

SENATE BILL REPORT

ESHB 1832

As of April 16, 2001

Title: An act relating to water resources management.

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).

Brief History:

Committee Activity: Environment, Energy & Water: 4/16/01.

Brief Summary

- Watershed planning units can receive an additional \$100,000 for instream flow and water quality, and also for storage, assessment, with priority for instream flow.
- Water right changes and transfers can be processed independently of applications for new water rights.
- Authority and procedures of water conservancy boards are amended.
- Transfer of family farm water permits is authorized, and the acreage limitation for family farm water permits is increased from 2,000 to 6,000.
- Public utilities can take a tax deduction for conservation measures.
- Donations of trust water rights for instream flows are authorized.

SENATE COMMITTEE ON ENVIRONMENT, ENERGY & WATER

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Background: Watershed Planning. Watershed planning for a water resource inventory area (WRIA), one of the 62 river basins and sub-basins in the state, is conducted in three phases: (1) organization of a planning unit and determination of the scope of planning, which must include water quantity and may also include instream flow, water quality, and habitat; (2) assessment and development of strategies; and (3) development of a watershed plan with recommendations for action. A planning unit can apply to the Department of Ecology for funding of up to \$50,000 for organizing; up to \$200,000, for assessments; and up to \$250,000, for planning. A planning unit must submit a proposed plan to the counties with territory in the WRIA within four years of when funding beyond organization is first received.

Water Rights. By law, applications for new water rights that have not yet been approved must be treated as existing rights. Among other requirements, state law does not allow approval of an application, if it will impair any other existing water rights. For purposes of efficiency, however, the law does allow all applications for the same source of supply to be

analyzed as a group, even though there may exist older applications whose group, according to source of supply, is still awaiting consideration. Due to limited funding, increasing numbers of applications, and the complexity of analysis, which results both from large numbers of pending applications and large numbers of existing rights, there is an accumulation of over 7,000 pending applications, many of which will not be able to be considered for many years.

Water Conservancy Boards. In 1997, the Legislature passed SHB 1272, creating local water conservancy boards. The final report on the legislation states, "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." The findings state that "voluntary water transfers" can result in more efficient use of water, among other benefits, and that the state should expedite "uncontested water transfers." As adopted the legislation included a section that established the powers of water conservancy boards. In subsection (1), boards were authorized to establish water transfer exchanges and approve "water transfers involving a change in place of use, point of diversion or withdrawal, purpose of use, time of use, source of supply, quantity of use permitted, and the place of storage." In subsection (3), water transfers approved by boards were required to remain within an existing category of beneficial use. Citing the apparent conflict between these subsections, the Governor vetoed the section. Citing a conflict with existing law regarding irrigation districts, the Governor also vetoed another section, which concerned board approval of transfers "involving a change in place or use" of water provided by an irrigation district. In the remaining sections of the act, only the word "transfer" is used in connection with stating the purpose of the boards and establishing the procedures to be used by the boards and the Department of Ecology. The department subsequently adopted administrative rules for carrying out the provisions of the statute. The rules defined "transfer" to mean an alteration in point of diversion or withdrawal, purpose of use, place of use, or change or amendment of a water right. The rules were challenged in superior court on the grounds that they gave boards broader powers than authorized by the statute. The court ruled that the statutory language gives boards authority over transfers of either ownership or location, including associated changes in point of diversion or withdrawal. The court ruled that the statutory language does not give boards authority to modify purpose of use.

Family Farm Permits. In 1977 the Legislature considered, but did not pass, ESHB 1120, which would have established a term permit system for significant appropriations of water for agricultural irrigation, whereby permits would be issued for limited periods of at least 50 years and could, thereafter, be terminated in favor of a higher beneficial use. At the same time, there was concern in the state regarding proliferation of large corporate farms. In the 1977 general election, Initiative 59 was approved. Codified as the Family Farm Water Act, it provides that permits to appropriate water for agricultural irrigation can be issued only for family farms of up to 2,000 acres. These permits have no time limit, but are conditioned on the land continuing to comply with the definition of a family farm. If land does not, and is not brought into compliance, the permit is canceled.

Public Utility Tax Deduction. Together with other utility and transportation businesses operating in the state, water distribution businesses are taxed on their gross income. In the case of water utilities, 20 percent of the revenue generated is deposited in the public works assistance account and the rest in the general fund. Certain water-sewer districts and irrigation districts are exempt from the tax according to a number of statutory criteria relating

to size and revenue. Deductions that are currently allowed, among others, include taxes levied by municipal utilities, proceeds from the sale of commodities to other water utilities, and proceeds used by a nonprofit for capital improvements.

Trust Water Rights. The state has established a trust water rights program for the Yakima River Basin and one for the rest of the state. Both programs allow the state to acquire water rights, hold them as trust water rights, and reallocate them to other uses, including instream flows. The water rights can be acquired on a permanent or a temporary basis, by purchase, gift, or other means, excluding condemnation. Both programs focus on acquisition of trust water rights through public funding of conservation measures. Both programs are exempt from the approval process otherwise required for changes or transfers of water rights and have their own process.

Summary of Bill: Watershed Planning. Provisions regarding watershed planning are amended.

A planning unit that chooses to address instream flow or water quality, as currently provided, may apply for up to an additional \$100,000 each for assessment of these. A planning unit is now authorized to study storage and apply for an additional \$100,000 for that purpose.

Instream flow assessment is given priority for funding. If a planning unit will not be addressing instream flow, funding for that purpose will go to the Department of Ecology, but the department will not amend instream flows unless requested by the planning unit. The department must complete a final non-project environmental impact statement (EIS) regarding instream flows for maintaining, preserving, and enhancing instream resources. A planning unit or state agency must consider the EIS but may establish flows differently, consistent with applicable instream flow laws.

