
SENATE BILL 5479

State of Washington

56th Legislature

1999 Regular Session

By Senators Fraser and Spanel

Read first time 01/25/1999. Referred to Committee on Environmental Quality & Water Resources.

1 AN ACT Relating to water resource transfers; amending RCW
2 90.03.380, 90.44.100, and 90.14.140; adding new sections to chapter
3 90.03 RCW; adding a new section to chapter 90.44 RCW; and creating new
4 sections.

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

6 **I. POLICIES AND PURPOSES REGARDING WATER TRANSFERS**

7 NEW SECTION. **Sec. 1.** A new section is added to chapter 90.03 RCW
8 to read as follows:

9 DECLARATION OF POLICIES. The legislature declares that water
10 transfers meeting the standards and procedural requirements of chapter
11 . . . , Laws of 1999 (this act) are an important means of satisfying
12 existing and future water demands in the state. Voluntary water
13 transfers improve the administration of the state's existing water
14 resources by increasing the flexibility of water supply and allocation,
15 particularly during droughts and other water shortages. Creative
16 approaches to reallocation of water usage through transfers and changes
17 provide opportunities to address streamflow augmentation, to address
18 salmon recovery needs, as well as to address water supply needs for

1 growing communities and new industrial, commercial, and agriculture
2 activities.

3 The legislature also declares that short-term and long-term water
4 transfers serve the public interest by creating economic incentives to
5 use water more efficiently and by allowing market processes to direct
6 the distribution of developed water supplies.

7 The legislature further declares that the recognition and
8 protection of water rights are in the public interest and are necessary
9 to facilitate voluntary transfers of water.

10 The legislature recognizes that some water transfers may adversely
11 affect a variety of third parties, including other water right holders,
12 other lawful water users, municipal water supply entities, and other
13 persons who use the state's water resources for their livelihood,
14 recreation, and aesthetic enjoyment. To the extent that water
15 transfers cause injury to other water users, water quality, fish and
16 wildlife, other instream uses of water, ground water resources, and the
17 regional economics of areas from which water is transferred, these
18 third-party interests must be appropriately protected or compensated.

19 The legislature recognizes that Washington's water code, while
20 allowing for transfers and changes in water rights, is silent or
21 unclear on many subjects and may impede or prevent parties from
22 pursuing innovative transfer agreements. Therefore, the legislature
23 declares that it must take an active responsibility to eliminate unwise
24 doctrinal barriers to achieving water transfers while assuring that
25 other recognized water rights and uses are protected.

26 NEW SECTION. **Sec. 2.** LEGISLATIVE PURPOSE. In accordance with the
27 policies set forth in section 1 of this act, the legislature intends by
28 this act to enact a comprehensive set of laws to govern voluntary
29 transfers of and changes in water rights, including:

30 (1) Expressly authorizing additional types of transfers of and
31 changes in water rights in which the water code is silent or does not
32 allow before the effective date of this section;

33 (2) Providing more opportunity for compensatory and consensual
34 mechanisms in which third-party interests may be addressed and
35 transfers allowed that would otherwise be prevented by the water code's
36 no impairment rule;

37 (3) Improving the processing of applications for transfers and
38 providing for expedited decisions upon short-term transfers, and

1 ensuring that administrative functions relating to review of proposed
2 transfers are adequately funded and do not require shifting fiscal
3 resources from other important water resource management activities;

4 (4) Improving the collection, management, and accessibility of
5 information relating to water rights transfers; and

6 (5) Providing assistance locally and at the state level to
7 encourage water transfer transactions and the development of markets
8 for water transfers generally.

9 **II. ENCOURAGING TRANSFERS AND REDUCING UNCERTAINTY**

10 NEW SECTION. **Sec. 3.** A new section is added to chapter 90.03 RCW
11 to read as follows:

12 **CHANGES IN SEASON.** In addition to the changes authorized by RCW
13 90.03.380, the season of use may be changed to another season or to
14 year-round use where such change can be made without detriment or
15 injury to existing rights, including streamflows adopted by rule by the
16 department or established as conditions upon the issuance of new water
17 withdrawals. A person seeking approval of such change shall file an
18 application with the department, which shall be processed as an
19 application for change under RCW 90.03.380.

