

Water Right Sales and Transfers

Background Paper for the Advisory Group, Meeting 2: May 7, 2020

One of the foundational elements of Washington's Water Law is the ability to change or transfer a water right to another person or another use. Codified in 1917 as part of the original water code, RCW 90.03.380(1) states:

The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights.

A change to an *attribute* of a water right – the purpose of use, place of use, point of diversion or withdrawal, season of use, and quantity of water – requires Ecology's review and the filing of a change application under RCW 90.03.380. However, selling a water right from one person to another does not change an attribute of the water right. The sale is therefore not reviewed by Ecology, and nothing in statute that requires a water right purchaser to report a sale to Ecology. Two key points are:

- If a person sells the water right to another entity, but does not change an attribute of the water right, then there is no requirement to file a change application with Ecology.
- If a person wishes to change an attribute of the water right, such as the place of use, he must apply for the change with Ecology.

While most sales of water rights also involve a change to an attribute of the right, they do not always coincide.

Sales of land and water together

Water rights can be purchased in conjunction with the land to which it is appurtenant. In these cases, the buyer and seller are required to report the sale to the county assessor's office and/or the Department of Revenue for collection of the Real Estate Excise Tax (per RCW 82.45). The new owner may or may not wish to change an attribute of the water right. If they do not (meaning they would continue to use the water as it had previously been used), Ecology would not be notified of the sale.

Sales of farmland with associated water rights occur frequently. Although Ecology has not evaluated these transactions in detail, the information on land transactions is public information under state real estate laws. A new landowner may choose to lease the land that was acquired to continue current practice for irrigated agriculture, with no notification to Ecology. Under this approach, a landowner may defer a decision about transferring water rights downstream for significant periods of time. Importantly, investments made in irrigated farmland may be larger (potentially much larger) in scale than sales of water rights separate from land.

Sales of water rights separate from land

Water rights purchased separate from the land to which it is appurtenant must be reported to the Department of Revenue, and Real Estate Excise Tax must be paid. These sales are reported to the county assessor's office, as a water right is recorded on the title to the land which it is appurtenant. Ecology does not necessarily get notified when this action is taken. It is common that when water rights are bought separate from the land to which they were appurtenant, the new owner will want to change an attribute of the water right (like place of use) and will file a change application with Ecology.

Evaluation of change applications

Water right holders can file a change application to allow new use of a water right through two avenues. First, they can file it with Ecology under the change process prescribed in RCW 90.03.380. Alternatively, they can file it through a Water Conservancy Board, which operate under chapter 90.80 RCW. A Conservancy Board reviews an application and makes a decision, which is forwarded to Ecology for a final decision. The decision is posted on the Ecology website for 30 days to allow other water users to make a claim of impairment. Ecology has 45 days from receipt of the Conservancy Board's decision to make a final decision.¹ Ecology reviews the recommendation and either affirms, reverses, or modifies the decision.

All change applications for surface water rights, whether processed through Conservancy Boards or Ecology, are evaluated under the same standards in law. Importantly, the law states that if the change can occur without impairing another existing water right, Ecology shall approve the change.

Note that for changes to groundwater rights, Ecology must also assess whether the change will be detrimental to the public interest. This requirement is set forth in case law (see [Public Utility District No. 1, of Pend Oreille County](#), "Sullivan Creek", 2002).

Public notice

Changes and transfers processed by Ecology under RCW 90.03.380 follow procedures in RCW 90.03.290, which requires public notice for a minimum of two weeks. Changes and transfers processed by Conservancy Boards follow procedures set forth in RCW 90.80.080, which provides a 30-day review period for any party to issue a letter of concern or support for a decision.

In addition to the public notice requirements applicable to all change applications, a law passed in 2011 establishes that Ecology has to notify the county commissioners for any out-of-basin transfer in counties east of the Cascades (RCW 90.03.380(10)(a)).

Out-of-basin water right transfers

"Out-of-basin transfers" typically refer to a change to a surface water right that moves the place of use out of the WRIA-of-origin (WRIA - Water Resource Inventory Area). Because changes cannot impair existing water rights, these changes are almost always downstream, from a tributary to receiving waterbody. An example would be transferring a right from the Methow River downstream into the mainstem Columbia, for use in the Kennewick. In Washington, these transfers happen along a

¹ Ecology can extend the decision deadline by an additional 30 days.

waterbody, rather than across basins. Out-of-basin transfers that involve two independent waterbodies, such as transferring a water right from the Methow River to the Wenatchee River, generally cannot occur due to impairment.

