

# **HOUSE BILL REPORT**

## **ESHB 2994**

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### **As Amended by the Senate**

**Title:** An act relating to trust water rights.

**Brief Description:** Regarding instream flows and trust water rights.

**Sponsors:** By House Committee on Agriculture & Ecology (originally sponsored by Representatives Parlette, G. Chandler, B. Chandler and Linville).

**Brief History:**

**Committee Activity:**

Agriculture & Ecology: 2/1/00, 2/4/00 [DPS].

**Floor Activity:**

Passed House: 2/14/00, 88-7.

Senate Amended.

Passed Senate: 3/3/00, 47-0.

#### **Brief Summary of Substitute Bill**

- Requires the Department of Ecology (DOE) to accept certain donations of water rights for the trust water right systems for instream flows in area where aquatic species have been listed as endangered or threatened.
- Waives requirements that the DOE make impairment determinations before these trust water rights may be exercised and alters notification requirements regarding their being exercised.

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### **HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY**

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 14 members: Representatives G. Chandler, Republican Co-Chair; Linville, Democratic Co-Chair; Cooper, Democratic Vice Chair; Koster, Republican Vice Chair; Anderson; B. Chandler; Delvin; Fortunato; Grant; Reardon; Schoesler; Stensen; Sump and Wood.

**Staff:** Kenneth Hirst (786-7105).

**Background:**

A water right is appurtenant to the land or place the right is used. However, the Surface and Ground Water Codes allow the right to be changed, transferred, or amended to change the place of use, the point of diversion or withdrawal, purpose, or manner of use. These changes in the right, often referred to as transfers, require the approval of the DOE and must be done without detriment or injury to existing rights.

A right may also be transferred to 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 trust water rights in the Yakima River Basin, and the other for the rest of the state and is often referred to as the statewide trust water right system. Trust water are administered by the DOE. Among the uses expressly authorized for such trust water rights are instream uses.

The DOE may acquire water rights for the trust water right system by purchase, gift, or other appropriate means other than condemnation. Water rights may be acquired for either system on a temporary or permanent basis.

The water transfer provisions of the Surface Water Code do not apply to trust water rights in the Yakima system or to trust water rights acquired through the state's funding of conservation projects under the statewide system. However, a trust water right in the Yakima system may be exercised only if the DOE first determines that no existing water rights will be impaired and publishes notice and provides notice to the director of the Department of Fish and Wildlife. To exercise a trust water right in the statewide system, the DOE must first determine that neither water rights existing at the time the trust water right was established, nor the public interest will be impaired. Before a trust water right may be created or modified for the statewide system, the DOE must also publish notice and provide notice to certain entities and other interested parties.

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.

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**Summary of Bill:**

The DOE must accept a donation of water rights to either the Yakima or the statewide trust water right system under the following circumstances: An aquatic species is listed as threatened or endangered under the federal Endangered Species Act (ESA) for a body of water; certain instream flows are needed for the species; and 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 those instream flows on a temporary or permanent basis. Neither the right donated nor the sum of the portion of a right remaining with a person plus the portion donated may exceed the extent to which the right was exercised during any of the last five years. Once accepted, such rights are trust water rights within the conditions prescribed by the donor. Current requirements that the DOE make a determination that the use of a trust water right will not cause impairments before the right is exercised do not apply to these donations. However, if impairment is found upon an appeal of a decision of the DOE, the donation must be altered to eliminate the impairment. Current requirements that notice be published before a trust water right is exercised apply only for the first time the donation is exercised as a trust water right. The provisions of the surface water code regarding transfers do not apply to such donations.

It is clarified that a trust water right acquired on a temporary basis need not be acquired for a specified period of time. For example, if a water right is acquired on a temporary basis to assist in providing instream flows for a species of fish that is listed as threatened or endangered under the ESA, the water right could be acquired for the period of time that the species is listed and could also be acquired for only the portions of that period of time that the water right is needed to assist in providing those flows.

If a water right acquired by the state for the state's trust water right systems is expressly conditioned to be instream use, it must be managed in that manner. If it is conditioned to be for instream use and is conveyed to the state as a gift 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.

