaty reserved right" which it does not have authority to do. *See* Attachment 1, Email from Carrie Sessions (Aug. 1, 2021). Ecology has thus adopted a narrow interpretation of the phrase "existing rights" that creates a new requirement for federal reserved water rights to be adjudicated and quantified to be "existing", and one which rejects the inclusion of federal reserved rights under the category of water rights acquired "otherwise" under RCW 90.03.010. The Tribe is concerned that Ecology's position effects an end run around tribes' property rights that enables Ecology to knowingly approve trust water rights and related actions that injure/impair tribes' federally reserved water rights. While tribes' federal reserved water rights are not expressly excluded from injury/impairment determinations under the Policy, Ecology's email clarifies that they are impliedly excluded according to Ecology's unpublished policy.

The Policy's failure to require consideration of federal reserved water rights is erroneous for three reasons. First, tribal water rights are "existing water rights" by operation of settled federal law. Second, state courts, the PCHB, and state regulations all identify federal reserved rights as "existing rights". Third, Ecology is explicitly permitted under *Rettkowski* and progeny to issue a tentative determination of an unquantified water right. Federal reserved water rights are not an exception to this rule, and a tentative determination that considers federal reserved water rights does not amount to a de facto adjudication of tribal water rights. Fourth, while injury/impairment determinations should reduce legal uncertainties surrounding water use in a given waterbody and the likelihood of future litigation, the exact opposite is true when Ecology excludes federal reserved water rights from its analyses. By disregarding tribes' reserved water rights, Ecology will exacerbate already diminished water levels in Washington waterbodies and will deepen existing uncertainty and tension around water rights in Washington, increasing the likelihood that future disputes will arise.

1. Tribal Water Rights Are "Existing Water Rights" Under Federal Law.

Evaluation of potential injury to existing rights will include, but is not limited to, an assessment of the extent and validity of the proposed mitigating right under RCW 90.03.380 and the water right's suitability to mitigate the proposed new or existing use(s).

Likewise, Section 4(3) of the states that "the purpose of a water banking agreement is to establish mutually-agreed upon terms and conditions that . . . protect against detriment or injury to existing water right holders." Similarly, Section 4(4) of the Policy states that "Ecology will ensure protection for existing rights" and explains that "[a]ny mitigated new water use must rely on a mitigating water right that has undergone a tentative determination of extent and validity under RCW 90.03.380, and has been authorized for instream flow and mitigation as purposes of use".



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



Tribal water rights are grounded in the federal reserved rights doctrine, now over a century old, which holds that the United States and Indian tribes have the power to reserve water from appropriation under state law.⁶ In Washington, treaties, executive orders, and agreements confirm the United States' and tribes' intent to reserve water to fulfill the purpose of a reservation to support a permanent homeland for tribes,⁷ which necessarily requires sufficient water resources, often for multiple purposes.⁸ These federal reserved water rights carry a priority date of the date of the establishment of the reservation.⁹ Federal reserved water rights may extend to both consumptive uses on the reservation,¹⁰ as well as non-consumptive uses on and off the reservation to support their traditional hunting and fishing lifestyle. These latter non-consumptive rights have a priority date of time immemorial.¹¹ The quantity of water reserved is the “quantity of water sufficient to meet the purposes” for which the reservation was established.¹² Because federally reserved water rights terminate only by express abrogation by Congress, tribes' reserved rights cannot expire or be forfeited for non-use; thus, they are effective today. Federal reserved water rights are also superior to the rights of future appropriators.¹³ In particular, water rights to maintain tribes' treaty right to hunt and fish entitles them “to prevent other appropriators from depleting the streams water below a protected level in any area where the non-consumptive right applies.”¹⁴

While the exact quantity of some tribes' reserved water rights has not been adjudicated, the quantity is not dependent on or capped at a tribe's historic or current use and the amount of water reserved is intended to “satisfy the future as well as the present needs of the Indian reservations”.¹⁵ In some seminal cases, courts enforce water rights by enjoining water uses interfering with the right without quantifying the amount reserved.¹⁶

⁶ See *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Arizona v. California*, 373 U.S. 546, 601 (1963), *Winters v. United States*, 207 U.S. 564, 575-578 (1908).

⁷ See, e.g., *In re CSRBA*, 448 P.3d 322 (Idaho 2019); *In re Gen. Adjud. of All Rts. to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 315 (Ariz. 2001).

⁸ *Colville Confed. Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (recognizing that water was reserved to the Tribes not only for the purpose of providing a land-based agrarian society, but also for the development and maintenance of replacement fishing grounds).

⁹ *Cappaert*, 426 U.S. at 138.

¹⁰ E.g., *Winters*, 207 U.S. 564; *Arizona v. California*, 373 U.S. 546.

¹¹ *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) (priority date of Klamath Tribes' aboriginal water right is time immemorial); *State, Dep't of Ecology v. Yakima Rsr. Irr. Dist.*, 121 Wash. 2d 257, 264 (Wash. 1993) (priority date of Yakama Nation's reserved water rights for fish is time immemorial).

¹² *Cappaert*, 426 U.S. at 138.

¹³ *Id.* at 139.

¹⁴ *Adair*, 723 F.2d at 1411.

¹⁵ *State of Ariz. v. State of Cal.*, 373 U.S. 546, 600 (1963), judgment entered sub nom. *State of Arizona v. State of California*, 376 U.S. 340 (1964), amended sub nom. *Arizona v. California*, 383 U.S. 268 (1966), and amended sub nom. *Arizona v. California*, 466 U.S. 144 (1984). See also *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956) (finding that Indian water rights may “grow to keep pace with development” on the reservation).

¹⁶ See, e.g., *Cappaert*, 426 U.S. 128 (affirming decision enjoining diversions of water that would lower the groundwater level in Devil's Hole below a level necessary to preserve fish to protect water right reserved by the



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



The Washington State Supreme Court has long affirmed these first principles of federal reserved water rights discussed above. In *State, Department of Ecology v. Yakima Reservation Irrigation District*, for example, the Court affirmed a water right for irrigation purposes and water rights necessary to fulfill treaty fishing rights, and held that these rights are “perpetual and is not limited by the beneficial use doctrine under state law.”¹⁷ In *In re Yakima River Drainage Basin*, the Washington State Supreme Court confirmed the Yakama Nation’s reserved rights to “sufficient water to meet the present and future needs of its reservation,” which include “agriculture based activities and fishing”, as well as “a right that dates from time immemorial to adequate water to sustain fish and other aquatic life in Ahtanum Creek.”¹⁸

In sum, contrary to Ecology’s position, the legal “existence” of federal reserved water rights is well settled and is not dependent upon prior adjudication of the quantity of water reserved. Tribes’ reserved rights are “existing rights” by operation of law and should not be artificially exempted from protection under the Policy.

2. Ecology’s Position is Contrary to State Court and PCHB Decisions as Well as State Regulations Recognizing Federal Reserved Rights as “Existing Rights”.

Courts of Appeals have recognized that federal reserved water rights are “existing rights.” In *Vander Houwen v. State, Dep’t of Ecology*, the court affirmed the Pollution Control Hearings Board’s denial of two water rights applications in part because the proposed withdrawals would impair “existing rights” of the Yakama Indian Nation and the United States’ and related efforts to improve the fishery.¹⁹ Likewise, in *Kennewick Public Hospital District v. Pollution Control Hearings Board*, the Court of Appeals held that appellee tribes had standing because “Tribes have treaty rights to take fish from the Columbia . . . [and] [t]hese rights are within the protection of [WAC 173-531A-060]” which requires permit applications to be evaluated for “possible impacts on fish and existing water rights”.²⁰ Courts in these cases did not require adjudication or quantification of water rights in the particular waterbody at issue.²¹

United States, but not quantifying the right); *Winters*, 207 U.S. 564 (enjoining diversions of water from the Milk River, but not quantifying the federal reserved water right of the resident Assiniboine or Gros Ventre Tribes); *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Dist’s v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987) (holding that even where a tribe’s water rights are unquantified, the Bureau of Indian Affairs has a duty to distribute project water fairly among other irrigators after the tribe’s rights were protected).

¹⁷ 121 Wash. 2d 257, 274, 301 (Wash. 1993) (en banc).

¹⁸ 177 Wash. 2d 299, 309-11 (Wash. 2013), as corrected (May 22, 2013). The court further recognized that these rights are not subject to appropriation or disposal under state law. *Id.* at 313.

