
HOUSE BILL 3140

State of Washington 58th Legislature 2004 Regular Session

By Representatives Linville and Chandler; by request of Governor Locke

Read first time 01/29/2004. Referred to Committee on Judiciary.

1 AN ACT Relating to the establishment of a water court; amending RCW
2 2.08.010, 43.03.012, 90.03.110, 90.03.120, 90.03.160, 90.03.180,
3 90.03.190, 90.03.210, 90.03.230, 34.05.514, 34.05.518, 34.05.570,
4 34.05.578, and 34.05.588; reenacting and amending RCW 34.05.526; adding
5 a new chapter to Title 2 RCW; creating new sections; and providing a
6 contingent effective date.

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

8 NEW SECTION. **Sec. 1.** The legislature finds that legal proceedings
9 relating to water rights and instream flows impose a growing demand on
10 the superior courts of the state. The legislature further finds that
11 the technical complexity and specialized legal issues raised by many
12 water right disputes would be better managed by a water court with
13 specialized expertise. Therefore, it is the intent of the legislature
14 to establish a water court within the state court system that will have
15 exclusive original jurisdiction for challenges relating to the adoption
16 of instream flows and that will have appellate jurisdiction for water
17 rights management and enforcement disputes. Further, it is the intent
18 of the legislature to provide the water court with exclusive original
19 jurisdiction for future general water rights adjudications, if any. It

1 is not the intent of the legislature, by vesting the water court with
2 exclusive original jurisdiction for future general water rights
3 adjudications, to direct the state to file, or not, any such
4 adjudications.

5 **Sec. 2.** RCW 2.08.010 and 1955 c 38 s 3 are each amended to read as
6 follows:

7 Except as provided in this act, the superior court shall have
8 original jurisdiction in all cases in equity, and in all cases at law
9 which involve the title or possession of real property, or the legality
10 of any tax, impost, assessment, toll or municipal fine, and in all
11 other cases in which the demand or the value of the property in
12 controversy amounts to three hundred dollars, and in all criminal cases
13 amounting to felony, and in all cases of misdemeanor not otherwise
14 provided for by law; of actions of forcible entry and detainer; of
15 proceedings in insolvency; of actions to prevent or abate a nuisance;
16 of all matters of probate, of divorce and for annulment of marriage,
17 and for such special cases and proceedings as are not otherwise
18 provided for; and shall also have original jurisdiction in all cases
19 and of all proceedings in which jurisdiction shall not have been by law
20 vested exclusively in some other court, and shall have the power of
21 naturalization and to issue papers therefor. Said courts and their
22 judges shall have power to issue writs of mandamus, quo warranto,
23 review, certiorari, prohibition and writs of habeas corpus on petition
24 by or on behalf of any person in actual custody in their respective
25 counties. Injunctions and writs of prohibition and of habeas corpus
26 may be issued on legal holidays and nonjudicial days.

27 NEW SECTION. **Sec. 3.** The water court is a court of record, and
28 shall be always open, except on nonjudicial days.

29 NEW SECTION. **Sec. 4.** The water court shall have exclusive
30 original jurisdiction in all appeals of rules adopted by the department
31 of ecology relating to instream flows and in any future general
32 adjudications of water rights filed after the effective date of this
33 section.

1 NEW SECTION. **Sec. 5.** The water court shall have appellate
2 jurisdiction in cases affecting water rights arising from review by the
3 pollution control hearings board.

4 NEW SECTION. **Sec. 6.** (1) There shall be three divisions of the
5 water court, one in each of the three court of appeals divisions within
6 the state. The water court shall be located in the city having the
7 largest population within each of the three divisions unless approved
8 otherwise by the chief justice of the supreme court. Each division
9 shall have a minimum of one judge. Additional judges may be added,
10 including an at-large judge under section 8 of this act. The water
11 court may hold hearings in any suitable location taking into account
12 the convenience of the hearing's participants and the public.

13 (2) A central court administrator for the water court shall be
14 appointed by the administrator for the courts and shall operate within
15 the office of the administrator for the courts.

16 (3) The water court may employ pro tem judges, court commissioners,
17 referees, and other court staff in the same manner as the superior
18 courts as provided in this title.

