
SUBSTITUTE HOUSE BILL 2994

State of Washington

56th Legislature

2000 Regular Session

By House Committee on Agriculture & Ecology (originally sponsored by Representatives Parlette, G. Chandler, B. Chandler and Linville)

Read first time 02/04/2000. Referred to Committee on .

1 AN ACT Relating to trust water rights; and amending RCW 90.03.345,
2 90.14.140, 90.38.020, 90.38.040, 90.42.040, and 90.42.080.

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

4 **Sec. 1.** RCW 90.03.345 and 1979 ex.s. c 216 s 7 are each amended to
5 read as follows:

6 (1) The establishment of reservations of water for agriculture,
7 hydroelectric energy, municipal, industrial, and other beneficial uses
8 under RCW 90.54.050(1) or minimum flows or levels under RCW 90.22.010
9 or 90.54.040 shall constitute appropriations within the meaning of this
10 chapter with priority dates as of the effective dates of their
11 establishment. Whenever an application for a permit to make beneficial
12 use of public waters embodied in a reservation, established after
13 September 1, 1979, is filed with the department of ecology after the
14 effective date of such reservation, the priority date for a permit
15 issued pursuant to an approval by the department of ecology of the
16 application shall be the effective date of the reservation.

17 (2) A water right for instream use may be held by the state through
18 the establishment of a minimum flow or level as described in subsection
19 (1) of this section or may be held by the state as a trust water right

1 under chapter 90.38 or 90.42 RCW. A water right for instream use may
2 also be established through the approval of a change, transfer, or
3 amendment of an existing water right under this chapter or chapter
4 90.44 RCW in the manner prescribed for a water right for any other use.
5 A water right for an instream use established through such a change,
6 transfer, or amendment may be held as an appropriative right by any
7 person or entity.

8 **Sec. 2.** RCW 90.14.140 and 1998 c 258 s 1 are each amended to read
9 as follows:

10 (1) For the purposes of RCW 90.14.130 through 90.14.180,
11 "sufficient cause" shall be defined as the nonuse of all or a portion
12 of the water by the owner of a water right for a period of five or more
13 consecutive years where such nonuse occurs as a result of:

- 14 (a) Drought, or other unavailability of water;
- 15 (b) Active service in the armed forces of the United States during
16 military crisis;
- 17 (c) Nonvoluntary service in the armed forces of the United States;
- 18 (d) The operation of legal proceedings;
- 19 (e) Federal or state agency leases of or options to purchase lands
20 or water rights which preclude or reduce the use of the right by the
21 owner of the water right;
- 22 (f) Federal laws imposing land or water use restrictions either
23 directly or through the voluntary enrollment of a landowner in a
24 federal program implementing those laws, or acreage limitations, or
25 production quotas.

26 (2) Notwithstanding any other provisions of RCW 90.14.130 through
27 90.14.180, there shall be no relinquishment of any water right:

- 28 (a) If such right is claimed for power development purposes under
29 chapter 90.16 RCW and annual license fees are paid in accordance with
30 chapter 90.16 RCW;
- 31 (b) If such right is used for a standby or reserve water supply to
32 be used in time of drought or other low flow period so long as
33 withdrawal or diversion facilities are maintained in good operating
34 condition for the use of such reserve or standby water supply;
- 35 (c) If such right is claimed for a determined future development to
36 take place either within fifteen years of July 1, 1967, or the most
37 recent beneficial use of the water right, whichever date is later;

1 (d) If such right is claimed for municipal water supply purposes
2 under chapter 90.03 RCW;

3 (e) If such waters are not subject to appropriation under the
4 applicable provisions of RCW 90.40.030; (~~or~~)

5 (f) If such right or portion of the right is leased to another
6 person for use on land other than the land to which the right is
7 appurtenant as long as the lessee makes beneficial use of the right in
8 accordance with this chapter and a transfer or change of the right has
9 been approved by the department in accordance with RCW 90.03.380,
10 90.03.383, 90.03.390, or 90.44.100; or

11 (g) If such right is held for instream use.

12 **Sec. 3.** RCW 90.38.020 and 1989 c 429 s 3 are each amended to read
13 as follows:

14 (1)(a) The department may acquire water rights, including but not
15 limited to storage rights, by purchase, gift, or other appropriate
16 means other than by condemnation, from any person or entity or
17 combination of persons or entities. Once acquired, such rights are
18 trust water rights. A water right acquired by the state that is
19 expressly conditioned to limit its use to instream purposes shall be
20 administered as a trust water right in compliance with that condition.

