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**Agriculture & Natural  
Resources Committee**

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**HB 1317**

**Brief Description:** Clarifying and consolidating procedures for trust water rights and authorizing creation of water banks.

**Sponsors:** Representatives Linville, Kirby, Grant, Quall, Shabro, Jarrett, Rockefeller, Hunt, Delvin, Morris and Conway; by request of Governor Locke.

**Brief Summary of Bill**

- Creates one trust water rights system for the state (repeals provisions for Yakima River Basin and recodifies other provisions).
- Amends provisions regarding establishment, quantity, and uses of trust water rights.
- Amends procedural provisions regarding notice, documentation, and appeals.
- Authorizes establishment of water banks administered by the Department of Ecology or others.
- Requires the Department of Ecology to conduct pilot rule making to determine the effectiveness of water banks

**Hearing Date:** 1/29/03

**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 systems, one for the Yakima River Basin and the other for the rest of the state, are established in state law.

Uses. 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. Trust water rights acquired

in areas with an approved watershed plan must be consistent with any plan provisions regarding acquisition.

Funding. The state may finance water conservation projects. The state deposits into the trust water rights program the "net water savings" achieved through funded projects. "Net water savings" is defined as the amount of water determined to be conserved and usable for other purposes without impairing water rights existing at the time a water conservation project is undertaken.

No state funding may be expended to acquire trust water rights unless specifically appropriated by the Legislature.

Notice. Before a trust water right is created or modified, the DOE must publish notice and provide notice to various government entities and interest groups according to statutory requirements.

Documentation. For each permanent trust water right conveyed to the state, the DOE issues a water right certificate. The DOE issues a superseding certificate, which has the same priority date as the original water right, to identify the amount of water a water right holder would continue to be entitled to use as a result of a water conservation project. The DOE uses other certificates or instruments to document nonpermanent water rights conveyances into the trust water rights program.

Amendments. Statutory requirements regarding water rights amendments for changes in point of diversion, place of use, or purpose of use do not apply to trust water rights acquired through funding of water conservation projects.

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

Extent and Validity of Right. For donations and leases, the amount of the trust water right (or the donated/leased portion and the portion reserved by the water right holder) does not exceed the extent to which the right was exercised during the five years preceding the donation or lease. When part of an existing water right donated to the trust water rights program will assist in achieving established instream flows, the DOE must process a change or amendment of an existing right without reviewing the extent and validity of the part of the right retained by the water right holder. The donated or leased right's status as a trust water right is not evidence of the validity or quantity of the water right.

Donations and Leases. The DOE must accept donations on the terms prescribed by the donor. Donations must be managed to ensure that they qualify as deductible for the donor for federal income tax purposes.

Temporary Trust Water Rights. The DOE places into the trust water rights program the full amount of water diverted or withdrawn according to a water right donated or acquired on a temporary basis. This same amount reverts to the donor or original right holder when the trust period ends.

Irrigation Districts. Evidence of an irrigation district's authority to represent water rights holders must be submitted to the DOE for any trust water rights conveyed by an irrigation district . The state may not contract for acquisition of trust water rights from any person served by an irrigation district without the district board's approval. Any disapproval by an irrigation district must be factually based on adverse effects on the district's ability to deliver water to other members or to maintain the financial stability of the district.

Federal Cooperation. The state must cooperate fully with the United States in implementing the trust water rights program. The state must treat any trust water rights acquired with federal funds in the same manner as trust water rights acquired with state funds.

Relinquishment. Statutory relinquishment provisions do not apply to trust water rights.

Impairment. 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.

Appeals. The DOE's impairment decisions are appealable to the Pollution Control Hearings Board.

Findings. 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 Bill:**

New statutes are codified to govern the state's trust water rights program. Statutes establishing the Yakima River Basin trust water rights system and several of the statutes applicable to trust water rights in other areas of the state are repealed.

The state may establish trust water rights through donation, purchase, lease, funding of a conservation project, or means other than condemnation. Trust water rights are to be held in trust by the Department of Ecology (DOE). These rights, however, may be administered by the DOE or by a water bank established under the provision of this act. Trust water rights must be administered according to the terms under which the right was conveyed, subject to any agreement related to modification of these terms.

The state may establish trust water rights from all or a part of an existing surface or ground water right. Trust water rights may be established on a temporary or permanent basis but may only be established from existing water rights. "Existing water rights" includes rights to divert or withdraw water under existing certificates, claims, and permits as well as rights to storage rights reflected in reservoir and secondary use rights.

Uses. Trust water rights may be used for any beneficial use specified in the state Water

Resources Act. These uses include domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the waters of the state. Trust water rights also may be established to protect water rights secured for mitigation and to preserve water rights for future needs. The DOE may make arrangements, including contracts, to ensure the trust water rights are exercised to the fullest extent possible consistent with state law.

Funding. The recipient of state funding for a water conservation project must convey to the state the part of the water right reflecting the net water savings for deposit into the trust water rights program. The state and the water right holder must agree on procedures for determining net water savings before state funds are expended for the project. The definitions of "pilot planning areas" and "water conservation projects" are removed from the trust water rights statutes.

When expending state funds appropriated by the Legislature to establish trust water rights, the DOE must exercise due diligence as practiced by other water rights purchasers to ensure the validity of the water right for which funds are expended.

Notice. The DOE must provide notice and opportunity to comment when it has decided to establish a trust water right. The notice must describe the trust water right, provide a time period for written comments and protests, and be published and provided to government agencies and interest groups and interested persons according to statutory requirements.