¹⁹ 170 Wash. App. 1009, *8 (Wash. Ct. App. 2012).

²⁰ 126 Wash. App. 1030, *4 (Wash. Ct. App. 2005).

²¹ Even existing state water rights under state law are not limited to fully adjudicated water rights. For instance, in *Neubert v. Yakima-Tieton Irr. Dist.*, the Washington Supreme Court characterized plaintiffs’ rights as “existing water rights,” but went on to determine the “extent” of those rights based on plaintiffs’ beneficial use of the water. 117 Wash. 2d 232, 241 (Wash. 1991).



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



More recently, in *The Tulalip Tribes of Washington v. Washington State Department of Ecology and Snohomish River Regional Water Authority*, the PCHB considered Tulalip's challenge to Ecology's approval of a water right change application under RCW 90.03.380. The PCHB noted that Tulalip's water rights had not been formally quantified, and found that Ecology actively considered Tulalip's unquantified reserved rights in its evaluation whether the water right transfer would "impair existing water right holders" by attaching water quality conditions to the permit.²² Thus, the unquantified status of Tulalip's water rights did not excuse Ecology from undertaking a determination of impairment/injury to federal reserved rights.²³ These cases demonstrate that Washington state courts regularly consider tribes' federal reserved rights as "existing rights" warranting protection under state law, even when they are unquantified.

Ecology's exclusion of federal reserved rights from the injury/impairment determination also runs contrary to the myriad regulations in the Washington Administrative Code ("WAC") that expressly include federal reserved rights within the definition of "existing rights". For example, the Water Management Program for the Dungeness Portion of the Elwha-Dungeness Resource [WRIA 18], the Entiat River Basin [WRIA 46], and the Instream Resources Protection Program-Wenatchee River Basin [WRIA 45] each state that: "[e]xisting water right" includes "federal Indian and non-Indian reserved rights". WAC 173-518-030, 173-546-030(9), 173-545-030(8). *See also* WAC 173-531A-030 (emphasis added) ("Nothing in the chapter shall be construed to lessen, enlarge, or modify existing rights acquired by appropriation *or by other means, including federal reserved rights.*"); WAC 173-503-070, 173-501-070, 173-546-010, 173-549-060(1) (stating, nothing in the chapter "shall affect existing water rights, including . . . "federal Indian and non-Indian reserved rights."). These provisions illustrate that inclusion of federal reserved water rights with the definition of "existing rights" is common throughout the very regulations that govern Ecology's decisions across the state. Notably, none of the regulations qualify the phrase "existing rights" to require adjudicated or quantified rights.

In sum, Ecology's artificial quantification requirement is unsupported by the language of state regulation, statute, or case law. Ecology should bring the Policy into conformity with state law and regulations and explicitly define "existing rights" to include tribes' federal reserved water rights.

3. Ecology is Permitted to Consider Unadjudicated Water Rights in Its Tentative Determinations.

²² 2002 WL 1650503 (PCHB No. 01-06, Apr. 17, 2002) at *8.

²³ *See also In the Matter of Johnny C. Pitts, v. State of Washington, Department of Ecology*, 1986 WL 26604 (PCHB No. 85-146, Apr. 21, 1986) at *4-5 (applying the federal reserved rights doctrine to irrigator's rights as a successor to an Indian allottee and holding that "[i]f there is here a right derived from federal law to divert river water through succession to the interest of the Indian allottee, we conclude that such right is an 'existing right' which must be recognized and respected").



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



Ecology rests its position on *Rettkowski*, however, that case does not support its position. *Rettkowski* actually supports the opposite rule. Under *Rettkowski*, Ecology is authorized to “tentatively determin[e] whether there are existing water rights with which the proposed use will conflict.”²⁴ The Court clearly differentiated between tentative determinations which it determined Ecology has authority to issue, and final determinations of water rights, including a determination of priorities, which require a general adjudication that is beyond Ecology’s power.²⁵ Over the nearly two decades since *Rettkowski* was decided, the Washington Supreme Court has repeatedly endorsed and extended Ecology’s authority to issue tentative determinations, not just in the permitting context, but for water right changes under RCW 90.03.380 as well.

For example, in *Okanogan Wilderness League, Inc. v. Town of Twisp*, the Supreme Court considered whether the abandonment of a water right precluded a change to a water right from surface diversion to groundwater wells under RCW 90.03.380.²⁶ The Court held that under *Rettkowski* “the Department has authority to tentatively determine whether there are existing rights . . . but said in the event a conflict exists, the Department must deny the permit rather than determine who has the better claim.”²⁷ The Court further held that quantification of a water right was necessary because if the right had been abandoned, “the issuance of a certificate of change in the amount of the old right, could cause detriment or injury to existing rights.”²⁸ Notably, Ecology’s quantification of the right did *not* convert the “tentative determination” into a “final determination of the validity of the water right.”

Just two years later in *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, the Washington Supreme Court upheld the very same rule declared in *Town of Twisp*: “[Ecology] must tentatively determine the existence and extent of the beneficial use of a water right,” where the “extent” of the right requires quantification of the right.²⁹ Subsequently, in *Public Utility District No. 1 of Pend Oreille County v. State*, the Court reaffirmed that: (1) Ecology has authority to tentatively quantify a water right, and (2) Ecology’s “tentative determination as to whether a right has been abandoned or relinquished cannot be a final determination of the validity of the water right.”³⁰ Most recently, in *Cornelius v. Washington Dep’t of Ecology*, the Court noted the requirement that Ecology “tentatively quantify the right in order to determine whether the right qualifies for a change.”³¹

²⁴ *Rettkowski v. Dep’t of Ecology*, 122 Wash. 2d 219, 228 (Wash. 1993) (en banc).

²⁵ *Id.* at 227 n. 2. The Court ruled that Ecology’s action went beyond a tentative determination because it had issued cease and desist orders.

²⁶ 133 Wash. 2d 769, 772 (Wash. 1997) (en banc).

²⁷ *Id.* at 778 (emphasis added).

²⁸ *Id.* at 779.

²⁹ 137 Wash. 2d 118, 127 (Wash. 1999) (en banc).

³⁰ 146 Wash. 2d 778, 794 (Wash. 2002) (en banc).

³¹ 182 Wash. 2d 574, 630 n. 21 (Wash. 2015) (en banc).



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



In sum, long-standing precedent explicitly authorizes Ecology to (1) consider existing unquantified water rights under RCW 90.03.380, among other statutes, and (2) to consider federal reserved rights as part of a tentative determination for the purpose of making an injury/impairment determination. Ecology's position appears to ignore both of these key rules. It is very troubling that Ecology appears to be making an artificial and unlawful exception for federal reserved rights to the detriment of tribes' existing rights and the environment. In addition, under the case law discussed above, a tentative determination that considers a tribe's federal reserved water right would *not* be a final or binding adjudication of the tribe's right. Rather, Ecology's finding would acknowledge and provide administrative accommodation of the tribe's existing water right in the limited context of the specific trust water action under review by Ecology.

4. Ecology's Exclusion of Federal Reserved Water Rights Will Increase Uncertainty and Will Reduce Water Available for Tribes, Habitat, and Species.

For all of the reasons discussed above, the Tribe is very concerned that the Policy excludes tribes' federal reserved water rights from Ecology's impairment/injury determination. This unlawful exception to Washington's long-standing protection for existing rights has numerous practical implications for tribal and non-tribal water users alike.

First, by excluding tribal water rights from its impairment/injury analysis, Ecology is more likely to approve a trust water right for mitigation that injures or impairs federal reserved water rights. This is particularly likely where the mitigating water right was permitted without regard for federal reserved water rights in the first place. Second, water users relying on mitigated water will be surprised to have their trust water right and associated agreement terminated on account of impairment of a later-adjudicated federal reserved water right.³² Such circumstances will only serve to intensify existing tension and disputes around water use in Washington, increasing the potential for protracted litigation. Third, transferring water rights, particularly out-of-basin transfers, without consideration for tribes' water rights, may leave a tribe with less water for its consumptive on-reservation uses or to support its non-consumptive, instream uses. However, the reduced availability of water will remain invisible as a legal matter because Ecology will not have documented potential impacts to existing tribal water rights. Fourth, the ecological health of habitat and species that depend on the water will bear the brunt of Ecology's incomplete impairment/injury determination.

