

# HOUSE BILL REPORT

## ESB 5014

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

**Title:** An act relating to best practices for water banks.

**Brief Description:** Concerning best practices for water banks.

**Sponsors:** Senators Honeyford and Ericksen.

**Brief History:**

**Committee Activity:**

Agriculture & Natural Resources: 3/24/15, 4/1/15 [DP].

**Brief Summary of Engrossed Bill**

- Requires all water bank sponsors operating in the Yakima River Basin to report a schedule of charges to the Department of Ecology.
- Prohibits a water bank sponsor operating in the Yakima River Basin from providing mitigation credits to similarly situated water uses or water users on different prices or terms.
- Requires all mitigation credits issued in the Yakima River Basin to be recorded for each mitigation credit with the county auditor in the same manner as is provided for water right certificates.
- Requires the Department of Ecology to ensure that any new water uses for which mitigation is required does not cause detriment or injury to existing water rights.
- Requires all water bank sponsors operating in the Yakima River Basin demonstrate the availability of an adequate and reliable water supply to mitigate for the intended purposes of the mitigation credits.
- Prohibits all water bank sponsors operating in the Yakima River Basin from using leased water to provide mitigation after the start of the year 2020, and limits the use of leased water before that date.

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### HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

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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.*

**Majority Report:** Do pass. Signed by 8 members: Representatives Blake, Chair; Lytton, Vice Chair; Buys, Ranking Minority Member; Chandler, Hurst, Pettigrew, Stanford and Van De Wege.

**Minority Report:** Do not pass. Signed by 2 members: Representatives Dent, Assistant Ranking Minority Member; Schmick.

**Minority Report:** Without recommendation. Signed by 2 members: Representatives Dunshee and Orcutt.

**Staff:** Jason Callahan (786-7117).

### **Background:**

According to the Department of Ecology (Department), water banking is an institutional mechanism used to facilitate the legal transfer and market exchange of various types of surface, groundwater, and water storage. The phrase "water banking" is widely used to refer to a variety of water management practices. Water banking is typically facilitated by an institution that operates in the role of broker or clearinghouse. Many banks pool water supplies from willing sellers and make them available as credits to willing buyers.

In 2003 legislation was passed to allow water banking in the Yakima Basin using the State Trust Water Rights Program (Program). During the 2009 legislative session, the law was amended to clarify that this tool is available to use for banking statewide.

The Program allows either a permanent donation of a water right or a temporary donation that allows the water right holder to maintain his or her water rights for future uses without the water right relinquishing. Water enrolled in the Program is held by the Department and put to beneficial uses. Water enrolled in the Program is held in trust and retains its original priority date.

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### **Summary of Bill:**

New requirements are established for a water bank sponsor operating in the Yakima River Basin. These requirements apply to any person, corporation, or other entity that holds a legal or beneficial interest in a trust water right from which mitigation credits will be offered for sale for domestic purposes in the Yakima River Basin. This includes: state agencies, local governments, and nonprofit organizations.

A water bank sponsor operating in the Yakima River Basin may establish a water bank for any lawful purpose. The sponsor also retains all authority to establish the charges for mitigation credits from the water bank, including the authority to create a sliding scale of charges. However, all water bank sponsors operating in the Yakima River Basin must file with the Department a schedule showing the amount of all charges for mitigation credits. Existing water banks must submit an initial schedule within 90 days of the bill taking effect.

Any changes to the prices shown on any schedule may only occur 30 days after giving the Department notice of the change.

Water bank sponsors have the authority to establish limited-purpose water banks that exist to provide mitigation credits for certain water uses or users but not others. However, a water bank sponsor may provide mitigation credits to similarly situated uses or users on different prices or terms.

The Department is required to display the schedule of charges provided by water bank sponsors operating in the Yakima River Basin on its internet website. The Department is also required to ensure that any new water uses for which mitigation is required does not cause detriment or injury to existing water rights, and must require that all water bank sponsors operating in the Yakima River Basin demonstrate the availability of an adequate and reliable water supply to mitigate for the intended purposes of the mitigation credits. All mitigation credits issued in the Yakima River Basin must be recorded for each mitigation credit with the county auditor in the same manner as is provided for water right certificates.