The DOE must provide copies of its final decision regarding establishment of the trust water right to any party providing writing comment and those entities and persons statutorily entitled to notice. Statutory notice provisions do not apply to trust water rights established during a formally declared drought.

The DOE must comply with statutory notice procedures for decisions to modify the exercise of a trust water right based on review of an impairment claim.

Documentation. The DOE must develop a form for gathering information regarding establishment of a trust water use. The form should provide for information on the existing purpose, place of use, point of diversion or withdrawal, extent of water use, and the proposed use or uses.

The DOE also must issue a water right certificate, certificate of change, or other appropriate legal document in the name of the state for all established trust water rights after the appeal period. The document must indicate the trust water right's quantity, location, use, duration, any other terms, and information in the informational form used in determining establishment of the right. The DOE must issue a superceding certificate or other legal document to the original water right holder which indicates the quantity of water reserved by the right holder. A certificate of change or other appropriate legal document may be issued for temporary trust water rights. For trust water rights established from a water right claim, the certificate of change or other legal document must reflect the terms of the trust water right.

Amendments. Statutory provisions regarding water rights amendments for changes in point of diversion, place of use, purpose of use, or new or additional wells do not apply to trust water rights.

Priority. Trust water rights retain the priority date of the right from which they are established. For partial transfers, the trust water right is junior in priority to the portion of the right not in trust unless otherwise specified. The priority date for an unperfected water right is the date the trust water right is established. If established as a temporary trust water right, the unperfected water right's priority reverts to the priority date for the original right when the trust period ends.

Extent and Validity of Right. Acceptance of an existing water right as a trust water right does not provide independent evidence of the validity or quantity of the water right.

Trust water rights may be established only to the extent the water right has been perfected through actual beneficial use. The extent to which a water right has been perfected is determined through water system engineering or other quantitative methods but may not exceed actual beneficial use and the amount reduced or foregone. A reduction in water use may result from:

- reduced diversion or withdrawal because of a water conservation project;
- reduced number of irrigated acres or a long-term change in crop production requiring less water;
- reduced seasonal period of use because of low stream flows or trust water right conditions;
- elimination of water use under the original right;
- a downstream change in point of diversion resulting in increased flows in the affected stream reach;
- temporary or permanent use of a different water supply; or
- other appropriate changes agreed to between the DOE and the water right holder.

The DOE must quantify only the portion of the water right to be placed in the trust water rights program. Any reduction in water use under the part of a water right retained by the original water right holder must be reflected in a superceding document issued by the DOE that is conditioned to ensure reduced water use is achieved.

Unperfected water rights in good standing may be established as trust water rights, with priority based on date of establishment.

Donations and Leases. The DOE must accept donations to assist in providing instream flows on the terms prescribed by the donor if the: (1) donation complies with the requirements of the trust water program statutes; and (2) terms are relevant and material to protecting any interest in that water right that is retained by the donor.

Irrigation Districts. The limitation on an irrigation district's ability to disapprove acquisition of a water right from a person served by the district is eliminated.

Appeals. The DOE's final decisions regarding establishment of a trust water right and

decisions regarding impairment claims are appealable to the Pollution Control Hearings Board.

Water Banks. The DOE is authorized to establish water banks by rule in one or more watersheds to administer trust water rights. Water banks may be created to:

- solicit water rights for the trust water rights program;
- accept and manage funds used to establish trust water rights;
- purchase or lease water rights to be held as trust water rights;
- create a system of credits to track water bank deposits;
- assign water rights or credits to third parties; and
- develop an annual schedule of the net water saved and anticipated water demands.

Water banks may be created to administer water rights for a specified geographic area and/or certain types of trust water rights. Water banks also may be created as joint water banks with neighboring states. The DOE must identify the trust water rights to be administered by the water bank.

Water banks may be created within or outside the DOE. Any water bank created outside the DOE must be constituted as either a public entity or a public-private partnership.

Pilot Rule Making. The Department of Ecology (DOE) is required to conduct pilot rule making to evaluate the effectiveness of water banks. The DOE's pilot rule making may involve one or more watersheds and may allow water banks for a specified geographic area and/or certain types of trust water rights.

In choosing pilot rule making areas, the DOE must consider the:

- likelihood of addressing drought or future water supply demands;
- existence of plans, programs, or technical resources within the water resource inventory area (WRIA) to assist with implementation and review of the pilot rule making;
- location in one of the 16 salmon critical basins; and
- degree of local watershed or regional group support.

At a minimum, the pilot rule making must include provisions relating to geographical constraints on trust assignments and procedures to establish, quantify, and appeal assignment of trust water rights. The pilot rule making also must include procedures for ensuring that assignments of trust water rights or credits comply with statutory impairment provisions.

The DOE is required to request comments on the pilot rule from a variety of governmental entities and interest groups within one year of pilot rule adoption. The DOE must submit a report on these comments and any legislative recommendations to the appropriate committees of the Legislature.

Findings. Legislative findings are added regarding the effective use of the state's trust water rights program to facilitate voluntary water transfers, secure and preserve water rights, and provide water for existing and future instream and out-of-stream needs. Legislative findings are included that the state's interests are served by developing water banking programs within

the trust water rights program to allow efficient management of multiple trust water rights and meet other purposes. Legislative intent is included to enhance the trust water rights program by improving incentives, removing disincentives, clarifying and consolidating procedures, and authorizing water banks.

**Appropriation:** None.

**Fiscal Note:** Not Requested.

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