

SENATE BILL REPORT

ESHB 1571

As Reported by Senate Committee On:
Environment, Water & Energy, March 25, 2009

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

Brief Description: Regarding the adjudication of water rights.

Sponsors: House Committee on Agriculture & Natural Resources (originally sponsored by Representatives Blake and Chandler; by request of Department of Ecology).

Brief History: Passed House: 3/12/09, 84-12.

Committee Activity: Environment, Water & Energy: 3/17/09, 3/25/09 [DPA, DNP].

SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

Majority Report: Do pass as amended.

Signed by Senators Rockefeller, Chair; Pridemore, Vice Chair; Fraser, Hatfield, Marr, Morton and Ranker.

Minority Report: Do not pass.

Signed by Senators Honeyford, Ranking Minority Member; Delvin and Holmquist.

Staff: Karen Epps (786-7424)

Background: The Surface Water Code has established a means by which the various existing rights to surface water or ground water from a water body may be adjudicated in court to determine the validity of claims to water rights and to identify the amounts of water to which each person with a right is entitled, the order of priority (seniority) of those rights, and other aspects of the rights. General stream adjudications do not create new water rights, but only confirm existing rights. Federal law authorizes the water rights of the United States to be adjudicated in state court if certain findings are made by a federal court.

A general stream adjudication is conducted in the superior court with the Department of Ecology (Ecology) as the plaintiff. Each person filing a statement of claim in the proceeding must pay a filing fee to the court. An evidentiary hearing is conducted by a duly authorized designee of Ecology, known as a referee. At the evidentiary hearing, those claiming the right to use water (or their representatives) appear to present factual information through testimony and documents supporting their claims. After the evidentiary hearing, the referee issues a

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report of findings and recommendations to the court. The superior court judge then reviews the recommendations and issues a final decree. The court then directs Ecology to issue a Certificate of Adjudicated Water Right for each confirmed right.

Eighty-two drainage systems (basins) in the state have been adjudicated since 1918. The Yakima River Basin Surface Water Adjudication is the only general adjudication currently in process and is nearing completion. While the Yakima Adjudication has been taking place, 13 smaller adjudications have been completed.

Summary of Bill (Recommended Amendments): Prior to filing an adjudication, Ecology must consult with the Administrative Office of the Courts in order to determine whether there are sufficient resources available to Ecology and the superior court to be able to conduct an adjudication in addition to executing their other duties. Additionally, Ecology must report to the appropriate committees of the Legislature on the estimated budget needs for the superior court and Ecology to conduct the adjudication.

After Ecology receives a petition from a water user or planning unit or if Ecology determines an adjudication is needed for groundwater or surface water or both, Ecology must identify each person or entity owning real property situated within the area to be adjudicated, but outside the boundaries of a city, town, or special purpose district that provides water, or identify all known persons claiming a water right, or both. Ecology must submit to the superior court a brief statement of the facts in describing the water involved, the parties involved, and the reasons why an adjudication is necessary.

The court is encouraged to conduct water right adjudications employing innovative practices and technologies, including electronic filing of documents, including notice and claims; appearance via teleconferencing; pre-filing testimony; and other practices and technologies consistent with court rules and emerging technologies. Additionally, early settlement of claims is needed for a fair and efficient adjudication, so Ecology and the other parties should identify opportunities for settlement. The superior court is encouraged to consider entering, after notice and hearing and as the court determines appropriate, pretrial orders from the Yakima Adjudication.

Service of the summons may either be by personal service or certified mail. Service of summons must be on all known persons as identified in the statement of facts. The return date for service of summons must be not less than 100 days or more than 130 days. If a person fails to file an adjudication claim after being served, Ecology must file a motion for default against that person. A party in default may file a late claim under court rules on default judgments.

Each defendant must file an adjudication claim on a form and in a manner provided by Ecology. Ecology will provide information to assist claimants of small uses of water in completing their adjudication claim. The adjudication claim must contain the name, mailing address, telephone number, and email address, if possible, of the claimant; the purpose or purposes of use of the water and the extent of each use; the date water was put to first use; the date of construction of wells, ditches, or other works; the dimensions and maximum capacity of the water conveyance system used; the maximum amount of land ever under irrigation; the period of time in which water is used annually; the legal description of the land

upon which the water is used; whether a right to both surface water or groundwater or both is claimed; the legal basis for the claimed right; whether documents have been filed with Ecology; and the amount of land and the quantities of water used thereon. An adjudication claim may be filed electronically if authorized by state and local court rules.

Each claimant must file evidence with the court to support the adjudication claim. The evidence may include permits or certificates of water rights, a statement of claim, documents related to issuance of a land patent, aerial photographs, decrees of previous water rights adjudications, crop records, records of livestock purchases and sales, metering records, records of diversion, and any other evidence to support that a water right was obtained and has not been abandoned or relinquished.

Upon the receipt of the adjudication claims and the filing of the claimants' evidence, Ecology must conduct a preliminary investigation in order to examine the uses of the subject waters. Ecology must make a good faith effort to notify a landowner or the person with a right to possess the land prior to entering private land. However, as part of the preliminary investigation, Ecology has the right to enter land appurtenant to a claim. After the preliminary investigation, Ecology must file with the court the findings of the investigation, and enter a motion for a partial decree in favor of all the stated claims, enter a motion seeking determination of contested claims, or both. A party may file and serve a response to Ecology motion(s).

A judge may be partially or fully disqualified from a general 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. A party filing a motion for disqualification has the burden of proving that the judge should be disqualified.

At the time of filing an adjudication claim, the claimant must pay the clerk of the superior court a fee of \$25, except that Indian tribes and the United States are not subject to the fees. Within 90 days after the final decree, each party must pay Ecology \$50 for preparing and issuing a water right certificate.

EFFECT OF CHANGES MADE BY ENVIRONMENT, WATER & ENERGY COMMITTEE (Recommended Amendments): Makes technical changes, including removing the phrase "or a part of the" and the phrase "for an adjudication" in three places. Requires that a court in a general adjudication issue a final decree and provide notice of the decree to all the parties. Establishes that within 90 days after the final decree, each party, except the United States or an Indian Tribe, must pay Ecology \$50 for preparing and issuing a water right certificate. Provides that the changes in Section 14 continue to apply in current adjudications as this section is amending the statute that establishes rules for any review of change or transfer decisions made by Ecology for rights that are subject to a general adjudication proceeding that is being litigated actively.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Engrossed Substitute House Bill: PRO: Adjudications are a critical tool to managing our water resources. The goal of this bill is to design a streamlined approach to adjudications that meet the needs of water users, environmental concerns, and others. The bill does modernize the adjudication process and helps provide information through the adjudication process to better manage water resources. This bill is very important so that the next adjudication can be heard and decided in a timely manner. This will pave the way for the Spokane Adjudication. The bill follows the recommendations from the 2003 Water Disputes Task Force. There is a need for more modern general adjudication procedures to be made available. This bill provides for the encouragement of the use of modern technologies that will save time. Additionally, this bill provides for the encouragement of settlements to reduce the cost and expedite completion of these very complex proceedings.

OTHER: There is concern that Ecology is planning to initiate a general adjudication on the Columbia and Snake Rivers.

Persons Testifying: PRO: Darcy Nonemacher, American Rivers; Bill Clarke, Washington Public Utility Districts Association; Rick Neidhardt, Superior Court Judges Association, Water Work Group; Joe Mentor, Mentor Law Group, PLLC; Dawn Vyvyan, Yakama Nation; Ken Slattery, Ben Bonkowski, Ecology.

OTHER: Pat Boss, Columbia Snake River Irrigators Association.