

# Washington Water Rights for Agricultural Producers

R. Troy Peters

## The Basics

Nobody “owns” water. It legally belongs to everybody. Nevertheless, water resources are limited, and fighting over water is a legacy of the West. As Mark Twain put it, “whiskey is for drinking, water is for fighting.” To limit this fighting, individual states set the rules and manage their own water resources and issue water “rights” to individuals and organizations to use the water.

In Washington, water rights are managed by the Washington State Department of Ecology (hereafter “Ecology”). Since 1917 Washington State has followed the *prior appropriation* doctrine which basically states, “first in time is first in right.” The first water users to make “beneficial” use of the water have the most senior water rights. In water short years, those who have more junior water rights get their water use cut back first and can lose their entire water allocation before more senior water rights holders will lose any. This applies to groundwater use as well. Water law also states that minimum in-stream flows must be maintained to protect fish, wildlife, and water quality.

There are many competing uses for water including municipal and industrial use, recreation, irrigation for agriculture, power generation, and providing flows for fish and wildlife habitat. Because of the emotional nature and large economic benefits related to these competing interests, the competition for the state’s limited water resources will continue to be intense into the future.

Water rights are typically attached to the land. Water rights are automatically transferred when land is bought or sold unless the seller explicitly reserves the water. Water rights can sometimes be transferred to

another piece of land or another type of use. Even if the water is available, irrigating additional land from the same water source (water spreading) may be an illegal expansion of a water right unless approved by Ecology.

However, you do not need to apply for a water right if the water will be pumped from groundwater to water stock, irrigate a half acre or less of non-commercial lawn and/or garden, or if you are using less than 5,000 gallons per day for domestic or industrial use. A water right is necessary if you plan to divert water for any use from surface waters.

## What does it take to get new water rights?

To get new surface or groundwater water rights under Washington State law an application must meet four criteria: 1) the water will be put to “beneficial use” (not wasted), 2) the water is available, 3) there is no impairment to existing water rights, and 4) it is not detrimental to the public interest.

To apply for a water right you must fill out an application (available at your nearest Ecology office or on Ecology’s web site) and pay an application fee (\$50). If everything is correct, Ecology will send you a legal notice to be published at least once per week for two weeks (at your expense) in an approved newspaper that has a circulation where the water will be used. After a 30 day “protest” period, you then send Ecology a notarized “Affidavit of Publication” from the paper showing that this was done. Ecology investigates the application, checks the additional water use against the four criteria given above, and issues you a “report of examination” (ROE) and a final decision. (Don’t expect a quick turn-around.) If you are denied you have 30 days to file an appeal. If approved and there are no appeals (from outside interest groups) you get issued a *permit* to “appropriate public waters of the state of Washington”. The permit allows you to construct the water system and put the

water to beneficial use. There is a timeline specified on the permit based on the size of the project that the work has to be started and completed by. When you are done developing the water right you submit a “proof of appropriation of water” affidavit form. Once Ecology confirms that all the conditions of the permit are met (the water right is “perfected”) you are issued a *certificate* of water right that is the legal record of your water right and this is recorded at the county auditor’s office.

Most of the water in Washington has been allocated and is often claimed by several different interest groups. Therefore new water rights are difficult to get and it is often easier to transfer a water right from somewhere else (see below). Also remember that the newest water rights are the most junior and during water short years will get shut off first.

### **Can I lose my existing water rights?**

Yes. If a water right is idle and isn’t put to “beneficial use” at least once every five years, that water right will be lost or “relinquished” and go back to the state. If even part of the water right isn’t put to beneficial use, then the unused portion can also be lost through “partial relinquishment.” If you can show a “sufficient cause” (good excuse) for not using the water during a time period of disuse then the water right can be retained. There are many exceptions to this “use it or lose it” rule. Check with Ecology to make sure your reason qualifies.

Unused water rights (or portions thereof) can be put into Ecology’s “Trust Water Reserve Program” for a specified time period. This will stop the five-year, use-it-or-lose-it clock. If the water rights are “exercised” (used by Ecology to increase in-stream flows) during the time period that the water rights are in the trust, then the clock is reset, not just stopped.

Potential drawbacks to the Water Trust Program are that Ecology can only admit into the trust the maximum amount of water that was beneficially used in the previous five years (based on a review by Ecology). All water rights not in the trust are not exempted and will be lost if left inactive during the trust period. If your water rights haven’t been beneficially used for 5 years you will want to do so (and keep records of it) before contacting Ecology to put them into the water trust or the review will show the non-use and will result in a permanent loss of the water rights with none going into the water trust program.

### **Can I buy, sell, transfer, or modify water rights?**

Essentially, yes. Although water rights are attached to the land, a water right can be legally *transferred* from one piece of land to another. Money can be offered privately to encourage this transfer. Because a water right is attached to the land it can’t legally be transferred for use elsewhere without informing Ecology. Water rights can only be transferred if conditions similar to those for obtaining new water rights are met: 1) the water right being transferred is a valid and legal water right, 2) the water will be beneficially used, 3) there is no impairment to existing water rights, including in-stream flows 4) it is not detrimental to the public interest, 5) the instantaneous or annual amount of water used won’t increase, and 6) the water source won’t change. In general because of in-stream flow requirements for aquatic habitat it often means that surface water rights can be transferred downstream, but not upstream. Transferring an existing water right does not change the seniority of that right.