Frequency of out-of-basin transfers: Table 1, below, indicates the number of transfers that have occurred since 2003 that allow water use in a WRIA different than the WRIA of origin. The first columns show the number of out-of-basin transfers achieved through a “direct” transfer, or a change that moved the place of use of the water right from one WRIA to another. The second columns show the number of out-of-basin transfers achieved through water banks. Each transfer represents a water right that was changed to instream flow and mitigation, conveyed to Ecology to be held in trust, and for which the Trust Water Right Agreement indicates that the intended new use(s) is in a different WRIA than the basin-of-origin.

Issues of impairment: In many cases of downstream, out-of-basin transfers for surface water rights, the change can be made without impairing another user. If impairment is not found, Ecology must approve the transfer (see figure 1, below). However, if a water right holder later wants to transfer the water right and change the place of use back upstream, this likely would result in impairment to other water rights (including instream flows). If there would be impairment, Ecology must deny the application (see figure 2, below). In this way, out-of-basin transfers are often thought of as a permanent change to a water right downstream.

Environmental benefits: A downstream transfer of a water right results in increased flows for a river or stream reach between the previous point of diversion and the new point of diversion (Refer to Point A and Point B in Figure 1). This benefits instream resources, including fish and wildlife.

Economic benefits: The availability of a source of water at the new place of use downstream can benefit the economy — both locally at the new place of use and for the state as a whole. In addition, the value of the water right may be higher at the new location, increasing the benefit to the previous water right holder in terms of the value (sale price) for the water right.

Economic costs: By transferring a water right downstream, there becomes less water available for out-of-stream uses in the basin of origin. This, combined with the permanent nature of downstream transfers, can lessen opportunity for economic growth in the basin of origin. This is often referred to as “buy and dry” where a farm in the basin of origin falls their fields and sells the water right downstream. This can have indirect and induced impacts on the local economy.

Table 1: Out-of-basin transfers since 2003

WRIA ²	Direct Out-of-Basin Transfers		Out-of-Basin Transfers through Water Banks ³	
	Number of Transfers	Quantity of water (ac-ft/yr)	Number of Transfers	Quantity of water (ac-ft/yr)
23 - Upper Chehalis	1	26		
30 - Klickitat	2	193		
32 - Walla Walla			8	4981
34 - Palouse	2	184		
35 - Middle Snake			2	302
36 - Esquatzel Coulee	4	1426	1	716
37 - Lower Yakima	1	42	1	484
39 - Upper Yakima			5 ⁴	2565
40 - Alkali-Squilchuck	3	164		
42 - Grand Coulee			1 ⁵	25000
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	1843	4	894
50 - Foster	4	1216		
52 - Sanpoil			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	1266		
60 - Kettle	1	204		
TOTAL	50	7,902	25	35,364

² WRIAs not shown had no applicable transfers.

³ Transfers to instream flow and mitigation, conveyed to Ecology to be held in trust, and for which the Trust Water Right Agreement indicates that the intended new use(s) is out of basin.

⁴ There are several water banks in Kittitas County that could mitigate new uses out of the WRIA of origin, but the banks were not created with that intent.

⁵ Lake Roosevelt water bank, operated by the Office of the Columbia River.

Figure 1: Application to transfer a water right for use downstream

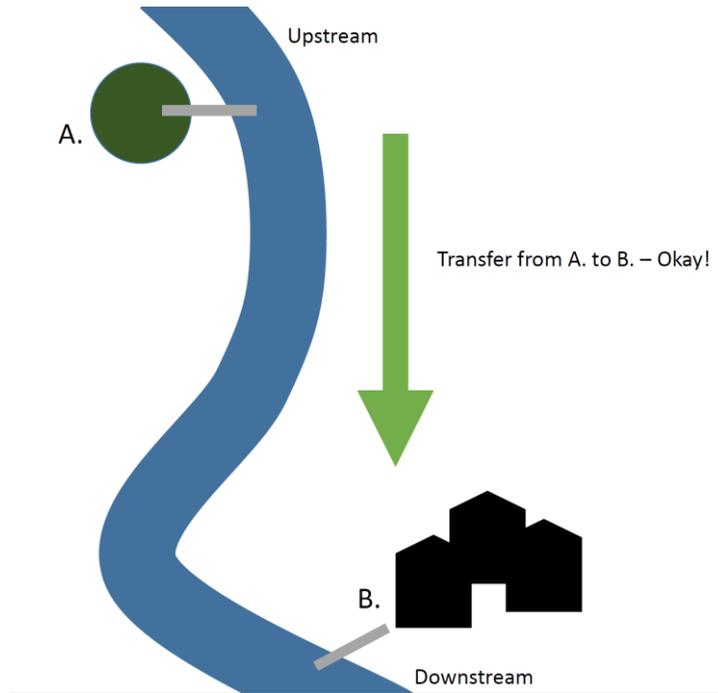


Figure 2: Application to transfer a water right upstream

