

## Water Transfers – Fallowing Guidelines

### A. Introduction:

Kittitas Reclamation District (KRD) and Roza Irrigation District (RID) have recently submitted a joint letter, dated November 3, 2023 to Ecology expressing concerns about transfers involving dual source water rights and transfers in which the Applicant proposes to move the consumptive use from one place of use to a new place of use. Our concerns relate to potential increases in consumptive use that negatively impact TWSA. These transfers should not be approved. In some instances, applicants propose to mitigate the negative impacts on TWSA by fallowing (or Ecology requires fallowing). Simply foregoing the application of irrigation water to all or part of land used to raise and/or cultivate crops<sup>1</sup> from which water is being transferred does not preclude or prevent the continued consumptive use of water on the place of use from which the water is being transferred.” “Fallowing” requires that affirmative steps such as those discussed below be taken to prevent consumptive use through continued plant growth in addition to stopping irrigation. Under some circumstances, allowing unirrigated plant growth to occur impairs or creates a substantial risk of impairment to TWSA.

**The Risk of Impairment or Enlargement of a Water Right:** Ecology, in any change or transfer decision<sup>2</sup> under RCW 90.03.380 must determine whether other water right holders, both junior and senior, will be impaired by the proposed change or transfer. Impairment is an adverse impact on the physical availability of water for a beneficial use that is entitled to protection. In Washington law does not permit any impairment, even a *de minimis* impairment, of a senior or junior water right due to a change or transfer. *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 471, 362 P.3d 959, 961 (2015). Enlargement of a water right occurs when a change or transfer results in more water being used than is authorized to be used under the water right, and any enlargement will reduce TWSA and thereby impair KRD and Roza’s water rights.

The proponent of a water right change or transfer may avoid a challenge to the change or transfer by Roza and KRD by understanding and complying with the following principles that KRD and Roza will use to determine whether the proposed transfer negatively impacts TWSA:

1. All crops (including pasture and turf) have an established consumptive use (CU) which means – regardless of how much water you apply to the crop – the crop only consumes a finite amount of water. The rest of the water applied eventually returns to the system. If an irrigator has two sources of water and they remove one source, the CU for the crop doesn’t change.
2. If the removed water source is not consumed again there is no impact to TWSA because there is no increase in consumptive use.

---

<sup>1</sup> Crops should be defined broadly and includes, but is not limited to, pasture, forage crops, row crops, grain crops, wine grapes and tree fruit.

<sup>2</sup> The same issue applies in the issuance of a new water right whether it be surface water right or a ground water right.

3. If, however, the removed water source is put to a new consumptive use (irrigation of additional lands, expansion of the season of use, new domestic uses, etc.) then there is a potential for increased CU and a reduction in TWSA. This is true even if the removed source has a priority date before 1905 because if there is an increase in the non pro-ratable use of water that results in a decrease in the TWSA available to satisfy pro-ratable users such as KRD and Roza. This constitutes impairment of all pro-ratable users' water rights, including the KRD and Roza.
4. There are several ways to avoid impairment: (1) Do not consume the removed water source; or (2) Structure the transfer so there is no net increase in CU. This can be accomplished through proper fallowing of the place of use or by not allowing the entire amount of consumptive use to be transferred and instead requiring that a portion of the consumptive use remain at the place of use to offset the impact to TWSA because of subirrigation and/or continued plant growth.

The definition of “fallowing” and the uses to which the transferred water will be applied must be properly conditioned to ensure that no additional consumptive use results from a transfer. These conditions will differ from transfer to transfer. KRD and RID will use the following guidelines to evaluate each transfer involving dual source water rights to determine if the transfer, as proposed by the applicant, provides for sufficient certainty that the fallowing requirement avoids an increase in consumptive use that would result in a decrease in TWSA.

**B. Fallowing Requirements.**

1. Transfers Outside of the Irrigation District Boundaries Which Provides for the Transfer of CU From the Sending Place of Use.

