

# SENATE BILL REPORT

## SB 5533

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As of February 25, 2009

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

**Brief Description:** Regarding the adjudication of water rights.

**Sponsors:** Senators Rockefeller, Honeyford, Morton, Fraser and Shin; by request of Department of Ecology.

**Brief History:**

**Committee Activity:** Environment, Water & Energy: 2/10/09.

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### SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

**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 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, thirteen smaller adjudications have been completed.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Summary of Bill:** A water user or planning unit may petition Ecology to start a limited adjudication of water rights or Ecology may commence a limited adjudication on its own. 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. An Indian tribe or the United States may not be joined as a party in a limited adjudication. However, Ecology must consult with any federally-recognized Indian tribe with an interest in the subject waters before filing a limited adjudication. 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.

After Ecology receives a petition from a water user or planning unit or if Ecology determines an adjudication is needed, 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. Ecology may use its discretion when initiating a general adjudication or a limited adjudication of rights to only surface water, only groundwater, or both surface water and groundwater together.

Service of the summons may either be by personal service or certified mail. For a general adjudication, service of summons can be either on all known persons claiming the right to use or store for use water involved or all owners of real property in the area to be adjudicated or both. For a limited adjudication, service of summons must be on all persons whose right or claim to use water is sought to be determined. If a potential claimant can not 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 of 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 return date of the summons will be between 100 and 130 days from the date the summons was issued. 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.

Each defendant must file an adjudication claim that contains a name, mailing address, telephone number, and email address; 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. Within 120 days after the date set by the court for filing an adjudication claim, each claimant must file evidence to support the claimant's adjudication claim.

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.

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 has 90 days to file and serve a response to Ecology motion(s).

A judge may be partially or fully disqualified from either a limited adjudication or 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 (Proposed First Substitute):** Requires a water right claimant to petition Ecology prior to Ecology commencing a limited adjudication. Adds that prior to filing a limited adjudication, Ecology must notify and consult affected state agencies, local governments, and Indian tribes; publish notice of its intent to file a limited adjudication; and post notice of the intent to file a limited adjudication on its website. Allows a water right claimant to move to intervene in a limited adjudication or, when joined as a party in a limited adjudication, to join another party, or to dismiss the adjudication for failure to join an indispensable party. Provides that a decree in a limited adjudication may be superseded in a subsequent general adjudication, but the parties to the limited adjudication may not raise issues or claims that were decided in the prior proceeding. Encourages the superior court to consider entering, after notice and hearing and as the court determines appropriate, pretrial orders from the Yakima Adjudication. Modifies the appeal process of a decision by Ecology on an application to change or transfer a water right subject to an adjudication. Allows a superior court to retain jurisdiction on appeals concerning decisions by the department that affect water in the adjudication.

**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:** PRO: The primary purpose of the bill is to tune-up the adjudication statutes after 90 years. As the Yakima Adjudication winds down, important lessons have been learned and this bill tunes-up the statutes and makes the process more efficient. The bill adopts many of the recommendations from the 2003 Water Disputes Task Force report.

CON: There are concerns about expediting the process. The timeframe established in the bill is way too short. Superior court rules should establish the procedures.

OTHER: Adjudication is a valuable tool and there are lessons from the Yakima Adjudication that need to be addressed. There are concerns about the limited adjudication process. However, limited adjudications could be a useful tool. This bill is very timely. It is highly likely that the final decree will be entered in the Yakima Adjudication and an adjudication will be filed in Spokane between now and next session.

**Persons Testifying:** PRO: Ken Slattery, Ben Bonkowski, Ecology; Rick Neidhardt, Superior Court Judges Association.

CON: Dawn Vyvyan, Yakama Nation.

OTHER: Kathleen Collins, Washington Water Policy Alliance; Joe Mentor, Mentor Law Group.