

# ANALYSIS OF HB 1272

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House Agriculture & Ecology Committee  
1997

January 29,

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## **BACKGROUND:**

The right to use water for a beneficial use remains appurtenant to the land where it is used. A water right may be transferred to another person if it can be made without causing an injury to existing water rights. If the water right is transferred, it becomes appurtenant to the land where it was transferred without any loss of priority.

In order to transfer a water right, an application must be filed with the Department of Ecology. The Department must publish notice of the application in a newspaper of general circulation in the area. If the transfer may be made without injuring existing rights, then the Department must issue the applicant a certificate granting the transfer. One certificate is filed with the Department and a duplicate is given to the applicant who may file it with the county auditor.

If an application proposes to transfer a water right from irrigation district to another, the Department must receive concurrence from each of the irrigation districts that the transfer will not adversely affect the ability to deliver water to other landowners or impair the financial integrity of the district. If the transfer will only involve a change in place of use within an irrigation district, then the only approval needed is from the board of directors of the irrigation district.

Interest has been expressed in allowing water transfers to be conditionally approved at the local level.

## **SUMMARY:**

Water conservancy boards may be formed to establish a water transfer exchange through which any person who owns or holds a water right may list the right for sale or transfer.

Formation. A water conservancy board may be formed by filing a petition with the Department of Ecology. The Director of the Department has 90 days to approve or deny the petition creating the board. Any one of three entities may file a petition to form a water conservancy board: (a) a local water resource agency (an irrigation district, reclamation district, city operating a municipal water supply system, public utility district, water-sewer district, or cooperative or mutual corporation serving 100 or more accounts); (b) water right holders who

divert water within one or more water resource inventory areas (WRIA); (c) or any combination of two or more water resource agencies and one or more local water right holders.

The petition must include the name and address for each petitioner, a brief description of the water right and use of each petitioner sufficient to identify the place and source of diversion and the place of use of the water, identification of the geographic boundaries of the local water resource agency or WRIA that will be included within the board's jurisdiction, and the proposed bylaws of the district.

If the petition is initiated by a local water resource agency, the board is composed of three or more directors who are appointed by the governing body of the local water resource agency. If the petition is initiated by water right holders who divert water within a WRIA, the board is composed of three directors appointed by the Director of the Department of Ecology from a list of six names submitted by the petitioners. If a petition is initiated by a combination of local water resource agencies and water right holders, the board is composed of three directors appointed by the organizing bodies. Directors serve four-year terms and may be reappointed.

Powers. A water conservancy board is considered to be a separate unit of local government in the state. A board may sue and be sued, acquire and sell real and personal property, hire employees, and enter into and perform all necessary contracts necessary to carry out its functions. Boards are to be independently funded, as determined by the board.

A water conservancy board must establish procedures that are consistent with rules adopted by the Department of Ecology for the administration of approvals for water transfers. The board may establish a water transfer exchange through which all or part of a water right may be listed for sale or transfer. Water transfers approved by the board must remain within existing beneficial uses or general sectors. Transfers of water used for agriculture is limited to short or long-term leases. Each board is required to maintain and publish all information available to the board concerning water rights listed with the board and any application to the board for a approval of a water transfer.

A transferor and transferee of any proposed water transfer may apply to a board for approval of a transfer if the water that will be transferred is currently diverted or used within the geographic boundaries of the board, or would be diverted or used within the boundaries of the board if the transfer is approved. Water that is diverted or used within a district that is transferred to an instream use is considered to be used within the district.

The board may require such information in the application as needed in order to review and act on the proposed transfer. The application must include information sufficient to establish to the board's satisfaction that the transferor is entitled to the quantity of water being transferred. It must also describe any applicable existing limitations on the right to use the water, including the place of diversion, place of use, source of supply, time of use, period of use, and the place of storage.

The board must publish notice of the application and send notice to the applicable state agencies. Any person who claims a detriment or injury to an existing water right as a result of the proposed transfer may intervene, and other persons may submit comments. The board may approve the application if it is complete, meets the requirements set forth in statute and any rules

adopted by the Director of Ecology, and does not cause an injury or detriment to existing water rights. If the board approves a transfer, it must issue the applicant a certificate conditionally approving the transfer, subject to review by the Director.

A water right that has not been adjudicated may be transferred, but any approval of a transfer by the board or by the Department does not constitute an adjudication of the water right and does not preclude a subsequent challenge to the water right in an adjudication proceeding. A rebuttable presumption is created that any water transfer does not impair or injure existing water rights of third parties. Any water transfer that is limited to the consumptive quantity of the transferor or a nonconsumptive use is conclusively presumed to cause no detriment or impairment to the rights of third parties. The burden is on the applicant to prove that a proposed transfer is limited to the transferor's consumptive quantity. A person who claims to be the holder of a water right is entitled to a hearing before the board. The board may approve a water right that impairs a the rights of a third party if the applicant or impaired party agree on compensation for the impairment, or the applicant proposes a physical solution that substantially mitigates the impairment and is reasonable under the circumstances.

Once a transfer is approved by the board and the proposed certificate conditionally approving the transfer is issued, the board must submit a copy of the certificate to the Department for review. The board must include a report summarizing its findings on which it relied in approving the transfer. The board must also send notice to any person who objected to the transfer or requested notice. Any person who feels that his or her water right is impaired, or either party to the transfer, may appeal the board's decision to the Department. The Department has 30 days to review the board's decision to grant a transfer and may affirm, reverse, or modify the decision. The Department may extend the 30-day time period upon the consent of the parties. If the Department fails to act within 30 days, the transfer is considered approved. Upon approval of the transfer or nonaction by the Department, the conditional certificate issued by the board becomes final and valid.

The decision of the Department to approve or deny a petition to form a board, or to approve or deny a water transfer is subject to judicial review provided under the Administrative Procedures Act.