
SECOND SUBSTITUTE HOUSE BILL 1113

State of Washington

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1998 Regular Session

By House Committee on Agriculture & Ecology (originally sponsored by Representatives Chandler, Mastin, McMorris, Koster, Delvin, Mulliken, Johnson, Schoesler and Honeyford)

Read first time 02/05/98. Referred to Committee on .

1 AN ACT Relating to water transfers and changes; amending RCW
2 90.03.380, 90.44.100, 90.03.290, and 90.44.445; and adding a new
3 section to chapter 90.03 RCW.

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

5 **Sec. 1.** RCW 90.03.380 and 1997 c 442 s 801 are each amended to
6 read as follows:

7 (1) The right to the use of water which has been applied to a
8 beneficial use in the state shall be and remain appurtenant to the land
9 or place upon which the same is used: PROVIDED, HOWEVER, That the
10 right may be transferred to another or to others and become appurtenant
11 to any other land or place of use without loss of priority of right
12 theretofore established if such change can be made without detriment or
13 injury to existing rights. The point of diversion of water for
14 beneficial use or the purpose of use may be changed, if such change can
15 be made without detriment or injury to existing rights. A change in
16 the place of use, point of diversion, and/or purpose of use of a water
17 right to enable irrigation of additional acreage or the addition of new
18 uses may be permitted if such change results in no increase in the
19 annual consumptive quantity of water used under the water right. For

1 purposes of this section, "annual consumptive quantity" means the
2 estimated or actual annual amount of water diverted pursuant to the
3 water right, reduced by the estimated annual amount of return flows,
4 averaged over the most recent five-year period of continuous beneficial
5 use of the water right. Before any transfer of such right to use water
6 or change of the point of diversion of water or change of purpose of
7 use can be made, any person having an interest in the transfer or
8 change, shall file a written application therefor with the department,
9 and the application shall not be granted until notice of the
10 application is published as provided in RCW 90.03.280. If it shall
11 appear that such transfer or such change may be made without injury or
12 detriment to existing rights, the department shall issue to the
13 applicant a certificate in duplicate granting the right for such
14 transfer or for such change of point of diversion or of use. The
15 certificate so issued shall be filed and be made a record with the
16 department and the duplicate certificate issued to the applicant may be
17 filed with the county auditor in like manner and with the same effect
18 as provided in the original certificate or permit to divert water.

19 (2) If an application for change proposes to transfer water rights
20 from one irrigation district to another, the department shall, before
21 publication of notice, receive concurrence from each of the irrigation
22 districts that such transfer or change will not adversely affect the
23 ability to deliver water to other landowners or impair the financial or
24 operational integrity of either of the districts.

25 (3) A change in place of use by an individual water user or users
26 of water provided by an irrigation district need only receive approval
27 for the change from the board of directors of the district if the use
28 of water continues within the irrigation district, and when water is
29 provided by an irrigation entity that is a member of a board of joint
30 control created under chapter 87.80 RCW, approval need only be received
31 from the board of joint control if the use of water continues within
32 the area of jurisdiction of the joint board and the change can be made
33 without detriment or injury to existing rights. The board of directors
34 of an irrigation district may approve such a change if the board
35 determines that the change: Will not adversely affect the district's
36 ability to deliver water to other landowners; will not require the
37 construction by the district of diversion or drainage facilities unless
38 the board finds that the construction by the district is in the
39 interest of the district; will not impair the financial or operational

1 integrity of the district; and is consistent with the contractual
2 obligations of the district.

3 (4) Subsections (1), (2), and (3) of this section do not apply to
4 a transfer or change governed by section 2 of this act.

5 (5) This section shall not apply to trust water rights acquired by
6 the state through the funding of water conservation projects under
7 chapter 90.38 RCW or RCW 90.42.010 through 90.42.070.

8 (6) Any right represented by an application for a water right for
9 which a permit for water use has not been issued by the time a transfer
10 or change is approved under this section may not be construed as being
11 injured or detrimentally affected by the transfer or change.

12 (7) The department may not initiate relinquishment proceedings
13 under chapter 90.14 RCW regarding a water right for which an
14 application for a transfer or change is filed under this section during
15 the period beginning on the date the department receives the
16 application and ending two years after the date the department approves
17 or denies the application.

18 NEW SECTION. Sec. 2. A new section is added to chapter 90.03 RCW
19 to read as follows:

20 (1)(a) If a portion of the water governed by a water right is made
21 surplus to the beneficial uses exercised under the right through the
22 implementation of practices or technologies, including but not limited
23 to conveyance practices or technologies, which are more efficient or
24 more water-use efficient than those under which the right was
25 perfected, the right to use the surplus water may be changed as
26 provided by subsection (2), (3), (4), or (5) of this section.

