

HOUSE BILL REPORT

ESB 5106

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to water rights.

Brief Description: Concerning the annual consumptive quantity of a water right.

Sponsors: Senators Hewitt, Hale, T. Sheldon, Doumit, Sheahan, Rasmussen, Morton, Mulliken, Honeyford, Deccio and Parlette.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 3/28/03, 4/4/03 [DPA].

Brief Summary of Engrossed Bill
(As Amended by House Committee)

- Identifies the extent to which stock-watering is exempt from the water right permit requirements of the ground water code.
- Alters the calculation of the "annual consumptive quantity" when determining how much water may be spread to additional acreage or new uses and modifies the evaluation made by the Department of Ecology regarding applications for spreading the water.
- Allows certain changes of use of water within a general category of an agricultural use of water which may be made without using the formal change, transfer, or amendment process for modifying existing water rights.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: Do pass as amended. Signed by 8 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Schoesler, Ranking Minority Member; Kristiansen, Assistant Ranking Minority Member; Eickmeyer, Grant, McDermott and Quall.

Minority Report: Do not pass. Signed by 5 members: Representatives Holmquist, Assistant Ranking Minority Member; Chandler, Hunt, Orcutt and Sump.

Staff: Kenneth Hirst (786-7105).

Background:

Ground Water Permits - Exemptions. The Ground Water Code was enacted in 1945. In general, it requires a water right permit for any new withdrawal of ground water after June 6, 1945. However, in addition to "grandfathering" ground water rights in existence before its enactment, the 1945 code also exempted certain new withdrawals from this permit requirement.

Recently, the state's Court of Appeals (Division II) decided a case involving the application of the exemptions provided by the 1945 code. In its decision, the Court found that a commercial nursery, as part of the nursery industry, falls within the exemption provided for industrial uses of ground water not exceeding 5,000 gallons per day. In reaching this conclusion, the Court viewed the overall scheme of the 1945 code as requiring ground water permits except for certain "small withdrawals." It cited these "small withdrawals" as being any amount of water for livestock; any amount of water for a lawn or for a noncommercial garden of a half acre or less; not more than 5,000 gallons per day for domestic use; and not more than 5,000 gallons per day for an industrial purpose.

Annual Consumptive Quantity. A water right has several elements. One is its priority. Other elements 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 the elements or conditions of a water right may be modified with the approval of the Department of Ecology (DOE), either directly or through a water conservancy board. These modifications are referred to in the water codes as transfers, changes, and amendments. They cannot be approved if they would impair other existing water rights, whether junior or senior.

A change in the place of use, point of diversion, or purpose of use of a water right to allow the irrigation of additional acreage or the addition of new uses may be permitted if the change results in no increase in the "annual consumptive quantity" of water used under the water right. This quantity is defined as being the estimated or actual annual amount of water diverted under the water right, reduced by the estimated annual amount of return flows. It is to be an average based on the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.

Summary of Amended Bill:

Stock-watering. The exemption from ground water right permit requirements for

stock-watering is expressly subject, for a new right to water stock, to a 5,000 gallon per day limitation. A withdrawal of ground water for stock-watering that was begun before the effective date of the bill continues to be exempt from the permit requirements up to the maximum extent that water was withdrawn for stock-watering under the right before the effective date of the bill.

Annual Consumptive Quantity. Requirements are altered for calculating the "annual consumptive quantity" used in determining the amount of water that is available for additional or new uses under a modification of an existing water right. It is the estimated or actual annual amount of water diverted or withdrawn under the water right, reduced by the estimated annual amount of return flows, but is no longer based on an average of two specified years. Instead, it is based on the year in which the largest volume of water was diverted or withdrawn for beneficial use during the five years immediately preceding the date the holder of the water right applies for the modification of the water right. If the water right has been held by the water right holder for less than five years on the application date, it is based on the year in which the largest volume of water was diverted or withdrawn for beneficial use under the right during the time the right has been held by the water right holder.

When an application for such a modification of a water right to enable the irrigation of additional acreage or the addition of new uses is considered by the DOE, the agency must determine the ownership of the entire right. However, it is to evaluate only the portion of the right directly involved in the proposal to irrigate additional acreage or to add the new uses.