19 NEW SECTION. **Sec. 7.** (1) One water court judge shall initially be
20 appointed by the governor for each water court division. The governor
21 shall determine which water court judge positions shall initially be
22 appointed for two years, four years, and six years. Except as provided
23 for the initial appointments made by the governor during the initial
24 establishment of the water court, water court judges shall be appointed
25 to terms of six years and shall serve until a successor is elected and
26 qualified or appointed. The supreme court shall nominate a minimum of
27 three qualified persons for each water court judgeship for the
28 governor's consideration and the governor shall make the appointment
29 from the slate of those persons so nominated. Persons who have
30 practiced law for a minimum of five years and have resided within the
31 water court division for a minimum of one year are eligible to be
32 appointed. The governor shall, in making appointments and filling
33 vacancies created in the water courts, take into consideration such
34 factors as: Personal character; intellect; ability; diversity of
35 background of experience in the practice of the law; diversity of
36 political philosophy; diversity of educational experience; and

1 diversity of affiliation with social and economic groups, for the
2 purpose of maintaining a balanced water court with the highest quality
3 of personnel. It is desirable, though not required, that appointees
4 have experience in and knowledge of state water law and have experience
5 working in a judicial or quasi-judicial body.

6 (2) A competitive election shall be held for each appointed judge
7 position in the general election immediately preceding the expiration
8 of the initial appointed term if the person appointed by the governor
9 informs the secretary of state of his or her intention to stand for
10 election to a second term. The election shall be held in the same
11 manner as the election of superior court judges except that those
12 eligible to vote are all registered voters within the water court
13 division in which the judge would serve. If the appointee informs the
14 secretary of state of an intention to not stand for election, no
15 general election shall be held and the governor shall appoint a new
16 judge in the same manner as provided in subsection (1) of this section.

17 (3) A water court judge who has been appointed and reelected in a
18 competitive election must thereafter stand for a retention election
19 held in the general election preceding the expiration of each six-year
20 term if the judge informs the secretary of state of his or her
21 intention to stand for reelection. The electorate consists of the
22 eligible voters within the water court division in which the judge
23 serves. The judge will be retained for another six-year term if fifty
24 percent or more of the persons casting a ballot in the retention
25 election vote in favor of retention. If the judge decides to not stand
26 for the retention election, no general election shall be held and the
27 governor shall appoint a new judge in the same manner as provided in
28 subsection (1) of this section. If the voters vote to not retain the
29 judge, the governor shall appoint a new judge in the same manner as
30 provided in subsection (1) of this section.

31 (4) A vacant judicial position on a water court shall be filled by
32 appointment by the governor for the remainder of the term or for a six-
33 year term in the case of a vacancy occurring at the conclusion of a
34 judge's full term. The appointment shall be made in the manner
35 provided by subsection (1) of this section. The person appointed to
36 fill a vacant position must stand for a competitive election at the
37 conclusion of the term of the position he or she is filling and
38 subsequent retention elections as provided in this section.

1 NEW SECTION. **Sec. 8.** An at-large water court judge may be
2 appointed by the governor upon the recommendation of the water court
3 judges and the central court administrator. The at-large judge may be
4 assigned cases within any of the three divisions in which the workload
5 exceeds the capacity of the water court. An at-large water court judge
6 shall be appointed in the same manner as for a judge serving in one of
7 the divisions and shall stand for a statewide open election prior to
8 the conclusion of the initial six-year term and for retention elections
9 every six years thereafter for as long as the judge wishes to continue
10 in the position. Vacancies of the at-large judge position shall be
11 filled in the same manner as provided in section 7(1) of this act.

12 NEW SECTION. **Sec. 9.** Every water court judge shall, before
13 entering upon the duties of his or her office, take and subscribe an
14 oath that he or she will support the Constitution of the United States
15 and the Constitution of the state of Washington, and will faithfully
16 and impartially discharge the duties of judge to the best of his or her
17 ability, which oath shall be filed in the office of the secretary of
18 state. Such an oath or affirmation to be in form substantially the
19 same as prescribed for justices of the supreme court.

