

Agriculture & Ecology Committee

HB 1877

Brief Description: *Regarding modifications of water rights.*

Sponsors: *Representatives G. Chandler and Linville.*

Brief Summary of Bill

- *Establishes a pilot project under which applications for modifying existing water rights may be processed separately from applications for new water rights and the latter applications are not protected from being impaired by decisions regarding the existing rights.*
- *Applies the pilot project in certain designated water resource inventory areas (WRIA's) and a ground water sub-area and terminates the project in 2004.*
- *Expressly allows water conservancy boards to process the same types of modifications of water rights as may be processed by the Department of Ecology (DOE).*
- *Waives liability of water conservancy boards arising from the water right modifications they may consider and waives the liability of their commissioners, agents and employees from related non-contractual acts or omissions.*
- *Makes decisions of water conservancy boards to deny applications subject to review in the same manner as currently required for its decisions to approve applications.*
- *Allows the transfer of water made surplus to a water use under a family farm permit through more efficient practices or technologies to be transferred to any use under certain circumstances.*
- *Allows other transfers of a water right established under a family farm permit to non-irrigation uses under certain circumstances.*

Hearing Date: *2/13/01*

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

Background:

WRIA's. The Water Resources Act directs the DOE to develop a comprehensive state water resources program for making decisions on future water resource allocation and use. (RCW 90.54.040.) The Act permits the DOE to develop the program in segments. Under the Act, the DOE has divided the state into 62 WRIA's. (Chapter 173-500 WAC.)

Modifying Existing Water Rights. There are several fundamental elements of a water right. One is its priority (or seniority). Other elements of the water right include: the amount of water that may be withdrawn from a particular water source under the right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place that the water may be used. Certain of these elements of a water right may be modified with the approval of the DOE if the modification would not impair other existing water rights. An approved modification does not affect the priority date of the right. Alterations in water rights are referred to in statute as transfers, changes, and amendments of water rights. (RCW 90.03.380 and 90.44.100.) In Schuh v. Department of Ecology (100 Wn.2d 180), the state's Supreme Court required the DOE to consider the rights represented by applications for new water permits that have not yet been granted or denied when it considers applications for modifying existing rights. This currently has the effect of tying together the DOE's consideration of the two types of applications.

Conservancy Boards. Historically, applications for modifying existing water rights were filed with and processed by the DOE and its predecessor agencies. An alternative processing system was established with the enactment of legislation in 1997 authorizing water conservancy boards. These boards may be created by a county legislative authority with the approval of the Department of Ecology for the purpose of expediting voluntary water transfers within the county. (RCW 90.80.020 and .030.) Before taking actions on applications, board members, called commissioners, must comply with training requirements established by the Director of the DOE by rule. (RCW 90.80.040.) If the board approves an application, the Director has 45 days in which to review the board's action to affirm, reverse, or modify it. With the consent of the parties, this review period may be extended an additional 30 days. If the Director fails to act within this time period, the action taken by the board is considered to be final, although it is subject to appeal in the same manner as other water right decisions of the Director. (RCW 90.80.080.) The laws authorizing water conservancy boards also waive the liability of the county and the DOE regarding claims of damages arising from the water right modifications approved by such a board.

Recent Superior Court Case. The Director of the DOE has adopted rules to implement the statutes regarding water conservancy boards. In these rules, the type of modification of water rights that may be approved by a board is defined broadly: the board may consider the same types of modifications as may the DOE under the surface and ground water codes. (WAC 173-153-030(5).) In a Thurston County Superior Court case, the breadth of that authority was challenged. The superior court found the authority of the boards to be much more limited: the boards may review applications to modify the place of use or the

point of diversion or withdrawal of a water right, but they may not review applications involving other modifications. The DOE has appealed the court's ruling.

Family Farm Permits. Family farm permits are water right permits issued under the Family Farm Water Act. The Act was adopted by the voters through the approval of Initiative Measure No. 59 in 1977. The Act requires that all water right permits issued after December 8, 1977, for irrigating agricultural lands be classified as: family farm permits, family farm development permits, public water entity permits, and publicly owned land permits. The principal permit for using water to irrigate privately owned agricultural lands under the Act is the family farm permit. (See RCW 90.66.050.) A family farm permit must limit the use of water withdrawn for irrigation of agricultural lands to land qualifying as a family farm. (RCW 90.66.050(1).) Under the Act, a family farm is not more than 2000 contiguous or noncontiguous acres of irrigated agricultural lands. (RCW 90.66.040(1).)