The process of transferring a water right is essentially the same as that for obtaining new water rights (see all of the steps for how to obtain a new water right

above). The only difference is that you fill out a different form and you may be required to submit additional documentation. If approved you are issued a *Superseding Certificate* that is then recorded at the county auditor's office.

Instead of Ecology, a local Water Conservancy Board can process a water right *transfer* application and produce the required *report of examination* (ROE) which is then submitted to Ecology for final review. Processing through these boards can result in a much shorter turn-around times. There are 21 different water conservancy boards operating in Washington. Contact Ecology or your local health department for more information.

Water rights can also be changed. A water right holder can ask Ecology to change the place of use, point of diversion or withdrawal, add additional point of withdrawal, and change the purpose of use. The process and is the same as with transfer of water right.

Ecology has a program where they will buy or lease surface water rights in certain target areas where improved in-stream flows could benefit fish. These water rights are either sold permanently or leased and put into the trust water program (see above).

### **When might I need an attorney, engineer, or hydrogeologist?**

You might need an attorney to resolve water disputes in civil courts or if your decision is appealed (by you or someone else). You might need an engineer or hydrogeologist if you work through a conservancy board, since they require an applicant to do work normally done by Ecology staff. Generally, if the application is processed by Ecology, it doesn't require any of these paid consultants to obtain new water rights or transfer existing water rights.

### **How much water am I entitled to with my existing water right?**

Usually a water right is limited to a maximum annual *quantity* withdrawal and a maximum withdrawal *rate*. The quantity that you are entitled to is usually stated in your water right but it is effectively tied to the quantity of water that is needed for your particular "beneficial use". For example most crops in the Columbia Basin region of Eastern Washington use about 3 – 3.5 acre-ft of water per acre per season. Overwatering through poor irrigation management would be an illegal expansion of your water right.

### **What happens if I use more than my share, or get caught stealing water?**

If you are caught breaking water law you can get fined by Ecology up to \$5,000 per day. However, Ecology generally uses fines as a last resort and provides technical assistance to encourage compliance. Anyone deprived of water because of your actions can also sue you in court.

### **My neighbor is cheating me out of water. Who can I go to?**

The least expensive way is to file a complaint with Ecology. Although Ecology has limited staff, it will try to determine if there is a water law violation and resolve the dispute. However, some disagreements about water use have to be resolved in civil courts.

### **What does adjudication mean?**

Basically this means that an existing water right and its validity, quantity, and priority have been confirmed by the court. This process is especially meaningful to "claims" for old or pre-code water rights that may not have been previously certified.

### **How much money are my water rights worth?**

Water rights can increase property values 5 – 10 times. Water can enable the production of agricultural crops worth up to thousands of dollars per acre on land where nothing at all could be profitably grown without it. This production stimulates local economies and industries, produces jobs, and increases the state's tax revenue. Water not only makes life possible, it makes it enjoyable. Although it is difficult to put a direct dollar/gallon value on it, water is extremely valuable. Please don't waste it.

**Can I put in a pond or reservoir on my property and store large amounts of water?**

Usually, as long as you don't exceed your water right to put water into it, it doesn't impact other's water rights, and it doesn't threaten other's safety. Storing water on site for meeting peak irrigation season requirements, frost control, evaporative cooling, out-of-season irrigation, irrigation flexibility and/or pumping energy savings is a good idea. If a dam has a maximum capacity of more than 10 acre-ft or if the dam is more than 10 ft high, then you have to get it professionally engineered and also follow Ecology's dam safety permitting process (includes a \$1400 application fee). If homes and lives would be at risk if the dam failed, then a prorated annual inspection fee is also required (\$280 in 2008). This fee increases with the more homes and lives that would be at risk in a dam failure. Check with Ecology as to whether a permit is required or not for your situation.

**Where do I go for more information?**

*Ecology's Water Rights website:*

<http://www.ecy.wa.gov/programs/wr/rights/water-right-home.html>

*Application form and instructions for a new water right:*

<http://www.ecy.wa.gov/pubs/ecy040114.pdf>

*Application form and instructions for a water right transfer:*

<http://www.ecy.wa.gov/pubs/ecy040197.pdf>

*Application form and instructions to put water into a water trust:*

<http://www.ecy.wa.gov/pubs/ecy07054.pdf>

*Ecology's dam safety web site:*

<http://www.ecy.wa.gov/programs/wr/dams/dss.html>

*Irrigation water management:*

<http://irrigation.wsu.edu>

**Ecology's Regional Offices**

*Northwest Regional Office / Bellingham*

*Field Office* (Island, King, Kitsap, San Juan, Skagit, Snohomish, and Whatcom counties)

3190 - 160th Ave. SE, Bellevue, WA 98008-5452.

Phone: 425-649-7000

*Southwest Regional Office / Vancouver Field*

*Office* (Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Mason, Lewis, Pacific, Pierce, Skamania, Thurston, and Wahkiakum counties)

300 Desmond Drive, Lacey, WA 98503. Phone: 360-407-6300

*Central Regional Office / Methow Valley*

*Field Office / Wenatchee Field Office* (Benton, Chelan, Douglas, Kittitas, Klickitat, Okanogan, and Yakima counties)

15 West Yakima Ave -- Suite 200, Yakima, WA 98902-3452. Phone: 509-575-2490

*Eastern Regional Office / Ephrata Field*

*Office / Walla Walla Field Office* (Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Lincoln, Pend Oreille, Spokane, Stevens, Walla Walla, and Whitman counties)

N. 4601 Monroe, Spokane, WA 99205-1295. Phone: 509-329-3400