20 NEW SECTION. **Sec. 10.** The water court judges shall select a
21 presiding judge and an assistant presiding judge as provided in
22 Washington courts general rule 29. In addition to having
23 responsibilities designated by rule, the presiding judge is responsible
24 for assigning each new water case filed with the court. The presiding
25 judge shall consider the geographic origin of each case and the
26 workload of each judge when making assignment decisions in order to
27 equitably distribute the workload of the court. The presiding judge
28 shall to the extent practicable balance the workload of the judges by
29 assigning cases to the division in which each case arises or by
30 assigning cases to the at-large judge, if one is established.

31 **Sec. 11.** RCW 43.03.012 and 2003 1st sp.s. c 1 s 2 are each amended
32 to read as follows:

33 Pursuant to Article XXVIII, section 1 of the state Constitution and
34 RCW 2.04.092, 2.06.062, 2.08.092, 3.58.010, and 43.03.310, the annual
35 salaries of the judges of the state shall be as follows:

- 1 (1) Effective September 1, 2002:
- 2 (a) Justices of the supreme court \$ 134,584
- 3 (b) Judges of the court of appeals \$ 128,116
- 4 (c) Judges of the superior court \$ 121,972
- 5 (d) Full-time judges of the district court \$ 116,135
- 6 (2) Effective September 1, 2003:
- 7 (a) Justices of the supreme court \$ 134,584
- 8 (b) Judges of the court of appeals \$ 128,116
- 9 (c) Judges of the superior court \$ 121,972
- 10 (d) Full-time judges of the district court \$ 116,135
- 11 (3) Effective September 1, 2004:
- 12 (a) Justices of the supreme court \$ 137,276
- 13 (b) Judges of the court of appeals \$ 130,678
- 14 (c) Judges of the superior court and water court \$ 124,411
- 15 (d) Full-time judges of the district court \$ 118,458
- 16 (4) The salary for a part-time district court judge shall be the
- 17 proportion of full-time work for which the position is authorized,
- 18 multiplied by the salary for a full-time district court judge.

19 NEW SECTION. **Sec. 12.** Water court judges are subject to the same
 20 mandatory retirement age as superior court judges as provided by
 21 Article IV, section 3(a) of the state Constitution and are eligible for
 22 benefits under the judicial retirement system as provided in chapters
 23 2.10, 2.12, and 2.14 RCW.

24 NEW SECTION. **Sec. 13.** Unless otherwise provided by statute, all
 25 process issuing out of the water court shall be directed to the sheriff
 26 of the county in which it is to be served, and be executed by the
 27 sheriff according to law. The process of the water courts shall extend
 28 to all parts of the state.

29 NEW SECTION. **Sec. 14.** Adjournments from day to day, or from time
 30 to time, are to be construed as recesses in the sessions, and shall not
 31 prevent the court from sitting at any time.

32 NEW SECTION. **Sec. 15.** The water court judges shall, from time to
 33 time, establish uniform rules for the government of the water court.

1 NEW SECTION. **Sec. 16.** Water court judges shall, on or before the
2 first day of November in each year, report in writing to the judges of
3 the supreme court, such defects and omissions in the laws as their
4 experience may suggest.

5 NEW SECTION. **Sec. 17.** Whenever the presiding judge of the water
6 court requests the governor of the state to direct a judge of the
7 superior court to hold a session of the water court, the governor shall
8 request and direct a judge of the superior court, making such selection
9 as the governor deems to be most consistent with the state of judicial
10 business, to hold a session of the water court. The direction by the
11 governor shall be made in writing, and shall specify the water court
12 division in which the governor directs the superior court judge to hold
13 the session of the water court, and the period during which the
14 superior court judge is to hold the session. Thereupon, it shall be
15 the duty of the superior court judge so requested, and the superior
16 court judge is hereby empowered to hold a session of the water court as
17 specified by the governor.

18 **Sec. 18.** RCW 90.03.110 and 1987 c 109 s 72 are each amended to
19 read as follows:

20 Upon the filing of a petition with the department by one or more
21 persons claiming the right to divert any waters within the state or
22 when, after investigation, in the judgment of the department, the
23 interest of the public will be subserved by a determination of the
24 rights thereto, it shall be the duty of the department to prepare a
25 statement of the facts, together with a plan or map of the locality
26 under investigation, and file such statement and plan or map in the
27 ((superior)) water court ((of the county in which said water is
28 situated, or, in case such water flows or is situated in more than one
29 county, in the county which the department shall determine to be the
30 most convenient to the parties interested therein)). Such statement
31 shall contain substantially the following matter, to wit:

32 (1) The names of all known persons claiming the right to divert
33 said water, the right to the diversion of which is sought to be
34 determined, and

35 (2) A brief statement of the facts in relation to such water, and
36 the necessity for a determination of the rights thereto.

