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3 **ESHB 2994** - S COMM AMD

4 By Committee on Environmental Quality & Water Resources

5

NOT ADOPTED 3/3/00

6 Strike everything after the enacting clause and insert the
7 following:

8 "Sec. 1. RCW 90.14.200 and 1989 c 175 s 180 are each amended to
9 read as follows:

10 (1) All matters relating to the implementation and enforcement of
11 this chapter by the department of ecology shall be carried out in
12 accordance with chapter 34.05 RCW, the Administrative Procedure Act,
13 except where the provisions of this chapter expressly conflict with
14 chapter 34.05 RCW. Proceedings held pursuant to RCW 90.14.130 are
15 adjudicative proceedings within the meaning of chapter 34.05 RCW.
16 Final decisions of the department of ecology in these proceedings are
17 subject to review in accordance with chapter 43.21B RCW.

18 (2) RCW 90.14.130 provides nonexclusive procedures for determining
19 a relinquishment of water rights under RCW 90.14.160, 90.14.170, and
20 90.14.180. RCW 90.14.160, 90.14.170, and 90.14.180 may be applied in,
21 among other proceedings, general adjudication proceedings initiated
22 under RCW 90.03.110 or 90.44.220: PROVIDED, That nothing herein shall
23 apply to litigation involving determinations of the department of
24 ecology under RCW 90.03.290 relating to the impairment of existing
25 rights.

26 (3) If the superior court issues an order excusing or prohibiting
27 a person or entity from exercising a water right during the pendency of
28 a general adjudication of water rights initiated by the department
29 under RCW 90.03.110 or 90.44.220, the provisions of RCW 90.14.130
30 through 90.14.180 shall not be construed to curtail the powers of the
31 superior court, under a recognized head of equitable jurisdiction, to
32 set aside or cancel relinquishment at the suit of the party claiming
33 the excused water right.

34 **Sec. 2.** RCW 90.38.020 and 1989 c 429 s 3 are each amended to read
35 as follows:

1 (1) The department may acquire water rights, including but not
2 limited to storage rights, by purchase, gift, or other appropriate
3 means other than by condemnation, from any person or entity or
4 combination of persons or entities. Once acquired, such rights are
5 trust water rights.

6 (2) The department may make such other arrangements, including
7 entry into contracts with other persons or entities as appropriate to
8 ensure that trust water rights acquired in accordance with this chapter
9 can be exercised to the fullest possible extent.

10 (3) The trust water rights may be acquired on a temporary or
11 permanent basis.

12 (4) The trust water rights may be expressly conditioned by the
13 grantor for instream use.

14 **Sec. 3.** RCW 90.42.005 and 1991 c 347 s 1 are each amended to read
15 as follows:

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

18 (2) The legislature finds that:

19 (a) The state of Washington is faced with a shortage of water with
20 which to meet existing and future needs, including the needs of aquatic
21 species listed as threatened or endangered under the federal endangered
22 species act, particularly during the summer and fall months and in dry
23 years when the demand is greatest;

24 (b) Consistent with RCW 90.54.180, conservation and water use
25 efficiency programs, including storage, and voluntary water
26 reallocation programs, such as water banking, should be the preferred
27 methods of addressing water uses because they can relieve current
28 critical water situations, provide for presently unmet needs, and
29 assist in meeting future water needs. Presently unmet needs or current
30 needs includes the water required to increase the frequency of
31 occurrence of base or minimum flow levels in streams of the state, the
32 water necessary to satisfy existing water rights, or the water
33 necessary to provide full supplies to existing water systems with
34 current supply deficiencies; and

35 (c) The interests of the state will be served by developing
36 programs and regional water resource plans, in cooperation with local
37 governments, federally recognized tribal governments, appropriate
38 federal agencies, private citizens, and the various water users and

1 water interests in the state, that increase the overall ability to
2 manage the state's waters in order to resolve conflicts and to better
3 satisfy both present and future needs for water.

4 **Sec. 4.** RCW 90.42.010 and 1998 c 245 s 173 are each amended to
5 read as follows:

6 The legislature finds that a need exists to continue to develop and
7 test ((a)) all feasible means to facilitate the voluntary ((transfer))
8 reallocation of water and water rights, including conserved water, to
9 provide water for presently unmet needs and emerging needs. Further,
10 the legislature finds that water conservation and voluntary
11 reallocation activities have the potential of affecting the quantity of
12 return flow waters to which existing water right holders have a right
13 to and rely upon. It is the intent of the legislature that persons
14 holding rights to water, including return flows, not be adversely
15 affected in the implementation of the provisions of this chapter.

16 **Sec. 5.** RCW 90.42.020 and 1991 c 347 s 6 are each amended to read
17 as follows:

18 Unless the context clearly requires otherwise, the definitions in
19 this section apply throughout this chapter.

20 (1) "Department" means the department of ecology.

21 (2) "Net water savings" means the amount of water that is
22 determined to be conserved and usable within a specified stream reach
23 or reaches for other purposes without impairment or detriment to water
24 rights existing at the time that a water conservation project is
25 undertaken, reducing the ability to deliver water, or reducing the
26 supply of water that otherwise would have been available to other
27 existing water uses.

