

HOUSE BILL REPORT

HB 1317

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to the trust water rights program.

Brief Description: Clarifying and consolidating procedures for trust water rights and authorizing creation of water banks.

Sponsors: Representatives Linville, Kirby, Grant, Quall, Shabro, Jarrett, Rockefeller, Hunt, Delvin, Morris and Conway; by request of Governor Locke.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 1/29/03, 2/4/03, 3/5/03 [DPS].

Brief Summary of Substitute Bill

- Includes numerous revisions to reorganize sections and subsections into subject-matter based statutes.
- Amends provisions regarding establishment, quantity, certification, and uses of trust water rights.
- Revises various procedural provisions regarding establishment, quantity, and uses of trust water rights.
- Makes numerous technical revisions.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Chandler, Eickmeyer, Grant, Hunt, McDermott and Quall.

Minority Report: Do not pass. Signed by 5 members: Representatives Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Kristiansen, Assistant Ranking Minority Member; Orcutt and Sump.

Staff: Caroleen Dineen (786-7156).

Background:

The state may acquire a trust water right by donation, purchase, lease, or means other than condemnation. Trust water rights are placed in the state's trust water rights program and managed by the Department of Ecology (DOE). Two trust water rights systems, one for the Yakima River basin and the other for the rest of the state, are established in state law.

Trust water rights may be held or authorized for use for instream flows, irrigation, municipal, or other beneficial uses consistent with applicable regional plans. Trust water rights also may be used to resolve critical water supply problems. Trust water rights acquired in areas with an approved watershed plan must be consistent with any plan provisions regarding acquisition.

A trust water right has the same priority date as the water right from which it originated. The trust water right is junior in priority to the original right unless specified otherwise by agreement of the state and the original water right holder.

The DOE must determine that a trust water right will not impair existing water rights or the public interest before such a right may be exercised. The DOE also must stop or modify trust water right use if impairment occurs. For donated and leased trust water rights, the DOE must review an impairment claim from any person who believes his or her water right has been impaired by a donated or leased right and must alter the trust water right to eliminate any impairment. The DOE's impairment decisions may be appealed to the Pollution Control Hearings Board.

Statutory relinquishment provisions do not apply to trust water rights.

Legislative findings recognize the benefits of water use efficiency programs in addressing the state's water shortage for existing and future water needs. Legislative findings also address the importance of developing programs to increase the state's ability to manage state waters to resolve conflicts and satisfy water needs.

Summary of Substitute Bill:

The trust water rights program statutes applicable to areas of the state other than the Yakima River basin are revised to reorganize and reorder sections and subsections into subject-based statutes. Substantive provisions regarding establishment, quantity, certification, and uses of trust water rights and various procedural provisions are amended. Numerous technical revisions also are made to the statutes.

The state may establish trust water rights from all or a part of an existing surface or ground water right. Trust water rights may be established on a temporary or permanent basis from existing water rights, including those represented by certificates and claims as

well as rights to storage rights reflected in reservoir and secondary use rights. Acceptance of an existing water right as a trust water right does not provide independent evidence of the validity or quantity of the water right.

Trust water rights may be acquired from any person or entity or combination of persons or entities. Once acquired by the state, these rights are trust water rights. The DOE may enter into arrangements with other persons or entities to ensure trust water rights may be exercised to the fullest extent possible. When expending state funds appropriated by the Legislature to establish trust water rights, the DOE must exercise due diligence as practiced by other water rights purchasers to ensure the validity of the water right for which funds are expended.

Uses. Trust water rights may be used for any beneficial use specified in the water statutes, including domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the waters of the state. Trust water rights also may be established to protect water rights secured for mitigation, resolve critical water supply problems, maintain existing water rights in certain situations, and preserve water rights for future needs.

Any trust water rights intended for uses other than enhancing or achieving established instream flows must be transferred to a water bank (as authorized by SHB 1640) as soon as a water bank is available for the area in which the trust water right is to be exercised.

Water Conservation Projects. The recipient of state funding for a water conservation project must convey to the state the part of the water right reflecting the net water savings of surface or ground water for deposit into the trust water rights program. Temporary or permanent trust water rights are public benefits received from state funding. The definition of "pilot planning areas" is removed, and the definition of "water conservation projects" is revised.

Notice. The DOE must provide notice and opportunity to comment before exercise of a donated or leased right and before acquisition, establishment, or modification of any other type of trust water right. Notice must be published and provided to government agencies and interest groups and interested persons according to statutory requirements. Notice provisions do not apply to trust water rights established during a formally declared drought or to donations (other than first exercise) or leases if the lease period is fewer than five years.