1 **Sec. 19.** RCW 90.03.120 and 1987 c 109 s 73 are each amended to
2 read as follows:

3 Upon the filing of the statement and map as provided in RCW
4 90.03.110 the judge of such ((~~superior~~)) water court shall make an
5 order directing summons to be issued, and fixing the return day
6 thereof, which shall be not less than sixty nor more than ninety days,
7 after the making of such order: PROVIDED, That for good cause, the
8 court, at the request of the department, may modify said time period.
9 A summons shall thereupon be issued out of said ((~~superior~~)) water
10 court, signed and attested by the clerk thereof, in the name of the
11 state of Washington, as plaintiff, against all known persons claiming
12 the right to divert the water involved and also all persons unknown
13 claiming the right to divert the water involved, which said summons
14 shall contain a brief statement of the objects and purpose of the
15 proceedings and shall require the defendants to appear on the return
16 day thereof, and make and file a statement of claim to, or interest in,
17 the water involved and a statement that unless they appear at the time
18 and place fixed and assert such right, judgment will be entered
19 determining their rights according to the evidence: PROVIDED, HOWEVER,
20 That any persons claiming the right to the use of water by virtue of a
21 contract with claimant to the right to divert the same, shall not be
22 necessary parties to the proceeding.

23 **Sec. 20.** RCW 90.03.160 and 1989 c 80 s 1 are each amended to read
24 as follows:

25 Upon the completion of the service of summons as hereinbefore
26 provided, the ((~~superior~~)) water court in which said proceeding is
27 pending shall make an order referring said proceeding to the department
28 to take testimony by its duly authorized designee, as referee, and the
29 designee shall report to and file with the ((~~superior~~)) water court of
30 the county in which such cause is pending a transcript of such
31 testimony for adjudication thereon by such court. The ((~~superior~~))
32 water court may, in any complex case with more than one thousand named
33 defendants, including the United States, retain for hearing and further
34 processing such portions of the proceeding as pertain to a discrete
35 class or classes of defendants or claims of water rights if the court
36 determines that: (1) Resolution of claims of such classes appear to
37 involve significant issues of law, either procedural or substantive;

1 and (2) such a retention will both expedite the conclusion of the case
2 and reduce the overall expenditures of the plaintiff, defendants, and
3 the court.

4 **Sec. 21.** RCW 90.03.180 and 1995 c 292 s 21 are each amended to
5 read as follows:

6 At the time of filing the statement as provided in RCW 90.03.140,
7 each defendant shall pay to the clerk of the ((~~superior~~)) water court
8 a fee as set under RCW 36.18.020.

9 **Sec. 22.** RCW 90.03.190 and 1987 c 109 s 78 are each amended to
10 read as follows:

11 Upon the completion of the taking of testimony it shall be the duty
12 of the department's designee to prepare and file with the clerk of the
13 ((~~superior~~)) water court ((~~where such proceeding is pending,~~)) a
14 transcript of the testimony taken at such hearing, in triplicate,
15 together with all papers and exhibits offered and received in evidence
16 and not already a part of the record. ((~~He~~)) The designee shall also
17 make and file in said court a full and complete report ((~~as in other~~
18 ~~cases of reference in the superior court~~)). Two of said transcripts
19 shall be for the use of the parties as the court may direct. The court
20 shall set a time for the hearing and the designee shall thereupon
21 prepare a notice designating a time for the hearing of said report and
22 serve a copy thereof, together with a copy of ((~~his~~)) the designee's
23 report, on all persons, their agents or attorneys who have appeared in
24 such proceeding. Such service shall be made not less than twenty days
25 before the time for said hearing, either personally or by registered
26 mail, and an affidavit of such service filed with the clerk.