27 (b) If a portion of the water governed by a water right is made
28 surplus to the beneficial uses exercised under the right through a
29 change in the crops grown under the water right, the right to use the
30 surplus water may be changed as provided by subsection (3) of this
31 section. This subsection (1)(b) does not apply to water supplied by an
32 irrigation district.

33 (c) This section applies only to a change of an agricultural use or
34 portion of an agricultural use of water to an agricultural use of
35 water.

36 (2) The use within an irrigation district of water supplied by the
37 district and made surplus as provided in subsection (1)(a) of this
38 section shall be regulated solely as provided by the board of directors

1 of the irrigation district. Such a use requires the approval of the
2 board of directors of the irrigation district or must otherwise be
3 authorized by the board. The board may approve or authorize such a use
4 only if the use does not impair the financial or operational integrity
5 of the district. Water supplied by an irrigation district and made
6 surplus as provided in subsection (1)(a) of this section through
7 actions taken by an individual water user served by the district is not
8 available for use as a matter of right by that individual water user,
9 but may be used by the board for the benefit of the district generally.
10 The district's board of directors may approve or otherwise authorize
11 under this subsection uses of such surplus water that result in the
12 total irrigated acreage within the district exceeding the irrigated
13 acreage recorded with the department for the district's water right if
14 the board notifies the department of the change in the irrigated
15 acreage within the district. Except as provided in subsection (5) of
16 this section, such a notification provides a change in the district's
17 water right and, upon receiving the notification, the department shall
18 revise its records for the district's right to reflect the change.

19 If an irrigation district is within a federal reclamation project
20 and the district's board of directors approves or otherwise authorizes
21 under this subsection uses of such surplus water that result in the
22 total irrigated acreage within the federal project exceeding the
23 irrigated acreage recorded with the department for the federal
24 project's water right, the board shall notify the department of the
25 change in the irrigated acreage within the federal project. Except as
26 provided by this subsection and subsection (5) of this section, such a
27 notification provides a change in the federal reclamation project's
28 water right and, upon receiving the notification, the department shall
29 revise its records for the federal project's right to reflect the
30 change except that the total irrigable acreage for a water right for a
31 federal reclamation project may not exceed the total irrigable acreage
32 authorized for the project by the United States and related repayment
33 contracts.

34 (3) The right to use water made surplus as provided in subsection
35 (1)(a) or (b) of this section but not supplied by an irrigation
36 district may be changed to use on other parcels of land owned by the
37 holder of the water right that are contiguous to the parcel or parcels
38 of land upon which the use of the water was authorized by the right
39 before such a change. The holder of the water right shall notify the

1 department of such a change. Except as provided in subsection (5) of
2 this section, the notification provides a change in the holder's water
3 right and, upon receiving the notification, the department shall revise
4 its records for the water right to reflect the change.

5 (4) If a notification is provided to the department under
6 subsection (2) or (3) of this section with regard to water made surplus
7 and subsequently used before the effective date of this section, the
8 change in the water right shall be made without loss of priority of the
9 right.

10 (5) If a notification is provided to the department under
11 subsection (2) or (3) of this section with regard to water made surplus
12 and subsequently used, and that use begins after the effective date of
13 this section, the priority date for the use of the water made surplus
14 under this section is the date the notification is filed with the
15 department. When the department is notified regarding such a use under
16 this subsection (5), the notification does not automatically provide a
17 change in the water right holder's, irrigation district's, or
18 reclamation project's water right. The department shall issue the
19 holder, district, or project a temporary water use permit for the use.
20 The term of the permit shall be for fifteen years. It is presumed that
21 the use of water under the temporary water use permit does not impair
22 or interfere with water rights that are senior to the water right
23 represented by the permit. However, if at any time within the fifteen-
24 year term of the permit the department determines that the change would
25 impair or interfere with the use of such a senior water right, the
26 department shall notify the holder of the temporary permit and shall
27 file a notice of its decision with the superior court of the county in
28 which the withdrawal of water under the right takes place. The notice
29 provided by the department shall not stay the use of water under the
30 temporary permit. The superior court shall review the determination of
31 the department de novo. In such a review, the burden of proof in
32 overcoming the presumption provided by this subsection is on the
33 department. The presumption can be overcome only through the
34 application of scientific data supporting the department's
35 determination. At the conclusion of its review, the superior court
36 shall enter a ruling canceling the temporary permit, modifying the
37 conditions of water use under the permit, or affirming that the use of
38 water under the permit does not interfere with water rights senior to
39 the water rights represented by the permit. The decision of the

1 superior court may be appealed as provided for other decisions of the
2 court. If a court's decision modifies the conditions of water use
3 under the permit or affirms that the use of water under the permit does
4 not interfere with senior water rights or if the department does not
5 provide a notice under this subsection within the fifteen-year term of
6 the permit, the use of the water is changed as provided by the
7 temporary permit or the court's decision and the department shall
8 revise its records regarding the right.

