

HOUSE BILL REPORT

ESHB 1640

As Amended by the Senate

Title: An act relating to authorizing water banking within the trust water program.

Brief Description: Authorizing water banking within the trust water program.

Sponsors: By House Committee on Agriculture & Natural Resources (originally sponsored by Representatives Linville, Hinkle, Grant, Chandler, Eickmeyer and Hankins).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 2/12/03, 3/5/03 [DPS].

Floor Activity:

Passed House: 3/19/03, 91-5.

Senate Amended.

Passed Senate: 4/17/03, 47-0.

Brief Summary of Engrossed Substitute Bill

- Authorizes the Department of Ecology to use the trust water rights program in the Yakima River basin for water banking purposes.
- Specifies procedures for transfer of water rights for water banking purposes.
- Requires reports to the Legislature regarding comments received on water banking and evaluation of water banking.
- Includes legislative findings regarding the benefits and uses of water banking.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Kristiansen, Assistant Ranking Minority Member; Chandler, Eickmeyer, Grant, Hunt, McDermott, Orcutt and Quall.

Minority Report: Do not pass. Signed by 3 members: Representatives Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; and Sump.

Staff: Caroleen Dineen (786-7156).

Background:

The state may acquire a trust water right by donation, purchase, lease, or means other than condemnation. Trust water rights are placed in the state's trust water rights program and managed by the Department of Ecology (DOE). Two trust water rights programs, one for the Yakima River basin and the other for the rest of the state, are established in state law.

Trust water rights may be held or authorized for use for instream flows, irrigation, municipal, or other beneficial uses consistent with applicable regional plans. Trust water rights also may be used to resolve critical water supply problems. Statutory relinquishment provisions do not apply to trust water rights.

A trust water right has the same priority date as the water right from which it originated. The trust water right is junior in priority to the original right unless specified otherwise by agreement of the state and the original water right holder.

The DOE must determine that a trust water right will not impair existing water rights or the public interest before such a right may be exercised. The DOE also must stop or modify trust water right use if impairment occurs. For donated and leased trust water rights, the DOE must review an impairment claim from any person who believes his or her water right has been impaired by a donated or leased right and must alter the trust water right to eliminate any impairment. The DOE's impairment decisions may be appealed to the Pollution Control Hearings Board.

Legislative findings recognize the benefits of water use efficiency programs in addressing the state's water shortage for existing and future water needs. Legislative findings also address the importance of developing programs to increase the state's ability to manage state waters to resolve conflicts and satisfy water needs.

Summary of Engrossed Substitute Bill:

The DOE is authorized to use the trust water rights program in the Yakima River basin for water banking purposes. Water banking may be used for mitigation, future water supply needs, or any statutory beneficial uses consistent with terms established by the transferor. However, return flows from water rights authorized for any purpose must remain available as part of the Yakima River Basin's total water supply available and to satisfy existing rights for other downstream uses and users. Water banking also may be used to:

- document transfers of water rights to and from the trust water rights program; and
- provide a source of water rights that the DOE can use to transfer to third parties on a temporary or permanent basis for any beneficial use.

The DOE may not use water banking to cause detriment or injury to existing rights, issue temporary rights for new potable uses, administer federal project rights, or allow carryover of stored water from one water year to another water year.

The DOE, with the water right holder's consent, may identify trust water rights for administration for water banking purposes. Trust water rights established before the effective date of these provisions may be included. The application to transfer to the water bank must identify reasonably foreseeable future temporary or permanent beneficial uses for the water right upon transfer from the trust water rights program. The water right and future uses must be reviewed according to statutory procedures for water rights transfers at the time the water right is transferred to the trust water rights program for water banking administration. If a future place of use, period of use, or other elements of the water right are not specifically identified at the time of transfer, another review will be necessary at the time of proposed transfer from the trust water rights program.

The DOE must transfer a water right being administered for water banking purposes from the trust water rights program to a third party when all of the following have occurred:

- the DOE receives a request to transfer;
- the request is consistent with the DOE's statutory transfer review and future temporary or permanent beneficial uses;
- the request is consistent with any condition, limitation, or agreement affecting the water right, including any transfer agreement executed at the time the water right was transferred to the trust water rights program; and
- the request is accompanied by an assignment of interest from a person or entity retaining an interest in the trust water right to the party requesting transfer.

The water right transferred from the trust water rights program for water banking purposes retains the same priority as the underlying right. The DOE must issue documentation of the transferred water right to the new water right holder. The DOE's decisions on water banks transfers may be appealed to the Pollution Control Hearings Board or a superior court conducting a general adjudication.

