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**Economic Development,  
Agriculture & Trade Committee**

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**HB 1098**

**Brief Description:** Changing provisions relating to the trust water rights program.

**Sponsors:** Representatives Linville, Kristiansen and Grant.

**Brief Summary of Bill**

- Consolidates and reorganizes trust water rights program statutes.
- Revises notice, documentation, and establishment procedures.
- Amends acquisition, determination, and use provisions.
- Changes water banking authority and uses provisions.

**Hearing Date:** 2/1/05

**Staff:** Caroleen Dineen (786-7156).

**Background:**

Trust water rights are water rights that have been placed into the state's trust water rights program. 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.

Acquisition. The state may acquire a trust water right by donation, purchase, lease, or means other than condemnation. Trust water rights acquired in areas with an approved watershed plan must be consistent with the plan's acquisition provisions.

For donations and for leases not exceeding five years, the quantity of water placed into trust (or the total of the trust amount and amount remaining with the water right holder) cannot exceed the amount exercised during the five years preceding acquisition.

Management. Trust water rights must be held in trust and managed by the Washington Department of Ecology (DOE). Water rights donated for instream flow purposes must be managed to ensure the donation qualifies as a gift for federal income taxation purposes.

For temporary trust water rights, the full quantity of the original right reverts to the water right holder when the trust period ends.

Funding. Funds may not be expended to purchase water rights unless specifically appropriated by the Legislature for that purpose. The state must cooperate with the United States in implementing the trust water rights program and treat trust water rights acquired with federal funds in the same manner as those acquired with state funds.

Uses. Trust water rights may be held or used 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.

Priority. Trust water rights retain the same priority date as the originating water right. Between the trust water right and its originating right, the trust water right is junior in priority unless otherwise specified by the water right holder and the DOE.

Water Conservation Projects. The state receives the "net water savings" achieved through state funding of a water conservation project. Conveyance of a trust water right pursuant to water conservation project funding can be achieved through transfer, lease, or other agreements. The state and water right holder must determine the amount of water the water right holder retains.

Irrigation Districts. An irrigation district proposing to transfer water to the trust water right program must provide evidence of its authority to represent the water rights holders. The state may not contract to acquire a water right served by an irrigation district without approval of the district's board of directors. The irrigation district board's disapproval of an acquisition must be based on factual evidence of probable adverse effects on the district's financial stability or ability to deliver water to the district.

Impairment. The trust water rights statutes do not authorize the involuntary impairment of any existing water right. 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. Impairment provisions do not apply to a donated trust water right for instream flows or a right leased for fewer than five years.

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.

Transfers, Changes, or Amendments. Statutory provisions regarding water rights transfers, changes, or amendments do not apply to trust water rights acquired through funding water conservation projects. Change and transfer provisions do not apply to trust water rights donated for instream flows but do apply to other transfers of water rights through the trust water rights program.

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

Instream Flows. A trust water right expressly conditioned for instream flow purposes must be administered according to that condition. The DOE must process a donated water right without reviewing the extent and validity of the portion of the right remaining with the water right holder.

Notice. The DOE must require published notice in a newspaper of general circulation in the relevant county once a week for two consecutive weeks. The DOE also must send notice to all appropriate state agencies, local and tribal governments, and other interested parties.

Documentation. The DOE must issue a water rights certificate in the state's name for a permanent trust water right. For trust water rights acquired through funding water conservation projects, the DOE must issue a superseding certificate reflecting the amount of water to which the water right holder is entitled. The DOE must issue certificates or other instruments for temporary trust water rights.

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

Water Banking. In 2003 the Legislature enacted provisions allowing the DOE to use the trust water rights program for water banking purposes in the Yakima River Basin. The 2003 legislation specified authorized purposes of water banking, including mitigation, water supply needs, beneficial uses, documentation of trust water rights transfers, and new water rights sources. This legislation also included prohibitions against using the water banking authority to injure existing water rights, issue temporary rights for new potable water uses, administer federal project rights, or allow carryover of stored water from one water year to another water year. Finally, the 2003 legislation established a process for applications and appeals related to water banking activities.

Definitions. "Net water savings" is defined as the amount of water determined to be conserved and usable for other purposes without impairment of existing water rights or reduction of available supply. Definitions of "water conservation project," "trust water right," and other terms are included.

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 in order to resolve conflicts and satisfy water needs.

### **Summary of Bill:**

The trust water rights program statutes applicable to areas of the state other than the Yakima River basin are reorganized. The trust water rights program provisions specific to the Yakima River Basin are consolidated in the general statute, and the Yakima River basin chapter is repealed. Substantive provisions regarding acquisition, establishment, quantity, documentation, notice, and uses of trust water rights are amended. Numerous technical revisions also are included.