The Tribe requests that Ecology rescind its current position and expressly define "existing rights" within the Policy to include tribes' federal reserved rights. This way, Ecology

³² Section 4(4) of the Policy advises that "Per RCW 90.42.040(4)(b), if impairment becomes apparent during the time the trust water right is being exercised, Ecology will renegotiate, amend, or terminate a water banking agreement." However, Ecology's exclusion of federal reserved water rights from its injury/impairment analysis increases the risk that if impairment of these rights is later determined, the trust water right agreement will need to be renegotiated, amended, or terminated.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



will acknowledge and accommodate tribes' reserved water rights in its impairment/injury determination consistent with federal and state law as it has in past cases. These amendments would be fully consistent with regulations that already define tribes' reserved water rights as "existing rights".³³ Ultimately, consistent, thorough consideration of tribes' reserved water rights across the state under TWRP will better protect the interests of Indian and non-Indian water users alike as well as the long-term ecological health of Washington waters.

B. Ecology's Definition of "Public Interest" is Over Broad and Unlawfully Conflates Public Interest With Beneficial Uses.

State law conditions the exercise of a trust water right on a determination by Ecology that "neither water rights existing at the time the trust water right is established, nor the public interest will be impaired."³⁴ Section 1 of the Policy defines "public interest" as, first, "[t]he consideration of impacts to the public at large that would result from the creation and operation of a water bank." Next, Ecology proposes that "public interest" considerations include "environmental impacts, with emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational, and economic effects; and impacts on publicly owned resources and facilities." The Policy then incorporates the "water resources fundamentals in RCW 90.54.020." Finally, the Policy "presumes" that the public interest is "reflected in watershed plans, ground water area management programs, related water supply plans, water conservation plans, Ecology administrative rules, and local land use plans and development regulations." This definition of "public interest" is overly broad and contrary to state law for the following reasons.

The first problem with the Policy's definition of public interest is that it equates "public interest" with beneficial use. However, in *Swinomish Indian Tribal Community. v. Washington State Department of Ecology*, the Washington Supreme Court held that "public interest" is not equivalent to beneficial use. The Court explained that beneficial uses that are public benefits only in the sense that any useful end to which water is put benefits the public are not equivalent to the "public interest."³⁵ In so holding, the Court made clear that not all beneficial uses of water lie within the public interest. The Court further ruled that considerations of the "public interest" may not be used to reallocate water for future beneficial uses that impair instream flows.³⁶ Thus, adopting a definition of "public interest" that embraces all beneficial uses of water, or which permits Ecology to mitigate water uses to the detriment of instream flows runs contrary to state law. Likewise, in *Caminiti v. Boyle*, the Washington Supreme Court interpreted "public interest" to mean "protect[ing] against adverse effects to the public health, the land and its vegetation and

³³ See Part (A)(2) *supra* (listing regulations that define federal reserved water rights as "existing rights").

³⁴ RCW 90.42.040.

³⁵ 178 Wash. 2d 571, 587 (Wash. 2013) (en banc).

³⁶ *Id.* at 598.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



wildlife, and the waters of the state and their aquatic life.”³⁷ Although this case was decided in the context of shoreline management, it would be imprudent for Ecology to ignore the Court’s clear indication that “public interest” does not include all uses; rather, it prioritizes public health and the conservation of natural resources.

In light of *Swinomish Indian Tribal Community* and *Caminiti*, Ecology should omit or substantially modify its incorporation of the “water resources fundamentals” in RCW 90.54.020. The “water resource fundamentals” provides a list of beneficial water uses—yet again, under *Swinomish Indian Tribal Community* and *Caminiti*, beneficial uses are not equivalent to the public interest. In addition, the “water resource fundamentals” include uses such as hydroelectric power production, mining, and industrial uses. Of course, these water uses are dramatically different in their impact from the other uses in the Policy’s proposed definition, such as the recovery of endangered species and recreation. Thus, Ecology’s incorporation of the “water resource fundamentals” is contrary to state law and over broad in its inclusion of uses that are water intensive and that cause pollution.

The second problem with the Policy’s definition of public interest is that it treats all listed water uses as equally within the public interest. Given extreme drought conditions and unmet and unenforced minimum flows in many basins across the state,³⁸ the definition of “public interest” should prioritize water uses that result in a net increase in water supply or which are water supply neutral. In particular, consumptive uses such as temporary or permanent mitigation of water use for new private development, for new water-intensive agriculture, and for water uses likely to diminish water quality should be given lower priority under the definition of public interest. A definition that places instream and consumptive water uses on equal footing ignores the reality of increasing severe water shortages across the state and misses an opportunity to meet or restore minimum flows.

The third problem with the Policy’s definition of public interest is that it does not expressly account for the impacts of climate change, which bear heavily on water supply in Washington state.³⁹ To inform its public interest review, Ecology should request from trust water right or water banking applicants and consider all best available information regarding projected

³⁷ 107 Wash. 2d 662, 671 (Wash. 1987) (quoting *Portage Bay-Roanoke Park Comm’ty Coun. v. Shorelines Hearings Bd.*, 92 Wash.2d 1, 4 (Wash. 1979)).

³⁸ For example, in Water Resource Inventory Area (“WRIA”) 14 and 15, U.S. Geological Survey (“USGS”) monthly stream flow data shows that Goldsborough Creek has failed to meet June minimum flows 2018-2020, 2013-2016, and 2005-2009; that is, minimum flows were not met 11 of the last 15 years. For August, Goldsborough Creek failed to meet minimum flows for *all* recorded years 2005-2020. For September, minimum flows were not met in Goldsborough Creek 2015-2020 and 2005-2009. Similarly, in WRIA 15, many streams are fully closed to further appropriation and many others are closed for the summer months.³⁸ Yet, increased demand on water resources continues in WRIs 14 and 15. See also *Saving Water in Washington*, available at <https://www.epa.gov/sites/default/files/2017-02/documents/ws-ourwater-washington-state-fact-sheet.pdf>.

³⁹ See, e.g., *id.*; *Water Supplies and Climate Change*, available at <https://ecology.wa.gov/Air-Climate/Climate-change/Climate-change-the-environment/Water-supply-impacts>.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



impacts of climate change on the waterbody or aquifer for which the trust water right action is proposed. With this information, Ecology may decide to condition the approval of a new mitigated water right on the reservation of a portion of the right for instream flows to compensate for water shortages from climate change, rather than approving the mitigated water right for the same amount previously used by the water right holder.

The fourth problem with the Policy's definition of public interest is that it presumes that certain local or regional planning documents, such as water supply plans, water conservation plans, Ecology administrative rules, and local land use plans and development regulations are in the public interest. While such presumption will likely expedite Ecology's processing of trust water rights, it may also lead to superficial examination of these documents, some of which may be outdated or insufficiently protective of the public interest. Moreover, the Policy does not specify how to rebut the presumption that these documents are in the public interest.

In conclusion, Ecology should revise its proposed definition of "public interest" to align with state case law, to account for the effects of climate change, and to actively protect instream flows and water quality.

C. Additional Comments on TWRP Policies

The Tribe offers comments on the following additional sections of the Policy.

In Section 1 of the Policy, Ecology proposes a single definition of "mitigating rights" that includes both rights for instream flows and for consumptive uses; however, these two types of mitigation are significantly different in their intent and effect on water supply. Therefore, Ecology should create two categories of "mitigating rights"—"instream mitigating rights" and "consumptive mitigating rights"—to ensure that the definition is sufficiently clear.

Section 1 of the Policy also proposes a definition of "temporary donation" that interprets the phrase to mean that water is donated "for a specified non-permanent period of time." This definition is over broad because it could include a donation for a period of time of 100 years or more, which is *de facto*, permanent. In addition, since trust water rights may be donated on a temporary, but recurring basis, Ecology should identify the total number of years after which a donation becomes "permanent." Such limitation is particularly crucial in circumstances in which mitigated out-of-stream uses rely on donated water to avoid a full tentative determination. Otherwise, Ecology could run afoul of the prohibition on the use of water banking to the detriment of existing water rights under RCW 90.42.100(3)(a).

In Section 4(1) of the Policy, Ecology proposes a minimum period of 30 days for publication of accepted water banking requests on its website. Ecology should post accepted water banking requests for a minimum of 90 days to maximize potential for informed public comment.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



Section 4(9) of the Policy requires an existing water bank seeking to modify operations “substantially from their existing water banking agreement” to submit a new request form. While this is likely a useful requirement, the Policy does not define the term “substantial”. Therefore, it is unclear which types of modifications will qualify as “substantial,” and when Ecology will permit a water bank to forego the modification process because the modification is deemed insubstantial.

