

ANALYSIS OF HB 2185

House Agriculture & Ecology Committee
1999

February 22,

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| <ul style="list-style-type: none">- Provides for the beneficial use of inchoate water rights under certain conditions.- Requires, if state funding for efficiency measures results in the beneficial use of certain inchoate rights, that a portion of the right be transferred to the state's trust water right system. |
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BACKGROUND: Beneficial Use and System Capacity. In 1997, the State Supreme Court required that an irrigation district's water right be quantified in an adjudication proceeding based on beneficial use and not on system capacity. (*Department of Ecology v. Acquavella* 131 Wn.2d 746 at page 756.) In a 1998 decision, the court came to a similar conclusion regarding the extent of a water right held by a private developer. The court declared in that decision that it declined to address issues concerning municipal water suppliers in the context of the 1998 case. Nonetheless, the court followed this declaration with a discussion of the possible effect of a gubernatorial veto of a bill regarding water rights for municipal water supplies. (*Dep't of Ecology v. Theodoratus* 135 Wn.2d 582 at page 594.)

Transfers. A water right is appurtenant to the land or place that the right is used. However, the Surface and Ground Water Codes allow the right to be changed, transferred, or amended to change the place of use, the point of diversion or withdrawal, or purpose of use. These changes, transfers, and amendments to existing water rights are often referred to collectively as transfers.— Such a transfer requires the approval of the Department of Ecology (DOE) and must be done without detriment or injury to existing rights, whether junior or senior to the right being transferred. A right transferred in this manner retains the date of priority (seniority) of the existing right. (RCW 90.03.380 and 90.44.100.) A right may also be transferred to the state for management by DOE as a trust water right. (Chapters 90.38 and 90.42 RCW.)

SUMMARY: Inchoate Rights. Each water right documented by a water right certificate or by a claim in the state's water rights claims registry is composed of two fundamental parts: the part that has been beneficially used, and the inchoate part of the right. The sum of these

Prepared for the House Agriculture & Ecology Committee
by Ken Hirst (786-7105)
Office of Program Research

parts cannot exceed instantaneously or annually the extent of the right stated on the certificate or the claim. The priority date for the beneficially used portion of a water right developed by exercising an inchoate portion of the water right is the priority date of the original water right. (Section 1.)

Inchoate Rights of a Public Water System. *The inchoate part of a right held by a public water system for public water systems purposes may be exercised only if the amount of water diverted or withdrawn for beneficial use does not exceed the amount represented by the capacity of the water diversion, withdrawal, or distribution facilities constructed for using the right on the effective date of the bill or on the date a certificate is issued for a new right. (Section 2(1).)*

The population served, the number of service connections, and the amount of water beneficially used under the right may be expanded through the conversion of an inchoate part of the right to a beneficially used part of the right. To be done without the approval of a transfer, this expansion must take place within the place of use listed on the certificate or claim and must satisfy certain conditions regarding the areas that must be served by the use. If the place of use of the system's water right includes an area that is within the boundaries of a critical water supply service area for which a coordinated water system plan has been adopted, the public water system must satisfy requests for service within the area dedicated to service by the system under the plan before use of water under the inchoate portion of the system's water right may be expanded for use elsewhere. Except for this service responsibility, if the place of use is in a city, town or urban growth area, the first priority for expanding use of the water must be within the city, town or urban growth area. This priority must be clearly documented in any water system plan submitted by the water system for review by the Department of Health (DOH) or the plan cannot be approved by DOH. (Section 2(2) and 2(3).)

If the place of use for a water system's water right includes part of the area of a coordinated water system plan or part of a city, town or urban growth area, any part of the inchoate portion of the system's right may be transferred to use for public water system purposes in any other part of the plan's area or any other part of the city, town or urban growth area. This is allowed if all conservation measures in guidelines of DOH that apply to the distribution systems of public water systems are incorporated into the distribution of the water within such an expanded place of use. Although the transfer must be approved by DOE, these are the only conditions or tests to be used by DOE in approving the transfer. (Sections 2(4), 5 and 6.)

Any inchoate part of a public water system's water right may be converted to a beneficially used part of the right through the transfer of the right under current transfer or intertie laws to another public water system and for use for public water system purposes. This may occur if all conservation measures in the guidelines of DOH that apply to public water system distribution systems are incorporated into the distribution of the water within such an expanded place of use. (Section 2(5).)

If the only place of use specified in a water right certificate held by a public water system is the system's service area, the place of use for the certificate for these purposes is the service area identified in the latest water system plan approved before the effective date of the bill by DOH for the public water system. (Section 2(7).)

If an inchoate portion of a water right is converted to a beneficially used portion of the water right and the holder of the water right is a public water system with one thousand or more service connections, the system and DOE must study the effects of such an action on habitat for fish stocks listed or proposed for listing as threatened or endangered under the federal endangered species act or as critical or depressed in the state's salmon and steelhead stock inventory. The study shall be completed within two years. If the habitat would be adversely impacted, the system must develop a plan for mitigating the adverse impacts and for monitoring the effectiveness of the mitigation effort. The plan must be developed within one year of completing the study. However, requirement does not apply if use of the water right is regulated under a license issued by the Federal Energy Regulatory Commission. (Section 2(8).)

Other Inchoate Rights. The inchoate part of any other water right is the part that becomes available for use by the holder of the water right through the implementation of water distribution and use efficiency measures. Such an inchoate part of the water right may be transferred to use on other lands owned by the holder of the water right if:

- the amount of water diverted or withdrawn by the water right holder for beneficial use under the original certificate or claim is not expanded;*
- the water distribution and use efficiency measures employed at the new place of use are at least as efficient as those employed at the original place of use;*
- the place of use to which the water would be transferred is within 1 mile of the place of use under the original right.*

A transfer or change that satisfies these conditions is presumed to be in the public interest and is presumed to be neither detrimental nor injurious to existing rights. The burden is on a challenging party or DOE to provide evidence that overcomes this presumption. (Sections 3, 5 and 6.)

If funding for financing these efficiency measures is provided by the state and the measures result in the ability of a water right holder to use the inchoate part of the person's water right, a part of the inchoate right made usable must be transferred to the state trust water right system. The amount transferred must be equal to the proportion of the total cost of the measures that is financed with state funding. (Section 4.)