

# HOUSE BILL REPORT

## HB 2603

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**As Reported by House Committee On:**  
Rural Development, Agriculture, & Natural Resources

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

**Brief Description:** Concerning trust water rights.

**Sponsors:** Representatives Springer, Chandler, Chapman, Fitzgibbon, Lekanoff and Tharinger;  
by request of Department of Ecology.

**Brief History:**

**Committee Activity:**

Rural Development, Agriculture, & Natural Resources: 1/31/20, 2/7/20 [DPS].

**Brief Summary of Substitute Bill**

- Directs the Department of Ecology to convene a work group of affected entities to study the design and use of the state water trust, water banking and water transfers, and tools to protect instream water rights from neighboring states and make recommendations on policy improvements.

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### HOUSE COMMITTEE ON RURAL DEVELOPMENT, AGRICULTURE, & NATURAL RESOURCES

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Blake, Chair; Shewmake, Vice Chair; Dent, Assistant Ranking Minority Member; Chapman, Fitzgibbon, Kretz, Lekanoff, Pettigrew, Ramos, Schmick and Springer.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Chandler, Ranking Minority Member; Dye, Orcutt and Walsh.

**Staff:** Robert Hatfield (786-7117).

**Background:**

Water Code.

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

Washington operates under a water right permit system. With certain exceptions, new rights to use surface or ground water must be established according to the permit system. A person seeking a new water right must file an application with the Department of Ecology (Ecology), which must then consider a four-part test when deciding whether to issue the requested right: (1) whether water is available; (2) whether a beneficial use of water would be made; (3) whether granting the right would impair existing rights; and (4) whether the proposed use would detrimentally affect the public welfare.

If an application passes this test, Ecology issues a permit. When the conditions of the permit are satisfied, Ecology issues a water right certificate.

Ecology may allow certain changes to a water right. Ecology may also allow a transfer of a water right from one holder to another. In processing applications to change or transfer a water right, Ecology analyzes the validity, limits, and quantity of the right. Changes or transfers cannot impair existing rights of other water right holders.

#### The Trust Water Rights Program.

The state may acquire a trust water right by donation, purchase, or lease. Trust water rights are placed in the state's Trust Water Rights Program and managed by Ecology. 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.

The Trust Water Rights Program enables the voluntary transfer of water and water rights to the state, either temporarily or permanently. While a water right is held in trust, it is considered an exercised water right and is protected from relinquishment. Water held in trust retains its original priority date.

#### Water Banks.

The process to establish a water bank begins with a consultation between Ecology's Water Resources Program and a would-be banker. If Ecology agrees that the banker's proposal is in the public interest, a water banking agreement may be negotiated. This agreement describes how Ecology will take ownership of a water right and hold it in the Trust Water Rights Program in exchange for processing applications for mitigated new uses.

Ecology is authorized to use water banking to mitigate for new water uses, hold water for beneficial uses consistent with terms established by the transferor, meet future water supply needs, and provide a source of water to third parties, on a temporary or permanent basis, for any allowed beneficial use.

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#### **Summary of Substitute Bill:**

The Department of Ecology (Ecology) must convene a work group of affected entities to study the design and use of the state water trust, water banking and water transfers, and tools

to protect instream water rights from neighboring states and make recommendations on policy improvements. Ecology shall invite representatives to serve on the work group from organizations including, but not limited to:

- federally recognized Indian tribes;
- local governments;
- environmental advocacy organizations;
- the farming industry in Washington;
- business interests; and
- entities that have been directly involved with the establishment of water banks.

In addition to an invitation to participate on the work group, Ecology must also consult with affected tribal governments upon request.

By August 1, 2020, Ecology shall present findings and policy recommendations to the Joint Legislative Task Force on Water Resource Mitigation and the Office of the Governor.

**Substitute Bill Compared to Original Bill:**

The policy provisions of the original bill are removed. The scope of the work group covered by the Department of Ecology is refined and the due date of the work group's report is changed from November 15, 2020, to August 1, 2020.

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**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on February 7, 2020.

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

**Staff Summary of Public Testimony:**

(In support) The state's water shortage dilemma is the result of long-ago decisions that led to over-appropriation of state waters. Washington is one of the least water-stressed states in all of the United States. Washington uses less than 10 percent of its annual physical water stores in any given year. Many other states use up to 80 percent of their annual water stores each year.

