

**Briefing Paper for WRAC Discussion on
Water Rights Transfers, Water Banking, and Private Investment in Public Water Resources**

For August 9, 2021

In the 2021/23 budgets, the Legislature directed Ecology to develop legislative recommendations to address issues of private investment in water banking and the out-of-basin transfer of water rights (see excerpt of the budget proviso on page 3).¹ Specifically, Ecology is to “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.” Ecology is to update the Legislature by December, 2021, then present our final recommendations by December, 2022.

The 2021/23 legislative directive is a continuation of work that Ecology has been undergoing for several years. In response to legislative direction in 2020, Ecology convened the *Advisory Group on Water Trust, Banking, and Transfers* to inform findings policy recommendations on these issues. Ecology’s final report presented to the Legislature is available [on our webpage](#).

Ecology’s upcoming task for 2021/23 is to better refine the previous recommendations into specific statutory changes. The WRAC’s input will be instructive to framing problems and scoping potential policy solutions.

Legal Background:

- [The State Water Trust and Water Banking: History and Function](#)
- [Water Right Sales and Transfers](#)

Discussion Prompt:

We plan to discuss three topics that are at the center of legislative concerns: out-of-basin water right transfers, water right sales, and water banking. For each topic, we present the driving or underlying concern, Ecology’s relevant finding from the Advisory Group process in 2020, and a refined list of the recommendations presented to the legislature.² **In the WRAC meeting, we want to discuss the potential legislative recommendations:**

- **Do you think the recommendation is good policy?**
- **If not, what policy would you recommend instead? Note that “status quo” or “do nothing” is always a viable option.**

For today’s discussion, rather than focusing on why a potential recommendation may not be a good idea, we want to hear your recommendations for possible solutions.

¹ Subsection (a) directs Ecology to “develop recommendations and implement actions under existing authority to modify the process for the review of water banks.” This is work that Ecology was already undergoing. This month we are publishing a draft program policy on the Administration of the Statewide Trust Water Rights Program, which establishes a process for review of water banks.

² The possible recommendations are analyzed in our full report. Policies herein were categorized under “recommendations requiring statutory changes” or “concepts for future legislative evaluation.” We have further refined this list based on further input and consideration.

1. Out-of-basin transfers

Driving concern: Downstream, out-of-basin transfers permanently move water rights out of the basin-of-origin, thereby reducing economic opportunity and negatively impacting the local community.

Ecology's Findings from the Advisory Group Process:

- Out-of-basin transfers may foreclose potential for future economic growth.
- Incentives to keep water rights in their basin-of-origin are more appropriate right now than regulatory limits.

Potential Legislative Recommendations

- Fund continuance of the water banking pilot grant program as a mechanism to incentivize water rights remaining in a basin. Change details of the program based upon results and learnings in 2021/23.
- Require that before the place of use of a water right may be transferred downstream out-of-basin, Ecology must determine that the change will not be detrimental to the public interest.

2. Water right sales

Driving concern: Out-of-state actors can buy Washington water rights for speculative purposes, sometimes with little public knowledge.

Ecology's Findings from the Advisory Group Process:

- While notice requirements for water right transfers may be sufficient, Ecology could improve the access to information.
- Limiting who can buy a water right (such as prohibiting out-of-state entities) would be unwise.

Potential Legislative Recommendations:

- Align disclosure laws for water right sales with the laws for land sales. Require that water right sales (including prices) are reported to the state and made publicly available. Note, this could be achieved through a pilot program or a permanent statute change.

3. Trust Water and Water Banking

Driving concern: Flexibility of the TWRP enables speculation in water rights in a way that promotes private profit over public benefit. Water banks are being used in ways that benefit private interests at a detriment to public interests.

Ecology's Findings from the Advisory Group Process:

- We need to remain aware of the possibility that the TWRP could benefit private interests at a detriment to public interests. But, we believe that the flexibility of the TWRP, and benefits to streamflow enhancement in the short term, currently outweighs those other concerns.
- Water banks play a critical role in reallocating water between beneficial uses. However, it is concerning when a bank that provides water to meet basic health needs gains disproportionate market power.

- Increased transparency will allow the public to better understand water banks' plans to help inform public interest.

Potential Legislative Recommendations:

- Provide legislative clarity around water banks and the public interest. This could look like strengthening the standard that banks not be detrimental to the public interest, or further defining objectives of the public interest.

Legislative Direction: (from the [2021/23 Operating Budget](#), Section 302, p. 316-318)

Sec. 302 (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.