Regarding Section 5 of the Policy, under RCW 20.42.080, the quantity of a trust water right may not exceed the highest quantity of water put to beneficial use over the most recent five-year period. The quantity of water available for temporary mitigation is significant because if the amount of water made available for mitigation is higher than that actually used during the past five years, when the water right reverts to private ownership, Ecology will have expanded the water right unlawfully and will cause a net decrease in water supply. Therefore, Ecology’s evaluation of the maximum amount of water used must be as rigorous as possible. In addition, Ecology should consider whether, in times of water shortage or drought, a mitigated water right should be approved for an amount less than the maximum used during the past five years to account for water shortages and climate change as well as water needed for habitat and species.

In addition, the Policy explains that Ecology may rely on an attestation from the water applicant, or alternatively, may conduct its own evaluation to quantify water use over the past five years. The Policy does not explain, however, how Ecology determines when it may rely on attestation and when it must conduct its own evaluation. In addition, the Policy does not list the requirements of an attestation or any criteria Ecology employs in its evaluation of past use. To ensure that Ecology’s determination of past water use is consistently rigorous, Ecology should not rely on applicants’ attestations. Furthermore, Ecology should disclose the standards and requirements it employs in its evaluation to avoid the unlawful expansion of water rights and to promote greater transparency and public trust in TWRP.

CONCLUSION

In conclusion, the Policy unlawfully prevents tribes’ unquantified federal reserved water rights from being acknowledged or considered for injury/impairment as part of Ecology’s tentative determinations, and the definition of “public interest” is contrary to state law and over broad, among other concerns. These issues should be fully corrected before Ecology recommends or adopts the Policy. The Tribe appreciates the opportunity to comment on the Policy and is available for any questions you may have. The Tribe will evaluate the need for consultation as this process unfolds.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346



Sincerely,

Paul McCollum

Director, Natural Resources Department
Port Gamble S'Klallam Tribe

cc: Steven Moe, Legal Counsel, Port Gamble S'Klallam Tribe
Claire Newman, Kanji & Katzen, P.L.L.C.
Jane Steadman, Kanji & Katzen, P.L.L.C.

ATTACHMENT 1

From: Sessions, Carrie (ECY)
To: "lkan@squaxin.us"; "m.ross@snoqualmtribe.us"; "lforsman@suquamish.nsn.us"; "chrismarks@ctuir.org"; "jamess@lummi-nsn.gov"; "merlej@lummi-nsn.gov"; "dsarff@skokomish.org"; Claire Newman; "jeffschuster@outlook.com"; Rasmussen, Lauren (non-ATG); "crossi@pnptc.org"; "bruce.wakefield@colvilletribes.com"; "charissa.eichman.ora@colvilletribes.com"; "aosullivan@suquamish.nsn.us"; "felecia.shue@puyalluptribe-nsn.gov"; Sullivan, Marie; "ted@tcklaw.com"; "jmarsh@cowlitz.org"; "danielle_squeochs@yakama.com"; "joseph@sauk-suiattle.com"; "stuart_crane@yakama.com"; "kmerrill@kalispeltribe.com"; "paribello@gmail.com"; "lukeesser@aol.com"; Lewis, Amber; "dpvyvyan@outlook.com"; "ann.harrie@snoqualmtribe.us"; "rogb@yakamafish-nsn.gov"; "smannakee@stillaguamish.com"; "romac@pgst.nsn.us"; "asavery@tulaliptribes-nsn.gov"; Jane Steadman; "garrett.rasmussen@quileutenation.org"; "jpavel@skokomish.org"; "haley.kennard@makah.com"; "jim_hedrick@comcast.net"; "atrain@swinomish.nsn.us"; "frankl@lummi-nsn.gov"; "wasser.swinomish@gmail.com"; "mmartinez@nwifc.org"; "shona@yakamanation-olc.org"; "amelia.marchand@colvilletribes.com"; "kelsey.taylor@snoqualmtribe.us"; "jbrown@stillaguamish.com"; "smoe@pgst.nsn.us"; "cindy@snoqualmtribe.us"; "paulm@pgst.nsn.us"; "darylwilliams@tulaliptribes-nsn.gov"
Cc: Brooks, Barbara (ECY); Verner, Mary (ECY); Wentzel, Noah (ECY); Christensen, Dave (ECY); North, Stephen (ATG)
Subject: RE: Follow up on Water Transfers, Banking, and Investment
Date: Thursday, July 29, 2021 3:37:46 PM

Dear tribal members,

I'm writing to follow up on our meeting last week on Water Right Transfers, Water Banking, and Private Investment in Public Water Resources. In response to a question on consideration of tribal water claims in impairment analyses, Ecology committed to sending legal citations for our position. Here is a synopsis of our position and legal rationale:

RCW 90.03.290(3), which governs appropriation of new water rights, directs Ecology to make a finding that the application "will not impair existing rights". Similarly, RCW 90.03.380 establishes that a water right may be transferred to another entity "if such a change can be made without detriment or injury to existing rights." Both statutes use the qualifier "existing" in the context of considering impairment. The Rettkowski Supreme Court decision makes clear that the agency cannot enforce priority of rights between unadjudicated claims and permitted junior water permits. To do so would constitute a de facto adjudication of the claim. Similarly, if an asserted tribal reserved right is to be considered in the context of an impairment claim, that would require the de facto adjudication of that claim. Therefore, the agency lacks the authority to consider the impairment claim because to do so, the agency would essentially have to validate, or adjudicate the claimed treaty reserved right.

Thank you again for your engagement on these issues.
Carrie Sessions

From: Sessions, Carrie (ECY)
Sent: Thursday, July 22, 2021 2:45 PM
To: lkan@squaxin.us; m.ross@snoqualmtribe.us; lforsman@suquamish.nsn.us; chrismarks@ctuir.org; jamess@lummi-nsn.gov; merlej@lummi-nsn.gov; dsarff@skokomish.org; cnewman@kanjikatzen.com; jeffschuster@outlook.com; Rasmussen, Lauren (non-ATG) <Lauren@Rasmussen-law.com>; crossi@pnptc.org; bruce.wakefield@colvilletribes.com; charissa.eichman.ora@colvilletribes.com; aosullivan@suquamish.nsn.us; felecia.shue@puyalluptribe-nsn.gov; Marie Sullivan <marie@mspublicaffairs.com>; ted@tcklaw.com; jmarsh@cowlitz.org; danielle_squeochs@yakama.com; joseph@sauk-suiattle.com; stuart_crane@yakama.com; kmerrill@kalispeltribe.com; paribello@gmail.com;

lukeesser@aol.com; Lewis, Amber <amber@lewisconsulting.us>; dpvyvyan@outlook.com; ann.harrie@snoqualmietribe.us; rogb@yakamafish-nsn.gov; smannakee@stillaguamish.com; romac@pgst.nsn.us; asavery@tulaliptribes-nsn.gov; jsteadman@kanjikatzen.com; garrett.rasmussen@quileutenation.org; jpavel@skokomish.org; haley.kennard@makah.com; jim_hedrick@comcast.net; atrainer@swinomish.nsn.us; frankl@lummi-nsn.gov; wasser.swinomish@gmail.com; mmartinez@nwifc.org; shona@yakamanation-olc.org; amelia.marchand@colvilletribes.com; kelsey.taylor@snoqualmietribe.us; jbrown@stillaguamish.com; smoe@pgst.nsn.us; cindy@snoqualmietribe.us; paulm@pgst.nsn.us; darylwilliams@tulaliptribes-nsn.gov

Cc: Barbara Brooks (ECY) (BABR461@ECY.WA.GOV) <BABR461@ECY.WA.GOV>; Mary Verner (ECY) (mave461@ECY.WA.GOV) <mave461@ECY.WA.GOV>; Wentzel, Noah (ECY) <Nwen461@ECY.WA.GOV>; Christensen, Dave (ECY) <davc461@ECY.WA.GOV>

Subject: Follow up on Water Transfers, Banking, and Investment

Good afternoon,

Thank you for joining us this morning for our discussion on Water Right Transfers, Water Banking, and Private Investment in Public Water Resources. I appreciated the fruitful discussion; I found it a helpful first step in dialogue about developing legislative recommendations on the issues. A few quick follow up items:

- Attached is a copy of the presentation and briefing paper for your reference.
- In response to a question from Larry Wasserman on consideration of tribal water claims in impairment analyses, Ecology committed to sending legal citations for our position. We will work on this with our attorneys and will email you this information when we have it available.