20 NEW SECTION. **Sec. 4.** A new section is added to chapter 90.44 RCW
21 to read as follows:

22 **CHANGES IN SEASON.** In addition to the changes authorized by RCW
23 90.44.100, the season of use may be changed to another season or to
24 year-round use where such change can be made without detriment or
25 injury to existing rights, including streamflows adopted by rule by the
26 department or established as conditions upon the issuance of new water
27 withdrawals. A person seeking approval of such a change shall file an
28 application with the department, which shall be processed as an
29 application for change under RCW 90.44.100.

30 NEW SECTION. **Sec. 5.** A new section is added to chapter 90.03 RCW
31 to read as follows:

32 **CHANGES IN SOURCE OF WATER.** (1) The source of water for an
33 existing water right or permit may be changed from a surface water
34 diversion to a ground water withdrawal or vice versa where the
35 following requirements are met:

1 (a) The two sources are in direct hydraulic continuity;
2 (b) The change will not result in enlargement of the original water
3 right; and

4 (c) The change can be made without detriment or injury to existing
5 water rights, including streamflows adopted by rule by the department
6 or established as conditions upon the issuance of new water
7 withdrawals.

8 (2) The application for change shall be processed as an application
9 for change under RCW 90.03.380 if the new source is surface water, and
10 under RCW 90.44.100 if the new source is ground water.

11 (3) The new point of diversion shall retain the original date of
12 priority. However, if within five years after approving the change the
13 department finds that the change results in substantial interference
14 with existing water rights that would not have occurred in the absence
15 of the change, the new point of diversion shall be subordinate to any
16 existing right injured by the change.

17 (4) The department shall approve an application to return to the
18 last authorized point of diversion, while retaining the original
19 priority date, if a water right holder submits an application to the
20 department within five years after the department approves a change
21 under this section.

22 **Sec. 6.** RCW 90.03.380 and 1997 c 442 s 801 are each amended to
23 read as follows:

24 (1) The right to the use of water which has been applied to a
25 beneficial use in the state shall be and remain appurtenant to the land
26 or place upon which the same is used: PROVIDED, HOWEVER, That the
27 right may be transferred to another or to others and become appurtenant
28 to any other land or place of use, including an instream use without
29 physical diversion of water, without loss of priority of right
30 theretofore established if such change can be made without detriment or
31 injury to existing rights. The point of diversion of water for
32 beneficial use or the purpose of use may be changed, if such change can
33 be made without detriment or injury to existing rights. A change in
34 the place of use, point of diversion, and/or purpose of use of a water
35 right to enable irrigation of additional acreage or the addition of new
36 uses may be permitted if such change results in no increase in the
37 annual consumptive quantity of water used under the water right. For
38 purposes of this section, "annual consumptive quantity" means the

1 estimated or actual annual amount of water diverted pursuant to the
2 water right, reduced by the estimated annual amount of return flows,
3 averaged over the most recent five-year period of continuous beneficial
4 use of the water right. Before any transfer of such right to use water
5 or change of the point of diversion of water or change of purpose of
6 use can be made, any person having an interest in the transfer or
7 change, shall file a written application therefor with the department,
8 and the application shall not be granted until notice of the
9 application is published as provided in RCW 90.03.280. The department
10 shall make a summary of the record of review of the application, and
11 the proposed certificate, if the department proposes to approve the
12 application, available to the public and provide a period of at least
13 sixty days for the public to submit comments thereon. The public
14 comment period may be reduced to fifteen days for short-term transfers
15 of no more than two years in duration. The department shall consider
16 the comments received and the entire record. If it shall appear that
17 such transfer or such change may be made without injury or detriment to
18 existing rights, the department shall issue to the applicant a
19 certificate in duplicate granting the right for such transfer or for
20 such change of point of diversion or of use. The certificate so issued
21 shall be filed and be made a record with the department and the
22 duplicate certificate issued to the applicant may be filed with the
23 county auditor in like manner and with the same effect as provided in
24 the original certificate or permit to divert water.

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

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

1 (4) A person may change the place of use of a water right without
2 the requirement of approval under this section where the water is used
3 on land contiguous to the place of use of the water right, the land is
4 owned by the holder of the water right, and the total amount of land to
5 which the water is applied is not increased. Before making the change,
6 the water right holder shall notify the department of the change and
7 describe the land subject to the change in place of use.

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

11 **Sec. 7.** RCW 90.44.100 and 1997 c 316 s 2 are each amended to read
12 as follows:

13 (1) After an application to, and upon the issuance by the
14 department of an amendment to the appropriate permit or certificate of
15 ground water right, the holder of a valid right to withdraw public
16 ground waters may, without losing the holder's priority of right,
17 construct wells or other means of withdrawal at a new location in
18 substitution for or in addition to those at the original location, or
19 the holder may change the manner or the place of use of the water.

