

# SENATE BILL REPORT

## ESSB 5828

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As Amended by House, February 27, 2024

**Title:** An act relating to water rights adjudication commissioners and referees.

**Brief Description:** Concerning water rights adjudication commissioners and referees.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Shewmake, Lovelett, Dhingra, Lovick and Nobles; by request of Administrative Office of the Courts).

**Brief History:**

**Committee Activity:** Law & Justice: 1/16/24, 1/18/24 [DPS-WM, w/oRec].  
Ways & Means: 2/01/24 [w/oRec].

**Floor Activity:** Passed Senate: 2/13/24, 49-0.  
Passed House: 2/27/24, 95-0.

**Brief Summary of Engrossed First Substitute Bill**

- Authorizes court commissioners for water rights adjudications.
- Specifies the powers of water commissioners.
- Authorizes the appointment of water adjudication referees without consent of the parties.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5828 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; Kuderer, Pedersen, Salomon, Valdez and Wagoner.

**Minority Report:** That it be referred without recommendation.

Signed by Senators McCune, Torres and Wilson, L..

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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 part of the legislation nor does it constitute a statement of legislative intent.*

**Staff:** William Bridges (786-7312)

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## SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** That it be referred without recommendation.

Signed by Senators Robinson, Chair; Mullet, Vice Chair, Capital; Nguyen, Vice Chair, Operating; Wilson, L., Ranking Member, Operating; Gildon, Assistant Ranking Member, Operating; Schoesler, Ranking Member, Capital; Warnick, Assistant Ranking Member, Capital; Billig, Boehnke, Braun, Conway, Dhingra, Hasegawa, Hunt, Keiser, Muzzall, Pedersen, Randall, Saldaña, Torres, Van De Wege, Wagoner and Wellman.

**Staff:** Tianyi Lan (786-7432)

**Background:** Court Commissioners. Superior courts may appoint commissioners to assist in hearing cases and other legal matters. The powers of commissioners are defined by the creating court and commissioners may have many of the same powers and duties of a superior court judge. The state constitution authorizes each county to appoint up to three commissioners. The Legislature may authorize additional commissioners by statute. For example, there are legislatively created commissioners for criminal and juvenile courts and commissioners for family law and mental health cases.

Water Code Referees. The state's Surface Water Code establishes a general adjudication process for determining rights to surface water, ground water, or both. Holders of water rights or watershed planning units may petition the Department of Ecology (Ecology) to start an adjudication which includes an evidentiary hearing conducted by Ecology subject to review by the superior court. The superior court may appoint a referee or other judicial officer to assist the court in the review.

2023-25 Biennial Budget. The 2023-25 budget for the Administrative Office of the Courts (AOC) funds a new commissioner or referee position. According to AOC, the money will be used to hire an attorney with specialized hydrology and water law expertise for the Whatcom County Superior Court.

**Summary of Engrossed First Substitute Bill:** Authorizing Court Commissioners for Water Rights Adjudications. Superior courts in every county are authorized to appoint one or more attorneys to act as full or part-time water commissioners. The appointments shall be made by majority vote of the county's superior court judges. Water commissioners may also be appointed to any other commissioner positions allowed by law.

Specifying the Powers of a Water Commissioner. Water commissioners may supervise water rights adjudications in the manner ordered by the presiding judge and assigned water adjudication judge. Powers may include holding evidentiary hearings and entering default judgments, settlement agreements, and conditional final orders.

Authorizing the Appointment of Water Adjudication Referees. A superior court that appoints a referee to hear water rights adjudication matters does not need the consent of the parties. The process for challenging the appointment of a referee is specified.

**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 on First Substitute (Law & Justice):** PRO: The Whatcom County Superior Court is understaffed for the coming water adjudication in the Nooksack Basin Water Resource Inventory Area. The county has reached its limit of court commissioners authorized by the Washington State Constitution, so its needs statutory authorization to create a new commissioner. As was discussed during the hearing on SB 5827, water adjudications are unique and complex litigations involving thousands of claims. After analyzing other adjudications, such as the Yakima River Basin adjudication, for example, *Ecology v Acquavella*, and after consulting with Whatcom County Superior Court and Spokane County Superior Court about their current caseloads and staffing along with their estimated needs for staffing and facilities costs, the Administrative Office of the Courts recommends the additional commissioner for Whatcom County Superior Court. The commissioner and referee are needed to deal with day-to-day issues so elected judges can concentrate on important issues, and removing the consent requirement for the appointment of referees will allow more timely decisions. Decisions by commissioners and referees are reviewable by superior court judges.

OTHER: Under the Point Elliot Treaty of 1855, the Lummi Nation is guaranteed hunting and fishing rights, which requires water and habitat protection. Salmon is as important to the Lummi Nation as the air we breathe; it is vital for food and cultural ceremonies. The Lummi Nation trusts the state of Washington to conduct a fair adjudication process, but a fair process requires that commissioners and referees should not be the final determiners of water rights, that they should focus on their water adjudication duties, and that the water adjudication should be prioritized. While the state will cover the local government costs of the coming water adjudication, the many homeowners and small farmers and businesses will have to pay their own costs, so the Legislature should maintain oversight of the litigation costs.

**Persons Testifying (Law & Justice):** PRO: Senator Sharon Shewmake, Prime Sponsor; Shannon Hinchcliffe, Administrative Office of the Courts; (Judge) David Freeman, Whatcom County Superior Court; Robin McPherson, Department of Ecology.

OTHER: Bill Clarke, Whatcom Ag Water Board; Lisa Wilson, Lummi Nation.

**Persons Signed In To Testify But Not Testifying (Law & Justice):** No one.

**Staff Summary of Public Testimony on First Substitute (Ways & Means):** No public hearing was held.

**Persons Testifying (Ways & Means):** N/A

**Persons Signed In To Testify But Not Testifying (Ways & Means):** N/A

**EFFECT OF HOUSE AMENDMENT(S):**

- Requires that a person appointed as a water commissioner receive training from the Administrative Office of the Courts (AOC) as soon as reasonably practicable on specified topics, including water law, Indian law, water science, and cultural awareness.
- Authorizes the AOC to contract with one or more academic institutions in Washington to develop and deliver the required training.