I would also like to reiterate our offer for continuing the conversation. Ecology will participate in Government-to-Government consultations with federally-recognized tribes as requested. In addition, we would value a less formal meeting with your tribe to dive deeper into the issues. Please reach out to me if you would like to schedule time to meet.

Lastly, a quick reminder on our next steps – After listening to tribal and stakeholder views on these issues over the next month, Ecology will draft a concept paper on issue definition, scope, and potential legislative recommendations. I will share the draft paper with all of you. We will then hold a public comment period and host 1:1 meetings to discuss feedback, after which Ecology will finalize what we present to the Legislature in November.

Thank you again for your engagement on these issues, and please reach out with any questions.

Best,
Carrie Sessions

Carrie Sessions

*Policy and Legislative Analyst, Water Resources Program
WA State Department of Ecology*

(360) 742-6582 (*work cell*)

Sarah Mack

Please see attached file.

Comment by Sarah E. Mack, Tupper Mack Wells, PLLC

on Department of Ecology's *Draft Water Right Transfers, Water Banking, and Trust Legislative Report* (August 2022)

September 6, 2022

Ecology's policy recommendation on evaluation of the public interest (pages 11-12 of the Draft Report) glosses over significant differences in the Water Code between changes to surface water rights and groundwater rights.

The Washington Supreme Court carefully analyzed and explained the Legislature's different treatment of surface water rights and groundwater rights in *Public Utility Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778 (2002). In that case, the Court explained that the groundwater change statute (RCW 90.44.100) authorizes changes to unperfected groundwater rights, unlike the surface water change statute (RCW 90.03.380). The two statutes also contain different standards for authorizing water right changes. In contrast to the groundwater change statute, which requires findings of compliance with the four-part test,¹ the surface water change statute – which, again, applies only to perfected water rights – requires only a finding that the change would not cause detriment or injury to existing rights. The Pend Oreille decision explains:

RCW 90.03.290, concerning applications for new permits to appropriate surface waters, expressly requires Ecology to consider the public interest when determining whether to issue a permit. . . . RCW 90.03.380, the surface water change statute, provides, in contrast, that a change in point of diversion may be granted if the change can be made “without detriment or injury to existing rights,” and, as noted, the water must have been put to beneficial use. . . . The statute's meaning appears plain as to what prerequisites must be met in order to obtain a change in point of diversion, and consideration of the public interest is not required. . . . First, when an applicant originally seeks to withdraw the public waters, the public interest is a necessary part of the determination to issue a permit to withdraw water. . . . Therefore, at the point in time that an allocation of public waters is made, the public interest is considered, However, when an application for change under RCW 90.03.380 is made, the allocation of public waters has already occurred, and the right involved is a perfected water right.

Ecology's proposal to require a public interest evaluation of all surface water right changes would not actually create the “same legal standard for evaluating surface and groundwater right changes,” as Ecology asserts (Draft Report at 11-12). Ecology's proposal would apply only two parts of the four-part test to applications for surface water right changes. Changes to

¹ RCW 90.44.100(2) requires “publication of notice of the application and findings as prescribed in the case of an original application.” The four-part test set out in RCW 90.03.290 is explicitly made applicable to groundwater permit applications in RCW 90.44.060.

groundwater rights must meet all four parts of the four-part test, as well as several conditions explicitly set forth in RCW 90.44.100.

More importantly, Ecology’s proposal to require surface water right changes to undergo a public interest evaluation does not seriously engage with the reasons underlying the Legislature’s deliberate choices – recognized by the Washington Supreme Court – to treat surface water rights and groundwater rights differently.

Evaluating merger of the groundwater and surface water codes to eliminate those differences and achieve true consistency might be a significant and worthwhile legislative endeavor – and it would deserve serious, detailed, and holistic examination and scrutiny. However, this isolated proposal – which would reverse a twenty-year-old Supreme Court decision – is an unwarranted and ill-considered response to “concerns regarding out-of-basin water right transfers, water banking, and the TWRP.”

Selah-Moxee Irrigation District
113 East Moxee Avenue
P.O. Box 166
Moxee, WA 98936
(509) 469-0449 FAX (509) 469-0489

September 6, 2022

VIA ELECTRONIC SUBMISSION

Department of Ecology

Re: Draft Water Resources Report to the Legislature regarding Trust, Transfers, and Water Banking

The Selah-Moxee Irrigation District (SMID) appreciates the opportunity to submit these comments to the Washington State Legislature regarding Ecology's Draft Water Resources Report on Trust, Transfers, and Water Banking.

The Selah-Moxee Irrigation District provides irrigation water to roughly 9,500 acres of land in the Yakima Valley consisting primarily of hops. The District diligently manages the water rights within our jurisdiction by constantly applying sound stewardship practices that include various water conservation projects in addition to operating a 9,000 acre-feet water bank stemming from the Yakima River Basin.

The ability to transfer water rights within the State of Washington helps to support communities, businesses, fish and wildlife, various waterways, and economic prosperity within the entire State. Water Banks can play a very important role in solving the various water issues within the State of Washington. SMID has examples of how we operate our water bank that show how it can help address various water needs in the region without the need of additional legislation.

Any proposed legislative changes may have a significant and detrimental impact to the way SMID operates its' water bank. Therefore, careful consideration should be taken when evaluating new legislation regarding water right transfers, water banking, and trust.

GENERAL COMMENTS

- Millions of dollars have been spent by various government agencies and WSWRA members, including SMID, to support improvements and solutions to our water supplies and efficient water use. These approved strategies were coordinated with Ecology and other interests including tribal, city, and other water users. SMID has existing water rights, and it is imperative that those rights are protected to ensure adequate water for our farms, orchards, cities, and dairies. Our current state water code already provides those protections. Although there can always be room for improvement, any legislative change

must be undertaken with caution so as to not cause unforeseen consequences to the efficient use of this valuable resource.

- SMID in conjunction with other Yakima Joint Board entities are active participants in the Yakima Basin Integrated Plan, a consensus organization that includes the Ecology, the United States, the Yakama Nation, environmental organizations, and other supporters and entities. Through the Integrated Plan, we have already implemented many improvements to the Yakima River Basin. Many of the existing and future important improvements to our Basin will rely on various strategies using existing solutions under our current water code regarding transfers, trusts, and water banking. Any changes to our water code have the potential to delay, complicate, or possibly prohibit those anticipated beneficial actions.
- The SMID has worked closely with the Department of Ecology and others on water right transfers, establishing a water bank, and utilizing the Trust Program. Although many of Ecology's existing regulations lack flexibility, use of the existing water bank and trust provisions have provided many solutions to complex water issues for the betterment of instream flows, transfers to other in-state users, and meeting demands of water users. We are concerned that additional legislative and regulatory requirements will impair the ability to seek solutions to water needs and strategies that will continue in our State.
- We are also concerned that the actions being recommended are an over-reaction to newspaper articles that sensationalized the threat of outside investors speculating on water for profit. We have found that such a threat has been overblown. Most, if not all, of the solutions proposed and implemented under our current water laws are for the benefit of other users in the State. The existing water banking and trust system has been used to provide water in times of drought; increased instream flows for fish and habitat; and moved water to areas where it is needed. All such transfers were made with the cooperation of Ecology and did not affect the existing water rights of others. Part of this process initiated by Ecology was to prevent "misuse" of the existing system. To our knowledge, all approved transfers were a valid use of the existing water transfer and water banking process and any perpetuation of any "misuse" by Ecology or others should not continue, nor be part of this Report or any other reports to the Legislature.

SPECIFIC COMMENTS TO RECOMMENDATIONS

- SMID supports funding the pilot water banking grant program.
- The recommendation to create a new statutory requirement so that all water right sales or changes in ownership be reported to the state is not needed. All current water right sales are already reported to the Counties, and available for public review. If the statutory

requirement is limited to summarizing those sales from the Counties, we have no objection. Reporting changes in water right “ownership” is not as easy. Almost every sale of real property includes water rights that run with the land. In the vast majority of those transactions there is no detail on water rights being transferred and any summary would be cumbersome and most likely useless. We presume that Ecology is possibly only asking for information on water ownership changes that are not included with a land sale. The benefit of such a proposal is not clear. All changes to water rights are already reviewed and approved by Ecology. We know that Ecology actively participates in those water right transfers and the need for an additional database seems unwieldy and duplicative.

