

# SENATE BILL REPORT

## SB 6301

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As of February 17, 2020

**Title:** An act relating to public interest considerations in the transfer or change of surface water rights.

**Brief Description:** Concerning public interest considerations in the transfer or change of surface water rights.

**Sponsors:** Senators Van De Wege, Warnick, Salomon, Lovelett, Carlyle, Walsh, Hobbs, Rolfes, Hasegawa and Wilson, C.

**Brief History:**

**Committee Activity:** Agriculture, Water, Natural Resources & Parks: 1/21/20.

**Brief Summary of Bill**

- Allows the Department of Ecology to grant an interbasin transfer if it determines the transfer is consistent with public interest, considering certain factors.
- Provides that a purchaser of a water right that is transferred separately from the land to which it is appurtenant does not have to pay real estate excise tax on the purchase if the purchaser files a notice of sale with Ecology within 30 days of the sale.

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**SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS**

**Staff:** Karen Epps (786-7424)

**Background:** Water Rights. Washington operates under a water right permit system. With certain exceptions, new rights to use surface or ground water, or to establish reservoir and storage projects, must be established according to the permit system. A person seeking a new water right files an application with the Department of Ecology (Ecology), which must consider a four-part test when deciding whether to issue the requested right:

- whether water is available;
- whether a beneficial use of water would be made;
- whether granting the right would impair existing rights; and

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- whether the proposed use would detrimentally affect the public interest.

If an application passes this test, Ecology issues a permit establishing a time table for constructing the infrastructure to access the water and for putting water to beneficial use. When the conditions of the permit are satisfied, Ecology issues a water right certificate.

Ecology may permit certain changes to a water right. Ecology may also permit a transfer of a water right from one holder to another. In processing change or transfer applications, Ecology analyzes the validity, limits, and quantity of the right. Changes or transfers cannot impair existing rights of other water right holders. Ecology must, when evaluating an application for a water use permit or for a transfer, change, or amendment of a water right, take into consideration the benefits of any water impoundment that is included as a component of the application.

For counties located east of the crest of the Cascade mountains, Ecology may only approve a change or transfer application for an interbasin water rights transfer after providing notice electronically to the board of county commissioners in the county of origin upon receipt of an application. Interbasin water rights transfer means a transfer of a water right for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

The Trust Water Rights Program. The state may acquire a trust water right by donation, purchase, or lease. Trust water rights are placed in the state's Trust Water Rights Program and managed by Ecology. The Trust Water Rights Program enables the voluntary transfer of water and water rights to the state, either temporarily or permanently. While a water right is held in trust, it is considered an exercised water right and is protected from relinquishment. Water held in trust retains its original priority date.

Real Estate Excise Tax. The sale of real estate is subject to the real estate excise tax (REET). REET applies to the sale of development rights, water rights, and air rights. A transfer of controlling interests in entities that own property in Washington is also subject to REET. The measure of the tax is the total consideration received in exchange for the transfer of the right. The tax is typically paid by the seller. The state REET rate is a flat 1.28 percent.

**Summary of Bill:** Ecology may grant a certificate for a transfer for interbasin water rights transfers if it determines the transfer is consistent with the public interest, considering the following:

- the economic net benefits to the state and local region, including the consideration of the opportunity costs of alternative foregone uses of the water in the basin of the water source;
- the cost-effectiveness of the proposed use in comparison with alternative sources of water in the basin to which the use will be transferred, including the costs and benefits external to the applicant or transferee;
- effects on public uses of water, including the instream uses;
- water resource plans and local comprehensive growth management plans applicable to the area of the water source;
- effects on public land and facilities and other water-related public resources;
- effects of proposed water transfers to another location upon the local communities in the area of origin;

- effects on water quality, public health, and safety;
- the extent to which the proposal maximizes water conservation and efficient use;
- effects upon public access to navigable and other waters of the state; and
- consistency with the fundamental principles of the state water code.

A purchaser of a water right that is transferred separately from the land to which it is appurtenant does not have to pay REET if the purchaser files a notice of sale with Ecology within 30 days of the sale. The notice must include:

- the amount of the selling price;
- a description of the water right being transferred, including reference to the permit or certificate for the right issued by Ecology;
- whether the water subject to the sale will continue to be used upon the land to which it is appurtenant;
- where the purchaser intends to seek approval for a change in place of use of the water right; and
- whether the purchaser intends to temporarily transfer the water right into the Trust Water Rights Program.

Ecology must submit a report to the Legislature by December 1, 2024, summarizing the information provided in notices of sale of water rights.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony:** CON: This issue deserves more discussion and contemplation. Water rights are property rights, usufructuary rights. There have not been a lot of out-of-basin water rights transfers for water banking purposes. Notice provisions on the east side of the state allow neighbors to comment on out-of-basin transfers. There is concern with some of the criteria in the public interest test. There is concern about bringing in the Growth Management Act into the water code. There are concerns about giving Ecology discretion to determine what is in the public interest. Addressing the Foster Decision will provide Ecology with some flexibility to approve transfers in a way that makes sense for the state.

OTHER: There is concern about making the water code more complicated and adding more tests. There is a question of whether Ecology is the right entity to be evaluating local public interest considerations. The issue of interbasin transfer is not so systemic yet that there needs to be legislation immediately. It is important to look at how many interbasin transfers are occurring, what is the purpose of the transfer, who is involved in the transfer are all good questions to ask and more information is needed. Water right transfers are hard enough to do under the current test. Good work that is being done around the state would be unnecessarily complicated by the bill. There is concern about downstream water transfers taking water from a community. The most rural and vulnerable counties are the ones that are located at

the top of the watershed. Water is a private property right but also a public resource that needs to be protected. There are some reluctance to define public interest in statute and there is concern with some of the criteria. Having Ecology balance the criteria in the public interest is concerning. If there are going to be out-of-basin transfers, those transfers need to go for flows for fish. The bill raises important considerations that impact communities directly when there is an interbasin transfer. Since 2003, there have been 85 out-of-basin transfers that have moved approximately 25,000 acre feet of water, roughly 10,000 irrigated acres. Out of basin transfers are about 10 percent of the overall transfers. Having a public interest test for out of basin transfers would improve water resource management decision making objectives. There would need to be substantial time and resources to evaluate the criteria.

**Persons Testifying:** CON: Kathleen Collins, Washington Water Policy Alliance; Jan Himebaugh, Building Industry Association of Washington.

OTHER: Bruce Wishart, Center for Environmental Law and Policy, Sierra Club; Bill Clarke, Kittitas County; David Christensen, Washington Department of Ecology; Dawn Vyvyan, Puyallup Tribe Yakama Nation; Paul Jewell, Washington State Association of Counties.

**Persons Signed In To Testify But Not Testifying:** No one.