This bill does not go far enough. While the work group is doing its work, watersheds are still vulnerable. One suggestion is to adopt a moratorium on out-of-basin transfers for certain watersheds until the Legislature has been able to review the work of the work group. There have been 2,000 acre feet of water rights transferred out of the Okanagan water resource inventory area since 2003, so any protection while the conversation is happening would be valuable.

There is support for the language that distinguishes between donations and transfers regarding putting water into trust. Donations do not go through the full extent and validity

determination that transfers do, so it is important that water right change applications for banking should be handled by the Department of Ecology (Ecology), not by water conservancy boards. It makes sense for Ecology to review new applications for new water banks. It is good to allow out-of-state water to be able to transfer into trust. There is concern with the notion of community interest; it could be interpreted to not include state interests, or protection of state resources like salmon. There needs to be a stakeholder process.

It is very clear that the water code is very complex. The bill seeks transparency and accountability. There are many water banks that operate successfully. There are currently 25 water banks in the state that use the trust water rights program. Water rights can also be bought and sold outside of the trust. The bill makes important improvements in clarity and transparency. There are policy considerations that the bill does not address, such as how long a water right may remain in trust. The bill protects the priority date of water rights coming from out of state, which is important.

(Opposed) Having a common application makes sense. It is a big problem that there is no definition of what counts as community need. Ecology is not the right agency to identify community need or community interest. There is concern that domestic use would not be a high priority. Water speculation is not the best use of water. To reduce the need for water speculation, there is a need to actually process water rights, which means the state needs to fix the *Foster* decision. If there is a desire to prevent Wall Street from buying up water, the water needs to be less valuable, which means there needs to be a greater ability to access some of the water that is currently not accessible.

(Other) The bill is helpful by clarifying what is allowed in the water code. There are concerns about giving discretion to Ecology about determining what the public interest is. Administrations change, and codifying the discretionary process may not work in the long run. Fish are not factored into consideration of community interest.

The use of the trust water rights program has been critical to the success of the Yakima Basin Integrated Plan. Ecology has some technical and logistical challenges that can be addressed now, but some of the policy issues need more time. The public interest test needs some work; who should have the authority to determine what constitutes the public interest? The bill speaks to water banking just in context of mitigation, but water banking also happens for other purposes, such as water banks that provide water for agricultural purposes. There is lots of good water banking happening out there.

There should be several suggested changes to the bill: the definition of "community needs" should be modified; the definition of "donation" should be modified; the language around transfers into the state water trust should be modified. "Public trust" is a broader term and may be more appropriate to refer to in this bill.

It is good to try to find the sweet spot on changes that can be made now while bigger issues get sorted out. What happened in the Seattle Times article is not the norm. Many transfers into the trust water rights program are for a single purpose, either in-stream or out-of-stream. Water banks serve a variety of needs. The trust water rights program started in 1991 in order to encourage conservation. There were initially only two areas where it operated. In 1993, the program was expanded to be able to operate across the state. In 2002, the program was

amended to provide that donations can be made for in-stream purposes. In 2003, the concept of water banks was introduced. In 2009, groundwater donations to the trust water rights program were allowed.

It is good that Ecology is taking a proactive approach on this issue. There are some dangers with trust program, one of which is that investors can buy up water. Water is a public resource and is needed for basic survival. It is hard to imagine a purely private market system being in the public interest. There have been instances where monopolistic practices raise the price of water 20 times nearly overnight. The accountability and the transparency in the bill are good. The issue deserves broader discussion.

**Persons Testifying:** (In support) Representative Springer, prime sponsor; Glen Smith, Washington State Ground Water Association; Mary McCrea, Methow Valley Citizens Council; Bruce Wishart, Center for Environmental Law and Policy and Sierra Club; and Mary Verner, Department of Ecology.

(Opposed) Jan Himebaugh, Building Industry Association of Washington.

(Other) Bill Clarke, Kittitas County and Kittitas Reclamation District; Jim Hedrick, Muckleshoot Tribe; Paul Jewell, Washington State Association of Counties; Kathleen Collins, Washington Water Policy Alliance; and Dawn Vyvyan, Yakama Nation and Puyallup Tribe.

**Persons Signed In To Testify But Not Testifying:** None.