28 (3) "Trust water right" means any water right acquired by the state
29 under this chapter for management in the state's trust water rights
30 program.

31 (4) (~~"Pilot planning areas" means the geographic areas designated~~
32 ~~under RCW 90.54.045(2).~~

33 ~~(5))~~ "Water conservation project" means any project or program
34 that achieves physical or operational improvements that provide for
35 increased water use efficiency in existing systems of diversion,
36 conveyance, application, or use of water under water rights existing on
37 July 28, 1991.

1 **Sec. 6.** RCW 90.42.030 and 1993 c 98 s 2 are each amended to read
2 as follows:

3 (1) For purposes of this chapter, the state may enter into
4 contracts to provide moneys to assist in the financing of water
5 conservation projects. In consideration for the financial assistance
6 provided, the state shall obtain public benefits defined in guidelines
7 developed under RCW 90.42.050.

8 (2) If the public benefits to be obtained require conveyance or
9 modification of a water right, the recipient of funds shall convey to
10 the state the recipient's interest in that part of the water right or
11 claim constituting all or a portion of the resulting net water savings
12 for deposit in the trust water rights program. The amount to be
13 conveyed shall be finitely determined by the parties, in accordance
14 with the guidelines developed under RCW 90.42.050, before the
15 expenditure of state funds. Conveyance may consist of complete
16 transfer, lease contracts, or other legally binding agreements. When
17 negotiating for the acquisition of conserved water or net water
18 savings, or a portion thereof, the state may require evidence of a
19 valid water right.

20 (3) As part of the contract, the water right holder and the state
21 shall specify the process to determine the amount of water the water
22 right holder would continue to be entitled to once the water
23 conservation project is in place.

24 (4) The state shall cooperate fully with the United States in the
25 implementation of this chapter. Trust water rights may be acquired
26 through expenditure of funds provided by the United States and shall be
27 treated in the same manner as trust water rights resulting from the
28 expenditure of state funds.

29 (5) If water is proposed to be acquired by or conveyed to the state
30 as a trust water right by an irrigation district, evidence of the
31 district's authority to represent the water right holders shall be
32 submitted to and for the satisfaction of the department.

33 (6) The state shall not contract with any person to acquire a water
34 right served by an irrigation district without the approval of the
35 board of directors of the irrigation district. Disapproval by a board
36 shall be factually based on probable adverse effects on the ability of
37 the district to deliver water to other members or on maintenance of the
38 financial integrity of the district.

1 (7) RCW 90.03.380 has no applicability to trust water rights
2 acquired by the state under this section through the funding of water
3 conservation projects.

4 **Sec. 7.** RCW 90.42.040 and 1993 c 98 s 3 are each amended to read
5 as follows:

6 (1) All trust water rights acquired by the state shall be placed in
7 the state trust water rights program to be managed by the department.
8 Trust water rights acquired by the state shall be held or authorized
9 for use by the department for instream flows, irrigation, municipal, or
10 other beneficial uses consistent with applicable (~~regional plans for~~
11 ~~pilot planning areas,~~) watershed plans under chapter 90.82 RCW or to
12 resolve critical water supply problems, including implementation of
13 state and local plans and programs for recovery of aquatic species
14 listed as threatened or endangered under the federal endangered species
15 act (16 U.S.C. Sec. 1531 et seq.).

16 (2) The department shall issue a water right certificate in the
17 name of the state of Washington for each permanent trust water right
18 conveyed to the state indicating the reach or reaches of the stream,
19 the quantity, and the use or uses to which it may be applied. A
20 superseding certificate shall be issued that specifies the amount of
21 water the water right holder would continue to be entitled to as a
22 result of the water conservation project. The superseding certificate
23 shall retain the same priority date as the original right. For
24 nonpermanent conveyances, the department shall issue certificates or
25 such other instruments as are necessary to reflect the changes in
26 purpose or place of use or point of diversion or withdrawal. Water
27 rights for which such nonpermanent conveyances are arranged shall not
28 be subject to relinquishment for nonuse.

29 (3) A trust water right retains the same priority date as the water
30 right from which it originated, but as between them the trust right
31 shall be deemed to be inferior in priority unless otherwise specified
32 by an agreement between the state and the party holding the original
33 right.

34 (4) Exercise of a trust water right may be authorized only if the
35 department first determines that neither water rights existing at the
36 time the trust water right is established, nor the public interest will
37 be impaired. If impairment becomes apparent during the time a trust

1 water right is being exercised, the department shall cease or modify
2 the use of the trust water right to eliminate the impairment.

3 (5) Before any trust water right is created or modified, the
4 department shall, at a minimum, require that a notice be published in
5 a newspaper of general circulation published in the county or counties
6 in which the storage, diversion, and use are to be made, and in other
7 newspapers as the department determines is necessary, once a week for
8 two consecutive weeks. At the same time the department shall send a
9 notice containing pertinent information to all appropriate state
10 agencies, potentially affected local governments and federally
11 recognized tribal governments, and other interested parties, and shall
12 post the notice on its web page.