The Act states that the right to withdraw water for use for irrigating agricultural lands under authority of such a permit is subject to the irrigated land's complying with the definition of a family farm at the time the permit is issued. If a person's acquisition of land and water rights would otherwise cause land being irrigated under a family farm permit to lose its status as a family farm, all lands held or acquired must again be in compliance with the definition of a family farm within 5 years from the date of the acquisition. (RCW 90.66.060(1).) Further, if the Department of Ecology (DOE) determines that water is being withdrawn under such a permit for use on land not in conformity with the definition of a family farm, the DOE must notify the permit holder and the permit must be suspended 2 years later unless the land is again in conformity with the definition of a family farm. The period may be extended in certain circumstances. If conformity is not achieved within 5 years of the notice, the withdrawal rights must be canceled. (RCW 90.66.060(2).) The DOE interprets these requirements as prohibiting the water right from being changed or amended so that it may be used for any purpose other than irrigating agricultural lands.

Summary of Bill:

"Two Lines." A pilot project is established that allows the DOE to process applications for modifications of existing rights independently of its consideration of applications for new water rights. The pilot project applies in a water resource inventory areas (WRIA's) and one ground water management sub-area. It expires on June 30, 2004. Under the pilot program, pending applications for new water rights are not entitled to protection from impairment when an application relating to an existing surface or ground water right is considered. Applications relating to the existing water rights may be processed and decisions on them may be rendered independently of the pending applications for new water rights within the same source of supply. An application relating to an existing water right may be processed ahead of a previously filed application when sufficient information for a decision on the previously filed application is not available and the applicant for the previously filed application is sent a written notice and explanation. The previously filed application does not lose its priority date. An applicant for a modification of an existing

water right cannot be required to give up a part of the applicant's valid water right or claim to a state agency, the trust water rights program, or to other persons, as a condition of processing or approving the application. (Section 2.)

The pilot project applies in the Nooksack, Island, Deschutes, Upper Chehalis, Walla Walla, Lower Yakima, Upper Yakima, Chelan, and Methow WRIA's and in the Odessa ground water management sub-area. The DOE must report to the Legislature annually regarding the pilot project. The expiration of the pilot project does not affect any right acquired or liability or obligation incurred or any rule or order adopted or decision made under the pilot project. It is not the intent of the pilot project to divert or deter DOE's processing of applications for new water rights. (Sections 1, 2(10)&(11), and 3.)

Water Conservancy Boards. The types of applications for modifying existing water rights that may be processed by a water conservancy board is expressly stated broadly. They may process the same types of modifications as may the DOE under the surface and ground water codes. It is clarified that the "withdrawals" of water for which the board may consider a modification include both withdrawals of ground water and diversions of surface water. (Section 4.) The waiver of liability provided by law to the county and the DOE for claims of damages arising from water right modifications approved by a water conservancy board is now extended to the board itself. The waiver also applies to decisions of the board to deny applications for such modifications. (Section 8.) No action may be brought against a commissioner, agent or employee of a water conservancy board for any non-contractual acts or omissions of the board or its commissioners, agents, or employees which are related to modifications of water rights it may consider. (Section 7.) An action taken by a water conservancy board to deny an application for a water right modification is subject to review and approval by the Director of the DOE in the same manner as prescribed for board actions approving such an application. (Section 6.)

Family Farm Water Permits. A "transfer" of a water right under the Family Farm Water Act is defined broadly to include transfers, changes, and amendments of surface and ground water rights. (Section 12.) If a portion of the water governed by a water right established under the authority of a family farm permit is made surplus to the beneficial uses exercised under the right, the right to use the surplus water may be transferred to any purpose of use that is a beneficial use of water. For this purpose, a water right or portion of a water right may be made surplus through the implementation of practices or technologies, including conveyance practices or technologies, that are more efficient or more water-use efficient than those under which the right was perfected. This authority cannot be used to transfer the portion of a water right that is necessary for the production of crops historically grown under the right nor to transfer a water right or a portion of a water right that has not been perfected through beneficial use before the transfer. (Section 11(3) and 13(3).)

All other transfers of water rights established under a family farm permit to uses that are for agricultural irrigation purposes are subject to the 2000 irrigated acreage provisions of the Family Farm Water Act. Within this limitation for irrigated acreage, a water right established under a family farm permit may be transferred to any purpose of use that is a beneficial use of water:

·if the transfer is made exclusively under a lease agreement; or

·if the water right is for the use of water at a location that is, immediately before the transfer is approved, within the boundaries of a city or town or within the boundaries of an urban growth area designated under the Growth Management Act. (Section 11(2) and 13(3).)

A provision of the Surface Water Code limiting transfers to not more than an "annual consumptive quantity" of water calculated over the most recent 5-year period, but expressly allowing that quantity to be transferred, does not apply to transfers of water rights established under a family farm permit. (Section 2(4).)

Appropriation: *None.*

Fiscal Note: *Requested on February 9, 2001.*

Effective Date: *The bill contains an emergency clause and the sections of the bill authorizing a pilot project for processing applications for modifying existing water rights take effect immediately. The remaining sections of the bill take effect 90 days after the legislative session in which the bill is enacted. (Section 14.)*

Null and Void: *The provisions of the bill authorizing a pilot project for processing applications for modifying existing water rights are null and void if any of the provisions of the bill regarding water conservancy boards is vetoed by June 30, 2001. (Section 2(13).)*