21 (b) If an aquatic species is listed as threatened or endangered
22 under the federal endangered species act (16 U.S.C. Sec. 1531 et seq.)
23 for a body of water, certain instream flows are needed for the species,
24 and the holder of a right to water from the body of water chooses to
25 donate all or a portion of the person's water right to the trust water
26 system to assist in providing those instream flows on a temporary or
27 permanent basis as described in subsection (3) of this section, the
28 department shall accept the donation on such terms as the person may
29 prescribe as long as the donation satisfies the requirements of
30 subsection (4) of this section. Once accepted, such rights are trust
31 water rights within the conditions prescribed by the donor.

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

36 (3) The trust water rights may be acquired on a temporary or
37 permanent basis. A trust water right acquired on a temporary basis may
38 or may not be acquired for a specified number of years or other period

1 of time. An example of one which might not be acquired for a specified
2 number of years is as follows: If a trust water right is acquired on
3 a temporary basis to assist in providing certain instream flows for a
4 species of fish that is listed as threatened or endangered under the
5 federal endangered species act (16 U.S.C. Sec. 1531 et seq.), the water
6 right could be acquired for the period of time that the species is so
7 listed and could also be acquired for only those portions of that
8 period of time that the water right is needed to assist in providing
9 those instream flows. The example provided by this subsection shall
10 not be construed as limiting in any manner the remaining provisions of
11 this subsection.

12 (4) A water right donated under subsection (1)(b) of this section
13 shall not exceed the extent to which the water right was exercised
14 during any of the five years before the donation nor may the total of
15 any portion of the water right remaining with the donor plus the
16 donated portion of the water right exceed the extent to which the water
17 right was exercised during any of the five years before the donation.
18 If, upon appeal from a determination by the department, it is found
19 that exercising the trust water right resulting from the donation or
20 exercising a portion of that trust water right impairs existing water
21 rights in violation of RCW 90.38.902, the donation shall be altered to
22 eliminate the impairment.

23 (5) Any water right conveyed to the trust water right system as a
24 gift shall be managed by the department for public purposes to ensure
25 that the gift qualifies as a deduction from federal income taxation for
26 the person or entity conveying the gift.

27 **Sec. 4.** RCW 90.38.040 and 1994 c 264 s 90 are each amended to read
28 as follows:

29 (1) All trust water rights acquired by the department shall be
30 placed in the Yakima river basin trust water rights program to be
31 managed by the department. The department shall issue a water right
32 certificate in the name of the state of Washington for each trust water
33 right it acquires.

34 (2) Trust water rights shall retain the same priority date as the
35 water right from which they originated. Trust water rights may be
36 modified as to purpose or place of use or point of diversion, including
37 modification from a diversionary use to a nondiversionary instream use.

1 (3) Trust water rights may be held by the department for instream
2 flows and/or irrigation use.

3 (4) A schedule of the amount of net water saved as a result of
4 water conservation projects carried out in accordance with this
5 chapter, shall be developed annually to reflect the predicted
6 hydrologic and water supply conditions, as well as anticipated water
7 demands, for the upcoming irrigation season. This schedule shall serve
8 as the basis for the distribution and management of trust water rights
9 each year.

10 (5)(a) No exercise of a trust water right may be authorized unless
11 the department first determines that no existing water rights, junior
12 or senior in priority, will be impaired as to their exercise or injured
13 in any manner whatever by such authorization. Before any trust water
14 right is exercised, the department shall publish notice thereof in a
15 newspaper of general circulation published in the county or counties in
16 which the storage, diversion, and use are to be made, and in such other
17 newspapers as the department determines are necessary, once a week for
18 two consecutive weeks. At the same time the department may also send
19 notice thereof containing pertinent information to the director of fish
20 and wildlife.

21 (b) Subsection (5)(a) of this section does not apply to a trust
22 water right resulting from a donation for instream flows described in
23 RCW 90.38.020(1). However, the department shall provide the notice
24 described in (a) of this subsection the first time the trust water
25 right resulting from the donation is exercised.

26 (6) RCW 90.03.380 and 90.14.140 through 90.14.910 shall have no
27 applicability to trust water rights held by the department under this
28 chapter or exercised under this section.

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

31 (1) All trust water rights acquired by the state shall be placed in
32 the state trust water rights program to be managed by the department.
33 Trust water rights acquired by the state shall be held or authorized
34 for use by the department for instream flows, irrigation, municipal, or
35 other beneficial uses consistent with applicable regional plans for
36 pilot planning areas, or to resolve critical water supply problems.

37 (2) The department shall issue a water right certificate in the
38 name of the state of Washington for each permanent trust water right

1 conveyed to the state indicating the reach or reaches of the stream,
2 the quantity, and the use or uses to which it may be applied. A
3 superseding certificate shall be issued that specifies the amount of
4 water the water right holder would continue to be entitled to as a
5 result of the water conservation project. The superseding certificate
6 shall retain the same priority date as the original right. For
7 nonpermanent conveyances, the department shall issue certificates or
8 such other instruments as are necessary to reflect the changes in
9 purpose or place of use or point of diversion or withdrawal. Water
10 rights for which such nonpermanent conveyances are arranged shall not
11 be subject to relinquishment for nonuse.

