

FINAL BILL REPORT

ESHB 1832

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Synopsis as Enacted

Brief Description: Modifying provisions concerning water management.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives Linville and G. Chandler; by request of Governor Locke).

House Committee on Agriculture & Ecology
House Committee on Appropriations

Background:

Watershed Planning. State law establishes procedures and policies for initiating watershed planning at the local level. If certain local governments choose to initiate the planning for one or more Water Resource Inventory Areas (WRIA's) or watersheds, they appoint a planning unit to do the planning. The planning unit must address water quantity issues in the WRIA. The initiating governments may choose to add other components to the planning process. These may include instream flows, water quality, and fish habitat. The maximum amount of money that may be granted by the Department of Ecology (DOE) to a planning unit for each of three phases of planning is: for Phase I (for organizing), up to \$50,000 for one WRIA or up to \$75,000 for multiple WRIA's; for Phase II (for watershed assessments), up to \$200,000/WRIA; and for Phase III (for developing a watershed plan and recommending actions), up to \$250,000/WRIA. If a planning unit receives more than the organizational grant monies from the DOE, it must submit its watershed plan for county approval within four years of the date the funding was first received by the planning unit.

Modifying Existing Water Rights. There are several fundamental elements of a water right. One is its priority (or seniority). Other elements include: the amount of water that may be withdrawn from a particular water source under the right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place that the water may be used. Certain elements of a water right may be modified with the approval of the DOE if the modification would not impair other existing water rights. In a 1983 decision, the state's Supreme Court required the DOE to consider the rights represented by applications for new water permits that have not yet been granted or denied when it considers applications for modifying existing rights. This has the effect of tying together the DOE's consideration of the two types of applications.

Conservancy Boards. Historically, applications for modifying existing water rights were

filed with and processed by the DOE and its predecessor agencies. An alternative processing system was established with the enactment of legislation in 1997 authorizing water conservancy boards. These boards may be created by a county legislative authority with the approval of the DOE. A board has three members, called commissioners. A water right holder who claims that his or her existing water right will be detrimentally affected or injured by an application being considered by the board may intervene. If the board approves an application, the director of the DOE has 45 days in which to review the board's action to affirm, reverse, or modify it. With the consent of the parties, this review period may be extended an additional 30 days. If the director fails to act within this time period, the action taken by the board is considered to be final, although it is subject to appeal in the same manner as other water right decisions of the director. A board member who has an ownership interest in a water right that is the subject of an application before the board cannot participate in the board's review or decision on the application. A board member who is on the governing board of or is an employee of a municipally owned water system cannot participate in the board's review of an application regarding a water right in which the system has an ownership interest.

In rules adopted by the DOE, the types of modifications of water rights that may be approved by a board are defined broadly: the board may consider the same types of modifications as may the DOE. However, in a Thurston County Superior Court case, the court found the authority of the boards to be much more limited: they may review applications to modify the place of use or the point of diversion or withdrawal of a water right, but they may not review applications involving other modifications. The DOE has appealed the court's ruling. The laws authorizing these boards also waive the liability of the county and the DOE regarding claims of damages arising from the water right modifications approved by such a board.

Family Farm Permits. Family farm permits are water right permits issued under the Family Farm Water Act, which was adopted by the voters through the approval of Initiative Measure No. 59 in 1977. Under the act, the principal permit for using water to irrigate privately owned agricultural lands is the family farm permit. A family farm permit must limit the use of water withdrawn for irrigating agricultural lands to land qualifying as a family farm (i.e., not more than 2000 contiguous or noncontiguous acres of irrigated agricultural lands). The right to withdraw water for use for irrigating agricultural lands under the authority of a family farm permit is subject to the irrigated land's complying with the definition of a family farm as defined at the time the permit is issued. If a person's acquisition of land and water rights would otherwise cause land being irrigated under a family farm permit to lose its status as a family farm, all lands held or acquired must again be in compliance with the definition of a family farm within certain specified periods of time. The DOE interprets these requirements as prohibiting the water right from being modified so that it may be used for any purpose other than irrigating agricultural lands.

Reclaimed Water. The Department of Health may issue a reclaimed water permit for

industrial and commercial uses of reclaimed water to the generator of the reclaimed water. The generator of the reclaimed water may then distribute the water according to the terms of the permit. The permit governs the location, rate, water quality, and purpose of use of the reclaimed water. A permit is required from the DOE for any land application of reclaimed water.

Trust Water Rights. A water right may be donated to or acquired by the state for management as a trust water right. The laws governing the state's trust water right system are divided into two parts: one for the Yakima River Basin; and the other for the rest of the state. The DOE may acquire water rights for the trust water right systems by purchase, gift, or other appropriate means other than condemnation. Water rights may be acquired for either system on a temporary or permanent basis. Among the uses expressly authorized for such trust water rights are instream uses. In general, if a person abandons his or her water right or voluntarily fails to use the right for five successive years, the person relinquishes the right or the portion of the right abandoned or not used. However, exemptions from this requirement are provided. For example, these relinquishment requirements do not apply to trust water rights.