27 **Sec. 23.** RCW 90.03.210 and 2001 c 220 s 5 are each amended to read
28 as follows:

29 (1) During the pendency of such adjudication proceedings prior to
30 judgment or upon review by an appellate court, the stream or other
31 water involved shall be regulated or partially regulated according to
32 the schedule of rights specified in the department's report upon an
33 order of the water court authorizing such regulation: PROVIDED, Any
34 interested party may file a bond and obtain an order staying the
35 regulation of said stream as to him or her, in which case the water

1 court shall make such order regarding the regulation of the stream or
2 other water as he or she may deem just. The bond shall be filed within
3 five days following the service of notice of appeal in an amount to be
4 fixed by the water court and with sureties satisfactory to the court,
5 conditioned to perform the judgment of the water court.

6 (2) Any appeal of a decision of the department on an application to
7 change or transfer a water right subject to a general adjudication that
8 is being litigated actively and was commenced before October 13, 1977,
9 shall be conducted as follows:

10 (a) The appeal shall be filed with the water court conducting the
11 adjudication and served under RCW 34.05.542(3). The content of the
12 notice of appeal shall conform to RCW 34.05.546. Standing to appeal
13 shall be based on the requirements of RCW 34.05.530 and is not limited
14 to parties to the adjudication.

15 (b) If the appeal includes a challenge to the portion of the
16 department's decision that pertains to tentative determinations of the
17 validity and extent of the water right, review of those tentative
18 determinations shall be conducted by the water court consistent with
19 the provisions of RCW 34.05.510 through 34.05.598, except that the
20 review shall be de novo.

21 (c) If the appeal includes a challenge to any portion of the
22 department's decision other than the tentative determinations of the
23 validity and extent of the right, the water court must certify to the
24 pollution control hearings board for review and decision those portions
25 of the department's decision. Review by the pollution control hearings
26 board shall be conducted consistent with chapter 43.21B RCW and the
27 board's implementing regulations, except that the requirements for
28 filing, service, and content of the notice of appeal shall be governed
29 by (a) of this subsection.

30 (d) Appeals shall be scheduled to afford all parties full
31 opportunity to participate before the (~~superior~~) water court and the
32 pollution control hearings board.

33 (e) Any person wishing to appeal the decision of the board made
34 under (c) of this subsection shall seek review of the decision in
35 accordance with chapter 34.05 RCW, except that the petition for review
36 must be filed with the (~~superior~~) water court conducting the
37 adjudication.

1 (3) Nothing in this section shall be construed to affect or modify
2 any treaty or other federal rights of an Indian tribe, or the rights of
3 any federal agency or other person or entity arising under federal law.
4 Nothing in this section is intended or shall be construed as affecting
5 or modifying any existing right of a federally recognized Indian tribe
6 to protect from impairment its federally reserved water rights in
7 federal court.

8 **Sec. 24.** RCW 90.03.230 and 1987 c 109 s 81 are each amended to
9 read as follows:

10 The clerk of the (~~superior~~) water court, immediately upon the
11 entry of any decree by the (~~superior~~) water court, shall transmit a
12 certified copy thereof to the director, who shall immediately enter the
13 same upon the records of the department.

14 **Sec. 25.** RCW 34.05.514 and 2001 c 220 s 3 are each amended to read
15 as follows:

16 (1) Except as provided in subsections (2) (~~and (3)~~) through (5)
17 of this section, proceedings for review under this chapter shall be
18 instituted by paying the fee required under RCW 36.18.020 and filing a
19 petition in the superior court, at the petitioner's option, for (a)
20 Thurston county, (b) the county of the petitioner's residence or
21 principal place of business, or (c) in any county where the property
22 owned by the petitioner and affected by the contested decision is
23 located.

24 (2) For proceedings involving institutions of higher education, the
25 petition shall be filed either in the county in which the principal
26 office of the institution involved is located or in the county of a
27 branch campus if the action involves such branch.

28 (3) For proceedings conducted by the pollution control hearings
29 board pursuant to chapter 43.21B RCW or as otherwise provided in RCW
30 90.03.210(2) involving decisions of the department of ecology on
31 applications for changes or transfers of water rights that are the
32 subject of a general adjudication of water rights that is being
33 litigated actively under chapter 90.03 or 90.44 RCW, the petition must
34 be filed with the (~~superior~~) water court conducting the adjudication,
35 to be consolidated by the court with the general adjudication. A party

1 to the adjudication shall be a party to the appeal under this chapter
2 only if the party files or is served with a petition for review to the
3 extent required by this chapter.