13 (6) RCW 90.14.140 through 90.14.230 have no applicability to trust
14 water rights held by the department under this chapter or exercised
15 under this section.

16 (~~((7) RCW 90.03.380 has no applicability to trust water rights~~
17 ~~acquired by the state through the funding of water conservation~~
18 ~~projects.))~~)

19 **Sec. 8.** RCW 90.42.050 and 1991 c 347 s 9 are each amended to read
20 as follows:

21 The department, in cooperation with federal agencies, federally
22 recognized Indian tribes, local governments, state agencies, and other
23 interested parties, shall establish guidelines (~~((by July 1, 1992,))~~)
24 governing the acquisition, administration, and management of trust
25 water rights. The guidelines shall address at a minimum the following:

26 (1) Methods for determining the net water savings resulting from
27 water conservation projects or programs carried out in accordance with
28 this chapter, and other factors to be considered in determining the
29 quantity or value of water available for potential designation as a
30 trust water right;

31 (2) Criteria for determining the portion of net water savings to be
32 conveyed to the state under this chapter;

33 (3) Criteria for prioritizing water conservation projects;

34 (4) A description of potential public benefits that will affect
35 consideration for state financial assistance in RCW 90.42.030;

36 (5) Procedures for providing notification to potentially interested
37 parties;

1 (6) Criteria for the assignment of uses of trust water rights
2 acquired for implementation of state and local plans and programs for
3 recovery of aquatic species listed as threatened or endangered under
4 the federal endangered species act (16 U.S.C. Sec. 1531 et seq.) or
5 acquired in areas of the state not addressed in a regional water
6 resource plan or critical area agreement; ((and))

7 (7) Procedures that will reasonably substitute for the requirements
8 of RCW 90.03.380 and 90.03.390, when trust water rights are conveyed
9 under RCW 90.42.080(6); and

10 (8) Contracting procedures and other procedures not specifically
11 addressed in this section.

12 These guidelines shall be submitted to the joint select committee
13 on water resource policy before adoption.

14 **Sec. 9.** RCW 90.42.080 and 1993 c 98 s 4 are each amended to read
15 as follows:

16 (1) The state may acquire all or portions of existing water rights,
17 by purchase, gift, contract, or other appropriate means other than by
18 condemnation, from any person or entity or combination of persons or
19 entities. Once acquired, such rights are trust water rights.

20 (2) The department may enter into leases, contracts, or such other
21 arrangements with other persons or entities as appropriate, to ensure
22 that trust water rights acquired in accordance with this chapter may be
23 exercised to the fullest possible extent.

24 (3) Trust water rights may be acquired by the state on a temporary
25 or permanent basis.

26 (4) The provisions of RCW 90.03.380 and 90.03.390 apply to
27 transfers of water rights under this section, except as provided in RCW
28 90.42.050(7).

29 (5) No funds may be expended for the purchase of water rights by
30 the state pursuant to this section unless specifically appropriated for
31 this purpose by the legislature.

32 (6) Trust water rights may be expressly conditioned by the grantor
33 for instream use, for implementation of state and local plans and
34 programs for recovery of aquatic species listed as threatened or
35 endangered under the federal endangered species act (16 U.S.C. Sec.
36 1531 et seq.), or for compliance with federal actions under the act.

37 (7) The state may acquire all or portions of existing water rights
38 as trust water rights on a temporary basis as a result of temporarily

1 reduced water need where such reduction is due to varying weather
2 conditions including but not limited to precipitation and temperature,
3 as long as the water user's diversion and delivery facilities are
4 maintained in good operating condition consistent with beneficial use
5 of the full amount of the water right. The trust water rights under
6 this subsection may be acquired either in anticipation of such reduced
7 water need or at the conclusion of a season during which use of water
8 had been anticipated but not carried out.

9 NEW SECTION. Sec. 10. A new section is added to chapter 90.42 RCW
10 to read as follows:

11 The status of a water right as a trust water right shall not be
12 evidence of the validity or quantity of the right."

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15 By Committee on Environmental Quality & Water Resources

16 NOT ADOPTED 3/3/00

17 On page 1, line 1 of the title, after "rights;" strike the
18 remainder of the title and insert "amending RCW 90.14.200, 90.38.020,
19 90.42.005, 90.42.010, 90.42.020, 90.42.030, 90.42.040, 90.42.050, and
20 90.42.080; and adding a new section to chapter 90.42 RCW."

EFFECT: Allows equitable relief from relinquishment for nonuse as
a result of excuse by the court in an adjudication.

Allows grantors to condition conveyance of trust water rights on
instream flows, on participation in an ESA plan or program, or for
purposes of compliance with federal actions under ESA.

Directs Ecology to adopt reasonable alternatives to the regular
changes/transfers analysis for these purposes.

Expressly allows conveyance by contract.

Amends the trust water rights statute to allow conveyance on a
temporary basis of unused water, as a result of temporarily reduced
need.

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