Summary:

Watershed Planning. For Phase II planning, a planning unit that is doing an instream flow or water quality component in its watershed planning or that conducts certain studies for multi-purpose water storage may apply for up to \$100,000 in additional funds for each component included or for the studies. Priority in providing funding is given for instream flows. The DOE is authorized to retain monies a planning unit is eligible to receive for setting instream flows if the unit will not be setting the flows or, if requested by a unit's initiating governments, for amending existing instream flows. A planning unit may also request a different amount of funding than the amounts specified by law for Phase II and Phase III under certain circumstances. The date by which a watershed plan must be submitted for county approval is four years after the date funds beyond the initial funding are drawn upon by the planning unit. By October 1, 2001, the OFM must report on its assessment of: watershed planning and its progress, including the performance of planning units and state agencies; and progress by planning units and the DOE in setting instream flows.

The DOE must complete a final non-project environmental impact statement (EIS) that evaluates stream flows to meet the goals of maintaining, preserving, and enhancing instream resources. A planning unit or state agency may establish flows in a manner that differs from the EIS if consistent with the applicable instream flow laws.

"Two Lines." Pending applications for new water rights are not entitled to protection from impairment when an application relating to an existing surface or ground water right is considered. Applications relating to the existing water rights may be processed and decisions on them may be rendered independently of the applications for new water rights

from the same source of supply. An application relating to an existing water right may be set aside for insufficient information if the applicant is sent a written notice and explanation. The application does not lose its priority date. If the applicant supplies the information within 60 days, the application must then be processed. Until January 1, 2004, the DOE must report annually to the Legislature on the results of processing applications under these new authorities.

Transfers - Generally. The calculation of the annual consumptive quantity of water that may be transferred is now averaged over the two years of greatest use in the last five years (rather than the average of use over those five years). No applicant for a modification of an existing water right may be required to give up any part of the right to a state agency, the trust water right system, or to other persons as a condition for processing the application.

Water Conservancy Boards. A water conservancy board may be established to serve multiple counties or one or more WRIsAs. The boards may process the same types of modifications of existing water rights as may the DOE. However, federal Indian reservations and tribal lands held in trust by the federal government are not within the jurisdictions of the boards. If the board processes an application to transfer water out of a WRIA, it must consult with the DOE. A board may act upon an application to transfer an historic right represented by a water right claim filed with the DOE by making a tentative determination as to the validity and extent of the right in the claim.

A county may appoint two additional commissioners to a board. At least one, rather than two, of the members of a board must be a water right holder. One member must be someone other than a water right holder. Alterations in membership to accommodate membership requirements do not have to be made until the first vacancy on the board occurs.

Conclusions of conservancy boards regarding applications are referred to as "records of decisions" and filing applications for modifying existing water rights with such boards rather than the DOE is expressly the option of the applicant. A person with an application on file with the DOE may request that the application be conveyed to a board for processing. A board may choose not to process an application and return it to the applicant. A board must provide notice regarding applications being processed by the board to Indian tribes with certain reservations and to any other Indian tribe requesting the notice. A board's record of decision to deny an application is subject to review by the DOE.

Among the existing rights that a board must expressly consider regarding possible impairment are rights established for instream flows. Any person may submit to a board comments and other information regarding an application and the comments must be considered. Any person may, within 30 days of the date the DOE receives a board's record of decision, file with the DOE a letter of concerns or support regarding a

conclusion reached by a board. When the DOE receives a board's record of decision, the department must promptly post the text of the transmittal form for it on DOE's internet site. The period during which the DOE may review the record of decision of a board may be extended by 30 days by the DOE or at the request of the board or applicant.

Conflict of interest provisions regarding board members are altered. A member may not engage in any act that is in conflict with the proper discharge of the official duties of a commissioner. It is a conflict of interest for the member to have an ownership interest in a water right subject to an application before the board, to receive or have financial interest in an application or its resulting project, or to solicit, accept or seek anything of economic value as a gift or favor from a person involved in an application. A person may request a board member to disqualify himself or herself from the consideration of an application for a conflict of interest and, if the member refuses to do so, time-lines are established for challenging that refusal. The DOE must remand a board's record of decision back to the board for such a conflict. The DOE's decision to remand is appealable at the time available for appealing the record of decision made by the board subsequent to the remand. Boards must provide information for the DOE's biennial reports regarding the boards. The DOE may petition the county or counties served by the board requesting that the board be dissolved for repeated statutory violations or a demonstrated inability to perform its functions.

A decision by the director to deny (not just approve) an action by a county to create a board is appealable to the Pollution Control Hearings Board. A county's board may be dissolved by the adoption of a resolution by the county's legislative authority. A board must maintain minutes of its meetings and the minutes are open to public inspection. A board is subject to the state's public disclosure laws and must maintain records of its proceedings and determinations, which must be available for public inspection and copying.