4 (4) For proceedings involving the review of a water rights
5 management or enforcement decision of the pollution control hearings
6 board, the petition shall be filed in the water court.

7 (5) For proceedings involving the review of a rule adopted by the
8 department of ecology that establishes instream flows, the petition
9 shall be filed in the water court.

10 **Sec. 26.** RCW 34.05.526 and 1988 c 288 s 505 and 1988 c 202 s 35
11 are each reenacted and amended to read as follows:

12 An aggrieved party may secure appellate review of any final
13 judgment of the superior court or the water court under this chapter by
14 the supreme court or the court of appeals. The review shall be secured
15 in the manner provided by law for review of superior court decisions in
16 other civil cases.

17 **Sec. 27.** RCW 34.05.518 and 2003 c 393 s 16 are each amended to
18 read as follows:

19 (1) The final decision of an administrative agency in an
20 adjudicative proceeding under this chapter may, except as otherwise
21 provided in chapter 43.21L RCW, be directly reviewed by the court of
22 appeals either (a) upon certification by the superior court or water
23 court pursuant to this section or (b) if the final decision is from an
24 environmental board as defined in subsection (3) of this section, upon
25 acceptance by the court of appeals after a certificate of appealability
26 has been filed by the environmental board that rendered the final
27 decision.

28 (2) For direct review upon certification by the superior court or
29 the water court, an application for direct review must be filed with
30 the superior court or the water court within thirty days of the filing
31 of the petition for review in superior court or water court. The
32 superior court or water court may certify a case for direct review only
33 if the judicial review is limited to the record of the agency
34 proceeding and the court finds that:

35 (a) Fundamental and urgent issues affecting the future

1 administrative process or the public interest are involved which
2 require a prompt determination;

3 (b) Delay in obtaining a final and prompt determination of such
4 issues would be detrimental to any party or the public interest;

5 (c) An appeal to the court of appeals would be likely regardless of
6 the determination in superior court; and

7 (d) The appellate court's determination in the proceeding would
8 have significant precedential value.

9 Procedures for certification shall be established by court rule.

10 (3)(a) For the purposes of direct review of final decisions of
11 environmental boards, environmental boards include those boards
12 identified in RCW 43.21B.005 and growth management hearings boards as
13 identified in RCW 36.70A.250.

14 (b) An environmental board may issue a certificate of appealability
15 if it finds that delay in obtaining a final and prompt determination of
16 the issues would be detrimental to any party or the public interest and
17 either:

18 (i) Fundamental and urgent statewide or regional issues are raised;
19 or

20 (ii) The proceeding is likely to have significant precedential
21 value.

22 (4) The environmental board shall state in the certificate of
23 appealability which criteria it applied, explain how that criteria was
24 met, and file with the certificate a copy of the final decision.

25 (5) For an appellate court to accept direct review of a final
26 decision of an environmental board, it shall consider the same criteria
27 outlined in subsection (3) of this section, except as otherwise
28 provided in chapter 43.21L RCW.

29 (6) The procedures for direct review of final decisions of
30 environmental boards include:

31 (a) Within thirty days after filing the petition for review with
32 the superior court or the water court, a party may file an application
33 for direct review with the superior court or the water court and serve
34 the appropriate environmental board and all parties of record. The
35 application shall request the environmental board to file a certificate
36 of appealability.

37 (b) If an issue on review is the jurisdiction of the environmental

1 board, the board may file an application for direct review on that
2 issue.

3 (c) The environmental board shall have thirty days to grant or deny
4 the request for a certificate of appealability and its decision shall
5 be filed with the superior court or the water court and served on all
6 parties of record.

7 (d) If a certificate of appealability is issued, the parties shall
8 have fifteen days from the date of service to file a notice of
9 discretionary review in the superior court or the water court, and the
10 notice shall include a copy of the certificate of appealability and a
11 copy of the final decision.

12 (e) If the appellate court accepts review, the certificate of
13 appealability shall be transmitted to the court of appeals as part of
14 the certified record.