9 The presumption provided by this subsection does not apply with
10 regard to a claim made by any person with a water right in superior
11 court or on appeal of a decision of the superior court that a temporary
12 permit or change in a water right made under this subsection impairs or
13 interferes with the use of the person's senior water right.

14 (6) If a notification is filed with the department regarding the
15 use of water made surplus under subsection (2) or (3) of this section
16 and that use begins after the effective date of this section, the
17 notification shall identify the date that the use of the water made
18 surplus begins.

19 (7) The authority provided by this section to change a water right
20 shall not be construed as authorizing the use of a junior water right
21 in a manner that impairs or interferes with the use of a senior water
22 right.

23 (8) If a water right changed under this section is a right
24 represented by a statement of claim in the water rights claims
25 registry, the department's obligation to revise its records to reflect
26 the change shall be accomplished by providing an amendment to the
27 statement of claim to reflect the change.

28 (9) This section does not apply in an area with an acreage
29 expansion program in effect on the effective date of this section that
30 is an element of a ground water area or subarea management program as
31 provided in RCW 90.44.445.

32 (10) Nothing in this section authorizes a change in a water right
33 or a portion of a water right that has not been perfected through
34 beneficial use before the change.

35 **Sec. 3.** RCW 90.44.100 and 1997 c 316 s 2 are each amended to read
36 as follows:

37 (1) After an application to, and upon the issuance by the
38 department of an amendment to the appropriate permit or certificate of

1 ground water right, the holder of a valid right to withdraw public
2 ground waters may, without losing the holder's priority of right,
3 construct wells or other means of withdrawal at a new location in
4 substitution for or in addition to those at the original location, or
5 the holder may change the manner or the place of use of the water.

6 (2) An amendment to construct replacement or a new additional well
7 or wells at a location outside of the location of the original well or
8 wells or to change the manner or place of use of the water shall be
9 issued only after publication of notice of the application and findings
10 as prescribed in the case of an original application. Such amendment
11 shall be issued by the department only on the conditions that: (a) The
12 additional or replacement well or wells shall tap the same body of
13 public ground water as the original well or wells; (b) where a
14 replacement well or wells is approved, the use of the original well or
15 wells shall be discontinued and the original well or wells shall be
16 properly decommissioned as required under chapter 18.104 RCW; (c) where
17 an additional well or wells is constructed, the original well or wells
18 may continue to be used, but the combined total withdrawal from the
19 original and additional well or wells shall not enlarge the right
20 conveyed by the original permit or certificate; and (d) other existing
21 rights shall not be impaired. The department may specify an approved
22 manner of construction and shall require a showing of compliance with
23 the terms of the amendment, as provided in RCW 90.44.080 in the case of
24 an original permit.

25 (3) The construction of a replacement or new additional well or
26 wells at the location of the original well or wells shall be allowed
27 without application to the department for an amendment. However, the
28 following apply to such a replacement or new additional well: (a) The
29 well shall tap the same body of public ground water as the original
30 well or wells; (b) if a replacement well is constructed, the use of the
31 original well or wells shall be discontinued and the original well or
32 wells shall be properly decommissioned as required under chapter 18.104
33 RCW; (c) if a new additional well is constructed, the original well or
34 wells may continue to be used, but the combined total withdrawal from
35 the original and additional well or wells shall not enlarge the right
36 conveyed by the original water use permit or certificate; (d) the
37 construction and use of the well shall not interfere with or impair
38 water rights with an earlier date of priority than the water right or
39 rights for the original well or wells; (e) the replacement or

1 additional well shall be located no closer than the original well to a
2 well it might interfere with; (f) the department may specify an
3 approved manner of construction of the well; and (g) the department
4 shall require a showing of compliance with the conditions of this
5 subsection (3).

6 (4) This section does not apply to a transfer or change governed by
7 section 2 of this act.

8 (5) Any right represented by an application for a water right for
9 which a permit for water use has not been issued by the time an
10 amendment is approved under this section may not be construed as being
11 impaired by the amendment.

12 (6) The department may not initiate relinquishment proceedings
13 under chapter 90.14 RCW regarding a water right for which an
14 application for an amendment is filed under this section during the
15 period beginning on the date the department receives the application
16 and ending two years after the date the department makes a decision on
17 the application.

18 (7) As used in this section, the "location of the original well or
19 wells" is the area described as the point of withdrawal in the original
20 public notice published for the application for the water right for the
21 well.