The Director of the DOE must assign a DOE representative to provide technical assistance to each board. If requested by the board, the representative must work with the board as it processes applications and develops records of decisions. A board may also receive assistance and support from the county government of the county in which it operates. The Office of Financial Management (OFM) must review and report to the Legislature annually until December 31, 2004, on whether the DOE has adequate funding for fulfilling its responsibilities for processing applications through water conservancy boards. The DOE must report to the Legislature annually until December 31, 2004, on the results of processing applications through such boards.

Family Farm Water Permits. A "family farm" under the Family Farm Water Act may be up to 6000 (rather than 2000) irrigated acres. A transfer of a water right under the Family Farm Water Act is defined broadly to include transfers, changes, and amendments of surface and ground water rights. All such modifications of a water right for irrigation use are subject to the limitations of the Act for irrigated acreage. If a portion of the

water governed by a water right established under a family farm permit is made surplus to the beneficial uses exercised under the right, the right to use the surplus water may be transferred to any purpose of use that is a beneficial use of water. For this purpose, a water right or portion of a water right may be made surplus through the implementation of practices or technologies, including conveyance practices or technologies, that are more water-use efficient than those under which the right was perfected. This authority cannot be used to transfer the portion of a water right that is necessary for the production of crops historically grown under the right nor to transfer a water right or a portion of a water right that has not been perfected through beneficial use before the transfer. A water right under a family farm permit may be transferred under a lease agreement to any beneficial use. A right to use water under a family farm permit may be transferred to any beneficial use if the place of use before the transfer is within the boundaries of an urban growth area designated under the Growth Management Act or, for a non-growth management planning county, within the boundaries of a city or town or in an area designated for urban growth in its comprehensive plan. A public water system receiving a water right transferred from a family farm permit must meet the conservation requirements of its state approved water system plan or its small water system management program. All water transferred from a family farm permit must remain within the WRIA or within the urban growth area or contiguous urban growth areas if these extend beyond one WRIA.

Reclaimed Water Tax Exemption and Water Conservation Tax Credit. The public utility tax does not apply to 75 percent of the amounts received for water services supplied by an entity with a reclaimed water permit for industrial and commercial uses of water when the water supplied is reclaimed water. In computing the public utility tax, 75 percent of the amounts expended to improve consumers' efficiency of water use or otherwise to reduce the use of water by consumers are deductible from the utility's gross income. These latter expenditures are deductible if they implement elements of the conservation plan within a state-approved water system plan or small system management program. The tax credit provisions expire on June 30, 2003.

A Water Rights Trust Account is created. The Legislature intends to appropriate amounts that are based on these tax reductions into the account for use by the DOE, after appropriation, to purchase or lease water rights to augment flows in certain streams. The OFM must report to the Legislature by December 31, 2001 on its evaluation of the revenue impacts, costs and benefits of the tax deductions and credits and of other potential water conservation tax incentives.

Trust Water Rights. The DOE may accept a donation of water rights to either the Yakima River or the statewide trust water right system under the following circumstances: (1) an aquatic species is listed as threatened, endangered, or depressed under state or federal law; and (2) the holder of a right to water from the body of water chooses to donate all or a portion of the person's water right to the trust water system to assist in providing instream flows on a temporary or permanent basis. Neither the right

donated nor the sum of the portion of a right remaining with the person plus the portion donated may exceed the extent to which the right was exercised during the last five years. Once accepted, such rights are trust water rights within the conditions prescribed by the donor that are relevant and material to protecting the donor's interest in the water right and that satisfy the requirements of the trust water laws. The acceptance of the right as trust water right is not evidence of the validity or quantity of the right. Similar provisions are established for leases by the DOE of water rights in areas covered by drought orders. The requirement that the DOE examine a water right for potential impairment of existing water rights before a trust water right may be exercised is waived for such a donated right. It is also waived for such a drought-leased right if the lease is for five or less years. However, if the DOE subsequently finds that the donated or drought-leased right impairs existing water rights, the resulting trust right must be altered to eliminate the impairment. Requirements that notice be published before a trust water right is exercised apply only the first time such a donation or drought-leased right is exercised as a trust water right.

Trust water rights acquired in an area with an approved watershed plan must be consistent with the plan if it calls for such acquisitions, to the extent practicable and subject to legislative appropriations. The full quantity of water diverted or withdrawn to exercise a right donated to or acquired by the trust water rights program on a temporary basis reverts to the donor or person from whom the right was acquired when the trust period ends.

If a water right acquired by the state for the state's trust water right systems is expressly conditioned to be for instream use, it must be managed in that manner. If it is a gift and is conditioned to be for instream use, it must be managed for public purposes to ensure that the gift qualifies as a deduction for federal income tax purposes for the person who gave it. The DOE is expressly authorized to lease water rights for the Yakima River trust water rights system and trust water rights in the Yakima system may expressly be exercised for beneficial uses other than instream flows or irrigation.

Other. The DOE must report to the Legislature on its experience with implementing this act by December 31, 2004. In revising or adding provisions to certain statutes, the legislature does not intend to imply legislative approval or disapproval of any existing administrative policy regarding, or any existing administrative or judicial interpretation of, the provisions of those statutes that are not expressly added or revised.

Votes on Final Passage:

House 83 14
Senate 33 16

Effective: May 10, 2001

