

# HOUSE BILL REPORT

## SB 5389

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*As Reported By House Committee on:  
Agriculture & Rural Development*

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

**Brief Description:** Providing for filing a statement of claim for water rights.

**Sponsor(s):** Senators Sutherland, Newhouse, Barr and Hansen.

**Brief History:**

Reported by House Committee on:  
Agriculture & Rural Development, February 20, 1992, DPA.

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**HOUSE COMMITTEE ON  
AGRICULTURE & RURAL DEVELOPMENT**

**Majority Report:** *Do pass as amended.* Signed by 11 members: Representatives Rayburn, Chair; Kremen, Vice Chair; Nealey, Ranking Minority Member; P. Johnson, Assistant Ranking Minority Member; Chandler; Grant; R. Johnson; Lisk; McLean; Rasmussen; and Roland.

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

**Background:** In 1917, the state established a permit system for appropriating or establishing rights to use the surface waters of the state. The system is based on the "first in time is first in right" principle of the prior appropriation doctrine of Western water law. Under this principle, a person's right to use water from a water source is inferior, or junior, to a previously established or senior right.

Prior to this permit system, rights to use surface water were established under a variety of circumstances and a variety of doctrines, some of which provided local notices and some of which did not. The 1917 Surface Water Code recognized the validity of these previously established rights, but declared the code's permit system to be the exclusive means by which any further rights to the use of surface waters could be established. A similar permit system was established in 1945 for appropriating the ground waters of the state.

In 1967, the Legislature codified the "use it or lose it" principle of the prior appropriation doctrine. Under this

law, any person who fails to use a water right for any period of five successive years after the enactment of the law relinquishes the water right. Exceptions were provided for certain "sufficient causes" for not using the right, such as drought and active military service during times of crisis. A relinquished water right reverts to the state and is available for subsequent appropriation under the permit system.

In 1969, the Legislature required all persons who claimed rights to use water under any authority other than a permit or certificate issued by the state to file a statement of the claim with the state. The claims had to be filed by June 30, 1974. The penalty for failure to file the claim for such a right was relinquishment of the right.

The Legislature has provided limited exemptions to this requirement by reopening the filing period under limited circumstances. In 1985, the reopening required the claimant to petition the Pollution Control Hearings Board and demonstrate to the board that certain circumstances applied to the claim which should permit it to be filed. However, the Legislature also declared that this limited reopening of the claim period was not to affect or impair any right existing prior to the reopening of the filing period.

***Summary of Amended Bill:*** A person may file a statement of water right claim with the Department of Ecology if the statement is for a right to use water with a priority date which is prior to June 6, 1917, and the statement is accompanied by notarized affidavits supporting the claimed right. The persons signing the affidavits must state that they personally witnessed a posting of a notice of intent to establish a water right at the point of diversion of the claimed right and have direct knowledge of the diversion of waters associated with the right to the places of beneficial use without interruption each year for the last 50 years.

The claim must be filed not later than August 31, 1992. The department must accept such a statement of claim.

The provisions of law declaring a right to be extinguished, if a claim for the right was not filed by a specified deadline, do not apply to a claim for a right filed under this new authority. However, this act of reopening the filing period must not affect or impair any water right existing before the period was reopened whether such a previously existing right was established under territorial, state, or federal law or is embodied in federal treaty rights or federally reserved rights. Further, a claim filed in this new filing period is subordinate to any water right derived from a permit or certificate issued under the

state's Surface Water Code or Ground Water Code or embodied in a previously filed claim.

This reopening of the filing period does not impact or affect the authority of the state, an Indian tribe, or any other governmental entity to allocate or administer water rights on a federal reservation nor does it change the jurisdiction of any governmental entity.

**Amended Bill Compared to Original Bill:** The amendments limit the affect of reopening the filing period by expressly: preventing a newly filed right from interfering with any water right in existence before the reopening of the filing period; and requiring such a newly filed right to be subordinate to any previously filed right or any right contained in a permit or certificate issued under state law. The amendments also add the declaration that the bill does not alter the jurisdiction of any governmental entity.

**Fiscal Note:** Available.

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

**Testimony For:** (In 1992) Negotiations which were expected to take place between the Yakima Indian Nation and the irrigation company were poisoned when the Nation notified the company that it must acknowledge the Nation as the sole entity with the power to issue a permit for the water in question. (In 1991) The attorney who had the responsibility of filing a claim for the Hell Roaring Irrigation Company fell off a roof and died before the claim was filed. The company and the community have continued to exercise the right under the assumption that a claim for it was properly filed. Innocent people should not be punished because one person died. (2) This bill is necessary to provide relief to the Glenwood community. Its economy depends on it. (3) A federal wildlife refuge depends on water from the irrigation company which will be lost without this bill. (4) The valley has used water from the company each year since the diversion works were constructed. The bill will not change any water use in the valley nor expand any uses.

**Testimony Against:** (In 1992) (1) The diversion works and part of the canal system for the Hell Roaring Irrigation Company are located on closed lands on the Yakima Indian Reservation. These lands are under the exclusive control of the Yakima Indian Nation. This is special interest legislation trying to resolve an ongoing dispute. Passage of the bill will violate the government-to-government processes the state has pledged to support and will result in costly litigation. (2) The company diverts an excessive

amount of water, to the detriment of fish and wildlife. (3) Tribal members of the Nation are part of the community served by water from the irrigation company; there is no interest in stopping the diversion completely. (4) If the company submits an application for a water right to the Nation, it will be evaluated in the same manner as any other application. (5) The bill may cause a court to invalidate the registration requirement for all historical water rights. (In 1991) (1) The bill grants a special privilege to some, but not all, citizens. (2) The purpose of the bill conflicts with the "register it or lose it" objective of state law and continued reopening of the filing period could jeopardize that law. (3) The Hell Roaring Irrigation Company should be required to submit a permit application to the Yakima Nation for the diversion works it uses on the Yakima Indian Reservation. (4) The company diverts water from other important uses and values on the reservation. Further, the diversion works are in an otherwise protected area on the reservation. (5) Rather than passing this legislation, the Legislature should give the company and the Yakima Nation one year to work toward an agreement. The bill will simply result in litigation.

**Witnesses:** (In 1992) Senator Sutherland (in favor); Charles Roe and Kenneth Sheridan, Hell Roaring Irrigation Company (in favor); and Dawn Vyvyan, Clifford Moses, and Elmer Ward, Yakima Indian Nation (opposed). (In 1991) Senator Sutherland (in favor); Charles Roe, Hell Roaring Irrigation Company (in favor); Sherman Kuhnhausen (in favor); Joan Frey, Klickitat County Commission (in favor); former Senator Web Hallauer (in favor); and Dawn Vyvyan, Virgil James, Jack Fiander, and Leo Alec, Yakima Indian Nation (opposed).