

Draft Discussion Paper: Limits on Allowed Use of Trust and Banking

NOTE: This paper was created only for the purposes of generating discussion to inform potential legislative recommendations. None of the topics described are proposed or endorsed by Ecology.

Summary

Ecology has heard concerns that private interests are buying large amounts of water rights in the state for the purpose of investment speculation. This could lead to undue influence on water prices or availability in certain areas. It could also result in using the state's Trust Water Rights Program (TWRP) and water banking in a way that prioritizes private profits over public interests.

These concerns could be addressed by limiting use of these programs in the following ways:

1. **Allow only public/semi-public entities to create and run new water banks.** Under this change, all newly formed water banks would need to be owned by public entities (e.g., city or county governments) or semi-public entities (i.e., public-private partnerships). This change would help ensure that new water banks are created by entities that are addressing public priorities. A positive outcome could be reduced incentives for private entities to engage in investment speculation using water rights in our state. However, negative outcomes could include reduced water availability in some areas that have few options for new/expanded water use other than private water banks.
2. **Allow only Washington entities to be new users of the TWRP or water banking.** This change could reduce investment speculation by out-of-state entities and increase the chance that benefits/profits from the TWRP and water banking stay in Washington. However, this requirement would not affect any in-state entities or existing out-of-state water right owners potentially engaging in investment speculation using water rights. This change could also reduce water availability in some areas that would be served by water banks owned by out-of-state entities. Another significant challenge would be related to enforcement because it is relatively easy to establish a new Washington-based business that could circumvent any out-of-state limits on the use of the TWRP.

Ecology does not currently have the authority to limit ownership of water rights or use of these state-run programs. In fact, the state's water law specifically envisions "firms" and "corporations" as entities that could be involved in the beneficial use of water in Washington¹. Therefore, any limits on ownership or use of water rights would require a statutory change by the Legislature to grant this authority.

Background

Since 1917, Washington has managed water as a common property resource that belongs to the public, but that is available for private use through a permitting system. Ecology manages the state's water resources to support public health, promote economic well-being, and preserve our state's natural resources and aesthetics. However, private entities can receive a water right, which are "usufructory

¹ RCW 90.03.250: "Any person, municipal corporation, firm, irrigation district, association, corporation or water users' association hereafter desiring to appropriate water for a beneficial use shall make an application to the department for a permit to make such appropriation."

rights” to use the water in accordance with Washington water law. Recently, there has been increasing attention on some private entities (e.g., pension funds and finance/investment funds) owning Washington water rights as investments and potentially using them for investment speculation. There are concerns that some of these private interests may not align with the state’s goals for managing this public resource. This includes worries that private investment companies and out-of-state entities could own enough water rights to influence the price or availability of water in certain areas.

Some of the large-scale private investment in water rights is due to economic trends in land ownership, including the consolidation of cropland into larger farms² and emerging farmland ownership by large corporations or investment firms³. When these private entities buy agricultural land, they are often also buying the water rights that come with it. The purchase of Easterday Farms in eastern Washington for over \$200 million⁴ and Bill Gates’ investment company becoming the largest private owner of agricultural land in the United States⁵ are two recent examples of large, privately owned entities owning substantial water rights in Washington State. Although Ecology does not control the sale of private land, these sales trends in the agricultural sector contribute to the movement or control of large quantities of water use by private investment companies and out-of-state entities.

Discussion

Allow only public/semi-public entities to create and run new water banks

This change would limit all newly formed water banks to be owned by public entities (e.g., city or county governments) or semi-public entities (e.g., public-private partnerships). It would exclude private entities from independently creating and operating new water banks.

This change would ensure that new water banks are created by entities that are responsible to the public, better aligning the objectives and outcomes of new water banks with the public interest and the state’s management of water resources. Additionally, investment companies would no longer be able to use water banking to speculate with Washington water rights.

Through 2021, private entities created the majority (53%) of water banks and held 25% (29,605 AFY) of the water in all water banks. As such, it is possible that this change would affect a substantial number of future water banks and reduce options for new/expanded water supplies in some areas. The secondary consequences of this could include reduced housing availability, jobs, and economic activity/tax revenue in some areas without existing water service. Although it is possible that the demand for new/expanded water availability could be offset by public/semi-public water banks, these entities may lack the staff resources and necessary funding to establish water banks in each of these areas. Balancing the potential

² USDA Economic Research Service, 2020. *Consolidation in U.S. Agriculture Continues*.

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

³ USDA Economic Research Service, 2020. *Farmland Ownership and Tenure*.

<https://www.ers.usda.gov/topics/farm-economy/land-use-land-value-tenure/farmland-ownership-and-tenure/>.

⁴ Progressive Farmer, 2021. *Winning Bid on Easterday Assets: \$209M*.

<https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2021/06/23/mormon-church-group-outbids-bill>.

⁵ The Land Report, 2021. *Bill Gates: America’s Top Farmland Owner*. <https://landreport.com/2021/01/bill-gates-americas-top-farmland-owner/>.

to limit water reallocation in some areas with the public interest benefits of having only public/semi-public water banks is a key consideration for implementing this change.

Allow only Washington entities to be new users of the TWRP or water banking

This change would limit the use of the TWRP only for water rights owned by Washington entities (e.g., Washington residents, governments, and Washington-based non-profits/companies). This would include water rights enrolled in the TWRP for water banking. It could also include water rights being temporarily donated.

This change would address the concerns regarding private companies and out-of-state entities potentially using Washington's state-run programs for investment speculation. It would increase the likelihood that the benefits from the state's water resources remain in-state.

However, we anticipate significant challenges to implementation. It is possible that this change would prohibit a substantial number of future water banks and reduce options for new/expanded water supplies in some areas. In addition, out-of-state companies could create associated/subsidiary companies based in Washington State to use the TWRP and water banking programs. Trying to restrict that from occurring could unintentionally exclude some important contributors to the effective management of the state's water resources (e.g., out-of-state non-profits). The details of establishing the definition of an "out-of-state entity" and its implications extend beyond the expertise of Ecology (e.g., involves corporate law) and would require significant coordination with other state agencies.

Ecology does not currently have an up-to-date database that can determine the location of the owners of all of the state's water rights. It would require substantial time and resources to determine the current owners of every water right in the state and may not be possible to fully determine if they are considered an out-of-state entity based on the available data. As such, it is not currently possible to fully evaluate the implications of this change and implementation of this change would face substantial challenges.