Documentation. The DOE must issue a water right certificate in the name of the state for any permanent water right conveyed to the trust water rights program. The certificate must indicate the water body, quantity, uses, and stream reach for instream flows. The DOE also must issue a certificate or other instruments needed to reflect changes for any

permanent and partial conveyances.

Transfers, Changes, or Amendments. Statutory provisions regarding water rights transfers, changes, or amendments do not apply to trust water rights acquired through funding of conservation projects, donations, and leases fewer than five years. The DOE is required to process transfers, changes, or amendments for other types of trust water rights without reviewing the extent and validity of the remaining right if the trust water right is established for instream flows.

Priority. Trust water rights retain the priority date of the right from which they are established. The trust water right is junior to the water right from which it originated. Priority of unperfected water rights in good standing is based on date of establishment.

Perfection. Trust water rights generally may be established only to the extent the water right has been perfected through actual beneficial use. However, unperfected water rights in good standing also may be established as trust water rights.

The DOE quantifies only the portion of the water right placed in the trust water rights program. For temporary rights, the DOE specifies the full quantity of water withdrawn or diverted before establishment, and this amount reverts to the original water right holder when the trust period ends. For donated or leased rights, the quantity may not exceed the extent to which the right was exercised in the preceding five years preceding donation or lease.

In other situations, quantity is determined through water system engineering or other quantitative methods and may not exceed actual beneficial use and the amount reduced or foregone. A reduction in water use may result from:

- reduced diversion or withdrawal because of a water conservation project;
- reduced number of irrigated acres or a long-term change in crop production requiring less water;
- reduced seasonal period of use because of low stream flows or trust water right conditions;
- elimination of water use under the original right;
- a downstream change in point of diversion resulting in increased flows in the affected stream reach;
- temporary or permanent use of a different water supply; or
- other appropriate changes agreed to between the DOE and the water right holder.

Appeals. Provisions are clarified regarding appeals of the DOE's final decisions on establishment of a trust water right and decisions regarding impairment claims.

Findings. Legislative findings are added regarding the ability of the trust water rights program to promote conservation and water use efficiency, provide flexibility to allow

establishment of trust water rights on either a temporary or permanent basis, to consider instream and out-of-stream uses, and to meet current and future needs. Legislative findings also specify that temporary establishment of trust water rights should not include an extensive examination of the extent and validity of the rights. In addition, legislative findings recognize the complexity and difficulties associated with the current trust water rights program and add the intent to enhance program effectiveness, clarify and consolidate procedures, improve incentives, and remove disincentives.

Substitute Bill Compared to Original Bill:

The substitute removes the repeal of the Yakima River basin trust water rights program statutes. The substitute also removes the repeal of statutes in the general trust water rights program chapter except for a statute directing development of trust water rights guidelines. In addition, the substitute includes numerous revisions to reorganize sections and subsections into subject-matter based statutory sections and revises language in various sections. Further, the substitute does not include any provisions regarding authority to establish water banks or pilot rules for water banks.

Appropriation: None.

Fiscal Note: Not Requested.

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

Testimony For: (Original bill) The trust water rights program's statutes are in two different sections of the code. These statutes are at times either not compatible or contradictory. This bill puts all the code sections relating to trust water rights into one chapter. The provisions unique to the Yakima program are included in the new chapter.

Trust water rights are a tool to meet municipal and environmental needs. This bill revised the trust water rights program statutes and provides flexibility to establish water banks. This bill requires the state to perform due diligence before acquiring a water right.

This bill does not require an extent and validity test before a water right is put into trust. The water right can come out on an "as is" basis as well.

(In support of original bill with concerns) The trust water rights program exists but has not been used much because of concerns about the DOE's policies regarding extent and validity testing. The problems associated with transfers and impairment have been layered on top of the program in the past. This bill addresses the problem. Concerns exists about the establishment of trust water rights as "super rights." The problems

regarding transfers should be resolved for all water rights holders and not just for trust water rights.

Trust water rights should be established based on perfection through actual beneficial use. Concerns exist regarding priority, governance, and partial transfers. Port districts are interested in the trust water rights program as a tool to avoid relinquishment of water rights acquired and marketed for economic development.

Testimony Against: (Original bill) This bill does not provide sufficient and adequate safeguards to protect treaty fishing. The bill is very complicated. It is not clear who is able to use and benefit from water banks. The bill attaches private water banking onto the trust water rights program without adequate public input.

Testified: (In support of original bill) Dick McKinley, City of Bellingham; and Jim Waldo, Office of the Governor.

(In support of original bill with concerns) Tim Stearns and Mike Moran, Center for Environmental Law and Policy; Eric Johnson, Washington Public Ports Association; Hertha Lund, Washington Farm Bureau; and Dave Monthie, King County.

(Opposed) Dawn Vyvyan, Yakama Nation.