

# FINAL BILL REPORT

## ESHB 1640

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Synopsis as Enacted

**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).

**House Committee on Agriculture & Natural Resources**  
**Senate Committee on Natural Resources, Energy & Water**

### **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. The DOE's impairment decisions may be appealed to the Pollution Control Hearings Board.

Legislative findings in the trust water right statutes 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:**

### Authority for Water Banking

The DOE may 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. "Total water supply available" is defined for water banking purposes consistent with the 1945 consent decree between the United States and Yakima River basin water users and later court interpretations. 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 the DOE can make available to third parties on a temporary or permanent basis for any statutory 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.

### Administration and Transfer of Water Rights

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. An application to transfer must indicate stream reach or reaches where the trust water right will be established and identify reasonably foreseeable future temporary or permanent beneficial uses for the water right upon transfer from the trust water rights program. 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 all or part of 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 and consistent with 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 including specified information for the transferred water right to the new water right holder. The DOE's decisions on water bank transfers may be appealed to the Pollution Control Hearings Board or a superior court conducting a general adjudication.

#### Interpretation of Water Banking Provisions

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, affect or modify the authority of a court conducting a general adjudication, affect or modify any person's or entity's rights under a water rights adjudication, or affect or modify any order of a court conducting a water rights 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 under state or federal law;
- affect or modify federal, state, or tribal, or any person's or entity's rights or jurisdiction over surface or ground water resources;
- 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*, or constitute evidence in any such proceeding.

#### Reports to the Legislature

The DOE must request comments on water banking from a variety of governmental entities and interest groups and submit a report on these comments and any recommendations for legislative action to the appropriate committees of the Legislature in the subsequent legislative session. By December 31 of every even-numbered year, the DOE must report to the appropriate committees of the Legislature on water banking

activities 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.

#### Legislative Findings

Legislative findings include voluntary water rights transfers and issuance of new water rights as acceptable 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.

#### **Votes on Final Passage:**

House 91 5  
Senate 47 0 (Senate amended)  
House 98 0 (House concurred)

**Effective:** May 7, 2003