

House Bill Analysis

HB 2994

HOUSE AGRICULTURE AND ECOLOGY COMMITTEE

February 1, 2000

- Requires the Department of Ecology to accept certain donations of water rights for the trust water right systems in certain ESA related situations.
- Further describes the types of temporary transfers that may be made to the trust water right systems.

BACKGROUND:

Relinquishment. In general, if a person abandons his or her water right or voluntarily fails to use the right for five successive years, the person relinquishes the right or the portion of the right abandoned or not used. (RCW 90.14.160 - 90.14.180.) However, exemptions from this requirement are provided in two forms: (1) outright exemptions from these statutory relinquishment provisions, and (2) a list of sufficient causes— for the voluntary non-use. These "sufficient causes— provide exemptions from relinquishment. (RCW 90.14.140.)

Abandonment of a water right is the *intentional* relinquishment of the right. In its *Okanogan v. Town of Twisp* decision, the state's Supreme Court adopted the general rule that, under the common law theory of abandonment of water rights, long periods of nonuse raise a rebuttable presumption of intent to abandon a water right. (133 Wn. 2d 769 (1997) at page 783.)

Transfers or Changes. A water right is appurtenant to the land or place the right is used. However, the Surface and Ground Water Codes allow the right to be changed, transferred, or amended to change the place of use, the point of diversion or withdrawal, purpose, or manner of use. These changes in the right, often referred to as transfers, require the approval of the Department of Ecology (DOE) and must be done without detriment or injury to existing rights. A right transferred in this manner retains the priority date of the existing right. (RCW 90.03.380, 90.030.390 and 90.44.100.)

Trust Water Rights. A right may also be transferred to the state for management as a trust water right. The laws governing the state's trust water right system are divided into two parts: One set (Chapter 90.38 RCW) governs trust water rights in the Yakima River Basin, and the other (Chapter 90.42 RCW) applies in the rest of the state and is often referred to as the state-wide trust water right system. Both are administered by the DOE. Among the uses expressly authorized for such trust water rights are instream uses. (Chapters 90.38 and 90.42 RCW.)

The DOE may acquire water rights for the trust water right system by purchase, gift, or other appropriate means other than condemnation. Water rights may be acquired for either system on a temporary or permanent basis. Water rights for the state-wide system may be purchased only with funds expressly appropriated for this purpose. (RCW 90.38.020 and 90.42.080.) The provisions of statutes requiring the relinquishment of a water right for non-use do not apply to trust water rights (RCW 90.38.040(6) and 90.42.040(6).)

The water transfer provisions of the Surface Water Code do not apply to trust water rights in the Yakima system or to trust water rights acquired through the state's funding of conservation projects under the state-wide system. (RCW 90.38.040(6), 90.42.040(7), and 90.42.080(4).) However, a trust water right in the Yakima system may be exercised only if the DOE first determines that no existing water rights will be impaired and publishes notice and provides notice to the Director of Fish and Wildlife. (RCW 90.38.040(5).)

To exercise a trust water right in the state-wide system, the DOE must first determine that neither water rights existing at the time the trust water right was established, nor the public interest will be impaired. Before a trust water right may be created or modified for the state-wide system, the DOE must also publish notice and provide notice to certain entities and other interested parties. (RCW 90.42.040(4)&(5).)

SUMMARY:

The DOE must accept a donation of water rights to either the Yakima or the state-wide trust water right system under the following circumstances: An aquatic species is listed as threatened or endangered under the federal Endangered Species Act (ESA) for a body of water; certain instream flows are needed for the species; and the holder of a right to water from the body of water chooses to donate all or a portion of the person's water right to the trust water system to assist in providing those instream flows on a temporary or permanent basis. Once accepted, such rights are trust water rights within the conditions prescribed by the donor. The provisions of the Surface Water Code regarding transfers do not apply to such donations.

It is clarified that a trust water right acquired on a temporary basis need not be acquired for a specified period of time. For example, if a water right is acquired on a temporary basis to assist in providing instream flows for a species of fish that is listed as threatened or endangered under the ESA, the water right could be acquired for the period of time that the species is listed and could also be acquired for only the portions of that period of time that the water right is needed to assist in providing those flows.

