

SENATE BILL REPORT

SB 6494

As of February 17, 2020

Title: An act relating to trust water rights.

Brief Description: Concerning trust water rights.

Sponsors: Senators Rolfes, Van De Wege, Warnick and McCoy; by request of Department of Ecology.

Brief History:

Committee Activity: Agriculture, Water, Natural Resources & Parks: 1/21/20.

Brief Summary of Bill

- Modifies provisions of the Trust Water Rights Program, clarifying trust water rights may be donated, leased, or consigned to the state on a temporary or permanent basis.
- Requires an entity seeking to use the state water trust for water banking purposes to submit a water banking application to the Department of Ecology (Ecology) requesting approval for the establishment of a water bank.
- Requires Ecology to publish preliminary decisions on water banking applications and accept public comments for 14 days.
- Prohibits water conservancy boards from processing transfer applications for a water right into the state water trust to change the purpose of use of a water right to instream flow for the mitigation of out-of-stream uses.

SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS

Staff: Karen Epps (786-7424)

Background: Water Code. 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 files an application with Ecology, which must consider a four-part test when deciding whether to issue the requested right: (1)

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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 interest.

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

Ecology may permit certain changes to a water right. Ecology may also permit a transfer of a water right from one holder to another. In processing change or transfer applications, 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 the banker's proposal is within the public's 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.

Water Conservancy Boards. Water conservancy boards (board) are created by resolution of the county or counties where they will serve and are subject to approval by the director of Ecology. The board is authorized to process the same kinds of transfer applications, as does Ecology, with a few exceptions. Boards do not have jurisdiction of new water rights. Approval or denial of a water right transfer application is determined by the majority vote of a board.

A board's decision is subject to Ecology approval. The director of Ecology must review the board's decision for compliance with applicable state water law. The director may affirm, reverse, or modify the board's decision within 45 days with a 30-day extension allowed. If the director fails to act within these timelines, the board's record of decision becomes Ecology's decision.

Summary of Bill: Provisions of the Trust Water Rights Program are modified to clarify trust water rights may be donated, leased, or consigned to the state on a temporary or permanent

basis. A water right established in a neighboring state authorizing the use of water from a waterbody in Washington and the neighboring state may be transferred into the state water trust for instream flow purposes. The priority date for the right is the priority date recognized by the neighboring state where the water right was established.

Transfers and Temporary Transfers. The transfer of a water right into the state water trust may be authorized only if Ecology determines that exercise of the trust water right will not impair water rights existing at the time the trust water right is established, and it serves the public interest. Ecology must provide notification of transfers. The water right holder must submit a change application under the water code to change the purpose of use to instream flow or to instream flow for the mitigation of out-of-stream uses. Ecology must determine the total quantity of water eligible to be transferred into trust. Ecology must issue a water right certificate for each water right permanently transferred into trust. For a temporary water right transfer, Ecology must issue certificates or other documents necessary to reflect the changes in purpose or place of use. These water rights revert to the original water right holder when the trust period ends. If a transfer is for only a portion of a water right, the quantity transferred plus the remaining portion may not exceed the total quantity of water eligible to be transferred. Where a portion of an existing water right is transferred and expressly conditioned to limit its use to instream flow purposes or groundwater preservation, Ecology must process the change or amendment of the existing right without conducting a review of the extent and validity of the portion of the water right that remains with the water right holder.

Short-Term Leases. Ecology may enter into a short-term lease and hold a water right in the state trust only if Ecology determines that the short-term lease will not impair water rights existing at the time the trust water right is established, and it serves the public interest. Ecology may issue documentation necessary to reflect the changes in purpose or use, place of use, point of diversion, or point of withdrawal. Ecology must post information on its website for each short-term lease. Water rights may be held in the state water trust through a short-term lease without a change to the purpose of use. The total quantity of water eligible to be leased may not exceed the extent to which the water right was exercised during the five years before the lease was executed. If the short-term lease is for only a portion of a water right, the quantity leased plus the remaining portion may not exceed the total quantity of water eligible to be transferred. Ecology's short-term leasing of a water right is not evidence of the validity or quantity of the water right. A leased water right reverts back to the original water right holder when the lease period ends.

Donations. A water right holder may donate all or a portion of a water right to the state water trust on a temporary or permanent basis solely to assist in providing instream flows or to preserve surface water or groundwater resources. Ecology must accept the donation, in a quantity that does not exceed the extent to which the water right was exercised during the five years prior to the donation and on terms prescribed by the water right holder. A water right donated as a gift that is expressly conditioned to limit its use to instream purposes or groundwater preservation must be managed by Ecology as a trust water right for public purposes. For a water right donated on a temporary basis, the full quantity of water diverted or withdrawn to exercise the right before the donation must be placed in the state water trust and reverts to the donor when the trust period ends. Ecology must provide notice of the trust water donation.