12 (3) A trust water right retains the same priority date as the water
13 right from which it originated, but as between them the trust right
14 shall be deemed to be inferior in priority unless otherwise specified
15 by an agreement between the state and the party holding the original
16 right.

17 (4) Exercise of a trust water right may be authorized only if the
18 department first determines that neither water rights existing at the
19 time the trust water right is established, nor the public interest will
20 be impaired. If impairment becomes apparent during the time a trust
21 water right is being exercised, the department shall cease or modify
22 the use of the trust water right to eliminate the impairment.

23 (5) Before any trust water right is created or modified, the
24 department shall, at a minimum, require that a notice be published in
25 a newspaper of general circulation published in the county or counties
26 in which the storage, diversion, and use are to be made, and in other
27 newspapers as the department determines is necessary, once a week for
28 two consecutive weeks. At the same time the department shall send a
29 notice containing pertinent information to all appropriate state
30 agencies, potentially affected local governments and federally
31 recognized tribal governments, and other interested parties.

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

35 (7) RCW 90.03.380 has no applicability to trust water rights
36 acquired by the state through the funding of water conservation
37 projects.

38 (8) Subsections (4) and (5) of this section do not apply to a trust
39 water right resulting from a donation for instream flows described in

1 RCW 90.42.080(1)(b). However, the department shall provide the notice
2 described in subsection (5) of this section the first time the trust
3 water right resulting from the donation is exercised.

4 **Sec. 6.** RCW 90.42.080 and 1993 c 98 s 4 are each amended to read
5 as follows:

6 (1)(a) The state may acquire all or portions of existing water
7 rights, by purchase, gift, or other appropriate means other than by
8 condemnation, from any person or entity or combination of persons or
9 entities. Once acquired, such rights are trust water rights. A water
10 right acquired by the state that is expressly conditioned to limit its
11 use to instream purposes shall be administered as a trust water right
12 in compliance with that condition.

13 (b) If an aquatic species is listed as threatened or endangered
14 under the federal endangered species act (16 U.S.C. Sec. 1531 et seq.)
15 for a body of water, certain instream flows are needed for the species,
16 and the holder of a right to water from the body of water chooses to
17 donate all or a portion of the person's water right to the trust water
18 system to assist in providing those instream flows on a temporary or
19 permanent basis as described in subsection (3) of this section, the
20 department shall accept the donation on such terms as the person may
21 prescribe as long as the donation satisfies the requirements of
22 subsection (4) of this section. Once accepted, such rights are trust
23 water rights within the conditions prescribed by the donor.

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

28 (3) Trust water rights may be acquired by the state on a temporary
29 or permanent basis. A trust water right acquired on a temporary basis
30 may or may not be acquired for a specified number of years or other
31 period of time. An example of one which might not be acquired for a
32 specified number of years is as follows: If a trust water right is
33 acquired on a temporary basis to assist in providing certain instream
34 flows for a species of fish that is listed as threatened or endangered
35 under the federal endangered species act (16 U.S.C. Sec. 1531 et seq.),
36 the water right could be acquired for the period of time that the
37 species is so listed and could also be acquired for only those portions
38 of that period of time that the water right is needed to assist in

1 providing those instream flows. The example provided by this
2 subsection shall not be construed as limiting in any manner the
3 remaining provisions of this subsection.

4 (4) A water right donated under subsection (1)(b) of this section
5 shall not exceed the extent to which the water right was exercised
6 during any of the five years before the donation nor may the total of
7 any portion of the water right remaining with the donor plus the
8 donated portion of the water right exceed the extent to which the water
9 right was exercised during any of the five years before the donation.
10 If, upon appeal from a determination by the department, it is found
11 that exercising the trust water right resulting from the donation or
12 exercising a portion of that trust water right impairs existing water
13 rights in violation of RCW 90.42.070, the donation shall be altered to
14 eliminate the impairment.

15 (5) The provisions of RCW 90.03.380 and 90.03.390 do not apply to
16 donations for instream flows described in subsection (1)(b) of this
17 section, but do apply to other transfers of water rights under this
18 section.

19 ~~((+5+))~~ (6) No funds may be expended for the purchase of water
20 rights by the state pursuant to this section unless specifically
21 appropriated for this purpose by the legislature.

22 (7) Any water right conveyed to the trust water right system as a
23 gift shall be managed by the department for public purposes to ensure
24 that the gift qualifies as a deduction from federal income taxation for
25 the person or entity conveying the gift.

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