A planning unit can request a different allocation between assessment and planning of the funding that is currently authorized for these, if it demonstrates that it will meet the goals of the chapter and submits a schedule for completing planning.

A planning unit must submit a proposed plan within four years of when funds beyond the initial organizing funding are first drawn upon.

Water Rights. The water code is amended.

When a water right is changed to enable irrigation of additional acreage or addition of new uses, the annual consumptive quantity of water, which cannot be increased, is calculated as the average of the two years of greatest use within the most recent five years.

Applications for new water rights that have not yet been approved are not entitled to protection from injury by changes and transfers of existing water rights. Applications for new water rights and those for changes and transfers of existing water rights within the same source of supply can be considered independently. Applications can be considered ahead of previously filed applications that do not have sufficient information for a decision. The latter receive notice, retain their priority date, and continue to be processed, if the information is supplied within 60 days.

No change or transfer of an existing water right can be required to give up part of a valid water right as a condition of processing.

Water Conservancy Boards. Provisions regarding water conservancy boards are amended.

"Transfer" is defined to mean a transfer, change, or amendment to a water right. The conclusion reached by a water conservancy board regarding an application is defined as a "record of decision."

A board can be established for multiple counties or WRIsAs.

Boards are authorized to process the same kinds of "transfer" applications as the Department of Ecology and make tentative determinations of validity regarding water right claims. An applicant can request to have an application transferred from the department to a board. A board can choose not to process an application. The department must provide a person to work with each board. Boards can establish water transfer information exchanges. Boards must consult with the department on "transfers" between WRIsAs.

Up to five commissioners can be appointed. One must be a water right holder and one not. If a board has only three commissioners and all are water right holders, a non-water right holder is appointed at the time of the first vacancy. The department can petition a county to dissolve a board for repeatedly breaking the law or being unable to perform its functions.

Notice of applications must be sent to tribes with reservation lands and to any who request notice. A board must consider public comment. Its "record of decision" must contain any conditions necessary to qualify an application for approval. Denial is required, if an application cannot be approved. Conclusions are reached by majority, with a quorum being two out of three, or three out of five members.

When the department receives a board's "record of decision," it must promptly post it on the department's internet site. Any person can submit a letter of concern or support within 30 days. The 45-day review period may be extended 30 days by the department or at the request of a board or applicant. If the department fails to act, a board's "record of decision" becomes the decision of the department and appealable to the Pollution Control Hearings Board.

A board, its members, and employees are not liable for board decisions.

Recusal is required for a board member with a conflict of interest. Conflict of interest or failure to recuse requires remand of a "record of decision" by the department.

Boards must keep and record minutes. They are subject to the public disclosure law, and must send copies of their files to the department for record keeping.

Family Farm Water Act. The Family Farm Water Act is amended.

A water right established as a family farm permit can be transferred or leased to another family farm. It can be leased to any other nonagricultural use and can be transferred to any other nonagricultural use within an urban growth area. For change to municipal or domestic

use, a public water system must be complying with the conservation requirements of its water supply plan or small system management program. A transfer must remain within the same WRIA or urban growth area. Conserved water can be transferred to any use. The acreage limitation for a family farm is increased from 2,000 to 6,000. "Transfer" is defined to mean transfer, change, or amendment.

Public Utility Tax Deduction. Public utility tax provisions are amended.

The public utility tax does not apply to 75 percent of the amounts received for supplying reclaimed water. For computing the public utility tax, 75 percent of expenditures to improve consumers' efficiency of water use or otherwise to reduce the use of water by consumers are deductible from gross income, if they implement the conservation elements of a state-approved water system plan or small system management program. These provisions expire on June 30, 2003.

A Water Rights Trust Account is created. The Legislature intends to appropriate amounts equal to 1/3 of the public utility tax savings into the account for use by the Department of Ecology, after appropriation, to purchase or lease water rights to augment flows in ESA listed streams.

Trust Water Rights. The trust water rights program is amended.

The Department of Ecology must accept a donation of water rights to either the Yakima River basin or the statewide trust water rights programs on the terms prescribed by the donor, if an aquatic species is listed as threatened, endangered, or depressed under state or federal law, and the holder of water right donates all or a portion of the right to the trust waters program for instream flows on a temporary or permanent basis. The donor's conditions must be relevant and material to protecting the donor's interest in the water right. The donation, together with any retained portion, may not exceed the extent to which the water right was exercised during the last five years. If the department subsequently finds that the trust water right impairs existing water rights, it must be altered to eliminate the impairment. Notice must be published only the first time that such a trust water right is exercised. Status as a trust water right is not evidence of the validity or quantity of the right. The full quantity of a water right donated on a temporary basis reverts to the donor. Similar provisions are established for leases by the department of water rights in areas covered by drought orders.

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. Trust water rights donated for instream flows must be managed so that they qualify as federal tax deductible gifts. Trust water rights are not subject to relinquishment.

Reports to the Legislature. The Department of Ecology must report on implementation of this act by December 31, 2004.

The department must report annually on implementation of the amendments to the water code and to water conservancy board provisions and, in the final report due January 1, 2004, provide an evaluation and recommendations. The Office of Financial Management must

report annually through December 31, 2004, regarding adequacy of funding to the department for processing applications through water conservancy boards.

The Office of Financial Management must assess implementation of watershed planning by October 1, 2001.

The Office of Financial Management must evaluate the revenue impacts and the costs and benefits of the water conservation public utility tax deductions and of other potential water conservation tax incentives by December 31, 2001. It must also evaluate the level of water savings of the deductions by December 31, 2002.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.