

HOUSE BILL REPORT

ESHB 1113

As Amended by the Senate

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: By 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: 1/20/9, 1/27/97, 2/10/97 [DPS].

Floor Activity:

Passed House: 3/14/97, 65-30.

Senate Amended.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The substitute bill be substituted therefor and the 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: Kenneth Hirst (786-7105).

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 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. The notification provides a change in the district's water right. 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. The notification provides a change in the project's right. However, the change cannot exceed the total irrigated acreage authorized for the project by the United States.

It is presumed that a change made in a water right regarding the use of surplus water does not impair or interfere with the use of a water right that is senior to the right being changed. However, if within one year of being notified of a change, the department determines that the change would impair or interfere with the use of a senior water right, the department is to notify the person making the change and file a notice with local the superior court. This notice does not stay the change made to the 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 department. It can be overcome only through the application of scientific data. At the conclusion of its review, the court may cancel the change, modify the conditions or extent of the change, or affirm the change. 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.

Whether the water is or is not supplied by an irrigation district, the priority date for the right to use the surplus water is the same as for the original 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 or undeveloped permits for water use. The Department of Ecology 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.

EFFECT OF SENATE AMENDMENT(S): WATER MADE SURPLUS. The provisions of the bill regarding the use of water made surplus through certain efficiencies now apply only to surface water and do not apply to: water supplied by an irrigation district; or surplus water resulting from efficiency improvements that were financed in whole or in part with state funds.

Rules are established for determining the amount of the water made surplus in this manner that may be used on contiguous lands owned by the holder of the water right. The water right holder is to assume that the per acre amount of water to be used on the additional land is equal to the revised per acre amount of water that the lands previously allowed to be irrigated under the original right would receive. This amount of water may be used to irrigate each parcel may be used on either the original parcel or on the additional land without differentiation.

Of the water made surplus, fifty percent is available for use on additional land and retains the priority (seniority) date of the original right. Fifty percent is available for use on additional land with a priority date that is subordinate to other existing water rights. A person who uses water made surplus in this way must not impair any existing right unless compensation or mitigation for the impairment or injury is agreed to by the holder of the affected water right.

The DOE may prescribe a form upon which notification of the use of water made surplus in this manner is to be made. It must establish procedures to verify the information contained in the notification and may require the submission of additional information to assure general compliance with these requirements regarding the surplus water.

EVAPORATIVE LOSS. If a person with a water right finances the installation of a water-efficient irrigation system, the person may enter into a contract with another person for the transfer of water saved through the installation of the irrigation system. The transfer may be permanent or may be under a lease with set expiration dates. A person installing such a system may apply to the DOE for a transfer of the reduction in evaporative loss, plus any additional net water savings, for the irrigation of: an additional parcel of previously unirrigated land, land with less senior water rights, or land that lacks a full and sufficient supply.

The DOE must allow the transfer of an amount equal to the reduction in the evaporative loss. Such a reduction includes the reduction in the amount of water consumed by nonproductive plants such as cover crops, but it does not include any water that contributed to return flows used to satisfy existing rights. In addition, the DOE must evaluate whether there are additional net water savings that result directly from the installation of the water-efficient irrigation system that could be transferred to the purchaser without impairment or detriment to existing water rights, without reducing the ability to deliver water, and without reducing the supply of water that otherwise would have been available to other existing water uses.

The transferred portion of the right has the same date of priority as the water right from which it originated. However, it is inferior in priority to the original right unless otherwise provided by the parties in the contract. If the DOE is unable to

conclusively determine the validity of the original water right, it may include a presumption of validity in the certificate of water rights.

The reduction in evaporative loss is readily transferrable. The approval of the transfer of the reduction in evaporative loss may not be delayed by the DOE's decisions regarding additional net water savings. The DOE must maintain a record of these contracts.

The DOE may adopt rules to facilitate the processing of these water right transfers and to establish a streamlined procedure to quantify the reduction in the evaporative loss. The DOE may use data from the United States Natural Resource and Conservation Service or the cooperative extension service for calculating reduction in evaporative loss in various regions of the state. The rules may allow the DOE to make preliminary findings that can be used as an initial basis for developing contracts by applicants. The use of water supplied by an irrigation district that is saved through installation of a qualifying water-efficient irrigation system is regulated solely as provided by the board of directors of the irrigation district.

A person with a water right may voluntarily enter into a contract with the DOE. The DOE may use funds authorized for the purchase of water savings made available under these procedures.

CONSUMPTIVE QUANTITY. A change in the place of use, point of diversion, or purpose of use of a water right to allow the irrigation of additional acreage or the addition of new uses may be permitted if the change results in no increase in the annual consumptive quantity of water used under the water right. The "annual consumptive quantity" is the estimated or actual annual amount of water diverted under the water right as that amount is reduced by the estimated annual amount of return flows, averaged over the most recent five-year period of continuous beneficial use of the water right, or, for a groundwater right, averaged over the period of actual use if it is less than five years.

TRANSFERS IN GENERAL. When the DOE approves a transfer or change of a surface water right, it is to issue the applicant an authorization to make the transfer or change. When this action is completed, the DOE is to issue a water right certificate for the transfer or change. Removed by the senate amendments are provisions: stating that the rights expressly protected from being detrimentally affected by a transfer or change do not include those represented by applications for new water rights or undeveloped permits for water use; prohibiting the DOE from initiating 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; and stating that a section of the surface water code for processing an application for a new water right expressly does not apply to transfers or changes of water rights.

The general transfer laws do not apply to water made surplus through changes in the crops grown under a surface water right.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: (1) The bill provides incentives for becoming more efficient in the use of water. (2) The bill recognizes the role of irrigation districts in acting on behalf of the irrigators in the district. (3) The bill is consistent with the notion that water is reused while it is within an irrigation project; for example, the water used by the South Columbia Basin Irrigation District is water recycled within the Columbia Basin Project.

Testimony Against: (1) If the new use of water-made surplus through efficiencies includes any water other than conserved water that is otherwise irretrievably lost, the use of the water may affect other right holders and third parties. It may reduce the water otherwise available to them through ground water recharge or return flows. (2) The transfer provisions of the bill reverse current policy that requires that the rights of people in the permit line be considered when a transfer is approved. The constitutional rights of those with undeveloped permit rights may be impaired by the bill. (3) The wasting water is not a part of a person's right to beneficially use water.

Testified: Mike Schwisow, Washington Water Resources Association (in favor).
Judy Turpin, Washington Environmental Council (opposed).