

Agriculture & Ecology Committee

SSB 5361

Brief Description: *Regarding instream flows and trust water rights.*

Sponsors: *By Senate Committee on Environment, Energy & Water (originally sponsored by Senators Parlette, Honeyford, Hewitt, Hale, Morton, Swecker, Hochstatter, Long, Oke, McCaslin, Sheahan and Fraser).*

Brief Summary of Substitute Bill

- *Requires the Department of Ecology (DOE) to accept certain donations of water rights for the trust water right systems for instream flows in areas where aquatic species have been listed as endangered or threatened and the terms prescribed for the donation are mutually acceptable.*
- *Waives requirements that the DOE make impairment determinations before these trust water rights may be exercised and alters notification requirements regarding their being exercised.*
- *Requires a trust water right to be managed for instream purposes if its acquisition by the state is expressly conditioned to be for that use.*

Hearing Date: *3/23/01*

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

Background:

Transfers, Changes, and Amendments to Water Rights. There are several fundamental aspects elements of a water right. One is its priority (or seniority). The priority date of a right secured under the state's water right permit system is the date the permit application leading to the right was filed. (RCW 90.03.340.) Other aspects of the water right include: the amount of water that may be withdrawn from a particular water source under the right, the time of year and point from which the water may be withdrawn, the type of water use authorized under the right (such as an agricultural or municipal use), and the place that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 approval if the modification would not impair other existing water rights. Such 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, 90.03.390, and 90.44.100.)

Trust Water Rights. A water right may be donated to or acquired by 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 is for trust water rights in the Yakima River Basin. The other is for the rest of the state and is often referred to as the statewide trust water right system. (Chapters 90.38 and 90.42 RCW.)

The DOE may acquire water rights for the trust water right systems by purchase, gift, or other appropriate means other than condemnation. Water rights may be acquired for either system on a temporary or permanent basis. (RCW 90.38.020 and 90.42.080.)

The water transfer and change 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 statewide system. 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 the Department of Fish and Wildlife. To exercise a trust water right in the statewide 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 statewide system, the DOE must also publish notice and provide notice to certain entities and other interested parties. Trust water rights are administered by the DOE. Among the uses expressly authorized for such trust water rights are instream uses. (RCW 90.38.040 and 90.42.040.)

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. For example, these relinquishment requirements do not apply to trust water rights. (RCW 90.38.040(6) and 90.42.040(6).) They also do not apply if the non-use of water is the result of federal laws imposing land or water use restrictions either directly or through the landowner's enrollment in certain federal programs. (RCW 90.14.140(1)(f).)

Summary of Bill:

The DOE must accept a donation of water rights to either the Yakima or the statewide trust water right system under the following circumstances: (1) an aquatic species is listed as threatened or endangered under the federal Endangered Species Act for a body of water; (2) certain instream flows are needed for the species; (3) 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, (4) the donation satisfies other requirements of the trust water laws, and (5) the terms described for the donation are relevant and material to protecting any interest in the

water right that is retained by the donor and are mutually acceptable. Neither the right donated nor the sum of the portion of a right remaining with a person plus the portion donated may exceed the extent to which the right was exercised during any of the last five years. Once accepted, such rights are trust water rights within the conditions prescribed by the donor. (Sections 2 and 5.) Current requirements that the DOE make a determination that the use of a trust water right will not cause impairments before the right is exercised do not apply to these donations. (Sections 3 and 4.) However, if impairment is found upon an appeal of a decision of the DOE, the donation must be altered to eliminate the impairment. The donated right's status as a trust water right is not evidence of the validity of quantity of the right. (Sections 2 and 5.) Current requirements that notice be published before a trust water right is exercised apply only for the first time the donation is exercised as a trust water right. The provisions of the surface water code regarding transfers do not apply to such donations. (Sections 3 and 4.)

If a water right acquired by the state for the state's trust water right systems is expressly conditioned to be for instream use, it must be managed in that manner. If it is conditioned to be for instream use, it must be managed for public purposes to ensure that the gift qualifies as a deduction for federal income tax purposes for the person who gave it. (Sections 2 and 5.)

Appropriation: *None.*

Fiscal Note: *Not Requested.*

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