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**SENATE BILL 5794**

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**State of Washington 65th Legislature 2017 Regular Session**

**By** Senator Short

AN ACT Relating to the transfer of seasonal irrigation water rights to the trust water rights program for the purpose of providing mitigation water to a third party for year-round potable water supplies; amending RCW 90.03.380, 90.03.380, and 90.42.120; providing an effective date; providing an expiration date; and declaring an emergency.

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

**Sec.**  RCW 90.03.380 and 2011 c 112 s 2 are each amended to read as follows:

(1) The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purposes of this section, "annual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right. Before any transfer of such right to use water or change of the point of diversion of water or change of purpose of use can be made, any person having an interest in the transfer or change, shall file a written application therefor with the department, and the application shall not be granted until notice of the application is published as provided in RCW 90.03.280. If it shall appear that such transfer or such change may be made without injury or detriment to existing rights, the department shall issue to the applicant a certificate in duplicate granting the right for such transfer or for such change of point of diversion or of use. The certificate so issued shall be filed and be made a record with the department and the duplicate certificate issued to the applicant may be filed with the county auditor in like manner and with the same effect as provided in the original certificate or permit to divert water. The time period that the water right was banked under RCW 90.92.070, in an approved local water plan created under RCW 90.92.090, or the water right was subject to an agreement to not divert under RCW 90.92.050 will not be included in the most recent five-year period of continuous beneficial use for the purpose of determining the annual consumptive quantity under this section. If the water right has not been used during the previous five years but the nonuse of which qualifies for one or more of the statutory good causes or exceptions to relinquishment in RCW 90.14.140 and 90.44.520, the period of nonuse is not included in the most recent five-year period of continuous beneficial use for purposes of determining the annual consumptive quantity of water under this section.

(2) If an application for change proposes to transfer water rights from one irrigation district to another, the department shall, before publication of notice, receive concurrence from each of the irrigation districts that such transfer or change will not adversely affect the ability to deliver water to other landowners or impair the financial integrity of either of the districts.

(3) A change in place of use by an individual water user or users of water provided by an irrigation district need only receive approval for the change from the board of directors of the district if the use of water continues within the irrigation district, and when water is provided by an irrigation entity that is a member of a board of joint control created under chapter 87.80 RCW, approval need only be received from the board of joint control if the use of water continues within the area of jurisdiction of the joint board and the change can be made without detriment or injury to existing rights.

(4) This section shall not apply to trust water rights acquired by the state through the funding of water conservation projects under chapter 90.38 RCW or RCW 90.42.010 through 90.42.070.

(5) A transfer of a seasonal irrigation water right to the trust water rights program for the purpose of providing mitigation water to a third party for year-round potable water supplies pursuant to chapter 90.42 RCW may not be considered to cause impairment to instream flows adopted under chapters 90.22 and 90.54 RCW as long as transfer of the water for mitigation does not exceed the total use and consumptive use that is available under the water right in the trust water rights program.

(6)(a) Pending applications for new water rights are not entitled to protection from impairment, injury, or detriment when an application relating to an existing surface or ground water right is considered.

(b) Applications relating to existing surface or ground water rights may be processed and decisions on them rendered independently of processing and rendering decisions on pending applications for new water rights within the same source of supply without regard to the date of filing of the pending applications for new water rights.

(c) Notwithstanding any other existing authority to process applications, including but not limited to the authority to process applications under WAC 173-152-050 as it existed on January 1, 2001, an application relating to an existing surface or ground water right may be processed ahead of a previously filed application relating to an existing right when sufficient information for a decision on the previously filed application is not available and the applicant for the previously filed application is sent written notice that explains what information is not available and informs the applicant that processing of the next application will begin. The previously filed application does not lose its priority date and if the information is provided by the applicant within sixty days, the previously filed application shall be processed at that time. This subsection ((~~(5)~~)) (6)(c) does not affect any other existing authority to process applications.

(d) Nothing in this subsection ((~~(5)~~)) (6) is intended to stop the processing of applications for new water rights.

((~~(6)~~)) (7) No applicant for a change, transfer, or amendment of a water right may be required to give up any part of the applicant's valid water right or claim to a state agency, the trust water rights program, or to other persons as a condition of processing the application.

((~~(7)~~)) (8) In revising the provisions of this section and adding provisions to this section by chapter 237, Laws of 2001, the legislature does not intend to imply legislative approval or disapproval of any existing administrative policy regarding, or any existing administrative or judicial interpretation of, the provisions of this section not expressly added or revised.

((~~(8)~~)) (9) The development and use of a small irrigation impoundment, as defined in RCW 90.03.370(8), does not constitute a change or amendment for the purposes of this section. The exemption expressly provided by this subsection shall not be construed as requiring a change or transfer of any existing water right to enable the holder of the right to store water governed by the right.

((~~(9)~~)) (10) This section does not apply to a water right involved in an approved local water plan created under RCW 90.92.090, a water right that is subject to an agreement not to divert under RCW 90.92.050, or a banked water right under RCW 90.92.070.

((~~(10)~~)) (11)(a) The department may only approve an application submitted after July 22, 2011, for an interbasin water rights transfer after providing notice electronically to the board of county commissioners in the county of origin upon receipt of an application.

(b) For the purposes of this subsection:

(i) "Interbasin water rights transfer" means a transfer of a water right for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

(ii) "County of origin" means the county from which a water right is transferred or proposed to be transferred.