General Category of An Agricultural Use of Water. A right to use surface or ground water that has been applied to any beneficial use within the general category of an agricultural use may be changed to another agricultural use under certain circumstances, within the other limitations of the water right. The general category of an agricultural use of water includes the beneficial uses of water for: agricultural irrigation; frost protection; watering livestock; processing agricultural commodities; dust suppression; cleaning of agricultural animals, equipment, and facilities; and confined animal feeding operations with applicable land use and water quality permits.

If the change does not involve a change in the season the water is used, the change may be made after notification to, but without the approval of, the DOE. If the change involves a change in the season the water is used, it may be made after providing notice to the DOE and giving the agency an opportunity to review the change. The water right holder must provide the DOE information describing the proposed change and evidence of beneficial use of the right. The change may be made unless the DOE notifies the water right holder within 45 days that the proposed change raises concerns regarding the potential impairment of other water rights. This period may be extended by an additional 30 days. The DOE must operate under a rebuttable presumption that other water rights will not be impaired if the season of use would be changed from a period that is more

critical for other water rights and stream flows to a period that is less critical. If the DOE determines that the proposed change raises concerns regarding the potential impairment of other water rights, the water right holder may not use this procedure to change the use, but may apply for approval under the formal transfer, change, and amendment procedures of the water code. The DOE's determination is not appealable. In making such a decision, the DOE is not bound by its earlier determinations.

Amended Bill Compared to Original Bill:

The amendment: strikes, for determining the "annual consumptive quantity," the authority to use the year of historic peak use and establishes a different means of calculating that amount; clarifies that this authority and calculation to apply ground water rights as well. With regard to the use of water with the general category of an agricultural use, the amendment: limits the use for watering livestock in confined feeding operations to those with applicable land use and water quality permits; requires notification of the DOE for certain changes of uses within the category, and requires notice with the opportunity for DOE review, and certain information to be provided to the DOE, regarding changes that involve a change in the season of use of the water; establishes a 45-day period (that may be extended) for the DOE to determine that the proposal raises concerns regarding the potential impairment of other rights; and does not allow such a change under this procedure if the DOE makes such a determination. The amendment also adds provisions expressly limiting the stock-watering exemption to 5,000 gallons per day for new rights and grandfathers existing withdrawals of ground water for stock-watering from this limitation to the maximum extent of the withdrawals before the effective date of the amendment.

Appropriation: None.

Fiscal Note: Not Requested.

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

Testimony For: For (Original bill): (1) The bill helps identify what you get when you buy a water right. Buying a water right is much like buying view property: its value is one thing if you have the view, but much less if someone can build in front of you obstructing the view. (2) The bill is needed to clean up the transfer laws and allow transfers without the loss of water. It addresses the nexus of the application of relinquishment requirements. (3) The bill provides clarity regarding the effect of crop rotation and changing cropping patterns. It is an important first step. The current law needs more work. (4) The bill will help keep property in agricultural use, rather than as a site for development. (5) Water use needs vary in agricultural operations; the bill allows the flexibility needed. The "agriculture to agriculture" provisions of the bill

allowing use of water within a general category of agricultural use under a water right are important. Any best management practices used under such flexibility should be self-generated, not imposed by the DOE. (6) Non-use of water by one person can reduce what a subsequent owner has a right to. (7) Removing obstacles to agriculture helps keep the industry's position from deteriorating further.

(Comments) (Original bill): (1) The language of a similar House bill is preferred. (2) These issues need to be addressed to keep conservation practices from creating a disadvantage; however, best management practices should be required. The current law is regarded as not working.

Testimony Against: (Original bill): (1) The bill will revive water rights when they are transferred. It will be difficult to know what a water right holder had intended to do with the right. (2) The "agriculture to agriculture" provisions allow a change in the timing and intensity of water use which could have implications for other water right holders and stream flows. Spreading the use of water could also have adverse effects.

Testified: (Comments) (Original bill): Mike Polson; and Jim Waldo, Governor's office.

Against (Original bill): Josh Baldi, Washington Environmental Council.