

HOUSE BILL REPORT

HB 2564

As Reported by House Committee On:
Agriculture & Natural Resources
Appropriations

Title: An act relating to participation by the state of Washington in a pilot negotiation and settlement of water rights involving Washington Indian tribes and the federal government.

Brief Description: Authorizing a pilot program for the settlement of water rights.

Sponsors: Representatives McCoy, Linville, Conway, Rockefeller, Sullivan, McDermott, Ormsby, Hunt, Lovick, Moeller, Kenney, McIntire, Kagi and Clibborn.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 1/28/04, 2/6/04 [DPS];
Appropriations: 2/9/04 [DP2S(w/o sub AGNR)].

Brief Summary of Second Substitute Bill

- Directs the state to form a negotiating team to participate in a federal pilot process to determine and quantify water rights claimed by the United States and by tribes agreeing to participate in the process.
- Allows the state negotiating team, with the parties' consent, to participate in resolving disputes between state-based and federally based water rights.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Eickmeyer, Grant, Hunt, McDermott and Quall.

Minority Report: Do not pass. Signed by 6 members: Representatives Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Kristiansen, Assistant Ranking Minority Member; Chandler, Orcutt and Sump.

Staff: Caroleen Dineen (786-7156).

Background:

In 1907 the United States Supreme Court determined that the federal government may reserve water rights and exempt these water rights from appropriation under state water law. *Winters*

v. United States, 207 U.S. 564 (1907). These federal reserved water rights include rights held by the United States for the government and in trust for Indian tribes.

Federal law, however, allows federal reserved rights to be adjudicated in a state court under certain circumstances. By what is known as the McCarran Amendment, the United States consented to joinder of the United States as a defendant in a comprehensive state water rights adjudication. 43 U.S.C. § 666. The McCarran Amendment applies to water rights claims made by the United States for the government and to tribal water rights claims made by the United States or Indian tribes. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

The Morris K. Udall Foundation (Udall Foundation) is a federal executive branch agency focused on, among other issues, environmental studies and public policy conflict resolution. The Udall Foundation created the U.S. Institute for Environmental Conflict Resolution (the Institute) in 1988 to assist in the resolution of federal environmental, natural resources, and public lands conflicts and controversies. Among other activities, the Institute reviews requests from state and local governments, tribes, and non-governmental organizations for services related to multi-party conflict resolution processes involving federal agencies or interests. The Institute provides services such as conflict assessment, assisted negotiation and mediation, facilitation, and dispute system design and evaluation. The Institute may provide some funding for participation in this type of process. In addition, the Institute contracted with the Western Justice Center Foundation for design of a pilot project to mediate complex environmental disputes in a district court in Oregon and to develop a joint project to increase mediation of environmental disputes in federal courts.

Summary of Substitute Bill:

The state is directed to participate in a federal pilot process to determine and quantify water rights claims of the United States and the tribal governments that agree to participate. The federal pilot process is expected to include a scoping process, development of alternatives, timeliness, collaborative decision making, public review, development of funding alternatives, and mediation.

The state must establish a negotiating team within the Office of the Governor to participate in this pilot process. With the parties' consent, the state negotiating team may participate in resolution of disputes between state-based water rights and federal water rights. The state negotiating team must report its findings and recommendations to the Governor and the Legislature by January 1, 2006.

A general fund appropriation of \$200,000 is made to the Office of the Governor for the fiscal year ending July 1, 2005. The appropriation is to pay the costs of forming and operating the negotiating team and an equitable share of the costs of facilitation by the United States Institute for Environmental Conflict Resolution.

Legislative findings are included relating to the need for greater certainty and security regarding water rights based on federal and state law. Legislative findings also recognize the need for state water law to take into account water rights based on federal law, including treaties between the federal government and Indian tribes in Washington. In addition, legislative findings recognize the federal government's current efforts to determine federal and tribal water rights. Legislative intent is specified for the state to participate in the federal proceedings to represent the state's interests, protect state-based water rights users, and ensure these processes are conducted in a fair and respectful manner.

Substitute Bill Compared to Original Bill:

The substitute revises the expectations regarding the scope of the federal pilot process. The substitute also adds provisions allowing the state negotiating team to participate in resolution of disputes between state-based water rights and federal water rights and requires the state negotiating team to report its findings and recommendations to the Governor and the Legislature. In addition, the substitute adds legislative findings regarding the need for state water law to take into account water rights based on federal law and the federal government's current efforts to determine federal and tribal water rights. Further, the substitute specifies legislative intent for the state to participate in the federal proceedings for specified purposes.

Appropriation: The sum of \$200,000 is appropriated to the Office of the Governor for the costs of forming and operating a negotiating team and for a share of the facilitation costs.

Fiscal Note: Available.

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

Testimony For: (Original bill) This bill mirrors a bill that is currently moving in Congress. Determining tribal water rights is critical to resolving water supply issues across the state. A better way of dealing with tribal water rights issues is important now, and this bill is a good step in the right direction. The pilot program established in this bill is extremely important to ensure water quality and quantity for all the state's citizens. The funding request is consistent with the Governor's budget.

(In support with amendments) (Original bill) Settlements have been done or are being negotiated in other states, and the settlement process authorized in this bill offers the best approach to resolving tribal rights. The bill should be amended to: (1) ensure the language is not linked to federal language; (2) include participation of other water rights users; and (3) identify a specific product for the process.

Testimony Against: (Original bill) The bill does not take into consideration state-based water rights, and state-based water right holders who need the opportunity to participate and to appeal. Putting one category of water rights into a different process will not yield a good

result. The McCarran Amendment is a valuable tool for resolving water rights issues in state court, and it has been widely used in the West.

Persons Testifying: (In support) Randy Scott, Quinault Nation; and Steve Robinson, Northwest Indian Fisheries Commission.

(In support with amendments) Tom Laurie, Governor's Water Team.

(Opposed) Kristin Sawin, Association of Washington Business.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Agriculture & Natural Resources. Signed by 15 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Cody, Conway, Dunshee, Grant, Hunter, Kagi, Kenney, Kessler, Linville, McIntire, Miloscia, Ruderman and Schual-Berke.

Minority Report: Do not pass. Signed by 12 members: Representatives Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member; Alexander, Anderson, Boldt, Buck, Chandler, Clements, Cox, McDonald, Sump and Talcott.

Staff: Dave Johnson (786-7154).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Agriculture & Natural Resources:

The provision making an appropriation from the general fund was removed.

Appropriation: None.

Fiscal Note: Available on original bill.

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

Testimony For: This bill provides a reasonable solution for defining the federal portion of water rights in this state. Federal water rights are senior rights, and they need to be quantified so that the state can move forward. This bill mirrors a bill that is working its way through the U.S. Congress.

Testimony Against: None.

Persons Testifying: Representative McCoy, prime sponsor.

Persons Signed In To Testify But Not Testifying: None.