

2 **ESHB 2994** - S AMD - 240

3 By Senators Fraser and Honeyford

4 ADOPTED 3/3/00

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

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

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

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

25 (3) The provisions of RCW 90.14.130 through 90.14.180 shall not be
26 construed to curtail the powers of the superior court, under a
27 recognized head of equitable jurisdiction, to set aside or cancel
28 relinquishment at the motion of a party claiming a water right that is
29 subject to a general adjudication of water rights initiated by the
30 department under RCW 90.03.110 or 90.44.220.

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

33 (1) The department may acquire water rights, including but not
34 limited to storage rights, by purchase, gift, or other appropriate
35 means other than by condemnation, from any person or entity or

1 combination of persons or entities. Once acquired, such rights are
2 trust water rights.

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

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

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

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

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

15 (2) The legislature finds that:

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

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

31 (c) The interests of the state will be served by developing
32 programs and regional water resource plans, in cooperation with local
33 governments, federally recognized tribal governments, appropriate
34 federal agencies, private citizens, and the various water users and
35 water interests in the state, that increase the overall ability to
36 manage the state's waters in order to resolve conflicts and to better
37 satisfy both present and future needs for water.

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

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

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

15 Unless the context clearly requires otherwise, the definitions in
16 this section apply throughout this chapter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 (4) Exercise of a trust water right may be authorized only if the
32 department first determines that neither water rights existing at the
33 time the trust water right is established, nor the public interest will
34 be impaired. If impairment becomes apparent during the time a trust
35 water right is being exercised, the department shall cease or modify
36 the use of the trust water right to eliminate the impairment.

37 (5) Before any trust water right is created or modified, the
38 department shall, at a minimum, require that a notice be published in
39 a newspaper of general circulation published in the county or counties

1 in which the storage, diversion, and use are to be made, and in other
2 newspapers as the department determines is necessary, once a week for
3 two consecutive weeks. At the same time the department shall send a
4 notice containing pertinent information to all appropriate state
5 agencies, potentially affected local governments and federally
6 recognized tribal governments, and other interested parties, and shall
7 post the notice on its web page.

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

11 (~~((7) RCW 90.03.380 has no applicability to trust water rights~~
12 ~~acquired by the state through the funding of water conservation~~
13 ~~projects.))~~)

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

16 The department, in cooperation with federally recognized Indian
17 tribes, local governments, state agencies, and other interested
18 parties, shall establish guidelines (~~((by July 1, 1992,))~~) governing the
19 acquisition, administration, and management of trust water rights. For
20 purposes of subsection 6 of this section, the department shall consult
21 with any appropriate federal agencies. The guidelines shall address at
22 a minimum the following:

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

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

30 (3) Criteria for prioritizing water conservation projects;

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

33 (5) Procedures for providing notification to potentially interested
34 parties;

35 (6) Criteria for the assignment of uses of trust water rights
36 acquired for implementation of state and local plans and programs for
37 recovery of aquatic species listed as threatened or endangered under
38 the federal endangered species act (16 U.S.C. Sec. 1531 et seq.) or

1 acquired in areas of the state not addressed in a regional water
2 resource plan or critical area agreement; ((and))

3 (7) Procedures that will reasonably substitute for the requirements
4 of RCW 90.03.380 and 90.03.390, that may be invoked in lieu of the
5 requirements of RCW 90.03.380 and 90.03.390 at the option of the
6 grantor, when trust water rights are conveyed under RCW 90.42.080(6);
7 and

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

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

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

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

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

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

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

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

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

35 (7) Trust water rights may be expressly conditioned by the grantor
36 to include all or portions of existing water rights as trust water
37 rights on a temporary basis as a result of temporarily reduced water
38 need where such reduction is due to varying weather conditions,

1 including but not limited to precipitation and temperature, or the
2 presence of water from a source not within the control of the water
3 user, 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.

13 NEW SECTION. Sec. 11. A new section is added to chapter 90.03 RCW
14 to read as follows:

15 (1) Applications for transfers or changes may be processed without
16 regard to potential impairment to pending applications for new water
17 rights for the same source of supply.

18 (2) The department may accord priority to the processing of
19 applications for transfers of water rights to the trust water rights
20 program under chapter 90.42 RCW."

21

22 **ESHB 2994** - S COMM AMD

23 By Senators Fraser and Honeyford

24

ADOPTED 3/3/00

25 On page 1, line 1 of the title, after "rights;" strike the
26 remainder of the title and insert "amending RCW 90.14.200, 90.38.020,
27 90.42.005, 90.42.010, 90.42.020, 90.42.030, 90.42.040, 90.42.050, and
28 90.42.080; and adding a new section to chapter 90.03 RCW and chapter
29 90.42 RCW."

EFFECT: Allows access to equitable relief from relinquishment
during 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, to be used at the option of the grantor.

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.

Allows priority processing of trust water right conveyances.

--- END ---