

HOUSE BILL REPORT

ESHB 1317

As Passed House:

March 18, 2003

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

Brief Description: Enhancing the effectiveness of the trust water rights program.

Sponsors: By House Committee on Agriculture & Natural Resources (originally sponsored by 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].

Floor Activity:

Passed House: 3/18/03, 93-4.

Brief Summary of Engrossed Substitute Bill

- Includes numerous revisions to reorganize sections and subsections of general trust water rights statutes.
- Revises notice procedures and includes new procedures for establishing temporary trust water rights.
- Revises various provisions regarding establishment, quantity, acquisition, 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 Engrossed Substitute Bill:

The trust water rights program statutes applicable to areas of the state other than the Yakima River basin are reorganized. Substantive provisions regarding acquisition, establishment, quantity, documentation, notice, and uses of trust water rights are amended. Numerous technical revisions also are included.

Trust water rights may be established on a temporary or permanent basis from existing

surface or ground water rights, including those represented by certificates, permits, claims, and storage rights reflected as reservoir and secondary use rights. Only the part of an existing water right established as a trust water right is subject to the provisions of the trust water rights program statutes.

Acceptance of an existing water right as a trust water right is not a determination of the validity or extent of the water right. 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 will be expended.

Uses. Trust water rights may be used for any beneficial use specified in the water statutes. These statutory beneficial uses include domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, thermal power production, 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 and preserve water rights for future needs.

Management. Trust water rights must be placed in the state trust water rights program and held in trust by the DOE. Trust water rights must be administered in strict accordance with the terms under which the trust water right was established, including any agreement between the parties. All trust water rights must be managed to ensure the attributes of each water right, such as priority date, status, identification, and uses, remain distinct for each water right.

Water Conservation Projects. Temporary or permanent trust water rights are public benefits received from state funding of water conservation projects. If requested by the water right holder, the state must specify as part of the contract the amount of water to which the water rights holder is entitled when the project is in place. The definition of "water conservation projects" is revised to reflect a state or federal funding component.

A trust water right resulting from a water conservation project must be established for the period of time during which the conservation project will result in establishment of a water right. The state and water rights holder must agree on the terms and duration of the trust water right transfer resulting from a conservation project.

Temporary Trust Water Rights. A temporary trust water right is established after the water right holder provides written notice to the DOE of intent to establish a temporary trust water right, the water right holder publishes a legal notice, and no impairment claim is filed or verified. A temporary trust water right also may be established by a superior court conducting a water rights adjudication.

The legal notice required for establishing a temporary trust water right must state that a

water right holder who wishes to assert a claim of impairment may do so by filing a claim with the DOE by a certain date. The temporary trust water right is established if, within 30 days of the last publication date, no claims of impairment are filed. If any impairment claims are filed, the DOE must issue a written determination regarding its finding.

A water right transferred to the trust water rights program on a temporary basis may not be conveyed to the state and remains the property of the water right holder. The full quantity of a temporary trust water right reverts to the water right holder (with the priority date of the original right) when the trust period expires. Temporary trust water rights must be managed by the DOE consistent with the terms of any transfer agreement.

Notice. The DOE must provide notice and opportunity to comment before acquiring, establishing, or modifying any trust water right. Notice must be published in a newspaper of general circulation in the county or counties in which the storage, diversion, and use are to be made (and in other newspapers as the DOE deems necessary). Notice also must be provided to appropriate state and local agencies, potentially affected tribal governments, and other interested parties. The DOE must develop expedited notice procedures for comment on proposals to establish trust water rights during a formally declared drought.

Documentation. The DOE must develop forms for use in the establishment of trust water rights to gather information regarding the right. The DOE must issue a certificate of change or transfer for any water right established as a permanent trust water right. This certificate must be filed for record with the DOE, and a duplicate must be issued to the applicant. For trust water rights transfers, the quantity of the trust water right and the remaining right is reflected in the superseding document issued to the water right holder. This document must be conditioned to ensure reduced water use is achieved.

The DOE may require a final investigation before issuing a superseding certificate for water rights. The DOE must issue a superseding certificate only when and to the extent water has been applied to actual beneficial use as described in the certificate of change or transfer. When only part of an existing right is established as a permanent trust water right, the DOE must issue a superseding certificate or permit to the original water right holder for the quantity of water remaining with the original right holder. For claims, the superseding certificate or permit must be issued only for the perfected portion of a claim demonstrated through actual beneficial use of water.

Transfers, Changes, or Amendments. Statutory provisions regarding water rights transfers, changes, or amendments do not apply to trust water rights established on a temporary basis unless these rights are transferred to another person.

Priority. Priority of an unperfected water right in good standing is based on date of

establishment. If a temporary transfer, the priority date of an unperfected right reverts to the priority date of the original right when the trust period expires.

Perfection. All or part of a water right perfected through actual beneficial use or an unperfected water right in good standing may be established as a trust water right.

Quantity. The quantity of a trust water right is the extent to which the use under the original right is reduced or foregone under the trust transfer, resulting in net benefit to the water body as a result of trust water right establishment. This reduction 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.

Decisions and Appeals. The DOE must provide copies of its final decision regarding establishment of a trust water right to the applicant and any person or entity providing comments on the proposed transfer. Appeals of the DOE's final decisions on establishment of a trust water right and decisions regarding impairment claims may be appealed to the Pollution Control Hearings Board.

Definitions. The definition of "pilot planning areas" is removed.

Findings. Legislative findings are added regarding the ability of the trust water rights program to facilitate voluntary water rights transfers, meet the needs of growing communities for adequate and reliable water supplies, meet instream and out-of-stream needs for water, and preserve water rights. Legislative findings also 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.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date: 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.