The DOE is required to request comments on water banking from a variety of governmental entities and interest groups and must submit a report on these comments and any legislative recommendations to the appropriate committees of the Legislature in the subsequent legislative session. By December 31st of every even-numbered year, the DOE must report to the appropriate committees of the Legislature on water banking and include: (1) an evaluation of the effectiveness of water banking; (2) a description of any statutory, regulatory, or other impediments to water banking in other areas of the state; and (3) an identification of other basins or regions that may benefit from authorization to use the trust water rights program for water banking purposes.

The statutory water bank provisions must not be construed to cause detriment or injury to

existing rights or the operation of the federal Yakima project to provide water for irrigation purposes, existing water supply contracts, or other existing water rights. These provisions also must not be construed to diminish existing rights or the total water supply available for irrigation or other purposes in the Yakima River basin or to affect or modify the authority of a court conducting a general adjudication. In addition, these provisions may not be construed to:

- affect or modify treaty or other federal rights of a federal agency, tribe, or other person or entity;
- change, interpret, or conflict with any interstate compact;
- alter, establish, or impair water or water-related rights of states, the United States, the Yakama Nation, or any other person or entity;
- affect or modify the rights of the Yakama Nation and management or regulation of water resources within the external boundaries of the Yakama Indian Reservation;
- affect or modify the settlement agreement between the United States and the State of Washington regarding federal reserved rights other than rights reserved by the United States for the Yakama Indian Nation; or
- affect or modify the rights of any federal, state, or local agency, the Yakama Nation, or any other person or entity with respect to unsettled claims in any water rights adjudication, including *State v. Acquavella*.

Legislative findings recognize voluntary water rights transfers and issuance of new water rights as methods to address current and future water needs. Legislative findings identify water banking as a way to facilitate voluntary water rights transfers and achieve a variety of resource management objectives.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment specifies that an application to transfer a water right for water banking purposes must indicate the stream reach or reaches where the trust water right will be established before transfer from the trust water rights program. The Senate amendment also requires that the documentation for the water right transferred from the trust water rights program include a description of the property to which the right will be appurtenant after transfer from the trust water rights program to a third party. Further, the Senate amendment defines "total water supply available" for purposes of water banking with reference to the 1945 consent decree between the United States and Yakima River basin water users and consistent with later interpretation by state and federal courts. Finally, the Senate amendment specifies the water banking provisions do not affect or modify rights of any person or entity under a water rights adjudication or under any other order of a court conducting a water rights adjudication.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: Trendwest hopes to use water banking for some water it purchased in connection with its Mountain Star master planned resort near Roslyn. In addition to water purchased for the resort and to mitigate resort use, Trendwest purchased and agreed to supply water for the "induced housing" arising from the development. The supply Trendwest purchased allows it to supply water for induced housing as it is built during the next 30 years. Through this bill, the water will go into the trust program and then be issued out of the water bank as it is needed. During the intervening period, the water in the water bank will be available for other uses.

This bill will allow cost-effective water rights transfers. Water rights are processed as they go into the trust program, and users will know when and how it can be used. This bill gives users a way to deal with relinquishment concerns and is a flexible, proactive way to have water rights available for additional users in the future.

Water banks and the trust water rights program are ways to address the needs of out-of-stream water users and flow restoration needs. Water banks will engage local communities and provide more accountability as to how trust water rights are managed. A more accountable banking system will help to promote trust in government. The DOE has a federal grant to develop a water bank by rule in the Yakima basin, so the initial rulemaking costs would not create fiscal impact.

(In support with concerns) The concept of water banking is intriguing, but concerns exist about how this process will work. Some of the language in the bill is vague and needs to be clarified. The DOE should not be given a broad mandate; this bill should specify the details regarding the program. The Legislature should consider a sunset in five years. Trendwest has worked with Kittitas irrigation districts to provide water in short years. The Yakima basin is one of the most complex and highly regulated in the state, and we need to ensure that no unintended consequences arise from this bill. The nature of return flows are an issue of concern.

Testimony Against: There is a great mistrust of government, and water rights are one of the most important rights to people. If a bank changes its name or goes out of business, there is no recourse.

Testified: (In support) Bill Clarke and Steve Gano, Trendwest Resorts; Carl Samuelson, Department of Fish and Wildlife; and Keith Phillips, Department of Ecology.

(In support with concerns) Hertha Lund and Mark Charlton, Washington Farm Bureau; and Mike Schwisow, Washington State Water Resources Association.

(Opposed) Mike Kayser.