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**Agriculture & Natural Resources  
Committee**

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**SB 5491**

**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 Summary of Bill**

- Makes 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.

**Hearing Date:** 3/26/15

**Staff:** Jason Callahan (786-7117).

**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.

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*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.*

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 invalidated a portion of the Department rules (*Swinomish Indian Tribal Community v. Washington State Department of Ecology*). The Supreme 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 Bill:**

A legislative declaration is made 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. The declaration applies only to the rules in effect prior to the Supreme Court's decision in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*; however, it does not apply to the rules at issue in *Swinomish Indian Tribal Community v. Washington State Department of Ecology*. The declaration also does not alter or affect the Department's authorities related to instream flows.

**Appropriation:** None.

**Fiscal Note:** Available.

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