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ENGROSSED SUBSTITUTE HOUSE BILL 1640

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State of Washington

58th Legislature

2003 Regular Session

By House Committee on Agriculture & Natural Resources (originally sponsored by Representatives Linville, Hinkle, Grant, Chandler, Eickmeyer and Hankins)

READ FIRST TIME 03/05/03.

1 AN ACT Relating to authorizing water banking within the trust water  
2 program; amending RCW 90.42.005; adding new sections to chapter 90.42  
3 RCW; creating a new section; and declaring an emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 90.42.005 and 1991 c 347 s 1 are each amended to read  
6 as follows:

7 (1) It is the policy of the state of Washington to recognize and  
8 preserve water rights in accordance with RCW 90.03.010.

9 (2) The legislature finds that:

10 (a) The state of Washington is faced with a shortage of water with  
11 which to meet existing and future needs, particularly during the summer  
12 and fall months and in dry years when the demand is greatest;

13 (b) Consistent with RCW 90.54.180, issuance of new water rights,  
14 voluntary water transfers, and conservation and water use efficiency  
15 programs, including storage, (~~should be the preferred~~) all are  
16 acceptable methods of addressing water uses because they can relieve  
17 current critical water situations, provide for presently unmet needs,  
18 and assist in meeting future water needs. Presently unmet needs or  
19 current needs includes the water required to increase the frequency of

1 occurrence of base or minimum flow levels in streams of the state, the  
2 water necessary to satisfy existing water rights, or the water  
3 necessary to provide full supplies to existing water systems with  
4 current supply deficiencies; (~~and~~)

5 (c) The interests of the state and its citizens will be served by  
6 developing programs and regional water resource plans, in cooperation  
7 with local governments, federally recognized tribal governments,  
8 appropriate federal agencies, private citizens, and the various water  
9 users and water interests in the state, that increase the overall  
10 ability to manage the state's waters in order to resolve conflicts and  
11 to better satisfy both present and future needs for water; and

12 (d) Water banking as a function of the trust water program and as  
13 authorized by this chapter can provide an effective means to facilitate  
14 the voluntary transfer of water rights established through  
15 conservation, purchase, lease, or donation, to preserve water rights  
16 and provide water for presently unmet and future needs; and to achieve  
17 a variety of water resource management objectives throughout the state,  
18 including drought response, improving streamflows on a voluntary basis,  
19 providing water mitigation, or reserving water supply for future uses.

20 NEW SECTION. Sec. 2. A new section is added to chapter 90.42 RCW  
21 to read as follows:

22 (1) The department is hereby authorized to use the trust water  
23 rights program in the Yakima river basin for water banking purposes.

24 (2) Water banking may be used for one or more of the following  
25 purposes:

26 (a) To authorize the use of trust water rights to mitigate for  
27 water resource impacts, future water supply needs, or any beneficial  
28 use under chapter 90.03, 90.44, or 90.54 RCW, consistent with any terms  
29 and conditions established by the transferor, except that return flows  
30 from water rights authorized in whole or in part for any purpose shall  
31 remain available as part of the Yakima basin's total water supply  
32 available and to satisfy existing rights for other downstream uses and  
33 users;

34 (b) To document transfers of water rights to and from the trust  
35 water rights program; and

36 (c) To provide a source of water rights the department can make

1 available to third parties on a temporary or permanent basis for any  
2 beneficial use under chapter 90.03, 90.44, or 90.54 RCW.

3 (3) The department shall not use water banking to:

4 (a) Cause detriment or injury to existing rights;

5 (b) Issue temporary water rights or portions thereof for new  
6 potable uses requiring an adequate and reliable water supply under RCW  
7 19.27.097;

8 (c) Administer federal project water rights, including federal  
9 storage rights; or

10 (d) Allow carryover of stored water from one water year to another  
11 water year.

12 NEW SECTION. **Sec. 3.** A new section is added to chapter 90.42 RCW  
13 to read as follows:

14 (1) The department, with the consent of the water right holder, may  
15 identify trust water rights for administration for water banking  
16 purposes, including trust water rights established before the effective  
17 date of this section.

18 (2) An application to transfer a water right to the trust water  
19 program shall be reviewed under RCW 90.03.380 at the time the water  
20 right is transferred to the trust water program for administration for  
21 water banking purposes, and notice of the application shall be  
22 published by the applicant as provided under RCW 90.03.280. The  
23 application must identify reasonably foreseeable future temporary or  
24 permanent beneficial uses for which the water right or portion thereof  
25 may be used by a third party upon transfer from the trust water right  
26 program. In the event the future place of use, period of use, or other  
27 elements of the water right are not specifically identified at the time  
28 of the transfer into the trust water program, another review under RCW  
29 90.03.380 will be necessary at the time of a proposed transfer from the  
30 trust water program.