20 (2) An amendment to construct replacement or a new additional well
21 or wells at a location outside of the location of the original well or
22 wells or to change the manner or place of use of the water shall be
23 issued only after publication of notice of the application and findings
24 as prescribed in the case of an original application. The department
25 shall make a summary of the record of review of the application, and
26 the proposed amendment, if the department proposes to approve the
27 application, available to the public and provide a period of at least
28 sixty days for the public to submit comments thereon. The public
29 comment period may be reduced to fifteen days for short-term transfers
30 of no more than two years in duration. The department shall consider
31 the comments received and the entire record. Such amendment shall be
32 issued by the department only on the conditions that: (a) The
33 additional or replacement well or wells shall tap the same body of
34 public ground water as the original well or wells; (b) where a
35 replacement well or wells is approved, the use of the original well or
36 wells shall be discontinued and the original well or wells shall be
37 properly decommissioned as required under chapter 18.104 RCW; (c) where
38 an additional well or wells is constructed, the original well or wells

1 may continue to be used, but the combined total withdrawal from the
2 original and additional well or wells shall not enlarge the right
3 conveyed by the original permit or certificate; and (d) other existing
4 rights shall not be impaired. The department may specify an approved
5 manner of construction and shall require a showing of compliance with
6 the terms of the amendment, as provided in RCW 90.44.080 in the case of
7 an original permit.

8 (3) The construction of a replacement or new additional well or
9 wells at the location of the original well or wells shall be allowed
10 without application to the department for an amendment. However, the
11 following apply to such a replacement or new additional well: (a) The
12 well shall tap the same body of public ground water as the original
13 well or wells; (b) if a replacement well is constructed, the use of the
14 original well or wells shall be discontinued and the original well or
15 wells shall be properly decommissioned as required under chapter 18.104
16 RCW; (c) if a new additional well is constructed, the original well or
17 wells may continue to be used, but the combined total withdrawal from
18 the original and additional well or wells shall not enlarge the right
19 conveyed by the original water use permit or certificate; (d) the
20 construction and use of the well shall not interfere with or impair
21 water rights with an earlier date of priority than the water right or
22 rights for the original well or wells; (e) the replacement or
23 additional well shall be located no closer than the original well to a
24 well it might interfere with; (f) the department may specify an
25 approved manner of construction of the well; and (g) the department
26 shall require a showing of compliance with the conditions of this
27 subsection (3).

28 (4) As used in this section, the "location of the original well or
29 wells" is the area described as the point of withdrawal in the original
30 public notice published for the application for the water right for the
31 well.

32 NEW SECTION. **Sec. 8.** A new section is added to chapter 90.03 RCW
33 to read as follows:

34 RECLAIMED WATER. The holder of any water right may transfer any
35 reclaimed water, as defined in RCW 90.46.010(4), generated from the
36 underlying beneficial use to another party for some other beneficial
37 use that is in compliance with the standards and criteria adopted by
38 the department or by the department of health, or both pursuant to

1 chapter 90.46 RCW. Where such a transfer results in a change in the
2 place of use of such water, the holder of the right shall apply for a
3 change in place of use using the procedures in RCW 90.03.380. The
4 department shall approve such a transfer as consistent with the public
5 interest where such change can be made without detriment or injury to
6 existing rights, including streamflows adopted by rule by the
7 department or established as conditions upon the issuance of new water
8 withdrawals.

9 NEW SECTION. **Sec. 9.** A new section is added to chapter 90.03 RCW
10 to read as follows:

11 CHANGED OF DIVERSION POINT IN RESPONSE TO CHANGED SURFACE WATER
12 LEVEL. In the event that government action results in or creates a
13 reasonable expectation of a change in the surface level of a surface
14 water source that impairs or threatens to impair access to a point of
15 diversion authorized by a water right permit, certificate, or decree,
16 the owner of the water right may change the point of diversion or add
17 an additional point of diversion in accordance with this section in
18 lieu of complying with the requirements of RCW 90.03.380. Before
19 changing the point of diversion, the water right owner shall provide
20 written notice of the proposed change to the department. Within thirty
21 days after the department receives notice from the owner, the
22 department shall, by order, approve the change unless the director
23 finds the changes will result in injury to other existing water rights,
24 including streamflows adopted by rule by the department or established
25 as conditions upon the issuance of new water withdrawals. Where the
26 point of diversion is located within one thousand feet of the existing
27 point of diversion, there shall be a rebuttable presumption that such
28 rights will not be impaired. All other terms and conditions of the
29 water right shall remain in effect.

