

SENATE BILL REPORT

ESHB 1113

As of February 25, 1998

Title: An act relating to water transfers and changes.

Brief Description: Authorizing a change in the use of water made surplus by certain activities and modifying transfer provisions.

Sponsors: House Committee on Agriculture & Ecology (originally sponsored by Representatives Chandler, Mastin, McMorris, Koster, Delvin, Mulliken, Johnson, Schoesler and Honeyford).

Brief History:

Committee Activity: Agriculture & Environment: 3/20/97, 4/1/97 [DPA]; 2/26/98.

SENATE COMMITTEE ON AGRICULTURE & ENVIRONMENT

Staff: Bob Lee (786-7404)

Background: Technologies are being developed to reduce the amount of water that is needed in irrigation applications. However, there are few incentives for reducing the amount of water used by water rights holders. In fact, the "use it or lose it" precept of the water code is a deterrent to adopting water efficiency measures. Holders who, without sufficient cause, use less than the amount of water they have a right to use expose themselves to a relinquishment and reversion back to the state of the unused portion when the nonuse continues for five years.

A basic principle of water rights law is that each right is appurtenant to a particular parcel of land, and the use of that water is limited to that land. It is generally not possible for a holder to apply water to a different use or to use it in a different location than the use or location to which the right is dedicated without prior approval of the Department of Ecology.

When such a change, or transfer, is allowed, the procedure involves publication of notice by the applicant and approval by the Department of Ecology (DOE). A prerequisite to approval is a determination that no injury or detriment to existing rights would result from the change. That standard is traditionally interpreted by DOE as preventing an increase in the number of acres to which the water can be applied. The possibility of an acreage expansion increasing the consumptive use of water raises concerns over an equivalent decrease in return flows. Return flows generally include water that returns to either the ground water or surface water and are part of the supply available to meet the needs of other existing right holders.

Summary of Bill: New rules are established for water made surplus to a water right through the implementation of practices or technologies that are more efficient or more water-use efficient than those under which the right was perfected, and for water made

surplus through a change in the crops grown with the water. These rules apply only to a change of an agricultural use of water to another agricultural use or expanded agricultural use of water.

If the water is not supplied by an irrigation district, the person who holds the water right may use the water on other parcels of land owned by the person that are contiguous to the parcel upon which use of the water was authorized before this change in use. The person who holds the water right is to notify DOE of the change. The notification provides a change in the person's water right, and the department is to revise its records for the right accordingly.

The provision regarding water made surplus through changes in crops does not apply to water supplied by an irrigation district. If water supplied by such a district is made surplus through an individual water user's implementation of efficiency practices or technologies, the individual water user does not have a right to the use of the surplus water. However, the surplus water may be used for the benefit of the district generally. The use of such surplus water is regulated solely by the irrigation district and must be approved or authorized by the district. If the use of such surplus water results in the total irrigated acreage within the district exceeding the irrigated acreage recorded with DOE for the district's water right, the board is to notify the department of the change. If an irrigation district is within a federal reclamation project and the use of such surplus water results in the total acreage within the project exceeding the total irrigated acreage recorded with DOE for the project's water right, the district is to notify the department of the change. However, the change cannot exceed the total irrigated acreage authorized for the project by the United States.

Generally, a notification provided to DOE regarding the use of such surplus water provides a change in the water right and the use of the surplus water has a priority date that is the same as the priority date of the original water right. However, if the notification is in regard to a use of such water made surplus that begins after the effective date of the bill, the notification does not automatically provide a change in the right and the priority date for its use is the date the notification was provided. DOE is to issue a 15 year temporary permit for the use of the water. During this 15-year period, if DOE determines that the change would interfere with a senior water right, it may file the action in superior court for deciding the issue of interference. It is presumed that the use of water under the temporary permit does not impair or interfere with the use of a senior water right. The superior court reviews the department's determination de novo. The burden of proof in overcoming the presumption of non-impairment is on DOE. It can be overcome only through the application of scientific data. At the conclusion of its review, the court may cancel the temporary permit, modify the conditions of water use under the permit, or affirm that the use of water under the permit does not interfere with senior water rights. If DOE does not file such an action within 15 years or if the court's decision affirms non-interference or modifies the conditions water use under the permit, the water right is changed as provided in the temporary permit and DOE is to revise its records accordingly.

The presumption regarding non-impairment does not apply with regard to a claim made in superior court by a person with a water right that a change made under this section by a junior water right holder impairs or interferes with the use of the person's senior water right.

These new rules regarding the use of surplus water do not authorize the use of a junior water right in a manner that impairs or interferes with the use of a senior water right. These provisions regarding the use of surplus water do not apply in an area with a groundwater management program with an acreage expansion program set by rule that is in effect on the effective date of this bill.

The rights expressly protected from being detrimentally affected by a transfer or change do not include those represented by applications for new water rights. DOE may not initiate relinquishment proceedings regarding a water right for which an application for a transfer or change is filed until two years after the department has approved or denied the application. A provision of the surface water code regarding processing an application for a new water right expressly does not apply to transfers or changes of water rights.

When an irrigation district is requested, under current law, to approve a transfer or change regarding water provided by the district, or when it is requested, under this bill, to approve changes for surplus water, the district must consider the effect of the transfer or change on the financial and operational integrity of the district.

Appropriation: None.

Fiscal Note: Available.

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