- The legislature must reject expansion of the “public interest” test in new legislation. The “public interest” of any proposed water use is already analyzed before a permit is issued. RCW 90.03.290. Any further attempt at redefining the public interest definition only causes uncertainty and will not serve the interests of the public because there will be no consensus on the definition; and any definition will still be analyzed and subjective depending on the opinion of the person or entity applying the test. A new definition only increases the time and costs of any entity proposing a transfer.
- Objections about conducting out-of-basin water transfers should be validly demonstrated that identify a real concern to a particular community which would prevent an inherently good project from developing. There are instances where water transferred out-of-basin does not have a negative economic impact on the community.
- Additional fees for out-of-basin transfers would create additional financial restraints and should be removed to allow a “good project” to advance for the greater good. Excise taxes collected from water right transactions are currently collected by the county of origin and these taxes could be allocated to help off-set negative economic impacts to those communities.
- The requirement to permanently dedicate a portion of the water right for stream flow purposes will prevent entities from developing water banks or entering the market if any portion of their water right is to be automatically taken.
- The regulation of water bank pricing would seriously impact the overall goals of the SMID. SMID’s establishment of a water bank is designed to be used to help off-set extremely high construction costs to implement the District’s Enhanced Water Conservation Program (EWCP). By regulating private water banks creates an impact on public banks and their ability to generate meaningful revenues to support our long-term water conservation goals.

- In reference to the various Concepts warranting further analysis, we do not agree that further analysis is needed. Many of these concepts are proposed answers to problems that do not or rarely exist. Water right banking, transfers, and trusts are already complex and costly. These proposals will only add complexities and costs and decrease the ability and efficiency of implementing strategies to solve water issues in our state.
- SMID agrees with Ecology's recommendations to reject other potential policy options.

In summary, we believe that the recommendations in this Report will require an increase in the need for staffing, and any potential benefits are far outweighed by the costs to both the State and to our water users utilizing various strategies to solve water issues. Currently, any party, including SMID, proposing any such strategy is already working with Ecology and other interests in providing water solutions. Any new legislation will only further complicate and delay answers.

Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan Draper", with a stylized flourish at the end.

Nathan Draper, Manager
Selah-Moxee Irrigation District



SQUAXIN ISLAND TRIBE

September 6, 2022

VIA ONLINE PUBLIC COMMENT FORM

Washington Department of Ecology
Water Resources Program
Attention: Mary Verner, Program Manager
300 Desmond Dr. Southeast
Lacey, WA 98503

Re: Squaxin Island Tribe's comments on Draft Water Right Transfers, Water Banking, and Trust Legislative Report

Dear Mary:

The Squaxin Island Tribe ("Squaxin") submits these comments on the above report ("Report"). Squaxin's overriding goal is a trust water rights program that ensures the restoration and long-term protection of instream flows for fish. Squaxin respectfully requests that Ecology modify the Report consistent with these comments in order to protect the public interest, avert costly disputes over federal reserved water rights, and conserve an increasingly limited water supply that is damaging fisheries.

Squaxin also asks that Ecology modify the Report to align with the goals of 2021 HEAL Act, RCW Ch. 70A.02. As you know, the Act's goals include reducing disproportionate health and environmental harms to tribes. RCW 70A.02.005(2). These "harms" include: (1) exposure to pollution; (2) loss or impairment of ecosystem functions or traditional food resources; (3) loss of access to gather cultural resources or harvest traditional foods; and (4) health and economic impacts from climate change. RCW 70A.02.010(5).

A. Squaxin's Treaty-reserved fishing and water rights

The 1854 Treaty of Medicine Creek reserved to the Squaxin Island Tribe fishing rights throughout a usual and accustomed fishing area ("U&A") that includes the saltwaters extending south and west of the Tacoma Narrows and the freshwaters that flow into them.¹ These fishing rights afford the Tribe one-half of the harvestable fish running through its U&A. The Tribe actively co-manages the fisheries, and also possesses federally-reserved water rights to

¹ *United States v. Washington*, 384 F.Supp.312, 377-378 (W.D. Wash. 1974); 626 F.Supp. 1405, 1441-1442 (W.D. Wash. 1985); 193 F.Supp.3d 1190 (2016).

streamflows in amounts that support healthy salmon populations.² Salmon are and have always been at the heart of the Tribe's culture and economy.

Squaxin also holds federally-reserved water rights in amounts that are sufficient to fulfill the purpose that its Reservation support a permanent homeland.³ This necessarily requires that sufficient water remain in streams to support healthy salmon habitat. These rights have a priority date of when the Reservation was established or of time immemorial. These federally reserved water rights terminate only by Congress's express abrogation, and thus cannot expire or be forfeited for non-use. They remain effective today. Federal reserved water rights are also superior to the rights of subsequent appropriators, which entitles tribes and the federal government to prevent other appropriators from depleting the streams water below a protected level in any area where the non-consumptive right applies.

While the exact quantity of Squaxin's reserved water rights has not yet been adjudicated, the quantity is not dependent on or capped at its historic or current use. Courts have enforced water rights by enjoining water uses interfering with the right without quantifying the amount reserved.⁴

Additionally, in the early- to mid- 1980's Ecology established instream flows in many streams and rivers throughout South Sound, within the Tribe's U&A. *See, e.g.*, WAC Chs. 173-514, -514, 515. These flows are protected water rights that in many circumstances cannot be impaired, but are being impaired. Many instream flows in Squaxin's U&A are increasingly unmet during the drier months of August and September, which is a critical time period in the salmon life cycle.

The instream flow rules that Ecology issued for South Sound WRIAs, however, are virtually ineffective. This is due to outdated language in the WRIA rules; Ecology's positions on the rules that further undermine their effectiveness (*see, e.g., Hirst case*); the dearth of Ecology concrete actions to ensure that these flows are met (*see, e.g. Ecology-approved watershed plans for WRIAs 13-15*); and Ecology's repeated refusals to update these outdated rules to make them effective.

B. Squaxin's general comments and concerns

Squaxin applauds Ecology's efforts to improve the trust program's transparency. Squaxin is concerned, however, that transferring a water right into Ecology's trust water rights program

² *See Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905).

³ *See Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Arizona v. California*, 373 U.S. 546, 601 (1963); *In re CSRB*, 448 P.3d 322 (Idaho 2019); *Colville Confed. Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981); *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

⁴ *See, e.g., Cappaert*, 426 U.S. 128 (affirming decision enjoining diversions of water that would lower the groundwater level in Devil's Hole below a level necessary to preserve fish to protect water right reserved by the United States, but not quantifying the right); *Winters*, 207 U.S. 564 (enjoining diversions of water from the Milk River, but not quantifying the federal reserved water right of the resident Assiniboine or Gros Ventre Tribes); *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Dist's v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987) (holding that even where a tribe's water rights are unquantified, the Bureau of Indian Affairs has a duty to distribute project water fairly among other irrigators after the tribe's rights were protected).

does not guarantee permanent streamflow restoration, particularly for those streams with unmet instream flows. Accordingly, Ecology's report should include recommendations that the Legislature, at minimum, fix these defects:

1. The law should ensure that a municipal water rights holder that claims inchoate water rights (which may or may not be valid) cannot object to Ecology's acceptance of an instream flow right into the trust program on grounds that Ecology's exercise of the trust right will interfere with the municipal user's opportunity to grow into the inchoate right in the future.
2. The law should ensure that once Ecology accepts an instream flow water right into the trust program, it cannot later decide terminate or modify the trust right to accommodate a municipal holder that claims impairment to its inchoate water rights.
3. The law should define "existing rights" to include tribes' federal reserved water rights in conformity with federal and state law. The legal analysis is more fully explained in Port Gamble S'Klallam Tribe's Comments Regarding Ecology's Policy and Interpretive Statement on the Administration of Statewide Trust Water Rights Program (Sept. 17, 2021), which Squaxin incorporates by reference.
4. The law should ensure that junior users downstream of a trust right cannot still exercise their perfected water rights during periods when instream flows are unmet.
5. The law should require a tentative determination of the holder's non-trust continuing right, in order to eliminate that risk of the holder using water in excess of his/her legal entitlement and decreasing the effectiveness of the instream trust right.
6. The law should diminish or, ideally, reduce the risk that Ecology will fail to fully exercise/manage instream trust rights, particularly during times that instream flows are not met. As noted earlier, Ecology has an extremely poor track record of implementing and enforcing instream flows in South Sound. The law also should ensure that Ecology will not choose to prioritize its resources for water banking (mitigating impacts so that new consumptive uses are allowed) over exercising instream trust rights.
7. The law should decrease the "parking" of water rights in temporary donations for purely speculative purposes and as a means to avoid relinquishment that is otherwise warranted.

