

HOUSE BILL REPORT

ESSB 5828

As Passed House - Amended:

February 27, 2024

Title: An act relating to water rights adjudication commissioners and referees.

Brief Description: Concerning water rights adjudication commissioners and referees.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Shewmake, Lovelett, Dhingra, Lovick and Nobles; by request of Administrative Office of the Courts).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/20/24, 2/21/24 [DP].

Floor Activity:

Passed House: 2/27/24, 95-0.

Brief Summary of Engrossed Substitute Bill (As Amended by House)

- Authorizes superior courts to appoint commissioners for water rights adjudications.
- Specifies the powers of water commissioners.
- Authorizes the appointment of water adjudication referees without consent of the parties.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass. Signed by 11 members: Representatives Taylor, Chair; Farivar, Vice Chair; Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Abbarno, Cheney, Entenman, Goodman, Peterson, Thai and Walen.

Staff: Yelena Baker (786-7301).

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

Background:

Superior Court Commissioners.

Article IV, section 23 of the Washington Constitution authorizes the superior courts to appoint up to three court commissioners in each county. Court commissioners have the power to perform all the duties of a superior court judge that do not require a trial by jury, and other duties provided by law to aid in the administration of justice.

The Legislature has authorized superior courts to appoint additional commissioners, including specialized mental health commissioners and criminal commissioners. These statutorily authorized commissioners are limited to the authority that they are expressly granted in statute.

All acts and proceedings of court commissioners are subject to revision by a superior court judge upon motion by a party.

Trial Before Referee.

Upon a written consent of the parties to a civil action, the court may order all or any of the issues of fact or law referred to a referee. The written consent of the parties constitutes a waiver of the right to trial by jury by any party having the right.

Where the parties do not consent, the court may still make a reference in certain cases, such as where an issue of fact will require the examination of a long account on either side or when it is necessary for the information of the court in a special proceeding.

If a referee is appointed by the court, each party has the same right to challenge the appointment. Challenges must be made and determined in the same manner and with like effect as in the formation of juries, except that neither party is entitled to a peremptory challenge.

Water Rights Adjudication.

State Surface Water Code establishes a general water rights adjudication procedure. A water rights 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 (Ecology) to start an adjudication, or Ecology may start an adjudication at its own discretion.

A water adjudication proceeding is conducted in a superior court where the plaintiff is Ecology, and the defendants are the persons or entities owning real property situated within the area to be adjudicated that do not receive their water from municipal water providers, and all known persons claiming a right to the water sought to be determined.

The court must appoint a guardian ad litem for any defendant in a water adjudication proceeding who is a minor, a person with a disability, or a person alleged to lack

competency.

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

Summary of Amended Bill:

The superior court of each county may appoint one or more attorneys to act as water commissioners to assist the superior court in disposing of its business. A person appointed as a water commissioner may also be appointed to any other commissioner positions authorized by law.

In making the appointment, the court must consider a potential commissioner's experience with water law and water use. A person appointed as a water commissioner must receive training from the Administrative Office of the Courts as soon as reasonably practicable on specified topics, including water law, Indian law, water science, and cultural awareness.

The superior court judges may authorize water commissioners to perform any of the following in a water rights adjudication:

- appoint guardians ad litem for claimants;
- hold evidentiary hearings to determine the facts underlying individual and multiple water right claims;
- hold hearings on all contested claims, objections, and stipulated agreements;
- issue decisions on factual and legal issues;
- enter default judgments, settlement agreements, and conditional final orders;
- enter the orders and findings of the adjudication; and
- provide supervisions of the water rights adjudication as ordered by the presiding judge and assigned water adjudication judge.

All acts and proceedings of a water commissioner are subject to revision by the superior court.

In a water adjudication proceeding, the superior court may order all or any issues of fact or law related to the water adjudication referred to a referee without the consent of the parties. Challenges to the appointment of a referee must be made pursuant to the Surface Water Code provisions regarding disqualification of a judge rather than the state law governing trials before referees.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) The scale of the anticipated water rights adjudication in Whatcom County Superior Court is epic in comparison to the court's annual court filings. It is anticipated that the litigation will involve up to 25,000 claims, and this is in a jurisdiction that last year had approximately 6,000 total matters filed. This litigation will affect countless individuals, municipalities, governments, sovereign nations, and tribes. The court needs maximum flexibility in the manner in which the court tries to triage this massive influx of cases. When the Legislature rewrote the Water Code a decade ago, it wisely contemplated that courts would use various forms of judicial officers to address the complexity of a water adjudication. This bill simply confirms what previous legislation allowed and clearly establishes the statutory authority for those judicial officers to act.

(Opposed) None.

(Other) Colville Tribal Council supports this bill, but the bill does have one weakness. The bill does not require that a commissioner or referee have any experience in Indian water law, and there is a significant difference between just water rights adjudication and Indian water law. The Colville Tribal Council passed a resolution asking that the bill be amended to require that any appointed commissioner or referee to have some background and knowledge of Indian water law cases.

Persons Testifying: (In support) David Freeman, Whatcom County Superior Court.

(Other) Mel Tonasket, Confederated Tribes of the Colville Reservation.

Persons Signed In To Testify But Not Testifying: Shannon Hinchcliffe, Administrative Office of the Courts; Lola Flores, Department of Ecology; Michael Moran, Confederated Tribes of the Colville Reservation; and Bill Clarke, Whatcom Ag Water Board.