

# SENATE BILL REPORT

## SB 6494

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As Reported by Senate Committee On:  
Agriculture, Water, Natural Resources & Parks, February 6, 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, 2/06/20 [DPS, w/oRec].

**Brief Summary of First Substitute Bill**

- Requires 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 the water transfer process.

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### SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS

**Majority Report:** That Substitute Senate Bill No. 6494 be substituted therefor, and the substitute bill do pass.

Signed by Senators Van De Wege, Chair; Salomon, Vice Chair; Warnick, Ranking Member; McCoy, Rolfes and Short.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Honeyford.

**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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*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.*

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.

Joint Legislative Task Force on Water Resource Mitigation. In 2018, the Legislature established a Joint Legislative Task Force on Water Resource Mitigation to review the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat, to develop and recommend a mitigation sequencing process and scoring system to address such appropriations, and to review the Washington supreme court decision in *Foster v. Department of Ecology*, 184 Wn.2d 465, 362 P.3d 9599 (2015).

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 (First Substitute):** 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 and make recommendations on policy improvements. Ecology must present findings and recommendations to the Joint Legislative Task Force on Water Resource Mitigation by August 1, 2020.

**EFFECT OF CHANGES MADE BY AGRICULTURE, WATER, NATURAL RESOURCES & PARKS COMMITTEE (First Substitute):**

- Requires 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 the water transfer process and present findings and recommendations to the Joint Legislative Task Force on Water Resource Mitigation.
- Removes the changes to the Trust Water Rights Program.

**Appropriation:** None.

**Fiscal Note:** Available.

**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 on Original Bill:** *The committee recommended a different bill than what was heard.* 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.