Acquisition. Trust water rights may be established on a permanent or temporary basis only from existing water rights, evidenced by a certificate, claim, or permit. Trust water rights may be acquired only by means other than condemnation. All or part of a water right perfected through actual beneficial use may be established as a trust water right. In addition, a temporary trust water right may be established by a superior court conducting a general adjudication.

Permanent trust water rights are conveyed to the state; temporary trust water rights remain the property of the water right holder. Only the part of an existing water right established as a trust water right is subject to the provisions of the trust water rights program statutes.

The quantity of water placed into trust is determined based on the extent to which water use under the original right is reduced or foregone for specified reasons.

Acceptance of an existing water right as a temporary trust water right is not a determination of the validity or extent of the water right.

Management. Trust water rights must be placed in the state trust water rights program and held in trust by the DOE. Trust water rights must be administered in strict accordance with the terms under which the trust water right was established, including any agreement between the parties. All trust water rights must be managed to ensure the attributes of each water right, such as priority date, status, identification, and uses, remain distinct for each water right. The DOE may make arrangements and contracts to ensure these rights can be used to the fullest extent consistent with applicable law.

For temporary trust water rights, the water right holder resumes use of the original water right when the trust period ends.

Funding. When expending state funds to establish trust water rights, the DOE must exercise appropriate due diligence to ensure the validity of the water right for which funds will be expended.

Uses. Trust water rights may be used for any beneficial use specified in the water statutes. Beneficial uses include domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, thermal power production, 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.

Water Conservation Projects. The trust water right must be established for the period of time during which the water conservation project is in effect. The state and water right holder must agree to the terms and duration of the transfer before state funds are expended. The definition of "water conservation project" is repealed.

Irrigation Districts. The state may not establish a trust water right for water rights appurtenant to land within an irrigation district without approval of the district's board of directors.

Impairment. The trust water rights chapter does not authorize impairment of any existing water right. "Impairment" is defined as injury or detriment to existing water rights. Claims of impairment are reviewed during the process of trust water right establishment. Other impairment provisions are repealed.

Transfers, Changes, or Amendments. Statutory provisions regarding water rights transfers, changes, or amendments do not apply to temporary trust water rights but do apply to other trust water rights.

Relinquishment. Statutory relinquishment provisions do not apply as of the date the trust water right is established.

Instream Flows. The DOE must accept donations of trust water rights for instream flow purposes on the donor's terms, if those terms satisfy the statutory trust water rights requirements and are relevant and material to protecting the donor's interests.

Notice. The DOE must issue a final decision after notice and consideration of comments. The DOE must provide copies of the final decision to the applicant and to persons who commented on the application. Notice procedures for filing impairment claims related to temporary trust water rights establishment are specified.

The DOE must establish expedited notice procedures for proposals to establish trust water rights during a formally declared drought.

Documentation. The DOE must issue a certificate of change or transfer for permanent trust water rights. This certificate must be filed for record with the DOE, and a duplicate must be issued to the applicant. The duplicate certificate may be filed with the appropriate county auditor.

The DOE must issue a superseding document to the water right holder for partial transfers specifying the quantities of the trust water right and the remaining right. The superseding document must include conditions to ensure reduced water use is achieved. The DOE must develop forms for identifying information related to trust water rights establishment.

Appeals. Appeals of the DOE's decisions regarding trust water rights may be filed with the Pollution Control Hearings Board.

Water Banking. The DOE may use previously unappropriated water released from withdrawal by the United States for water banking purposes. Issuance of new water rights is an authorized water banking purpose when these rights (in combination with trust water rights held for water banking) will not decrease the total water supply available in the Yakima River basin.

Definitions. "Impairment" is defined by reference to the water code's impairment provisions. The definition of "net water savings" is amended to include surface and ground water bodies and to reference time of funding. The "trust water right" definition is amended to include any existing water right. The definitions of "pilot planning areas" and "water conservation project" are removed.

Findings. Legislative findings are added regarding the ability of the trust water rights program to facilitate voluntary water rights transfers, secure and preserve water rights, and satisfy existing and future needs for water. Legislative findings also recognize the importance of the trust water rights program and the complexity and difficulties associated with the current program. In addition, legislative findings recognize the trust water rights program's ability to promote cooperative efforts to satisfy existing rights and other needs in the Yakima basin.

Legislative intent is specified to enhance program effectiveness, clarify and consolidate procedures, improve incentives, and remove disincentives. Legislative policies to preserve beneficial uses of water and to consider growing communities' water needs and instream and out-of-stream uses are added.

**Appropriation:** None.

**Fiscal Note:** Requested on January 27, 2005.

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