

# HOUSE BILL REPORT

## EHB 1350

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### As Passed Legislature

**Title:** An act relating to appeals of water right decisions regarding water rights subject to a general stream adjudication.

**Brief Description:** Changing water right appeals procedures for rights subject to a general stream adjudication.

**Sponsors:** By Representatives G. Chandler and Linville.

### Brief History:

#### Committee Activity:

Agriculture & Ecology: 2/8/01, 2/20/01 [DP].

#### Floor Activity:

Passed House: 4/10/01, 89-5.

Senate Amended.

Passed Senate: 4/21/01, 44-1.

House Concurred.

Passed House: 4/22/01, 83-0.

Passed Legislature.

### Brief Summary of Engrossed Bill

- Grants the Pollution Control Hearings Board (PCHB) authority to review decisions of the Department of Ecology regarding transfers or changes of existing water rights that are themselves subject to a general adjudication proceeding for water rights;
- Requires appeals of the PCHB decisions to be made to the superior court conducting the general adjudication; and
- Establishes special rules for such appeals that apply if the general adjudication proceeding was begun before October 13, 1977.

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### HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

**Majority Report:** Do pass. Signed by 14 members: Representatives G. Chandler, Republican Co-Chair; Linville, Democratic Co-Chair; Cooper, Democratic Vice Chair;

Mielke, Republican Vice Chair; B. Chandler, Delvin, Dunshee, Grant, Hunt, Kirby, Quall, Roach, Schoesler and Sump.

**Staff:** Kenneth Hirst (786-7105).

**Background:**

The Surface Water Code has established a means by which the various existing rights to surface water from a water body may be adjudicated in court to determine the validity of claims to water rights and to identify the amounts of water to which each person with a right is entitled, the order of priority (seniority) of those rights, and other aspects of the rights. It is called a general adjudication of water rights and is analogous to a quiet title action involving various claims of land ownership in a particular area. The Ground Water Code applies this procedure to determining rights to ground water as well. The rights subject to such an adjudication proceeding include all rights to use the water, including diversionary and instream uses and water rights of the United States. Federal law authorizes the water rights of the United States to be adjudicated in state court if certain findings are made by a federal court. A general adjudication proceeding for water rights has been underway for surface water rights in the Yakima River watershed since the late 1970s.

In such a general adjudication proceeding, the Department of Ecology (DOE) acts as a referee for the superior court conducting the proceeding. Although the Pollution Control Hearings Board (PCHB) generally has jurisdiction to review appeals of the decisions of the DOE, that jurisdiction does not apply to proceedings of the department relating to such a general adjudication proceeding.

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**Summary of Engrossed Bill:**

The jurisdiction of the Pollution Control Hearings Board (PCHB) is altered regarding actions related to general adjudication proceedings for water rights. Excluded from the jurisdiction of the PCHB are such general adjudication proceedings that are conducted by the Department of Ecology (DOE), rather than proceedings of the DOE that are simply related to such general adjudications. Once the PCHB has reviewed a decision of the DOE regarding transfers or changes of existing water rights that are themselves subject to a general adjudication proceeding for water rights, any petition for obtaining superior court review of the PCHB's decision must be filed directly with the superior court conducting the general adjudication. The petition for review must be consolidated with the general adjudication.

Special rules are established for any review of change or transfer decisions made by the DOE for rights that are subject to a general adjudication proceeding that was begun before October 13, 1977. If the appeal includes a challenge to the DOE's tentative

determinations regarding the validity and extent of the water right being changed or transferred, the court's review is de novo. If the appeal includes a challenge to a part of the DOE's decisions other than those regarding the validity and extent of the water right, that part must be certified by the court to the PCHB for the board's review and decision. The PCHB's review must be scheduled to afford all parties full opportunity to participate before the court and the board.

The decision of the PCHB may be appealed to the court conducting the general adjudication proceeding. A party to the general adjudication is a party to such an appeal of the PCHB's decision only if the party files or is served with a petition for review. Standing to appeal is not limited to the parties to the general adjudication proceeding.

The provisions of this act do not affect or modify any rights of an Indian tribe, or the rights of a federal agency or other entity arising under federal law. Nothing in the act may be construed as affecting or modifying any existing right of a federally recognized Indian tribe to protect from impairment its federally reserved water rights in federal court.

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**Appropriation:** None.

**Fiscal Note:** Available.

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

**Testimony For:** (1) If the DOE is authorized to process applications to modify existing water rights during a general adjudication, any appeal of a decision of the DOE regarding such an application may go through two rounds of appeals up through the Supreme Court, one round duplicating the other, before the decision of the DOE is incorporated back into the adjudication process. Just one round of appeals is needed. (2) It would be a shame for appeals to bounce from one court to another just because the law is not clear on how the appeals should be handled. The process should be fair, not repetitive.

**Testimony Against:** (1) Making the PCHB part of a round of appeals complicates matters for those representing federally held water rights or rights held in trust by the United States that are also part of the general adjudication. Federally held rights are adjudicated in state court under a federal waiver of sovereign immunity that may not extend to having decisions made in a state administrative setting such as the PCHB. (2) Water rights of third parties must not be harmed by the DOE's decision on such an application. Their rights should be protected. (3) Both the courts and the PCHB should have a role. A good record needs to be maintained.

**Testified:** (In favor): Joe Mentor and Steve Gano, TrendWest Resorts; Kathleen Collins, Washington Water Policy Alliance; and Jim Halstrom, Washington Water Policy Alliance

and Washington State Horticultural Association.

(In favor of concept): Ken Slattery, Department of Ecology; and Jim Zimmerman, Washington Cattlemen's Association.