(c) This subsection applies to counties located east of the crest of the Cascade mountains.

**Sec.**  RCW 90.03.380 and 2011 c 112 s 3 are each amended to read as follows:

(1) The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purposes of this section, "annual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right. Before any transfer of such right to use water or change of the point of diversion of water or change of purpose of use can be made, any person having an interest in the transfer or change, shall file a written application therefor with the department, and the application shall not be granted until notice of the application is published as provided in RCW 90.03.280. If it shall appear that such transfer or such change may be made without injury or detriment to existing rights, the department shall issue to the applicant a certificate in duplicate granting the right for such transfer or for such change of point of diversion or of use. The certificate so issued shall be filed and be made a record with the department and the duplicate certificate issued to the applicant may be filed with the county auditor in like manner and with the same effect as provided in the original certificate or permit to divert water.

(2) If an application for change proposes to transfer water rights from one irrigation district to another, the department shall, before publication of notice, receive concurrence from each of the irrigation districts that such transfer or change will not adversely affect the ability to deliver water to other landowners or impair the financial integrity of either of the districts.

(3) A change in place of use by an individual water user or users of water provided by an irrigation district need only receive approval for the change from the board of directors of the district if the use of water continues within the irrigation district, and when water is provided by an irrigation entity that is a member of a board of joint control created under chapter 87.80 RCW, approval need only be received from the board of joint control if the use of water continues within the area of jurisdiction of the joint board and the change can be made without detriment or injury to existing rights.

(4) This section shall not apply to trust water rights acquired by the state through the funding of water conservation projects under chapter 90.38 RCW or RCW 90.42.010 through 90.42.070.

(5) A transfer of a seasonal irrigation water right to the trust water rights program for the purpose of providing mitigation water to a third party for year-round potable water supplies pursuant to chapter 90.42 RCW may not be considered to cause impairment to instream flows adopted under chapters 90.22 and 90.54 RCW as long as transfer of the water for mitigation does not exceed the total use and consumptive use that is available under the water right in the trust water rights program.

(6)(a) Pending applications for new water rights are not entitled to protection from impairment, injury, or detriment when an application relating to an existing surface or ground water right is considered.

(b) Applications relating to existing surface or ground water rights may be processed and decisions on them rendered independently of processing and rendering decisions on pending applications for new water rights within the same source of supply without regard to the date of filing of the pending applications for new water rights.

(c) Notwithstanding any other existing authority to process applications, including but not limited to the authority to process applications under WAC 173-152-050 as it existed on January 1, 2001, an application relating to an existing surface or ground water right may be processed ahead of a previously filed application relating to an existing right when sufficient information for a decision on the previously filed application is not available and the applicant for the previously filed application is sent written notice that explains what information is not available and informs the applicant that processing of the next application will begin. The previously filed application does not lose its priority date and if the information is provided by the applicant within sixty days, the previously filed application shall be processed at that time. This subsection ((~~(5)~~)) (6)(c) does not affect any other existing authority to process applications.

(d) Nothing in this subsection ((~~(5)~~)) (6) is intended to stop the processing of applications for new water rights.

((~~(6)~~)) (7) No applicant for a change, transfer, or amendment of a water right may be required to give up any part of the applicant's valid water right or claim to a state agency, the trust water rights program, or to other persons as a condition of processing the application.

((~~(7)~~)) (8) In revising the provisions of this section and adding provisions to this section by chapter 237, Laws of 2001, the legislature does not intend to imply legislative approval or disapproval of any existing administrative policy regarding, or any existing administrative or judicial interpretation of, the provisions of this section not expressly added or revised.

((~~(8)~~)) (9) The development and use of a small irrigation impoundment, as defined in RCW 90.03.370(8), does not constitute a change or amendment for the purposes of this section. The exemption expressly provided by this subsection shall not be construed as requiring a change or transfer of any existing water right to enable the holder of the right to store water governed by the right.

((~~(9)~~)) (10)(a) The department may only approve an application submitted after June 30, 2019, for an interbasin water rights transfer after providing notice electronically to the board of county commissioners in the county of origin upon receipt of an application.

(b) For the purposes of this subsection:

(i) "Interbasin water rights transfer" means a transfer of a water right for which the proposed point of diversion is in a different basin than the proposed place of beneficial use.

(ii) "County of origin" means the county from which a water right is transferred or proposed to be transferred.

(c) This subsection applies to counties located east of the crest of the Cascade mountains.

**Sec.**  RCW 90.42.120 and 2003 c 144 s 4 are each amended to read as follows:

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

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

(b) The request is consistent with any previous review under RCW 90.03.380 of the water right and future temporary or permanent beneficial uses;

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

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

(2) The priority date of the water right or portion thereof transferred by the department from the trust water ((~~[rights]~~)) rights program for water banking purposes shall be the priority date of the underlying water right.

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

(4) The transfer of a seasonal irrigation water right or portion thereof currently administered by the department for water banking purposes to a third party for year-round potable water supplies may not be considered to cause impairment to instream flows adopted under chapters 90.22 and 90.54 RCW as long as transfer of the water for mitigation does not exceed the total use and consumptive use that is available under the water right in the trust water rights program.

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

NEW SECTION. **Sec.**  Section 1 of this act expires June 30, 2019.

NEW SECTION. **Sec.**  Section 2 of this act takes effect June 30, 2019.

NEW SECTION. **Sec.**  Except for section 2 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

**--- END ---**