C. Specific comments on Ecology's recommendations to Legislature

1. Squaxin supports Ecology's recommendations for making the trust and banking program more transparent.
2. Squaxin supports Ecology's recommendation to require a public interest evaluation for all surface water right changes.

3. Squaxin is skeptical that having the Legislature define the “public interest” by statute will further the critical goals of long-term streamflow restoration and protection. It is foreseeable that the Legislature, pressured by local governments and developers, would prioritize consumptive water uses over instream flows, which is not the case now. Moreover, the Legislature could alter court decisions that currently further the streamflow-protective goals of the trust program and bind Ecology.⁵ For that reason, Squaxin does not support such a recommendation.

If Ecology proceeds to include this recommendation to the Legislature, however, it should also include sideboards:

(a) A “public interest” definition must expressly acknowledge that new water supply for residential development is often a private and not a public use and thus not in the public interest. (For that reason, simply adopting the fundamentals in RCW 90.54.020 is inappropriate.)

(b) Instream flows are enforceable water rights, and the “public interest” must expressly include restoring instream flows during periods that they are unmet and protecting restored flows over the long term.

(c) Exclude “emphasis” on protection, restoration, and recovery of ESA-listed species. Many species, and specifically fisheries that are not ESA-listed but are being harmed by unmet instream flows, must be equally considered.

(d) Expressly account for the impacts of climate change.

Thank you for your consideration.

Sincerely,

Andy Whitener

Andy Whitener (Sep 6, 2022 09:53 PDT)

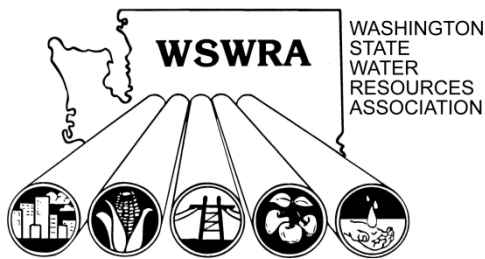
Andy Whitener, Director

Squaxin Island Natural Resources Department

⁵ See, e.g., *Swinomish Indian Tribal Community v. Washington State Department of Ecology*, 178 Wash.2d 571, 587 (Wash. 2013) (the court held that “public interest” is not equivalent to any and all beneficial uses, and that considerations of the “public interest” may not be used to reallocate water for future beneficial uses that impair instream flows); *Caminiti v. Boyle*, 107 Wash. 2d 662, 671 (Wash. 1987) (court interpreted “public interest” to mean “protect[ing] against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life.”).

Washington State Water Resources Association

Please find our comments in the attached letter.



September 6, 2022

VIA ELECTRONIC SUBMISSION

Department of Ecology

Re: Draft Water Resources Report to the Legislature regarding Trust, Transfers, and Water Banking

The Washington State Water Resources Association (WSWRA) appreciates the opportunity to comment on the Draft Report to the Legislature regarding Trusts, Transfers, and Water Banking. The members of WSWRA diligently manage the water rights within their jurisdiction by constantly applying sound stewardship practices. WSWRA is a trade association representing Washington irrigation districts and irrigation companies, and other agricultural and municipal water providers throughout Washington. WSWRA's members deliver water to enable billions of dollars of food production annually. Water is the lifeblood of food and fiber production in Washington, and our members strive to ensure adequate water is delivered.

GENERAL COMMENTS

- Millions of dollars have been spent by various government agencies and WSWRA members to support improvements and solutions to our water supplies and efficient water use. These approved strategies were coordinated with Ecology and other interests including tribal, city, and other water users. All of our members have existing water rights and it is imperative that those rights are protected to ensure adequate water for our farms, orchards, cities, and dairies. Our current state water code already provides those protections. Although there can always be room for improvement, any legislative change must be undertaken with caution so as to not cause unforeseen consequences to the efficient use of this valuable resource.
- As previously stated, our members work closely with the Department of Ecology and others on water right transfers, water banking, and use of trusts. Although many of Ecology's existing regulations lack flexibility, use of the existing water bank and trust provisions have provided solutions to complex water issues for the betterment of

instream flows, transfers to other in-state users, and meeting demands of water users. We are concerned that additional legislative and regulatory requirements will impair the ability to seek solutions to water needs and strategies in the future.

- We are also concerned that the actions being recommended are an over-reaction to newspaper articles that sensationalized the threat of outside investors speculating on water for profit. We have found that such a threat has been overblown. Most, if not all, of the solutions proposed and implemented under our current water laws are for the benefit of other users in the State. The existing water banking and trust system has been used to provide water in times of drought; increased instream flows for fish and habitat; and moved water to areas where it is needed. All such transfers were made with the cooperation of Ecology and did not affect the existing water rights of others. Part of this process initiated by Ecology was to prevent “misuse” of the existing system. To our knowledge, all approved transfers were a valid use of the existing water transfer and water banking process and any perpetuation of “misuse” by Ecology or others should not continue, nor be part of this Report or any other reports to the Legislature.

SPECIFIC COMMENTS TO RECOMMENDATIONS

- We support funding the pilot water banking grant program.
- The recommendation to create a new statutory requirement so that all water right sales or changes in ownership be reported to the state is not needed. All current water right sales are already reported to the Counties, and available for public review. If the statutory requirement is limited to summarizing those sales from the Counties, we have no objection. Reporting changes in water right “ownership” is not as easy. Almost every sale of real property includes water rights that run with the land. In the vast majority of those transactions there is no detail on water rights being transferred and any summary would be cumbersome and most likely useless. We presume that Ecology is only asking for information on water ownership changes that are not included with a land sale. The benefit of such a proposal is not clear. All changes to water rights are already reviewed and approved by Ecology. We know that Ecology actively participates in those water right transfers and the need for an additional database seems unwieldy and duplicative.
- The legislature must reject expansion of the “public interest” test in new legislation. The “public interest” of any proposed water use is already analyzed before a permit is issued. RCW 90.03.290. Any attempt at redefining the public interest definition only causes uncertainty and will not serve the interests of the public. There will be no consensus on the definition, and any definition will still be analyzed and subjective based on the opinion

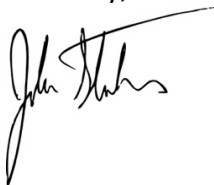
of the person or entity applying the test. A new definition only increases the time and costs of any entity proposing a transfer.

- In reference to the various concepts warranting further analysis, we do not agree that further analysis is needed. Many of these concepts are proposed answers to problems that do not or rarely exist. Water right banking, transfers, and trusts are already complex and costly. These proposals will only add complexities and costs and decrease the ability and efficiency of implementing strategies to solve water issues in our state.
- We do agree with Ecology's recommendations to reject other potential policy options.

In sum, we believe that the recommendations in this Report will require an increase in the need for staffing, and any potential benefits are far outweighed by the costs to both the State and to our water users applying various strategies to solve water issues. Currently, any party proposing any such strategy is already working with Ecology and other interests in providing water solutions. Any new legislation will only further complicate and delay answers.

Thank you for providing this opportunity to comment on the Draft Water Resources Report. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Stuhlmiller', with a long horizontal line extending from the end of the signature.

John Stuhlmiller
Executive Director
Washington State Water Resources Association



YAKIMA BASIN JOINT BOARD

**A Partnership of Public Entities Promoting the Multiple Uses
of the Yakima Valley's Water Supply**

*City of Yakima • Kittitas Reclamation District • Roza Irrigation District
Sunnyside Division Board of Control • Yakima-Tieton Irrigation District • Columbia Irrigation District
Naches-Selah Irrigation District • Selah-Moxee Irrigation District*

September 7, 2022

VIA ELECTRONIC SUBMISSION

Department of Ecology

Re: Draft Water Resources Report to the Legislature regarding Trust, Transfers, and Water Banking

On behalf of the Yakima Basin Joint Board (Joint Board), we submit these comments to Ecology's Draft Water Resources Report regarding Trust, Transfers, and Water Banking that proposes changes to the long-standing water code of the State of Washington.

