

HOUSE BILL REPORT

ESHB 1113

As Reported By House Committee On:
Agriculture & Ecology

Title: An act relating to water transfers and changes.

Brief Description: Authorizing a change in the use of water made surplus by certain activities and modifying transfer provisions.

Sponsors: House Committee on Agriculture & Ecology (originally sponsored by Representatives Chandler, Mastin, McMorris, Koster, Delvin, Mulliken, Johnson, Schoesler and Honeyford).

Brief History:

Committee Activity:

Agriculture & Ecology: 2/5/98 [DP2S].

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass. Signed by 8 members: Representatives Chandler, Chairman; Parlette, Vice Chairman; Schoesler, Vice Chairman; Anderson, Assistant Ranking Minority Member; Delvin; Koster; Mastin and Sump.

Minority Report: Do not pass. Signed by 3 members: Representatives Linville, Ranking Minority Member; Cooper and Regala.

Staff: Carole Richmond (786-7114).

Background: Transfers and Relinquishment. State law permits water rights or portions of water rights to be transferred to other uses or places if the transfer can be made without detriment or injury to existing rights. If the transfer involves surface water supplied by an irrigation district, and the transferred water remains in the district, the transfer need be approved only by the irrigation district. Other transfers must be approved by the Department of Ecology (DOE).

In consideration for the financial assistance the state provides for certain water conservation projects, the state may receive a portion of the net water savings resulting from the projects as trust water rights. Although the state may acquire such net water savings, conserved water, and other rights to the use of water for its trust water right

system, state statutes do not expressly provide for the transfer of conserved water under other circumstances. Indeed, if a portion of a water right is not beneficially used for five consecutive years without sufficient cause recognized by statute, that portion of the right is relinquished. However, a related acreage expansion program set by the DOE by rule as part of a groundwater management program is recognized by statute.

Groundwater Planning. The groundwater code permits the department to designate and manage groundwater areas, sub-areas, or depth zones to prevent the overdraft of groundwaters.

Summary of Second Substitute Bill: Water made Surplus. New rules are established for water made surplus to a water right through the implementation of practices or technologies that are more efficient or more water-use efficient than those under which the right was perfected, and for water made surplus through a change in the crops grown with the water. These rules apply only to a change of an agricultural use of water to another agricultural use or expanded agricultural use of water.

If the water is not supplied by an irrigation district, the person who holds the water right may use the water on other parcels of land owned by the person that are contiguous to the parcel upon which use of the water was authorized before this change in use. The person who holds the water right is to notify the DOE of the change. The notification provides a change in the person's water right, and the department is to revise its records for the right accordingly.

The provision regarding water made surplus through changes in crops does not apply to water supplied by an irrigation district. If water supplied by such a district is made surplus through an individual water user's implementation of efficiency practices or technologies, the individual water user does not have a right to the use of the surplus water. However, the surplus water may be used for the benefit of the district generally. The use of such surplus water is regulated solely by the irrigation district and must be approved or authorized by the district. If the use of such surplus water results in the total irrigated acreage within the district exceeding the irrigated acreage recorded with the DOE for the district's water right, the board is to notify the department of the change. If an irrigation district is within a federal reclamation project and the use of such surplus water results in the total acreage within the project exceeding the total irrigated acreage recorded with the DOE for the project's water right, the district is to notify the department of the change. However, the change cannot exceed the total irrigated acreage authorized for the project by the United States.

Generally, a notification provided to the DOE regarding the use of such surplus water provides a change in the water right and the use of the surplus water has a priority date that is the same as the priority date of the original water right. However, if the notification is in regard to a use of such water made surplus that begins after the effective date of the bill, the notification does not automatically provide a change in the right and

the priority date for its use is the date the notification was provided. The DOE is to issue a 15 year temporary permit for the use of the water. During this 15-year period, if the DOE determines that the change would interfere with a senior water right, it may file the action in superior court for deciding the issue of interference. It is presumed that the use of water under the temporary permit does not impair or interfere with the use of a senior water right. The superior court reviews the department's determination de novo. The burden of proof in overcoming the presumption of non-impairment is on the DOE. It can be overcome only through the application of scientific data. At the conclusion of its review, the court may cancel the temporary permit, modify the conditions of water use under the permit, or affirm that the use of water under the permit does not interfere with senior water rights. If the DOE does not file such an action within 15 years or if the court's decision affirms non-interference or modifies the conditions water use under the permit, the water right is changed as provided in the temporary permit and the DOE is to revise its records accordingly.

The presumption regarding non-impairment does not apply with regard to a claim made in superior court by a person with a water right that a change made under this section by a junior water right holder impairs or interferes with the use of the person's senior water right.

These new rules regarding the use of surplus water do not authorize the use of a junior water right in a manner that impairs or interferes with the use of a senior water right. These provisions regarding the use of surplus water do not apply in an area with a groundwater management program with an acreage expansion program set by rule that is in effect on the effective date of this bill.

Transfers in General. The rights expressly protected from being detrimentally affected by a transfer or change do not include those represented by applications for new water rights. The DOE may not initiate relinquishment proceedings regarding a water right for which an application for a transfer or change is filed until two years after the department has approved or denied the application. A provision of the surface water code regarding processing an application for a new water right expressly does not apply to transfers or changes of water rights.

When an irrigation district is requested, under current law, to approve a transfer or change regarding water provided by the district, or when it is requested, under this bill, to approve changes for surplus water, the district must consider the effect of the transfer or change on the financial and operational integrity of the district.

Second Substitute Compared to Engrossed Substitute Bill: Removed by the second substitute bill are the provisions of the engrossed substitute bill stating that a right represented by an undeveloped water use permit, under which water has not been withdrawn by the time a transfer or change in a water right is approved, is not injured or detrimentally affected by the transfer or change. If water is made surplus and used

as authorized under the bill but that use begins after the effective date of the bill, the notification given to the DOE does not provide, under the second substitute bill, an automatic change in the right. Instead, it results in the issuance of a 15-year temporary permit for the use of the surplus water. The priority date for the temporary permit is the date the chance notice is filed with the DOE. During this 15-year period, if the DOE determines that the change would interfere with a senior water right, it may file the action in superior court authorized by the engrossed substitute bill for deciding the issue of interference. The temporary permit is converted to a change in the water right if the DOE does not file such an action in the 15-year period or the court does not find interference. The priority date of a change notice regarding a use begun before the effective date of the bill is the same as the priority date of the original water right and notices regarding such a prior use are not subject to this form of review by the DOE.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: None.

Testimony Against: There has not been enough time to review the bill.

Testified: Hal Beecher, Washington Department of Fish and Wildlife (con); and Judy Turpin, Washington Environmental Council (con).