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**EFFECT OF SENATE AMENDMENT(S):** The senate amendments replace the provisions of the bill as passed by the House with the following:

**I. TRUST WATER RIGHTS.**

Added to the issues to be addressed by the DOE's guidelines for the acquisition and management of trust water rights for the state-wide trust water right system are: 1) criteria for assigning uses of trust water rights to implement state and local plans and programs for the recovery of aquatic species listed as threatened or endangered under the federal endangered species act (ESA); and 2) procedures that will reasonably substitute for those of the surface water transfer statutes that may be used at the option of the grantor when trust water rights are dedicated by the grantor to instream use for such state and local recovery plans and programs, or for compliance with federal actions under the ESA. Trust water rights in the state-wide system may be expressly conditioned by the grantor for instream use, for the implementation of such state and local recovery plans and programs, or for compliance with federal actions

under the ESA. A grantor of a trust water right for the Yakima basin system may expressly condition the right for instream use.

Management of the state-wide system that is currently required to resolve critical water supply problems must now include management for the implementation of state and local plans and programs for the recovery of aquatic species listed as threatened or endangered under the ESA. As an alternative to management for resolving such water supply problems, management of the state-wide system must now to be consistent with locally initiated watershed plans authorized in 1997 and 1998 rather than consistent with regional plans for pilot planning areas.

Trust water rights may be conditioned by the grantor to include all or portions of existing water rights on a temporary basis as a result of temporarily reduced water need where the reduced need is due to varying weather conditions or the presence of water from a source not within the control of the water user. This applies as long as the water user's diversion and delivery facilities are maintained in good operating condition consistent with beneficial use of the full amount of the water right. These trust water rights may be acquired either in anticipation of such a reduced water need or at the conclusion of a season during which use of water had been anticipated but not carried out.

The state is expressly allowed to acquire trust water rights by contract. The status of a water right as a trust water right is not evidence of the validity or quantity of the right. The deadline by which the currently authorized guidelines for the state-wide system had to be established is no longer July 1, 1992. Before a trust water right may be created or modified, notice regarding it must be posted on the DOE's web page.

The general policies for the state-wide trust water rights system are amended. Voluntary water programs, such as water banking, are added to storage and water conservation and efficiency programs as being preferred methods of addressing critical water situations, when consistent with the water management principles of the Water Resources Act of 1971 and its provisions on water use efficiency and conservation. The needs to be met in water shortages expressly include those for meeting the needs of aquatic species under the ESA.

References to pilot planning projects conducted previously under the Water Resources Act are removed.

## II. OTHER PROVISIONS.

Applications for transfers or changes of existing water rights under the Surface Water Code may be processed without regard to potential impairment to pending applications for new water rights for the same source of supply. The DOE may accord priority to

the processing of applications for transfers of water rights to the state-wide trust water rights system.

The relinquishment-for-nonuse provisions of water law do not curtail a superior court from setting aside or canceling a relinquishment under its equity powers at the motion of a party claiming a water right that is subject to a general adjudication of water rights initiated by the DOE.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Testimony For:** In an area where two species of fish have been listed as endangered it is important that the people with water rights in the area who are unable to exercise them because of the listings do not relinquish their water. They must have assurances that they will eventually get their water rights back. The bill provides a tool for dealing with ESA concerns, especially in the Methow Valley where it fits with a local desire to form a water bank. Real water needs to be transferred to the trust, but if the rights to be transferred are first subjected to something like an adjudication, it will have a chilling effect.

**Testimony Against:** These donations must be accepted by the DOE on such terms as the donor may prescribe. These terms may be unacceptable. They may also increase the costs to the DOE for administering the trust water system. A better solution would be to allow a third party to hold the rights. It is important to ensure that rights to real water, not paper rights, are donated.

**Testified:** (In support) (Original bill) Representative Parlette, prime sponsor; Kathleen Collins, Washington Water Policy Alliance; Carl Samuelson, Department of Fish and Wildlife; and Dick Ducharme, Yakima Growers and Shippers and Building Industry Association of Washington.

(Opposed) (Original bill) Judy Turpin, Washington Environmental Council.