

# SENATE BILL REPORT

## SB 6435

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As Reported By Senate Committee On:  
Ecology & Parks, February 1, 1996

**Title:** An act relating to water resource management.

**Brief Description:** Modifying water resource management.

**Sponsors:** Senator Fraser.

**Brief History:**

**Committee Activity:** Ecology & Parks: 1/23/96, 1/26/96, 2/1/96 [DPS, DNP].

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### SENATE COMMITTEE ON ECOLOGY & PARKS

**Majority Report:** That Substitute Senate Bill No. 6435 be substituted therefor, and the substitute bill do pass.

Signed by Senators Fraser, Chair; Fairley, Vice Chair; McAuliffe and Spanel.

**Minority Report:** Do not pass.

Signed by Senators Hochstatter and Swecker.

**Staff:** Gary Wilburn (786-7453)

**Background:** Beneficial Use Doctrine. The existing law defining the beneficial use doctrine is primarily court-made. A statutory list of beneficial uses is provided in the water resource "fundamentals," and includes all other uses "compatible with the enjoyment of public waters of the state." See RCW 90.54.020(1).

A summary of the beneficial use doctrine and related terms as developed by court decisions was provided recently by the Washington Supreme Court in Department of Ecology v. Grimes, 121 Wn.2d 459, 467-475 (1993). The court stated:

"Beneficial use refers to the quantity of water diverted by the appropriator, not to its availability in the source of supply. 'The underlying reason for all this constitutional, legislative and judicial emphasis on beneficial use of water lies in the relation of available water resources to the ever increasing demands made upon them.' . . .

"'Beneficial use' is a term of art in water law, and encompasses two principal elements of a water right. First, it refers to the purposes, or types of activities, for which water may be used. . . . Second, beneficial use determines the measure of a water right. The owner of a right is entitled to the amount of water necessary for the purpose to which it has been put, provided that the purpose constitutes a beneficial use. To determine the amount necessary for a beneficial use, courts have developed the principle of 'reasonable use.' Reasonable use of water is determined by analysis of the factors of water duty and waste."

"Public Interest" Considerations. In reviewing a surface water right permit application, Washington statutes require the Department of Ecology to determine whether the proposed development is "likely to prove detrimental to the public interest." The term is not defined further in statute. Many western states have adopted similar "public interest" standards in making permit decisions, but only Alaska has provided further definition of this term in statute.

Private Actions to Condemn Water Rights. The right of private persons to file actions to condemn water rights pre-dates the 1917 Water Code in Washington State, but has not been amended since 1917. In determining whether the asserted use is a "superior use" under this statute, the court determines "what use will be for the greatest public benefit." In addition, the statute contains specific limitations upon condemnation of water rights for irrigation purposes, where the condemnee is employing "the most economical method of artificial irrigation" usually employed in the area. Such actions have rarely, if ever, been filed in recent years.

Transfers. The Department of Ecology must approve all transfers of water rights between persons, as well as changes in use, changes in place of use, and changes in point of diversion. Existing rights may not be impaired by such changes or transfers, and no provision is made in existing law to otherwise mitigate for minimal impacts to existing rights.

Relinquishments. Washington statutes provide that a person who, without sufficient cause, abandons or fails to beneficially use all or part of a water right for five successive years shall relinquish that right. The circumstances in which "sufficient cause" prevents relinquishment are described in statute.

**Summary of Substitute Bill: Beneficial Use.** All existing and future water rights are to be determined based upon beneficial use, which are those uses that are: (1) efficient; (2) in the public interest; and (3) do not constitute a misuse of water.

Efficient Use of Water. A standard for efficient use is provided, based upon a water duty for each type of use plus a reasonable transportation loss. Beneficial effects of return flows are also to be considered. The Department of Ecology is to adopt rules further providing methods to determine efficiency of uses.

Public Interest Considerations. In reviewing applications for new water rights, transfers, or changes in use or point of diversion, the department is directed to consider ten factors in the "public interest" evaluation. These include the economic net benefits to the state and local region, the cost-effectiveness of the use compared to alternative water sources, effects upon instream uses, water resource and land use plans applicable to the area, and other considerations.

Misuse of Water. Misuse of water is defined under the beneficial use requirement as occurring when the use degrades water quality below applicable state water quality standards.

Eminent Domain. The authority for private actions to condemn water rights is repealed.

Review and Issuance of Permits for New Water Rights. The public interest determination in the issuance of permits for new rights is amended to include the public interest considerations described above. A preliminary permit issued for conducting further studies may not authorize construction of any diversionary works. The governing standards for issuance of the permit are reorganized and the beneficial use definition and public interest considerations made applicable.

For permits to appropriate ground waters, the department must determine that: (1) no injury is going to occur to rights under prior permits; (2) the permit is consistent with the public interest, using the considerations described above; and (3) the ground water source is not going to be depleted beyond the rate of recharge.

A permit may be issued based upon enforceable provisions to fully mitigate impairment to existing rights.

Relinquishment of a Water Right. The "legal proceedings" exception to the relinquishment provisions of existing law is narrowed to administrative or court orders temporarily preventing use of the water right. Compliance with a water quality discharge permit is added as an additional exception to the relinquishment provisions.

Transfers. Legislative findings are made regarding the importance of water transfers in meeting current and future water demands in the state. Ecology is to accord a priority on processing water transfer applications. A 180-day processing deadline established, with certain periods not included. Ecology is to compile data on water transfers and make it available to participants in water marketing transactions.

Transfer approval authority may be delegated by Ecology to a county governing body under specified conditions. The county must exercise the authority in compliance with state law and rules, a regional water resource plan and minimum stream flows must have been adopted in the area, and the county must have sufficient resources to timely process the applications. Multiple counties in a watershed may exercise the authority through interlocal agreement. The authority is renewable at least every two years.

**Substitute Bill Compared to Original Bill:** The 180-day deadline for processing transfer applications does not include the time required for public notice and filing of protests, and does not include time during which any required environmental impact statement is being prepared. An amended water right certificate reflecting a transfer or change is issued following the authorization and actual transfer or change in use.

**Appropriation:** None.

**Fiscal Note:** Requested on January 17, 1996.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** Greater statutory specificity is required in basic water law doctrines such as the beneficial use of water and the "public interest" standard. The bill emphasizes greater attention to water transfers which hold great promise to address growing water needs.

**Testimony Against:** The bill's definition of terms such as "beneficial use" and standards for "public interest" determination are vague, and may exceed the current meaning under court-made law regarding water law doctrines. This would have an unsettling effect on existing water rights.

**Testified:** Ron Shultz, Nat. Audubon Soc. (pro); Dick Ducharme, Yakima Growers & Shippers Assn. (con); Bruce Wishart, Sierra Club (pro); Jim Miller, WA Water Unlim. Council (pro); Judy Turpin, WA Environmental Council (pro); Dawn Vyvyan, Yakima Nation (pro).