30 No fee may be charged for the department's review under this
31 section.

32 **Sec. 10.** RCW 90.14.140 and 1998 c 258 s 1 are each amended to read
33 as follows:

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

- 1 (a) Drought, or other unavailability of water;
- 2 (b) Active service in the armed forces of the United States during
3 military crisis;
- 4 (c) Nonvoluntary service in the armed forces of the United States;
- 5 (d) The operation of legal proceedings;
- 6 (e) Federal or state agency leases of or options to purchase lands
7 or water rights which preclude or reduce the use of the right by the
8 owner of the water right;
- 9 (f) Federal laws imposing land or water use restrictions either
10 directly or through the voluntary enrollment of a landowner in a
11 federal program implementing those laws, or acreage limitations, or
12 production quotas; or
- 13 (g) The temporary transfer of the water right to another who
14 applies the water to beneficial use during the transfer.

15 (2) Notwithstanding any other provisions of RCW 90.14.130 through
16 90.14.180, there shall be no relinquishment of any water right:

17 (a) If such right is claimed for power development purposes under
18 chapter 90.16 RCW and annual license fees are paid in accordance with
19 chapter 90.16 RCW;

20 (b) If such right is used for a standby or reserve water supply to
21 be used in time of drought or other low flow period so long as
22 withdrawal or diversion facilities are maintained in good operating
23 condition for the use of such reserve or standby water supply;

24 (c) If such right is claimed for a determined future development to
25 take place either within fifteen years of July 1, 1967, or the most
26 recent beneficial use of the water right, whichever date is later;

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

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

31 (f) If such right or portion of the right is leased to another
32 person for use on land other than the land to which the right is
33 appurtenant as long as the lessee makes beneficial use of the right in
34 accordance with this chapter and a transfer or change of the right has
35 been approved by the department in accordance with RCW 90.03.380,
36 90.03.383, 90.03.390, or 90.44.100.

37 NEW SECTION. **Sec. 11.** A new section is added to chapter 90.03 RCW
38 to read as follows:

1 NOT EVIDENCE OF WASTE OR NONUSE. The offer of water or water
2 rights for transfer, the transfer negotiations, the agreement to
3 transfer water, and the application and supporting information for
4 approval of a water transfer shall not be used as evidence of the
5 transferor's waste or unreasonable use, or the nonuse, of the water or
6 water rights made available for transfer, nor may the transfer of water
7 cause, or be the basis of, an abandonment of any water rights or other
8 right to use water.

9 NEW SECTION. **Sec. 12.** A new section is added to chapter 90.03 RCW
10 to read as follows:

11 MITIGATION. (1) This section provides authority to the department
12 to approve a transfer or change in which the potential detriment,
13 injury, or impairment of existing rights as defined in RCW 90.03.380,
14 90.44.100, and sections 3 through 5 of this act, will be fully
15 mitigated by the applicant through compensation, a substitute source of
16 water, conditions upon the transfer, or other means of mitigation.

17 (2) The department may approve a transfer or change providing for
18 mitigation of existing rights only where the applicant demonstrates the
19 detriment, injury, or impairment will be fully mitigated. The
20 applicant has the initial burden of demonstrating such mitigation.

21 (3) The department may not deny a transfer or change based upon
22 detriment or injury to a party who has entered a mitigation agreement
23 with the applicant.

24 (4) The department may not deny a transfer or change on the basis
25 of the applicant's refusal to undertake mitigation that is not directly
26 related to the potential detriment or injury to existing rights by the
27 proposed transfer or change.

28 (5) The department may approve a transfer or change with conditions
29 that will prevent detriment or injury to existing water rights,
30 including streamflows adopted by rule by the department or established
31 as conditions upon the issuance of new water withdrawals. The
32 department shall not impose conditions on the approval of a transfer or
33 change to mitigate the detriment or injury to such existing water
34 rights or to mitigate harm to the economy in the area from which the
35 water is to be transferred, that would be caused by factors other than
36 the proposed water transfer.

1 the application, and for other changes within ninety days of receipt.
2 Only in exceptional circumstances may a decision be made later than one
3 hundred eighty days after receipt of a complete application.