All water bank sponsors operating in the Yakima River Basin are prohibited from using leased water to provide mitigation after the start of the year 2020. Until the year 2020, a water bank sponsor must use any non-leased adequate and reliable water supplies instead of leased water if it is available and provide non-leased adequate and reliable water to any person receiving leased mitigation water as soon as practical and no later than the year 2020.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:**

(In support) Water banks are appearing and being used at a rapid pace without any guidance from the Legislature. Best practices are needed, even if just limited to domestic uses in the Yakima River Basin. Water banks should operate with clarity and transparency. It is appropriate that the Department is not being put in a position to approve fees and costs but to only make that information available to the public.

The terms used in the bill to describe the type of water allowed to be used by a water bank are consistent with rest of the Water Code and have well-established meanings. Adding new words, like uninterruptable, would be inconsistent with the existing law. The Department is already required to analyze all water transfers for impairment of all senior water rights, including instream flows. The bill does not need to specify that impairments to instream flows needs to occur for the analyses to occur.

Water banks that rely on leased water are a concern because they cannot ensure that the purchasers of mitigation credits will receive reliable, real water. Leased water does not

undergo an individual localized impairment analyses and is not permanent, reliable water. Homeowners should not be put in a position where their water use can be curtailed in times of drought. It is important for mortgage lenders and the real estate industry to know that a home will have reliable water into the future. Anything short of permanent water, or a plan to find permanent water, will lead to inaccurate representations of a property's value. Disallowing leased water after the year 2020 will hold Kittitas County accountable for their promises.

(In support with concerns) Water banking is an important issue for the Legislature to address. Although the bill is limited to the Yakima River Basin, it will be seen as a model for other basins going forward, so it is important to get it right and ensure that water banks are operating in a fair and consistent manner.

There are questions about mitigation water being interruptible. If it is, homeowners will not be protected from curtailment in times of drought. This is a public health issue that will only become more serious as climate change brings more low water years. Merely relying on the adequate and reliable standard is too vague and not as protective of public health as linking mitigation water to water rights that have a pre-1905 priority date.

It is important to specifically require the Department to analyze impairment to instream flows when reviewing mitigation water transfers. The Department is required to do this under current law, but not specifying it in the bill may create legislative intent that it is no longer required for water bank transfers. The existing judicially approved timelines for leased water usage should be allowed to play out.

(With concerns) Water is important to counties and county level decision makers need resources to manage growth. Kittitas County has been approved by the Department and the courts to work towards permanent water solutions with temporary leased water. This process should be allowed to play out without legislative interference.

Transparency in the operation of water banks is welcomed; however, adding language about additional impairment analyses will confuse implementation.

Leased water has been approved by the Department and the courts and the transition to permanent water should be allowed to play out. It is inappropriate to use the legislative process to re-litigate lost court cases. The concern over homeowners losing their water is untrue and leased water allows development to occur without taking water away from agriculture.

(Opposed) There has been a prolonged, but significant, shift in how water is viewed. It used to be that individuals were entitled to use a portion of the state's water, and if they didn't, that right was given to someone else who would use it. Water is now more and more seen as a commodity, and this structural change will result in water only being available to those with money, and no benefits of water being shared with the residents of poorer counties.

Individuals who invest in property and homes lose the ability to use their land in any productive way when the Department closes basins to future appropriations. This is done on

the assumption that there is connectivity between groundwater and surface water. It is an oversight to not address this root problem.

The Growth Management Act allows counties to plan locally for their own growth. However, water is the single largest factor influencing growth and that is in the control of the Department and not the counties. The counties should have say over water use in their areas so that they can control population growth.

(Other) Flexibility is critical in finding effective water management strategies, and the Legislature must be careful to not inadvertently take solutions off of the table or undue the benefits of recent litigation. Limitations on the use of leased water can have an effect on the implementation of the Yakima Basin Integrated Plan and on leases with the United States Bureau of Reclamation. Leased water may, in some cases, provide better, faster, and cheaper access to available water without fragmenting the agricultural economy. The language around what the Department must include in any impairment analyses is a vague and should instead rely on the standard language used in the Water Code.

**Persons Testifying:** (In support) Senator Honeyford, prime sponsor; Paul Eisenberg, Suncadia; Jessica Kuchan, Mentor Law Group; Jim Halstrom; and Bill Clarke, Kittitat County Commissioners and Washington Realtors.

(In support with concerns) Bruce Wishart, Sierra Club and Center for Environmental Law & Policy; and Bryce Yadow, Futurewise.

(With concerns) Laura Merrill, Washington State Association of Counties.

(Opposed) Ian Elliot.

(Other) Dave Christensen, Washington Department of Ecology; and Evan Sheffels, Washington Farm Bureau.

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