Type of Transfer	Consumptive Use to be Transferred
1.1 Transfer results in 100% of the consumptive use being used for instream flow with no new consumptive uses.	100%
1.2 Transfer results in all or part of the consumptive use being used for new consumptive uses <u>and</u> the former place of use of sending water right will be covered with impervious surfaces.	100%
1.3 Transfer results in all or part of the consumptive use being used for new consumptive uses <u>and</u> the former place of use of the water right will <u>not</u> have irrigation water applied to it <u>and</u> the new	100%

place of use will be planted (or replanted) with native vegetation.	
1.4 Transfer results in all or part of the consumptive use being used for new consumptive uses <u>and</u> the former place of use of the water right will <u>not</u> have irrigation water applied to it, <u>but</u> the former place of use is left in pasture, turf, alfalfa or annual grain crops.	The transferable consumptive use should be determined on a case-by-case basis depending on the type of vegetation that is allowed to grow in the place of use with the transferable consumptive use reduced by the estimated consumptive use of the crop without irrigation.

2. Transfers Inside of the Boundaries of an Irrigation District or Other Water Purveyor That Has a Contract with the USBR Which Defines Irrigable Acreage.

- Limitation on transferable quantity:** These transfers require a determination of the USBR classified irrigable acres (CIA) and the number of acres of irrigation water in the natural flow right within the same place of use (NFRA). Because the USBR classified irrigable acres are contractually<sup>3</sup> entitled to water, when water is available, and cannot therefore be completely fallowed, if the NFRA minus CIA is a positive number, then the sum of NFRA-CIA should be available for transfer subject to the following requirements set forth below, but if the NFRA minus CIA is a negative number (meaning the CIA is equal to or greater than the NFRA), no portion of the consumptive use should be transferred.

Type of Transfer	Consumptive Use to be Transferred
2.1 Transfer results in 100% of the consumptive use being used for instream flow	100%
2.2 Transfer results in all or part of the consumptive use being used for new consumptive uses <u>and</u> the former place of use of water right will be covered with impervious surfaces	100%
2.3 Transfer results in all or part of the consumptive use being used for new consumptive uses <u>and</u> the former place of use of the water right will <u>not</u> have irrigation water applied to it <u>and</u> the new	100%

<sup>3</sup> The contracts that irrigation districts have with landowners require landowners with irrigable acreage to adhere to certain rules and regulations imposed either by the District or by the Bureau of Reclamation as a condition of receipt of irrigation water. As such a landowner must have irrigable acreage and follow all applicable rules and regulations in order to receive irrigation water which is available to the district.

place of use will be planted with native vegetation	
2.4 Transfer results in all or part of the consumptive use being used for new consumptive uses <u>and</u> the former place of use of the water right will not have irrigation water applied to it, <u>and</u> former place of use is left in pasture, turf, alfalfa or annual grain crops	The transferable consumptive use should be determined on a case-by-case basis depending on the type of vegetation that is allowed to grow in the place of use with the transferable consumptive use reduced by the estimated consumptive use of the crop without irrigation

3. Definitions. The following terms have the following definitions.

3.1 Consumptive Use: The consumptive use as determined using Ecology guidance documents.

3.2 Definition of Dual Source Water Rights: Dual source water rights arise when an authorized place of use has two or more sources of water from which to raise one crop. Dual source water rights are prevalent in the Upper Yakima Basin, as there are many creeks which flow through the valley across the KRD and other irrigation purveyors' places of use. Dual source water rights also arise when a landowner has land within the Irrigation District and which acreage has been classified as irrigable by the USBR. In those instances, the Irrigation Purveyor is obligated to be able to deliver irrigation water because those acres are designated as irrigable and are allotted water, and the owner of the place of use also has a state-based water right to a creek or tributary of the Yakima River.

3.3 Native Vegetation: Low water use vegetation, bunch grass or shrub step plants that would historically been found on the place of use prior to the inception of irrigation.

3.4 New Consumptive Uses: Water uses that will occur because of the proposed change which result in some portion of the water right being consumed in a manner different than before the proposed change.

3.5 Transferable Quantity. The quantity of water that is available for transfer after the extent and validity determination required by 90.03.380 has been completed.