22 **Sec. 4.** RCW 90.03.290 and 1994 c 264 s 84 are each amended to read
23 as follows:

24 When an application complying with the provisions of this chapter
25 and with the rules and regulations of the department has been filed,
26 the same shall be placed on record with the department, and it shall be
27 its duty to investigate the application, and determine what water, if
28 any, is available for appropriation, and find and determine to what
29 beneficial use or uses it can be applied. If it is proposed to
30 appropriate water for irrigation purposes, the department shall
31 investigate, determine and find what lands are capable of irrigation by
32 means of water found available for appropriation. If it is proposed to
33 appropriate water for the purpose of power development, the department
34 shall investigate, determine and find whether the proposed development
35 is likely to prove detrimental to the public interest, having in mind
36 the highest feasible use of the waters belonging to the public. If the
37 application does not contain, and the applicant does not promptly
38 furnish sufficient information on which to base such findings, the

1 department may issue a preliminary permit, for a period of not to
2 exceed three years, requiring the applicant to make such surveys,
3 investigations, studies, and progress reports, as in the opinion of the
4 department may be necessary. If the applicant fails to comply with the
5 conditions of the preliminary permit, it and the application or
6 applications on which it is based shall be automatically canceled and
7 the applicant so notified. If the holder of a preliminary permit
8 shall, before its expiration, file with the department a verified
9 report of expenditures made and work done under the preliminary permit,
10 which, in the opinion of the department, establishes the good faith,
11 intent and ability of the applicant to carry on the proposed
12 development, the preliminary permit may, with the approval of the
13 governor, be extended, but not to exceed a maximum period of five years
14 from the date of the issuance of the preliminary permit. The
15 department shall make and file as part of the record in the matter,
16 written findings of fact concerning all things investigated, and if it
17 shall find that there is water available for appropriation for a
18 beneficial use, and the appropriation thereof as proposed in the
19 application will not impair existing rights or be detrimental to the
20 public welfare, it shall issue a permit stating the amount of water to
21 which the applicant shall be entitled and the beneficial use or uses to
22 which it may be applied: PROVIDED, That where the water applied for is
23 to be used for irrigation purposes, it shall become appurtenant only to
24 such land as may be reclaimed thereby to the full extent of the soil
25 for agricultural purposes. But where there is no unappropriated water
26 in the proposed source of supply, or where the proposed use conflicts
27 with existing rights, or threatens to prove detrimental to the public
28 interest, having due regard to the highest feasible development of the
29 use of the waters belonging to the public, it shall be duty of the
30 department to reject such application and to refuse to issue the permit
31 asked for. If the permit is refused because of conflict with existing
32 rights and such applicant shall acquire same by purchase or
33 condemnation under RCW 90.03.040, the department may thereupon grant
34 such permit. Any application may be approved for a less amount of
35 water than that applied for, if there exists substantial reason
36 therefor, and in any event shall not be approved for more water than
37 can be applied to beneficial use for the purposes named in the
38 application. In determining whether or not a permit shall issue upon
39 any application, it shall be the duty of the department to investigate

1 all facts relevant and material to the application. After the
2 department approves said application in whole or in part and before any
3 permit shall be issued thereon to the applicant, such applicant shall
4 pay the fee provided in RCW 90.03.470: PROVIDED FURTHER, That in the
5 event a permit is issued by the department upon any application, it
6 shall be its duty to notify the director of fish and wildlife of such
7 issuance.

8 This section does not apply to transfers or changes made under
9 section 2 of this act or to applications for transfers or changes made
10 under RCW 90.03.380 or 90.44.100.

11 **Sec. 5.** RCW 90.44.445 and 1993 c 99 s 1 are each amended to read
12 as follows:

13 In any acreage expansion program adopted by the department as an
14 element of a ground water management program, the authorization for a
15 water right certificate holder to participate in the program shall be
16 on an annual basis for the first two years. After the two-year period,
17 the department may authorize participation for ten-year periods. The
18 department may authorize participation for ten-year periods for
19 certificate holders who have already participated in an acreage
20 expansion program for two years. The department may require annual
21 certification that the certificate holder has complied with all
22 requirements of the program. The department may terminate the
23 authority of a certificate holder to participate in the program for one
24 calendar year if the certificate holder fails to comply with the
25 requirements of the program.

26 This section applies only in an area with an acreage expansion
27 program in effect on the effective date of this amendatory section that
28 has been adopted by the department as an element of a ground water area
29 or subarea management program. The provisions of section 2 of this
30 act, RCW 90.03.380, and 90.44.100 apply to transfers, changes, and
31 amendments to permits or rights for the beneficial use of ground water
32 in any other area.

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