

## FAQs Regarding Boards of Joint Control pursuant to RCW 87.80

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As requested, here is an overview on the role and background of boards of joint control as discussed at the last meeting of the Entiat landowner steering committee. . This document is not intended to reflect on any particular proposition. It is expected to provide informative background information and explanation. As such it is not a legal opinion, but it is expected to be authoritative on the subject. To make it more accessible it will be organized around frequently asked questions.

### **What is a Board of Joint Control?**

RCW 87.80 provides for the creation of Boards of Joint Control. Such boards are entities created by a County resolution at the request of the members proposed to be part of the board. Similar entities can be created using interlocal agreements, but interlocal entities are typically limited to exercise only the powers derived from the entities forming them. Joint boards are similarly limited except that they are granted the additional authority to change water right attributes within the jurisdictional area of the board's members. This additional authority makes them ideally suited to administrate regional water resources because they are uniquely empowered to do so.

### **Do joint boards allow persons to retain control of their water rights?**

Yes. Joint boards do not have any control over water rights unless those rights are acquired by the board through gift or purchase. A water right holder may apply to the joint board to authorized changes to their water right, but the decision will not change the ownership or divest control of the water right. The change decision will be limited to the scope of the request of the applicant.

### **If I use a board of joint control to change a water right will the right lose its seniority?**

No. The board merely authorizes changes to the right if it can confirm that the right exists and if it can confirm that the proposed changes will not impair other water rights. Sometimes changes will be conditioned in such a way to avoid a possible impairment, but it remains up to the applicant to decide if they want to proceed with the changes in light of any conditions required. The applicant may decide to withdraw the application at any time. The applicant will likely be expected to draft the board's decision document and propose conditions as a solution to avoid a possible impairment issue. Even after the decision the applicant can decide to not go through with the changes and the right will revert to its original attributes.

### **What advantages are there to having a county as a member?**

Counties have large jurisdictional boundaries that frequently align well with watershed boundaries. Since the ability to change water rights is limited to the jurisdictional boundaries of the members of a joint board it is helpful to have a member whos jurisdictional boundary extends sufficiently to allow access to the jurisdiction by all applicants within a watershed. If a

joint board's boundaries do not include areas that are served by water rights then the owners of those rights will not benefit from the joint board jurisdiction.

Counties also serve as the primary land use planning and permitting agency for nearly all projects outside of areas incorporated by cities. Nearly all permits require a showing of water availability. Without the ability to allocate or reallocate water rights effectively the ability to plan and permit land uses is severely compromised. Having a County participate as a joint board member enables it to retain local land use authority that would otherwise be governed solely by the lack of water availability. Without a joint board all water right allocations and reallocations must be approved by the State Department of Ecology.

### **What are the risks to a County by being a member?**

Legal challenges to a joint board could bear upon some aspect of its creation and membership, but are more likely to bear upon the merits of its actions. Challenges to a water right change decision can be expected to be defended by the applicant. In such a decision a County acting as a joint board member would typically enjoy the same immunity as in any permit decision because "a duty to all is a duty to none."

### **How does a joint board operate for water right change decisions?**

In making changes to water rights a joint board will likely operate virtually identically to a Water Conservancy Board. Chelan County has had a Water Conservancy Board operating regularly for more than a decade without incident. These boards fund their operations with application fees from persons and entities seeking permits to change water rights. The joint board decisions are appealable by aggrieved parties (which may include DOE) to Superior Court. The applicant will be the only party motivated to defend the permit granted from third party challenges. If the permit fails on appeal then the applicant's loss is limited to the cost of the appeal and the permission granted in whole or in part. The Chelan Conservancy Board applicants have enjoyed a very high success rate defending Chelan Board decisions.

### **Does a joint board decision relieve the applicant from any other permitting requirements?**

No. The permit does not relieve the applicant from any obligation to comply with any other permitting processes, nor does it relieve the applicant from the obligation to avoid impairing other water rights even if the impairment occurs within the scope of the permission granted.

**Who belongs to the Stemilt board of joint control and why did they form it? What decisions have they made so far?** Stemilt's joint board was given some control, but not ownership, of a reservoir by an interlocal agreement between its members. The control it has over that asset is limited by the interlocal agreement. This limited control of a reservoir is currently the limit of its interest in any assets even though its members have extensive water resources and distribution systems.

The Stemilt joint board has served to change water right attributes, but can only do so at the request of the party who owns the water right. Since the joint board has not been given ownership of any water rights the only way it can change a water right is at the request of the owner, and even then it is limited to rights within its jurisdictional boundary. The joint board decision to change the water right is merely permission to do so. It remains the applicant's

obligation to undertake whatever is necessary to implement the authorized changes. If the applicant fails to perfect the changes authorized the water right will continue to have whatever attributes it had to the extent the changes were not perfected and the permission will lapse to the degree it has not been implemented.

**What is the difference between a joint board and a conservancy board when they make a water right decision?**

Unlike a conservancy board a joint board can not authorize changes beyond its jurisdictional boundary which is composed of the combined boundaries of its members. Unlike a conservancy board a joint board merely consults with the Department of Ecology regarding proposed changes to water rights. Conservancy Board water right change decisions must be approved by the Department. If the applicant or any third party is unhappy with the Department's decision they must appeal to the Pollution Control Hearings Board where the applicant will continue to bear the burden of proof. If a third party (including the Department) is unhappy with a joint board decision they will have the burden of proof in Superior Court where the Department is further exposed to an award of fees if it loses.

**How can joint boards be used to access water in the Entiat instream flow reserve?**

Getting the reserve appropriated will require applicants to apply to have the reserve appropriated. It will also require the funding to pay the Department of Ecology to pay one of its consultants to process the applications. Optimizing the results of this process can be greatly facilitated by coordinating the applications to maximize the initial and long term benefits of the appropriation. The joint board could serve as a proxy for existing applicants who wish to coordinate their applications and share the costs. The joint board could actually be an applicant and serve much the same role.

Without coordination the appropriation will likely result in more water being given to projects that never come to fruition such that the appropriation gets wasted. Similarly without coordination the appropriation will likely result in a disproportionate allocation to downstream points of diversion that again squander the value of the appropriation. By coordinating the applications with an entity like a joint board the appropriation can result in an allocation that takes maximum advantage of the upstream allocation and preserves the flexibility for subsequent allocations if initial water uses fail to materialize as planned.

**Are there other ways to get to the reserve and manage it locally?**

Yes, an individual applicant can "go it alone" and use existing channels to administrate their water rights. This approach has lead to expensive and very limited success. Applicants can effectively band together with interlocal agreements or the private equivalent to get economies of scale which can help by regionalizing the effort and benefits. However, only joint boards really offer an efficient means of changing existing and newly appropriated rights. This, in turn, allows for efficient allocation of rights both now and after appropriation which greatly enhances the value of all rights.