

# SENATE BILL REPORT

## SB 6584

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As of February 9, 2016

**Title:** An act relating to establishing a proof of water reliance application process by which any property owner who relies on legal water availability to obtain a building permit prior to the invalidation of an instream flow rule may secure proof that continued use of water at the property will not be considered to be causing impairment of minimum flows.

**Brief Description:** Establishing a proof of water reliance application process by which any property owner who relies on legal water availability to obtain a building permit prior to the invalidation of an instream flow rule may secure proof that continued use of water at the property will not be considered to be causing impairment of minimum flows.

**Sponsors:** Senators Pearson, Bailey and Warnick.

**Brief History:**

**Committee Activity:** Agriculture, Water & Rural Economic Development: 2/02/16, 2/04/16 [DP-WM].

Ways & Means: 2/08/16.

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### SENATE COMMITTEE ON AGRICULTURE, WATER & RURAL ECONOMIC DEVELOPMENT

**Majority Report:** Do pass and be referred to Committee on Ways & Means.

Signed by Senators Warnick, Chair; Danel, Vice Chair; Takko, Ranking Member; Hobbs and Honeyford.

**Staff:** Bonnie Kim (786-7316)

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### SENATE COMMITTEE ON WAYS & MEANS

**Staff:** Sherry McNamara (786-7402)

**Background:** Instream Flow Rules. The Department of Ecology (Ecology) manages state water resources to resolve conflicts between out-of-stream uses - domestic, commercial, and agricultural uses - and instream flows needed to preserve the natural environment.

Generally, Ecology must base water allocation among potential uses and users on the principle of securing maximum net benefits for the people of the state. Ecology must also,

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however, set minimum instream flows to protect instream resources - fish and wildlife habitat and water quality. Ecology establishes instream flow rules for the state's major river basins and typically bases rules on the stream flows needed to support healthy fish populations. Ecology may authorize withdrawals of water conflicting with base flows necessary to preserve instream values only in situations where it is clear that overriding considerations of the public interest will be served.

In April 2001, the Skagit River Basin Instream Resources Protection Program Rule (WAC 173-503) established minimum instream flows throughout the basin in water resource inventory areas 3 and 4. Eight businesses and 475 homes have relied on Skagit reservations – finite water amounts set aside for specific future uses – for their water supplies since 2001. In 2006, Ecology found that limited reservations would not substantially harm fish populations and amended the rule to establish reservations of surface and groundwater for future out-of-stream uses. The reservations provided uninterrupted, year-round water supplies for new agricultural, residential, commercial or industrial, and livestock uses across 25 subbasins.

In October 2013, the Washington Supreme Court invalidated the 2006 amendments, holding that Ecology could not set aside water reservations through water management rules where it had previously set aside water to support stream flows for fish. Since the court decision, Ecology has exercised its enforcement discretion not to curtail water use of homes and businesses that have relied on the 2006 reservations. The Supreme Court has since issued a subsequent decision reiterating its 2013 holding.

Permit-Exempt Wells. Generally, all groundwater withdrawals require an application to and permit from Ecology. There is a class of lawful, unpermitted wells, often referred to as permit-exempt wells, which may be constructed and used without a permit. Exemptions from the permitting requirement include any withdrawal of public groundwater for stock-watering purposes or for watering a lawn or a noncommercial garden less than one-half acre. Single or group domestic uses or industrial purposes not exceeding 5000 gallons per day are also included in the class of permit-exempt wells.

State Building Code. The State Building Code requires all building permit applicants to provide evidence that an adequate supply of potable water will be available for the proposed building. Adequate evidence may include possession of a water right or a letter from a water purveyor stating the ability to provide water to the building. All public water systems must provide an adequate quantity and quality of water in a reliable manner at all times.

**Summary of Bill:** If an instream flow rule is invalidated as a result of judicial action, a person who received a building permit for property that was subject to the instream flow rule that was invalidated is not considered to be causing impairment of minimum flows if the person acquires a proof of water reliance from Ecology.

"Proof of water reliance" means a document issued by Ecology establishing that the holder is not considered to be causing impairment of minimum flows under any instream flow rule identified in the proof of water reliance.

A person may apply to Ecology for proof of water reliance if the person:

- received a building permit for property that was subject to an instream flow rule that was invalidated as a result of judicial action after the person obtained the building permit;
- is relying on a permit-exempt well to provide an adequate water supply to the property; and
- applies to Ecology within five years from the effective date of this act or the date of the invalidation of an instream flow rule, whichever is later.

Ecology must create an application form and provide proof of water reliance to any person who satisfies the three above conditions. Each proof of water reliance must identify the instream flow rule or rules for which the proof of water reliance applies. Ecology must also publish information on its website, informing the public about the process of applying for proof of water reliance, including information about the eligibility requirements.

Ecology may not adopt any rule or policy that alters, limits, or restricts the eligibility criteria for proof of water reliance established in this section. Ecology's enforcement authority is not affected as it applies to instream flow rules for any person who does not acquire proof of water reliance. The ability of any person to pursue any lawful action for the protection of any water right that is not a minimum flow established by an instream flow rule is also not affected.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

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

**Staff Summary of Public Testimony (Agriculture, Water & Rural Economic Development):** PRO: This bill helps a small number of citizens who were issued valid building permits only to lose out when the courts overturned instream flow rules. This situation is an emergency for families in the Upper Skagit Valley.

CON: We recognize and are willing to work with property owners in the Skagit but need balanced solutions to protect people and fish. This bill potentially affects basins other than the Skagit. This bill makes legal what the 2013 Supreme Court decisions made illegal. The Swinomish Tribe is willing to work with Ecology and others on this issue. We support Ecology's decision not to pursue enforcement against the homeowners while we negotiate mitigation solutions. This bill does not hold the county accountable and allows a junior water right to leapfrog a senior water right.

OTHER: We appreciate the Legislature's attempt to find water solutions for those homeowners negatively affected by the 2013 Supreme Court decision. The proof of water reliance only resolves issues for the Skagit basin and may lead to more litigation. We understand the dilemma this bill tries to address but the bill makes changes that remove protections of senior water rights in instream flows. Many of the 6000 families left without water rights are concerned with this issue. Citizens Alliance for Property Rights should be

considered a stakeholder. Many affected property owners have lost up to 90 percent of their property value. RCW 90.04.247 could be amended or repealed.

**Persons Testifying (Agriculture, Water & Rural Economic Development):** PRO: Senator Pearson, prime sponsor; Glen Smith, WA State Ground Water Assn.

CON: Jeanne Cushman, Squaxin Island Tribe & Port Gamble S'Klallam Tribe; Bruce Wishart, CELP and Sierra Club; Davor Gjurasic, Swinomish Tribal Community of Indians and the Nisqually Indian Tribe.

OTHER: Tom Loranger, Dept. of Ecology; Jeff Parsons, Puget Sound Partnership; Cindy Alia, Citizens Alliance for Property Rights.

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

**Staff Summary of Public Testimony (Ways & Means):** CON: This bill makes legal what the Supreme Court made illegal. Ecology is working on mitigation of this instream issue, and is using discretionary enforcement. This bill is creating a precedent. It would make an uninterruptible water right interruptible. Water loss in this area will threaten salmon, there should be consideration of alternative water sources. This bill will invite further litigation.

**Persons Testifying (Ways & Means):** CON: Davor Gjurasic, Swinomish Tribal Community of Indians and the Nisqually Indian Tribe; Dawn Vyvyan, Puyallup Tribe and Yakama Nation and Sauk-Suiattle Tribe; Bruce Wishart, Sierra Club / CELP.

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