

ESHB 1640 - S AMD 411

By Senators Honeyford, Morton, Fraser

ADOPTED 04/17/2003

1 Strike everything after the enacting clause and insert the
2 following:

3 "Sec. 1. RCW 90.42.005 and 1991 c 347 s 1 are each amended to read
4 as follows:

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

7 (2) The legislature finds that:

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

11 (b) Consistent with RCW 90.54.180, issuance of new water rights,
12 voluntary water transfers, and conservation and water use efficiency
13 programs, including storage, (~~should be the preferred~~) all are
14 acceptable methods of addressing water uses because they can relieve
15 current critical water situations, provide for presently unmet needs,
16 and assist in meeting future water needs. Presently unmet needs or
17 current needs includes the water required to increase the frequency of
18 occurrence of base or minimum flow levels in streams of the state, the
19 water necessary to satisfy existing water rights, or the water
20 necessary to provide full supplies to existing water systems with
21 current supply deficiencies; (~~and~~)

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

29 (d) Water banking as a function of the trust water program and as
30 authorized by this chapter can provide an effective means to facilitate

1 the voluntary transfer of water rights established through
2 conservation, purchase, lease, or donation, to preserve water rights
3 and provide water for presently unmet and future needs; and to achieve
4 a variety of water resource management objectives throughout the state,
5 including drought response, improving streamflows on a voluntary basis,
6 providing water mitigation, or reserving water supply for future uses.

7 **NEW SECTION. Sec. 2.** A new section is added to chapter 90.42 RCW
8 to read as follows:

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

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

13 (a) To authorize the use of trust water rights to mitigate for
14 water resource impacts, future water supply needs, or any beneficial
15 use under chapter 90.03, 90.44, or 90.54 RCW, consistent with any terms
16 and conditions established by the transferor, except that return flows
17 from water rights authorized in whole or in part for any purpose shall
18 remain available as part of the Yakima basin's total water supply
19 available and to satisfy existing rights for other downstream uses and
20 users;

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

23 (c) To provide a source of water rights the department can make
24 available to third parties on a temporary or permanent basis for any
25 beneficial use under chapter 90.03, 90.44, or 90.54 RCW.

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

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

28 (b) Issue temporary water rights or portions thereof for new
29 potable uses requiring an adequate and reliable water supply under RCW
30 19.27.097;

31 (c) Administer federal project water rights, including federal
32 storage rights; or

33 (d) Allow carryover of stored water from one water year to another
34 water year.

35 (4) For purposes of this section and section 6 of this act, "total
36 water supply available" shall be defined as provided in the 1945

1 consent decree between the United States and water users in the Yakima
2 river basin, and consistent with later interpretation by state and
3 federal courts.

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

6 (1) The department, with the consent of the water right holder, may
7 identify trust water rights for administration for water banking
8 purposes, including trust water rights established before the effective
9 date of this section.

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

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

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

31 (a) The department receives a request for transfer of a water right
32 or portion thereof currently administered by the department for water
33 banking purposes;

34 (b) The request is consistent with any previous review under RCW

1 90.03.380 of the water right and future temporary or permanent
2 beneficial uses;

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

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

11 (2) The priority date of the water right or portion thereof
12 transferred by the department from the trust water program for water
13 banking purposes shall be the priority date of the underlying water
14 right.

15 (3) The department shall issue documentation for that water right
16 or portion thereof to the new water right holder based on the
17 requirements applicable to the transfer of other water rights from the
18 trust water rights program. Such documentation shall include a
19 description of the property to which the water right will be
20 appurtenant after the water right or portion thereof is transferred
21 from the trust water program to a third party.

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

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

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

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

25 (4) Affect or modify the rights of any person or entity under a
26 water rights adjudication or under any order of the court conducting a
27 water rights adjudication.

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

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

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

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

3 (4) Alter, establish, or impair the respective rights of states,
4 the United States, the Yakama Nation, or any other person or entity
5 with respect to any water or water-related right;

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

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

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

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

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

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28 On page 1, line 2 of the title, after "program;" strike the
29 remainder of the title and insert "amending RCW 90.42.005; adding new

1 sections to chapter 90.42 RCW; creating a new section; and declaring an
2 emergency."

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