
ENGROSSED SUBSTITUTE HOUSE BILL 2050

State of Washington

55th Legislature

1997 Regular Session

By House Committee on Agriculture & Ecology (originally sponsored by Representatives Mastin, Chandler, Clements and Honeyford)

Read first time 03/05/97.

1 AN ACT Relating to determining the impairment of water rights and
2 uses; amending RCW 90.03.380 and 90.44.100; adding a new section to
3 chapter 90.03 RCW; and adding a new section to chapter 43.21B RCW.

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

5 **Sec. 1.** RCW 90.03.380 and 1996 c 320 s 19 are each amended to read
6 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 said
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. Before any
16 transfer of such right to use water or change of the point of diversion
17 of water or change of purpose of use can be made, any person having an
18 interest in the transfer or change, shall file a written application
19 therefor with the department, and said application shall not be granted

1 until notice of said application shall be published as provided in RCW
2 90.03.280. If it shall appear that such transfer or such change may be
3 made without injury or detriment to existing rights, the department
4 shall issue to the applicant a certificate in duplicate granting the
5 right for such transfer or for such change of point of diversion or of
6 use. The certificate so issued shall be filed and be made a record
7 with the department and the duplicate certificate issued to the
8 applicant may be filed with the county auditor in like manner and with
9 the same effect as provided in the original certificate or permit to
10 divert water.

11 (2) If an application for change proposes to transfer water rights
12 from one irrigation district to another, the department shall, before
13 publication of notice, receive concurrence from each of the irrigation
14 districts that such transfer or change will not adversely affect the
15 ability to deliver water to other landowners or impair the financial
16 integrity of either of the districts.

17 (3) A change in place of use by an individual water user or users
18 of water provided by an irrigation district need only receive approval
19 for the change from the board of directors of the district if the use
20 of water continues within the irrigation district, and when water is
21 provided by an irrigation entity that is a member of a board of joint
22 control created under chapter 87.80 RCW, approval need only be received
23 from the board of joint control if the use of water continues within
24 the area of jurisdiction of the joint board and the change can be made
25 without detriment or injury to existing rights.

26 (4) Any right represented by an application for a water right for
27 which a permit for water use has not been issued by the time a transfer
28 or change is approved under this section shall not be construed as
29 being injured or detrimentally affected by the transfer or change.

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

33 **Sec. 2.** RCW 90.44.100 and 1987 c 109 s 113 are each amended to
34 read as follows:

35 After an application to, and upon the issuance by the department of
36 an amendment to the appropriate permit or certificate of ground water
37 right, the holder of a valid right to withdraw public ground waters
38 may, without losing his priority of right, construct wells or other

1 means of withdrawal at a new location in substitution for or in
2 addition to those at the original location, or he may change the manner
3 or the place of use of the water: PROVIDED, HOWEVER, That such
4 amendment shall be issued only after publication of notice of the
5 application and findings as prescribed in the case of an original
6 application. Such amendment shall be issued by the department only on
7 the conditions that: (1) The additional or substitute well or wells
8 shall tap the same body of public ground water as the original well or
9 wells; (2) use of the original well or wells shall be discontinued upon
10 construction of the substitute well or wells; (3) the construction of
11 an additional well or wells shall not enlarge the right conveyed by the
12 original permit or certificate; and (4) other existing rights shall not
13 be impaired. The department may specify an approved manner of
14 construction and shall require a showing of compliance with the terms
15 of the amendment, as provided in RCW 90.44.080 in the case of an
16 original permit.

17 Any right represented by an application for a water right for which
18 a permit for water use has not been issued by the time an amendment is
19 approved under this section shall not be construed as being impaired by
20 the amendment.

21 NEW SECTION. **Sec. 3.** A new section is added to chapter 90.03 RCW
22 to read as follows:

23 (1) In making a determination of impairment:

24 (a) The availability of water and the effect of granting a water
25 right permit, transfer, change, or amendment are those that exist with
26 the incorporation of the effects of any impoundment to be provided by
27 the applicant under RCW 90.03.255 or 90.44.055 or any other water
28 supply augmentation or mitigation to be provided by the applicant as
29 part of his or her application for a water right permit, transfer,
30 change, or amendment.

31 (b) The existence of hydraulic continuity between ground water and
32 a surface body of water does not, in itself, constitute the impairment
33 of an existing water right in the surface water body by a proposed
34 permit for a ground water right or an amendment to a ground water
35 right.

36 (c) The department shall take into consideration seasonal
37 variations in water supply and in the recharge of surface and ground
38 water bodies.

1 (d) Impairment of an existing water right in a surface body of
2 water by a proposed permit for a ground water right or for an amendment
3 to a ground water right does not exist if the withdrawal of water under
4 the permit or amendment would reduce within one hundred years the
5 supply of water to the surface water body by less than one-tenth of one
6 percent of the annual rate of ground water withdrawal proposed under
7 the permit or amendment. In considering the cumulative effects of
8 multiple applications for such permits and amendments and of ground
9 water rights that are junior to the existing water rights in the
10 surface water body, the department may find impairment by those
11 applications that would, taken in the order of their priority dates,
12 cause a reduction in the supply of water to the surface water body by
13 one percent or more within one hundred years and would, by that
14 reduction, result in the impairment of existing water rights.

15 (2) As used in this section:

16 (a) "Determination of impairment" means a determination made by the
17 department as to whether the issuance of a water right permit under
18 this chapter or chapter 90.44 RCW or whether the approval of a
19 transfer, change, or amendment under RCW 90.03.380 or 90.44.100 would
20 injure or impair existing water rights or would conflict with or be
21 detrimental to existing water rights;

22 (b) "Impairment" means an injury or impairment of existing water
23 rights or a conflict with or detriment to existing water rights; and

24 (c) "Existing water rights" includes, but is not limited to, rights
25 to the diversion, withdrawal, storage, and use of water existing before
26 a determination of impairment, instream or base flows set by the
27 department by rule before a determination of impairment, and any flows
28 determined to be necessary by the department under RCW 75.20.050.

29 (3) The rule of impairment provided by subsection (1)(d) of this
30 section is provided for water allocation decisions made by the
31 department and is provided to adjust for the uncertainty that is
32 inherent in evaluating the effects of proposed ground water withdrawals
33 on surface water bodies. It does not provide a standard for reviewing
34 any claim made by a person with a senior water right in superior court
35 or in an appeal of a superior court decision that the person's senior
36 water right is impaired or injured by the use of any junior water right
37 or that the use of a junior water right conflicts with or is
38 detrimental to the use of the person's senior water right. A decision
39 by a superior court regarding any claim of impairment of existing water

1 rights shall be made based on the preponderance of the evidence
2 presented. The superior court shall consider any such claim de novo
3 and shall not grant deference to determinations that may have been made
4 by the department or by the pollution control hearings board regarding
5 such a claim.

6 NEW SECTION. **Sec. 4.** A new section is added to chapter 43.21B RCW
7 to read as follows:

8 In appeals involving a decision or order of the hearings board
9 regarding a determination of impairment made by the department of
10 ecology or regarding the impairment of existing water rights, the
11 appeal to superior court shall be de novo. A decision by a superior
12 court regarding a determination of impairment or the impairment of
13 existing water rights shall be made based on the preponderance of the
14 evidence presented. The superior court shall not grant deference to a
15 determination made by the department of ecology or by the pollution
16 control hearings board regarding such a determination or such
17 impairment. Appellate review of a decision of the superior court may
18 be sought as in other civil cases.

19 As used in this section, "determination of impairment,"
20 "impairment," and "existing water rights" have the meanings provided by
21 section 3 of this act.

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