4 (2) The department may process applications for transfers or
5 changes regarding water uses in a basin independently of the order of
6 processing or priority placed upon processing applications for new
7 withdrawals within the same basin, and independently of the order of
8 processing or priority placed upon any applications regarding water use
9 in other basins.

10 NEW SECTION. **Sec. 16.** A new section is added to chapter 90.03 RCW
11 to read as follows:

12 FUNDING OF REGULATORY REVIEW. (1) The department may enter into a
13 voluntary written agreement with an applicant for a transfer or change
14 to recover from the applicant the reasonable costs incurred by the
15 department in conducting regulatory review of the application. The
16 agreement shall specify the staffing and other resources to be
17 committed by the department in processing the application, and shall
18 establish deadlines for completing each of the major steps in
19 conducting regulatory review. The agreement shall normally establish
20 a deadline of making a decision no more than one hundred eighty days
21 from the filing with the department of a complete application. The
22 applicant's refusal to enter an agreement under this section shall not
23 be the basis for otherwise delaying the processing of the application.
24 The department may refuse to enter into an agreement in order to ensure
25 sufficient processing resources for other pending applications.

26 (2) The costs remitted under this section shall be in addition to
27 the fees required by RCW 90.03.470.

28 (3) The water transfers account is created in the state treasury.
29 All receipts from costs collected under this section shall be deposited
30 into the account. Expenditures from the account may be used only for
31 the department's costs in the review of applications for transfers or
32 changes covered by agreements under subsection (1) of this section.
33 Only the director of the department or the director's designee may
34 authorize expenditures from the account. The account is subject to
35 allotment procedures under chapter 43.88 RCW, but an appropriation is
36 not required for expenditures.

37 **V. TRANSFER RECORDS AND DATA MANAGEMENT**

1 NEW SECTION. **Sec. 17.** A new section is added to chapter 90.03 RCW
2 to read as follows:

3 DATA COMPILATION. (1) The department shall create and maintain a
4 water transfer registry of all final agreements concerning water rights
5 transfers. The registry shall include the names of the parties to the
6 transfer, the consideration paid for the transfer, a brief description
7 of the transfer, and an explanation of changes in water storage, timing
8 and point of diversion, place and purpose of use, consumption, and
9 timing and point of return flow caused by the transfer. The department
10 shall ensure that the registry is available in print form and over the
11 internet. Other state and local agencies receiving information
12 pertinent to such transactions, such as tax affidavits, shall cooperate
13 with the department in maintaining the registry and making the
14 information available locally to prospective water marketing
15 participants.

16 (2) This section is intended to make accessible information that is
17 otherwise in the public domain and does not require the disclosure of
18 proprietary information that is protected from disclosure under any
19 other law or authority.

20 NEW SECTION. **Sec. 18.** A new section is added to chapter 90.03 RCW
21 to read as follows:

22 TRANSFERS OF LAND WITH WATER RIGHTS. Upon closing of a land
23 transaction involving the transfer of a water right appurtenant to the
24 land, the seller shall also deliver to the purchaser evidence of any
25 permit, transfer approval, or certificate of water rights if the
26 permit, transfer approval, or certificate is available. In addition,
27 the seller shall notify the department on a form prescribed by the
28 department of: (1) The real estate transaction; and (2) the water
29 right involved in the transaction. The notice shall also be provided
30 in the case of the sale of parcels of land from a subdivision or short
31 subdivision of land to which a water right is appurtenant to each
32 resulting parcel.

33 NEW SECTION. **Sec. 19.** A new section is added to chapter 90.03 RCW
34 to read as follows:

35 KEEPING ADJUDICATION DECREES CURRENT. The department, acting
36 through the office of the attorney general, shall use the information
37 included in the water transfer registry authorized under section 17 of

1 this act and other pertinent information to provide periodic summaries
2 of transfers and changes in water rights in a basin in which a general
3 adjudication decree has been entered within twenty years before the
4 effective date of this section. The summary shall be filed with the
5 superior court that entered the decree and entered of record in the
6 proceeding for the purpose of advising interested persons of changes
7 occurring since entry of the decree.

8 **VI. MISCELLANEOUS**

9 NEW SECTION. **Sec. 20.** PART HEADINGS AND SECTION CAPTIONS NOT LAW.
10 Part headings and sections captions used in this act are not any part
11 of the law.

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