

HOUSE BILL REPORT

SB 5491

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to maintaining reservations of water for certain future uses.

Brief Description: Maintaining reservations of water for certain future uses.

Sponsors: Senators Parlette, Hatfield, King, Hargrove, Benton, Pearson, Braun, Rivers, Cleveland, Warnick, Honeyford and Bailey.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 3/26/15, 4/1/15 [DPA].

**Brief Summary of Bill
(As Amended by Committee)**

- Specifically authorizes the Department of Ecology (Department) to maintain and implement all reservations of water for certain future uses that are included in rules adopted and amended by the Department since the year 2001 other than the rules that were subject to the Supreme Court's decision in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*.
- Prohibits the Department from changing an existing rule relating to water reservations in a way that increases the amount of water included in a future use reservation.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 10 members: Representatives Blake, Chair; Lytton, Vice Chair; Buys, Ranking Minority Member; Dent, Assistant Ranking Minority Member; Chandler, Dunshee, Hurst, Pettigrew, Stanford and Van De Wege.

Minority Report: Do not pass. Signed by 2 members: Representatives Orcutt and Schmick.

Staff: Jason Callahan (786-7117).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

The Department of Ecology (Department) has the authority to adopt rules establishing a minimum water flow for stream, lakes, or other public water bodies for the purposes of protecting fish, game, birds, and the recreational and aesthetic values of the waterways. These levels, commonly called "instream flows", essentially function as water rights with a priority date set at the adoption date of the corresponding rule.

Per statute, the instream flow cannot affect an existing water right with a senior time priority date. The Department may not allow any subsequent water withdrawals with a junior priority date to the instream flow that conflicts with the established flow level unless the withdrawals clearly serves to satisfy an overriding considerations of the public interest. As of today, there is an instream flow rule in place for almost half of the state's 64 identified watersheds.

The Department adopted specific rules related to instream flows and interruptible water withdraws in the Skagit River basin in 2001. In 2006, in response to a legal settlement, the Department amended these rules to assure that certain future withdrawals were uninterrupted. The rules included a determination by the Department that water is not available in the Skagit River basin for year-round consumptive appropriation. The Department's rule set aside a limited amount of surface water for future out-of-stream uses in the Skagit River basin; however, with some exceptions, the basin was to be closed to future appropriation once those set asides were allocated. These reservations provided uninterrupted water supplies for new agricultural, residential, commercial or industrial, and livestock uses across 25 subbasins of the Skagit River.

In October 2013 the Washington Supreme Court (Court) invalidated a portion of the Department rules (*Swinomish Indian Tribal Community v. Washington State Department of Ecology*). The Court held that the exception for withdrawals that effect an instream flow to address an overriding consideration of the public interest is narrow and requires extraordinary circumstances before the minimum flow water right can be impaired. The Court also found that the Department could not set aside water reservations through water management rules where it had previously set aside water to support stream flows for fish.

Summary of Amended Bill:

Most reservations of water for certain future uses that are included in rules adopted and amended by the Department since the year 2001 are declared to be consistent with legislative intent and are specifically authorized to be maintained and implemented by the Department. The specific authorization excludes all rules that were subject to the Supreme Court's decision in *Swinomish Indian Tribal Community v. Washington State Department of Ecology* and any rules adopted after that decision.

The Department's authorities related to adopting, amending, or repealing rules related to instream flows are unaffected. However, the Department may not amend a rule affected by the bill in a way that increases the amount of water included in a future use reservation.

Amended Bill Compared to Original Bill:

The bill as it passed the Senate made a legislative declaration that it is clear that an overriding consideration of the public interest would be served by ensuring that reservations of water for certain future uses are included in rules related to instream flows, other than those rules that were subject to the Court's decision in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) It is important to clarify the Legislature's intent to maintain water reservations for certain future uses due to a recent court decision that created uncertainty and jeopardizes the reliance that many individuals and communities has put onto the reservations. If the courts are asked to consider the existing water reservation rules, the result will likely be that the entire underlying rule will be thrown out, not just the parts about water reservations. The bill is narrowly tailored to only affect the water basins that were not subject to the court decision that created the uncertainty. It would provide an extra level of certainty in six watersheds where the affected parties came together and negotiated in good faith. The Court invited the Legislature for addition clarification on the overriding consideration of public interest standard, and this is an area ripe for judicial and legislative branch collaboration.

Water reservations balance the needs of people and the environment. Countless hours have gone into the rules establishing water reservations and many hard decisions and sacrifices have been made. The legislation would not lessen or change the high bar set for an overriding consideration of public interest analyses, but it would support good water resource planning in areas that have shown a willingness to be collaborative.

All landowners deserve equitable treatment and homebuilders need assurances that water will be available to service the homes they build. Not building homes has a major impact on the state's economy and budget. The Department should focus on implementing state statutes and not adopting rules that undermines them. It is possible for all beneficial uses of water to be accommodated, especially if water storage facilities are prioritized.

(With concerns) Language in the bill relating to the overriding consideration of public interest standard may inadvertently alter the law or change the court's interpretation of it.

(Opposed) The idea behind water reservations is built on the false premise that the overriding consideration of public interest can be used to justify the impairment of senior water rights. The Indian tribes hold water rights with a priority date of time immemorial, and water

reservations threaten treaty guarantees to fish in the state's rivers. There are some basins where the water reservations are already exhausted.

(Other) There are some watersheds where there was close participation of many affected parties in the development of the rules that gave rise to water reservations. These rules are based on a consensus with established parameters. Rules developed through the process should receive legislative recognition.

Persons Testifying: (In support) Senator Parlette, prime sponsor; Glen Smith, Washington State Groundwater Association; Tom Loring, Department of Ecology; Mike Kaputa, Chelan County; Jan Himebaugh, Building Industry Association of Washington; Evan Sheffells, Washington Farm Bureau; and Kathleen Collins, Washington Water Policy Alliance.

(With concerns) Bruce Wishart, Sierra Club and Center for Environmental Law & Policy.

(Opposed) Steve Robinson, Lummi Nation and Stillaguamish Tribe; Jeanne Cushman, Squaxin Island Tribe; and Daryl Williams, Tulalip Tribes.

(Other) Dawn Vyvyan, Yakama Nation

Persons Signed In To Testify But Not Testifying: None.