The Joint Board is an organization of the major irrigation districts and the City of Yakima located in Yakima River Basin. As is well known in our State, the Yakima Valley in one of the most diversified and productive agricultural areas of the world. The Bureau of Reclamation's Yakima Project is made up of Joint Board member districts and irrigates about 293,800 acres, and with over 95,000 residents of the City of Yakima. The Yakima Valley is known worldwide for its production of high-value apples and hops and is also a major producer of cherries, soft fruits, and pears. Its wine grapes support over 700 local wineries. Also, agricultural exports from the Yakima River Basin are a major aspect of our state and regional economy.

GENERAL COMMENTS

- Millions of dollars have been spent by various government agencies and WSWRA members to support improvements and solutions to our water supplies and efficient water use. These approved strategies were coordinated with Ecology and other interests including



tribal, city, and other water users. All of our members have existing water rights, and it is imperative that those rights are protected to ensure adequate water for our farms, orchards, cities, and dairies. Our current state water code already provides those protections. Although there can always be room for improvement, any legislative change must be undertaken with caution so as to not cause unforeseen consequences to the efficient use of this valuable resource.

- All of our Yakima Joint Board entities are active participants in the Yakima Basin Integrated Plan, a consensus organization that includes the Ecology, the United States, the Yakama Nation, environmental organizations, and other supporters and entities. Through the Integrated Plan, we have already implemented many improvements to the Yakima River Basin. Many of the existing and future important improvements to our Basin will rely on various strategies using existing solutions under our current water code regarding transfers, trusts, and water banking. Any changes to our water code have the potential to delay, complicate, or possibly prohibit those anticipated beneficial actions.
- As previously stated, our members work closely with the Department of Ecology and others on water right transfers, water banking, and use of trusts. Although many of Ecology's existing regulations lack flexibility, use of the existing water bank and trust provisions have provided many solutions to complex water issues for the betterment of instream flows, transfers to other in-state users, and meeting demands of water users. We are concerned that additional legislative and regulatory requirements will impair the ability to seek solutions to water needs and strategies that will continue in our State.
- We are also concerned that the actions being recommended are an over-reaction to newspaper articles that sensationalized the threat of outside investors speculating on water for profit. We have found that such a threat has been overblown. Most, if not all, of the solutions proposed and implemented under our current water laws are for the benefit of other users in the State. The existing water banking and trust system has been used to provide water in times of drought; increased instream flows for fish and habitat; and moved water to areas where it is needed. All such transfers were made with the cooperation of Ecology and did not affect the existing water rights of others. Part of this process initiated by Ecology was to prevent "misuse" of the existing system. To our knowledge, all approved transfers were a valid use of the existing water transfer and water banking process and any perpetuation of any "misuse" by Ecology or others should not continue, nor be part of this Report or any other reports to the Legislature.

SPECIFIC COMMENTS TO RECOMMENDATIONS

City of Yakima: David.Brown@yakimawa.gov
Kittitas Reclamation District: urban@krdistrict.org
Roza Irrigation District: srevel@roza.org
Sunnyside Division Board of Control: bradyl@svid.org

Yakima-Tieton Irrigation District: Dieker@ytid.net
Columbia Irrigation District: cflynn@columbiairrigation.com
Naches-Selah Irrigation District justinh@n-sid.org
Selah-Moxee Irrigation District: smidistrict@qwestoffice.net



- No disagreement with funding the pilot water banking grant program.
- The recommendation to create a new statutory requirement so that all water right sales or changes in ownership be reported to the state is not needed. All current water right sales are already reported to the Counties, and available for public review. If the statutory requirement is limited to summarizing those sales from the Counties, we have no objection. Reporting changes in water right “ownership” is not as easy. Almost every sale of real property includes water rights that run with the land. In the vast majority of those transactions there is no detail on water rights being transferred and any summary would be cumbersome and most likely useless. We presume that Ecology is possibly only asking for information on water ownership changes that are not included with a land sale. The benefit of such a proposal is not clear. All changes to water rights are already reviewed and approved by Ecology. We know that Ecology actively participates in those water right transfers and the need for an additional database seems unwieldy and duplicative.
- The legislature must reject expansion of the “public interest” test in new legislation. The “public interest” of any proposed water use is already analyzed before a permit is issued. RCW 90.03.290. Any further attempt at redefining the public interest definition only causes uncertainty and will not serve the interests of the public because there will be no consensus on the definition; and any definition will still be analyzed and subjective depending on the opinion of the person or entity applying the test. A new definition only increases the time and costs of any entity proposing a transfer.
- In reference to the various Concepts warranting further analysis, we do not agree that further analysis is needed. Many of these concepts are proposed answers to problems that do not or rarely exist. Water right banking, transfers, and trusts are already complex and costly. These proposals will only add complexities and costs and decrease the ability and efficiency of implementing strategies to solve water issues in our state.
- We do agree with Ecology’s recommendations to reject other potential policy options.

In sum, we believe that the recommendations in this Report will require an increase in the need for staffing, and any potential benefits are far outweighed by the costs to both the State and to our water users utilizing various strategies to solve water issues. Currently, any party proposing any such strategy is already working with Ecology and other interests in providing water solutions. Any new legislation will only further complicate and delay answers.

City of Yakima: David.Brown@yakimawa.gov
Kittitas Reclamation District: urban@krdistrict.org
Roza Irrigation District: srevel@roza.org
Sunnyside Division Board of Control: bradyl@svid.org

Yakima-Tieton Irrigation District: Dieker@ytid.net
Columbia Irrigation District: cflynn@columbiairrigation.com
Naches-Selah Irrigation District: justinh@n-sid.org
Selah-Moxee Irrigation District: smidistrict@qwestoffice.net



Thank you for providing this opportunity to comment on the Draft Water Resources Report. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Lori Brady". The signature is fluid and cursive, with the first name "Lori" and last name "Brady" clearly distinguishable.

Lori Brady
Yakima Basin Joint Board President

City of Yakima: David.Brown@yakimawa.gov
Kittitas Reclamation District: urban@krdistrict.org
Roza Irrigation District: srevell@roza.org
Sunnyside Division Board of Control: bradyl@svid.org

Yakima-Tieton Irrigation District: Dieker@ytid.net
Columbia Irrigation District: cflynn@columbiairrigation.com
Naches-Selah Irrigation District: justinh@n-sid.org
Selah-Moxee Irrigation District: smidistrict@qwestoffice.net

Northwest Solutions

These are comments submitted by Councilwoman Kadi Bizyayeva from the Stillaguamish Tribe of Indians:

We do Recommend:

- Continued funding for the pilot water banking grant program.
- Water right ownership and sales disclosure – we need better systems to document the transferring of ownership on water rights.
- Public interest evaluations to further define the criteria in statute and extend them to surface water right changes – further guidance from the legislature on how to properly invoke PI or OCPI when making water decisions would be helpful. However, this definition should be explicit and narrow, and not for broad water use decisions that could potentially cause harm to natural processes. We would not support Ecology having authority to use PI or OCPI while making surface water decisions, as we're concerned it could be levied against instream sources like exempt wells in basins that have already proven to be over-allocated.
- Implementing a ban on out-of-basin transfers, especially when they're from one WRIA to the next.
- Establishing a right of first refusal for out-of-basin water right transfers.
- Restricting the use of the TWRP to in-state entities.
- Limiting enrollment time periods and re-enrollment for temporary donations – perhaps also considering a relinquishment of a water right at some point if the water is not going to be used.
- Requiring a "cool-off" period for water right changes following the removal of a temporary water right from the TWRP.
- Requiring a portion of the water rights used for water banking to be permanently dedicated for streamflow purposes.
- Creating water conservation incentives for mitigation plans for putting real water back into rivers and streams.

We do NOT Recommend:

- First and foremost, we do not support transfers from one WRIA to the next. However, IF out-of-basin transfers are allowed, we could not support a fee collection by local governments upon transferring water rights out of basin. We would prefer that those funds went into creating flows for the impacted basin instead.
- Capping the size of water rights that can be temporarily donated into the TWRP – especially if those temporary donations can benefit instream flows.
- Establishing a mechanism for transferring water rights upstream.
- Directing ecology to take a more substantial role in actively creating and promoting water markets.

Take care,

Kadi Bizyayeva | Fisheries Director

Direct Line: (360)572-3068

Cell Phone: (360)391-1871

Natural Resources Department

22712 6th Ave NE, Arlington WA 98223