

# SENATE BILL REPORT

## SB 6260

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As of February 17, 2020

**Title:** An act relating to tribal traditional and cultural interests in water resources.

**Brief Description:** Concerning tribal traditional and cultural interests in water resources.

**Sponsors:** Senators McCoy, Stanford, Wilson, C. and Das.

**Brief History:**

**Committee Activity:** Agriculture, Water, Natural Resources & Parks: 1/21/20.

**Brief Summary of Bill**

- Allows any Washington tribe to file a description of its historical and current uses of a surface or ground water body that support the cultural, spiritual, ceremonial, and traditional rights or lifeways of the tribe, with the Department of Ecology (Ecology).
- Requires Ecology to recognize the tribe's traditional and cultural interests in the water body when the filing is supported by certain documentation.
- Requires Ecology to consider recognized tribal traditional and cultural interests when reviewing various water right applications.
- Restricts Ecology from categorially exempting, from the requirements of the State Environmental Policy Act, water right applications for a new water right in which there is a recognized tribal historical and cultural interest.

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**SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS**

**Staff:** Karen Epps (786-7424)

**Background:** Water Code. Washington operates under a water right permit system. With certain exceptions, new rights to use surface or ground water or to establish reservoir and storage projects must be established according to the permit system. A person seeking a new water right files an application with Ecology, which must consider a four-part test when deciding whether to issue the requested right: (1) whether water is available; (2) whether a

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beneficial use of water would be made; (3) whether granting the right would impair existing rights; and (4) whether the proposed use would detrimentally affect the public interest. If an application passes this test, Ecology issues a permit which establishes a time table for constructing the infrastructure to access the water and for putting water to beneficial use. When the conditions of the permit are satisfied, Ecology issues a water right certificate.

Ecology may permit certain changes to a water right. Ecology may also permit a transfer of a water right from one holder to another. In processing change or transfer applications, Ecology analyzes the validity, limits, and quantity of the right. Changes or transfers cannot impair existing rights of other water right holders. Ecology must, when evaluating an application for a water use permit or for a transfer, change, or amendment of a water right, take into consideration the benefits of any water impoundment that is included as a component of the application.

Water Resources Act. The Legislature passed the Water Resources Act of 1971 setting forth fundamentals of water resource policy for the state to ensure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state. These fundamentals require allocation of water in a manner that secures the maximum net benefits, protects the quality of the natural environment, protects water quality, provides adequate and safe supplies of water, and promotes regional water supply systems that serve the public generally.

State Environmental Policy Act. The State Environmental Policy Act (SEPA) establishes a review process for state and local governments to identify environmental impacts that may result from governmental decisions, such as the issuance of permits or the adoption of land use plans. Under SEPA, a government agency is designated as the lead agency, and in that role is assigned responsibility for complying with SEPA's procedural requirements, including making a threshold determination and preparing an environmental impact statement when one is required. Under SEPA laws and in SEPA rules adopted by Ecology, certain projects or activities are exempt from SEPA requirements.

**Summary of Bill:** Water Code. Any Washington tribe may file with Ecology a description of its historical and current uses of a surface or ground water body that support the cultural, spiritual, ceremonial, and traditional rights or lifeways of the tribe, including both consumptive and nonconsumptive uses. When the filing is supported with documentation that such uses by the tribe have been longstanding, Ecology must recognize the traditional and cultural interests in the water body.

Ecology must consider whether a new water right application will be detrimental to a recognized tribal traditional and cultural interest when issuing or rejecting a water right permit. When considering a change application, Ecology must consider whether the change can be made without detriment or injury to a recognized tribal traditional and cultural interest. The point of diversion of water may be changed, if the change can be made without detriment or injury to a recognized tribal traditional and cultural interest. Ecology may issue an amendment to a groundwater permit or certificate only on certain conditions, including that recognized tribal traditional and cultural interests are not impaired.

Water Resources Act. The fundamentals of water resource policy are amended to include the protection of recognized tribal traditional and cultural interests. This act is intended to expand the recognition of tribal traditional and cultural interests in the administration of the state water code. Nothing in this act is intended to otherwise affect or diminish the right of any tribe or any person regarding the state water resource management provisions of the water code, the Water Resources Act of 1971, and the groundwater code.

State Environmental Policy Act. Ecology may not categorially exempt an application for a new withdrawal from a surface or groundwater body in which there is a recognized tribal historical and cultural interest from the requirements of SEPA.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony:** PRO: The tribes interest is never brought into the conservation and by the time a tribe finds out about a water right transfer, the tribe has to go to court. Generally the tribe will win those types of lawsuits. Tribes considered water for the public use and tribes did not understand the concept of owning the water. The bill provides that the tribes need to be considered when water right decisions are being made. Tribes want to have their share and be able to take care of fish and other living things. This bill does not create new water rights for tribes but the issues has been how to quantify them and this bill attempts to do that. The only way the state has right now to quantify rights is through adjudication.

CON: This bill would be a huge change in Washington water law. It would create confusion and litigation and probably no resolution. Tribal water rights are based in federal law and there has always been a tension between state and federal water rights. The proper way to resolve this is through adjudication and it provides certainty. This bill would probably stop the permit system in the state altogether. The challenge with this bill is that the process to determine state water rights happens through the state permitting system and the process to establish federal reserve water rights happens through a court system. Federal reserve water rights and state water rights are fundamentally at odds with one another. This bill goes too far and goes against decades of water law. The stakeholder process that determines how water is allocated does help to increase buy in from all the stakeholders and creates a collaborative sense of ownership of the final determination and this bill would threaten that.

OTHER: It is difficult to work within the state code when discussing cultural beliefs. Moving water around that has not been quantified, has not been adjudicated, and has not been measured makes it challenging to know what is being used. It is very difficult to quantify what a cultural or traditional right is. The tribes water rights are the most senior in Washington. The bill would make it very difficult for Ecology operationally because the tribal water rights have not been quantified. Without an adjudicated water right, it is difficult

for Ecology to weigh that right against the others that are permitted. Ecology reaches out to tribes prior to making a final determination.

**Persons Testifying:** PRO: Senator John McCoy, Prime Sponsor; Bruce Wishart, Center for Environmental Law and Policy, Sierra Club.

CON: Kathleen Collins, Washington Water Policy Alliance; Bill Clarke, Washington PUD Association; Jan Himebaugh, Building Industry Association of Washington; Peter Godlewski, Association of Washington Business.

OTHER: Dawn Vyvyan, Puyallup Tribe Yakama Nation; Mary Verner, Department of Ecology.

**Persons Signed In To Testify But Not Testifying:** No one.