15 (f) If a certificate of appealability is denied, review shall be by
16 the superior court or the water court. The superior court's or the
17 water court's decision may be appealed to the court of appeals.

18 **Sec. 28.** RCW 34.05.570 and 1995 c 403 s 802 are each amended to
19 read as follows:

20 (1) Generally. Except to the extent that this chapter or another
21 statute provides otherwise:

22 (a) The burden of demonstrating the invalidity of agency action is
23 on the party asserting invalidity;

24 (b) The validity of agency action shall be determined in accordance
25 with the standards of review provided in this section, as applied to
26 the agency action at the time it was taken;

27 (c) The court shall make a separate and distinct ruling on each
28 material issue on which the court's decision is based; and

29 (d) The court shall grant relief only if it determines that a
30 person seeking judicial relief has been substantially prejudiced by the
31 action complained of.

32 (2) Review of rules. (a) A rule may be reviewed by petition for
33 declaratory judgment filed pursuant to this subsection or in the
34 context of any other review proceeding under this section. In an
35 action challenging the validity of a rule, the agency shall be made a
36 party to the proceeding.

1 (b)(i) The validity of any rule, except a rule relating to instream
2 flows established under chapter 90.22, 90.54, or 90.82 RCW, may be
3 determined upon petition for a declaratory judgment addressed to the
4 superior court of Thurston county, when it appears that the rule, or
5 its threatened application, interferes with or impairs or immediately
6 threatens to interfere with or impair the legal rights or privileges of
7 the petitioner. The declaratory judgment order may be entered whether
8 or not the petitioner has first requested the agency to pass upon the
9 validity of the rule in question.

10 (ii) The validity of a rule relating to instream flows may be
11 determined upon petition for a declaratory judgment addressed to the
12 water court when it appears that the rule, or its threatened
13 application, interferes with or impairs or immediately threatens to
14 interfere with or impair the legal rights or privileges of the
15 petitioner. The declaratory judgment order may be entered whether or
16 not the petitioner has first requested the agency to pass upon the
17 validity of the rule in question.

18 (c) In a proceeding involving review of a rule, the court shall
19 declare the rule invalid only if it finds that: The rule violates
20 constitutional provisions; the rule exceeds the statutory authority of
21 the agency; the rule was adopted without compliance with statutory
22 rule-making procedures; or the rule is arbitrary and capricious.

23 (3) Review of agency orders in adjudicative proceedings. The court
24 shall grant relief from an agency order in an adjudicative proceeding
25 only if it determines that:

26 (a) The order, or the statute or rule on which the order is based,
27 is in violation of constitutional provisions on its face or as applied;

28 (b) The order is outside the statutory authority or jurisdiction of
29 the agency conferred by any provision of law;

30 (c) The agency has engaged in unlawful procedure or decision-making
31 process, or has failed to follow a prescribed procedure;

32 (d) The agency has erroneously interpreted or applied the law;

33 (e) The order is not supported by evidence that is substantial when
34 viewed in light of the whole record before the court, which includes
35 the agency record for judicial review, supplemented by any additional
36 evidence received by the court under this chapter;

37 (f) The agency has not decided all issues requiring resolution by
38 the agency;

1 (g) A motion for disqualification under RCW 34.05.425 or 34.12.050
2 was made and was improperly denied or, if no motion was made, facts are
3 shown to support the grant of such a motion that were not known and
4 were not reasonably discoverable by the challenging party at the
5 appropriate time for making such a motion;

6 (h) The order is inconsistent with a rule of the agency unless the
7 agency explains the inconsistency by stating facts and reasons to
8 demonstrate a rational basis for inconsistency; or

9 (i) The order is arbitrary or capricious.

10 (4) Review of other agency action.

11 (a) All agency action not reviewable under subsection (2) or (3) of
12 this section shall be reviewed under this subsection.

13 (b) A person whose rights are violated by an agency's failure to
14 perform a duty that is required by law to be performed may file a
15 petition for review pursuant to RCW 34.05.514, seeking an order
16 pursuant to this subsection requiring performance. Within twenty days
17 after service of the petition for review, the agency shall file and
18 serve an answer to the petition, made in the same manner as an answer
19 to a complaint in a civil action. The court may hear evidence,
20 pursuant to RCW 34.05.562, on material issues of fact raised by the
21 petition and answer.