31 NEW SECTION. **Sec. 4.** A new section is added to chapter 90.42 RCW  
32 to read as follows:

33 (1) The department shall transfer a water right or portion thereof  
34 being administered for water banking purposes from the trust water  
35 program to a third party upon occurrence of all of the following:

1 (a) The department receives a request for transfer of a water right  
2 or portion thereof currently administered by the department for water  
3 banking purposes;

4 (b) The request is consistent with any previous review under RCW  
5 90.03.380 of the water right and future temporary or permanent  
6 beneficial uses;

7 (c) The request is consistent with any condition, limitation, or  
8 agreement affecting the water right, including but not limited to any  
9 trust water right transfer agreement executed at the time the water  
10 right was transferred to the trust water rights program; and

11 (d) The request is accompanied by and is consistent with an  
12 assignment of interest or portion thereof from a person or entity  
13 retaining an interest in the trust water right or portion thereof to  
14 the party requesting transfer of the water right or portion thereof.

15 (2) The priority date of the water right or portion thereof  
16 transferred by the department from the trust water program for water  
17 banking purposes shall be the priority date of the underlying water  
18 right.

19 (3) The department shall issue documentation for that water right  
20 or portion thereof to the new water right holder based on the  
21 requirements applicable to the transfer of other water rights from the  
22 trust water rights program.

23 (4) The department's decision on the transfer of a water right or  
24 portion thereof from the trust water program for water banking purposes  
25 may be appealed to the pollution control hearings board under RCW  
26 43.21B.230, or to a superior court conducting a general adjudication  
27 under RCW 90.03.210.

28 NEW SECTION. **Sec. 5.** A new section is added to chapter 90.42 RCW  
29 to read as follows:

30 (1) The department shall seek input from agricultural  
31 organizations, federal agencies, tribal governments, local governments,  
32 watershed groups, conservation groups, and developers on water banking,  
33 including water banking procedures and identification of areas in  
34 Washington state where water banking could assist in providing water  
35 supplies for instream and out-of-stream uses. The department shall  
36 summarize any comments received on water banking and submit a report,

1 including any recommendations, to the appropriate committees of the  
2 legislature for their consideration in the subsequent legislative  
3 session.

4 (2) By December 31st of every even-numbered year, the department  
5 shall submit a report to the appropriate committees of the legislature  
6 on water banking activities authorized under section 2 of this act.  
7 The report shall:

8 (a) Evaluate the effectiveness of water banking in meeting the  
9 policies and objectives of this chapter;

10 (b) Describe any statutory, regulatory, or other impediments to  
11 water banking in other areas of the state; and

12 (c) Identify other basins or regions that may benefit from  
13 authorization for the department to use the trust water program for  
14 water banking purposes.

15 NEW SECTION. **Sec. 6.** A new section is added to chapter 90.42 RCW  
16 to read as follows:

17 Nothing in this act shall:

18 (1) Cause detriment or injury to existing rights or to the  
19 operation of the federal Yakima project to provide water for irrigation  
20 purposes, existing water supply contracts, or existing water rights;

21 (2) Diminish in any way existing rights or the total water supply  
22 available for irrigation and other purposes in the Yakima basin; or

23 (3) Affect or modify the authority of a court conducting a general  
24 adjudication pursuant to RCW 90.03.210.

25 NEW SECTION. **Sec. 7.** Nothing in this act may be construed to:

26 (1) Affect or modify any treaty or other federal rights of an  
27 Indian tribe, or the rights of any federal agency or other person or  
28 entity arising under state or federal law;

29 (2) Affect or modify the rights or jurisdictions of the United  
30 States, the state of Washington, the Yakama Nation, or other person or  
31 entity over waters of any river or stream or over any ground water  
32 resource;

33 (3) Alter, amend, repeal, interpret, modify, or be in conflict with  
34 any interstate compact made by the states;

35 (4) Alter, establish, or impair the respective rights of states,

1 the United States, the Yakama Nation, or any other person or entity  
2 with respect to any water or water-related right;

3 (5) Alter, diminish, or abridge the rights and obligations of any  
4 federal, state, or local agency, the Yakama Nation, or other person or  
5 entity;

6 (6) Affect or modify the rights of the Yakama Indian Nation or its  
7 successors in interest to, and management and regulation of, those  
8 water resources arising or used, within the external boundaries of the  
9 Yakama Indian Reservation;

10 (7) Affect or modify the settlement agreement between the United  
11 States and the state of Washington filed in Yakima county superior  
12 court with regard to federal reserved water rights other than those  
13 rights reserved by the United States for the benefit of the Yakama  
14 Indian Nation and its members; or

15 (8) Affect or modify the rights of any federal, state, or local  
16 agency, the Yakama Nation, or any other person or entity, public or  
17 private, with respect to any unresolved and unsettled claims in any  
18 water right adjudications, or court decisions, including *State v.*  
19 *Acquavella*, or constitute evidence in any such proceeding in which any  
20 water or water-related right is adjudicated.

21 NEW SECTION. **Sec. 8.** This act is necessary for the immediate  
22 preservation of the public peace, health, or safety, or support of the  
23 state government and its existing public institutions, and takes effect  
24 immediately.

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