

HOUSE BILL REPORT

HB 1571

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to the adjudication of water rights.

Brief Description: Regarding the adjudication of water rights.

Sponsors: Representatives Blake and Chandler; by request of Department of Ecology.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 1/30/09, 2/20/09 [DPS].

Brief Summary of Substitute Bill

- Authorizes the Department of Ecology to initiate a limited adjudication of water rights within a basin.
- Establishes the requirements for the adjudication claims.
- Encourages the settlement of adjudication claims out of court.
- Provides criteria for the disqualification of judges.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Blake, Chair; Jacks, Vice Chair; Chandler, Ranking Minority Member; Smith, Assistant Ranking Minority Member; Kretz, Lias, McCoy, Nelson, Ormsby, Pearson, Van De Wege and Warnick.

Staff: Jaclyn Ford (786-7339)

Background:

The state's Surface Water Code establishes a general adjudication procedure. An adjudication can determine rights to surface water, ground water, or both. Holders of water rights or watershed planning units may petition the Department of Ecology (DOE) to start an adjudication. The DOE may also do so at its own discretion. Such a proceeding is

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conducted in the superior court with the DOE as the plaintiff. Each person filing a statement of claim in the proceeding must pay a filing fee to the court. The DOE, or a designee of the DOE, takes testimony and files a report with the court of its findings regarding the water rights of all of the entities claiming water rights in the proceeding. The expenses incurred by the state in such a proceeding or upon an appeal are borne by the state.

Summary of Substitute Bill:

Commencement of Limited Adjudication.

Upon the filing of a petition with the DOE by any water right claimant, the DOE may commence a limited adjudication of water rights. The limited adjudication may be used in an area where the source of water under adjudication does not affect every water right holder in a basin. The DOE may not join as a party an Indian tribe or the United States in a limited adjudication.

Any water right claimant may move to: (1) intervene in a limited adjudication of claims to such a water source; (2) when joined as a party in a limited adjudication, to join another party; or (3) when joined as a party in a limited adjudication, to dismiss the adjudication for failure to join an indispensable party.

Prior to filing a limited adjudication, the DOE must: (1) notify and consult with affected state agencies, local governments, and Indian tribes; (2) publish notice of its intent to file a limited adjudication on the same day of each week for two consecutive weeks in a legal newspaper of general circulation in the area where the property that is the subject of the action is located; and (3) post notice of its intent to file a limited adjudication on the DOE website prior to the date of the last newspaper publication.

After a petition by a water user or planning unit, the DOE will consult with the Administrative Office of the Courts to determine whether there are sufficient resources available to the DOE and the superior court to conduct an adjudication in addition to executing their other duties. The DOE must report to the Legislature on the estimated budget needs for the superior court and the DOE to conduct the adjudication.

The court is encouraged to conduct the water rights adjudication with innovative practices and technologies, such as filing documents electronically, using teleconferencing for appearances, and pre-filing testimony.

Water Right Claimant.

"Water right claimant" means any person who claims a right to divert or withdraw water from a water source, or makes a permanent transfer of a water right to the Washington Trust Water Rights Program and retains a beneficial interest in that water right. A water right claimant does not include the DOE.

Summons.

Service of the summons may either be by personal service or certified mail. If a potential claimant cannot be found within Washington or fails to sign a receipt for the certified mail

summons, summons may be made in a publication of general circulation in the county where the subject water is found. Summons must be served at least 60 days before the required return date of the summons.

The summons will require the claimants to appear and file a claim to the subject water involved. If the claimant fails to file a claim, the court may issue a default judgment. A party in default may file a late claim under the same circumstances the party could respond or defend under court rules on default judgments.

Preliminary Investigation.

Upon receiving the adjudication claims and filing the claimants' evidence, the DOE must conduct a preliminary investigation to examine the uses of the subject waters. After the preliminary investigation, the DOE must file with the court the findings of the investigation, and: (1) enter a motion for a partial decree in favor of all the stated claims; (2) enter a motion seeking determination of contested claims; or (3) both.

Referee.

The superior court may appoint a referee or other judicial officer to assist the court.

Judgment.

The judgment is binding in a limited adjudication, but not in a general adjudication. However, the determination of a limited adjudication is admissible as prima facie evidence of the existence and conditions of the right in a general adjudication. Out-of-court settlements are encouraged.

Disqualification of a Judge.

A judge may be partially or fully disqualified from either a limited adjudication or a general adjudication. Partial disqualification means disqualification from hearing specified claims. Full disqualification means disqualification from hearing any aspect of the adjudication. A judge is partially disqualified when the judge's impartiality might reasonably be questioned and the apparent or actual partiality is limited to specified claims. A judge is fully disqualified when the judge's impartiality might reasonably be questioned, and the apparent or actual partiality extends beyond limited claims so that the judge should not hear any part of the adjudication.

Appeals.

Any party to an appeal may move the court to certify portions of the appeal to the Pollution Control Hearings Board (PCHB), but the appellant must file a motion for certification no later than 90 days after the appeal is filed. However, the PCHB may not hear appeals of decisions by the DOE to administer or enforce a final adjudication decree if the superior court has retained jurisdiction.

Fees.

At the time of filing an adjudication claim, the claimant must pay the clerk of the superior court a fee of \$25. Within 90 days after the final decree, each party must pay the DOE \$50 for preparing and issuing a water right certificate.

Substitute Bill Compared to Original Bill:

The substitute bill deletes:

- the authority for the DOE to enter onto land appurtenant to the claim to conduct a preliminary investigation; and
- retroactive effective dates.

The substitute adds:

- that prior to filing a limited adjudication, the DOE must:
 - (1) notify and consult affected state agencies, local governments, and Indian tribes;
 - (2) publish notice of its intent to file a limited adjudication; and
 - (3) post notice of the intent to file a limited adjudication on its website;
- a definition of “water right claimant;”
- additional motions for a water right claimant;
- criteria for the statement to the court;
- provisions for a party in default to file a late claim;
- criteria for the adjudication claim;
- criteria for evidence; and
- provisions for the superior court to appoint a referee and adopt special rules.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill will make necessary adjustments. Once an adjudication occurs, it makes water management more efficient. This bill will make the process more timely and use court time better. This bill requires the DOE to do advance work and will lessen the amount of time spent in court. This bill includes measures that were recommendations from the 2003 Water Disputes Task Force. This bill allows for timely decisions and court efficiency. Money should be funneled through the judiciary system and not the DOE.

(With concerns) This bill does not help move along current adjudications. This bill would leave us severely disadvantaged in the Idaho adjudication. This bill would allow the DOE to exclude groundwater claimants; they need to be in the adjudication. The *Aquavella* pretrial procedures should be codified. This may impair a claimant's ability to protect his or her water right. The deadlines are too short; superior court civil rules should apply.

(Opposed) Limited adjudications give the DOE too much discretion. Current law gives individual water users the ability to settle disputes in court, which is a much better option than adjudication.

Persons Testifying: (In support) Representative Blake, prime sponsor; Ken Slattery, Department of Ecology; Rick Neidhart, Superior Court Judges Association; and Peter Dykstra, Washington Rivers Conservancy.

(With concerns) Kathleen Collins, Washington Water Policy Alliance; Joe Mentor, Mentor Law Group; Dawn Vyvyan, Yakama Nation; and Rob Kavanaugh.

(Opposed) Mike Schwisow, Washington State Water Resources Association.

Persons Signed In To Testify But Not Testifying: None.