22 (c) Relief for persons aggrieved by the performance of an agency
23 action, including the exercise of discretion, or an action under (b) of
24 this subsection can be granted only if the court determines that the
25 action is:

26 (i) Unconstitutional;

27 (ii) Outside the statutory authority of the agency or the authority
28 conferred by a provision of law;

29 (iii) Arbitrary or capricious; or

30 (iv) Taken by persons who were not properly constituted as agency
31 officials lawfully entitled to take such action.

32 **Sec. 29.** RCW 34.05.578 and 1988 c 288 s 518 are each amended to
33 read as follows:

34 (1) In addition to other remedies provided by law, an agency may
35 seek enforcement of its rule or order by filing a petition for civil
36 enforcement in the superior court or the water court.

1 (2) The petition must name as respondent each alleged person
2 against whom the agency seeks to obtain civil enforcement.

3 (3) Venue is determined as in other civil cases.

4 (4) A petition for civil enforcement filed by an agency may
5 request, and the court may grant, declaratory relief, temporary or
6 permanent injunctive relief, any other civil remedy provided by law, or
7 any combination of the foregoing.

8 **Sec. 30.** RCW 34.05.588 and 1989 c 175 s 30 are each amended to
9 read as follows:

10 (1) If a person fails to obey an agency subpoena issued in an
11 adjudicative proceeding, or obeys the subpoena but refuses to testify
12 or produce documents when requested concerning a matter under
13 examination, the agency or attorney issuing the subpoena may petition
14 the superior court of any county where the hearing is being conducted
15 or the water court, where the subpoenaed person resides or is found, or
16 where subpoenaed documents are located, for enforcement of the
17 subpoena. The petition shall be accompanied by a copy of the subpoena
18 and proof of service, shall set forth in what specific manner the
19 subpoena has not been complied with, and shall request an order of the
20 court to compel compliance. Upon such petition, the court shall enter
21 an order directing the person to appear before the court at a time and
22 place fixed in the order to show cause why the person has not obeyed
23 the subpoena or has refused to testify or produce documents. A copy of
24 the court's show cause order shall be served upon the person. If it
25 appears to the court that the subpoena was properly issued, and that
26 the particular questions the person refused to answer or the requests
27 for production of documents were reasonable and relevant, the court
28 shall enter an order that the person appear before the agency at the
29 time and place fixed in the order and testify or produce the required
30 documents, and on failing to obey this order the person shall be dealt
31 with as for contempt of court.

32 (2) Agencies with statutory authority to issue investigative
33 subpoenas may petition for enforcement of such subpoenas in accordance
34 with subsection (1) of this section. The agency may petition the
35 superior court of any county or the water court where the subpoenaed
36 person resides or is found, or where subpoenaed documents are located.
37 If it appears to the court that the subpoena was properly issued, that

1 the investigation is being conducted for a lawfully authorized purpose,
2 and that the testimony or documents required to be produced are
3 adequately specified and relevant to the investigation, the court shall
4 enter an order that the person appear before the agency at the time and
5 place fixed in the order and testify or produce the required documents,
6 and failing to obey this order the person shall be dealt with as for
7 contempt of court.

8 (3) Petitions for enforcement of agency subpoenas are not subject
9 to RCW 34.05.578 through 34.05.590.

10 NEW SECTION. **Sec. 31.** Nothing in this act is intended to affect
11 the jurisdiction of the superior court for any general adjudication of
12 water rights proceeding, water management, or enforcement dispute, or
13 challenge of a rule adopting instream flows if such action before the
14 court was filed prior to the effective date of this section.

15 NEW SECTION. **Sec. 32.** Sections 3 through 10 and 12 through 17 of
16 this act constitute a new chapter in Title 2 RCW.

17 NEW SECTION. **Sec. 33.** If Senate/House Bill Joint Resolution No.
18 . . . (Z-1175.1/04) fails to pass the legislature or if the resulting
19 referendum to the voters fails to receive a majority approval of the
20 electorate, this act is null and void.

21 NEW SECTION. **Sec. 34.** If any provision of this act or its
22 application to any person or circumstance is held invalid, the
23 remainder of the act or the application of the provision to other
24 persons or circumstances is not affected.

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