Water Banks. Water banks provide an efficient means to allow changes from one beneficial use of water to another and to provide water for uses that may not otherwise have water available. Use of the state water trust for water banking purposes statewide is authorized when Ecology finds such a use will serve community needs and not impair existing rights. An entity seeking to use the state water trust for water banking purposes must submit a water banking application to Ecology, requesting approval for the establishment of a water bank, including:

- the water rights proposed for transfer to the state water trust for mitigation;
- the beneficial uses of water that the bank intends to serve;
- the anticipated geographic area to be served by bank operations;
- the anticipated demand to be served by the bank, including the water quantities, timing, and other information identified by Ecology to evaluate the impacts from the potential new uses; and
- description of anticipated community benefits.

A water banking agreement between Ecology and the entity seeking to use the state water trust for banking purposes must establish bank administration responsibilities. The entity applying to use the state water trust for banking purposes must submit a water right change application under the water code to change the purpose of use of the water right to instream flow for the mitigation of out-of-stream uses. Ecology must process the water right change application using cost-reimbursement, and may adopt rules to establish fees related to cost recovery. The applicant must provide public notice of the water banking application.

Ecology must publish its preliminary decision relating to each water banking application on its website and include the water banking application, proposed banking agreement, and corresponding draft report of the examination for the water right transfer. Ecology must provide electronic notice of the preliminary decision to all affected local governments and federally recognized tribal governments, and accept public comments for a minimum of 14 days.

Approval of the water banking application requires:

- the report of examination issued under the change provisions in the water code includes an approval of the water right change and no parties appeal;
- ecology determines water rights identified in the water banking application are sufficient to serve current and projected demand; and
- ecology determines the water bank will serve community needs.

An approved water bank seeking to modify operations from their existing banking agreement must submit a new banking application to Ecology before authorizing new uses.

Water Conservancy Boards. A board may not process or act upon an application to transfer a water right into the state water trust to change the purpose of use of a water right to instream flow for the mitigation of out-of-stream uses.

Work Group. Ecology must convene a work group of affected entities to study the design and use of the state water trust, water banking, and the water transfer process in the state, and to make recommendations on policy improvements. Ecology must submit a report to the

Legislature by November 15, 2020, documenting the work group's findings and policy recommendations.

Appropriation: None.

Fiscal Note: Requested on January 18, 2020.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony: PRO: Water banks are an important tool and they help reallocate water from senior water right holders to those who may be curtailed without a water bank. This bill makes some administrative improvements, clarifies the difference between a donation and a transfer, and provides that the transfer process will be used for water banking so that water can then be used while also held in trust. The bill adds transparency by requiring an entity to submit an application to operate a water bank. Currently, there are about 25 water banks in the state, both privately and publicly held. There is support for the language that clearly delineates donations from transfers. Water right change applications for banking should be handled by Ecology not conservancy boards as they are very complicated applications.

CON: The bill does not define community needs which is problematic and leaves too much discretion with Ecology. It opens Ecology up to liability as this is such a subjective term. The bill does not have any deadlines for Ecology to act on a water bank application. Making it harder to form water banks makes it harder to move the state forward when it comes to economic growth and mitigation.

OTHER: This bill makes improvements to water banking and the Trust Water Rights Program, but there are concerns with the term "community needs." Requiring an application and a prospectus from a water bank will provide information about what the water bank is proposing to do. This bill considers how to manage the workload of processing water bank applications and provides for cost reimbursement, which is appropriate in some cases. This bill should focus on those administrative reforms and transparency needs that can be done now and have a stakeholder group look into the more substantive issues. The Trust Water Rights Program and water banking have provided a tool that has allowed economic development and land use that is sensitive to instream flows and environmental considerations. The transparency in this bill will be very helpful, but it is important to not add additional layers of complication and make these tools to reallocate water more difficult to use.

Persons Testifying: PRO: Senator Christine Rolfes, Prime Sponsor; Bruce Wishart, Center for Environmental Law and Policy, Sierra Club; Mary Verner, Department of Ecology.

CON: Kathleen Collins, Washington Water Policy Alliance; Jan Himebaugh, Building Industry Association of Washington.

OTHER: Scott Revell, Roza Irrigation District; Bill Clarke, Kittitas County, Kittitas

Reclamation District, Trout Unlimited; Jamie Morin, Confluence Law, PLLC; Jim Hedrick, Muckleshoot Indian Tribe; Dawn Vyvyan, Puyallup Tribe Yakama Nation; Paul Jewell, Washington State Association of Counties.

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