

HOUSE BILL REPORT

HB 2038

As Reported by House Committee On:
Agriculture & Ecology

Title: An act relating to clarifying "voluntarily fails" for water rights relinquishment purposes.

Brief Description: Clarifying "voluntarily fails" for water rights relinquishment purposes.

Sponsors: Representatives Linville and G. Chandler .

Brief History:

Committee Activity:

Agriculture & Ecology: 2/23/01, 2/26/01 [DPS].

Brief Summary of Substitute Bill

- Defines when a failure to use a water right is voluntary and, therefore, subjects the right to relinquishment for non-use and identifies circumstances that qualify as involuntary failures to use a water right.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The substitute bill be substituted therefor and the substitute bill 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:

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. 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. Examples of the sufficient causes that provide

exemptions for the voluntary non-use of water include: drought or unavailability of water, certain military service, and the operation of legal proceedings.

Abandonment of a water right is the intentional relinquishment of the right. In a 1997 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.

Summary of Substitute Bill:

The type of voluntary failure to use a water right that, absent an exemption, triggers the relinquishment-for-nonuse provisions of water law is defined. It is the nonuse by the owner of the water right where the nonuse occurs as a result of factors within the control of the water user.

Non-use of an irrigation water right is involuntary when the water needed for irrigation under the right is reduced as a result of varying weather conditions, the temporary presence and use of return flows, or crop rotation. It is involuntary based on weather conditions if the water user's diversion and delivery facilities are maintained in good operating condition consistent with the beneficial use of the full amount of the water right. The burden is on the water user to prove that the weather conditions are significantly different from average conditions and they resulted in the reduction of water use. It is involuntary based on return flows if the flows are used in lieu of water from the primary source of water supply under the right and the flows are measured or reliably estimated using a scientific methodology accepted as reliable by the director of the Department of Ecology.

Substitute Bill Compared to Original Bill:

The retroactivity clause is removed by the substitute bill. The substitute bill lists the things that constitute an involuntary nonuse of irrigation water and establishes qualifying conditions for nonuse caused by varying weather conditions and the use of return flows.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Substitute Bill: The bill contains an emergency clause and takes effect immediately.

Testimony For: (Original bill): (1) In response to a recent state Supreme Court case, the judge in the Yakima basin general adjudication proceeding for water rights reverse his

earlier position regarding relinquishment during the proceeding and found that five consecutive, cool, wet years resulted in an irrigation district's losing a substantial portion of its right through non-use of the full extent of its water right. The judge called it a perverse outcome of the relinquishment laws. (2) An irrigation district with a senior water right has used return flows from a district with a more junior water right. The judge has found that the senior district's right must be reduced by the extent of that use, even though the return flows will not be available in sufficient quantities in a water short that the junior district, but not the senior district, has a reduced water supply available to it. This bill is a necessary baby step in addressing the inequities of the relinquishment laws and is needed as a matter of fairness. (3) Even greater changes in the relinquishment laws are needed.

Testimony Against: (Original bill): (1) The bill should not be retroactive. (2) The provisions of a Senate bill describing the types of non-use that can be exempted, are preferred. (3) The Arizona Supreme Court struck down a similar law aimed at parties involved in an adjudication being conducted in that state. The court stated that it harmed without due process the water rights of those who gained as the result of relinquishment. (4) The subject matter of the bill is the focus of negotiations before the Yakima court that may provide a remedy.

Testified: (In support, original bill): Mike Schwisow, Washington Water Resources Association; Jim Halstrom, Washington Horticultural Association; Kathleen Collins, Washington Water Policy Alliance; and Tim Boyd, Columbia/Snake Irrigators' Association.

(Support alternative without retroactivity): Dawn Vyvyan, Yakama Indian Nation; and Josh Baldi, Washington Environmental Council.

(In support with Concerns): Ken Slattery, Department of Ecology.