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**SUBSTITUTE HOUSE BILL 1334**

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**State of Washington**

**61st Legislature**

**2009 Regular Session**

**By** House Agriculture & Natural Resources (originally sponsored by Representatives Blake, Chandler, Haler, Van De Wege, Ericks, Hinkle, Warnick, Schmick, Condotta, Kretz, Ormsby, Smith, Kessler, Newhouse, Walsh, Nelson, Pearson, Moeller, and Short)

READ FIRST TIME 02/23/09.

1 AN ACT Relating to water resource management on the mainstem of the  
2 Columbia and lower Snake rivers; amending RCW 90.90.005, 90.03.380, and  
3 90.90.030; and reenacting and amending RCW 90.14.140.

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

5 **Sec. 1.** RCW 90.90.005 and 2006 c 6 s 1 are each amended to read as  
6 follows:

7 (1) The legislature finds that a key priority of water resource  
8 management in the Columbia river basin is the development of new water  
9 supplies that includes storage and conservation in order to meet the  
10 economic and community development needs of people and the instream  
11 flow needs of fish.

12 (2) The legislature finds that uncertainty as to existing law may  
13 discourage water conservation in the Columbia river basin and that  
14 modern conservation practices can result in substantial water savings.

15 (3) The legislature therefore declares that a Columbia river basin  
16 water supply development program is needed, and directs the department  
17 of ecology to aggressively pursue the development of storage,  
18 conservation, and other actions to provide water supplies to benefit  
19 both instream and out-of-stream uses.

1       **Sec. 2.** RCW 90.03.380 and 2003 c 329 s 2 are each amended to read  
2 as follows:

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

35       (2) If an application for change proposes to transfer water rights  
36 from one irrigation district to another, the department shall, before  
37 publication of notice, receive concurrence from each of the irrigation

1 districts that such transfer or change will not adversely affect the  
2 ability to deliver water to other landowners or impair the financial  
3 integrity of either of the districts.

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

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

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

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

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

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

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

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

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

19 (9) Notwithstanding subsection (1) of this section, the point of  
20 diversion, place of use, and purpose of use of conservation operation  
21 and maintenance savings as defined in chapter 90.90 RCW may be  
22 seasonally changed and transferred under this subsection and RCW  
23 90.03.390 to any other land or place of use without loss of priority of  
24 right previously established, except as provided in RCW 90.14.140  
25 (2)(h).

26 **Sec. 3.** RCW 90.14.140 and 2001 c 240 s 1, 2001 c 237 s 27, and  
27 2001 c 69 s 5 are each reenacted and amended to read as follows:

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

32 (a) Drought, or other unavailability of water;

33 (b) Active service in the armed forces of the United States during  
34 military crisis;

35 (c) Nonvoluntary service in the armed forces of the United States;

36 (d) The operation of legal proceedings;

1 (e) Federal or state agency leases of or options to purchase lands  
2 or water rights which preclude or reduce the use of the right by the  
3 owner of the water right;

4 (f) Federal laws imposing land or water use restrictions either  
5 directly or through the voluntary enrollment of a landowner in a  
6 federal program implementing those laws, or acreage limitations, or  
7 production quotas;

8 (g) Temporarily reduced water need for irrigation use where such  
9 reduction is due to varying weather conditions, including but not  
10 limited to precipitation and temperature, that warranted the reduction  
11 in water use, so long as the water user's diversion and delivery  
12 facilities are maintained in good operating condition consistent with  
13 beneficial use of the full amount of the water right;

14 (h) Temporarily reduced diversions or withdrawals of irrigation  
15 water directly resulting from the provisions of a contract or similar  
16 agreement in which a supplier of electricity buys back electricity from  
17 the water right holder and the electricity is needed for the diversion  
18 or withdrawal or for the use of the water diverted or withdrawn for  
19 irrigation purposes;

20 (i) Water conservation measures implemented under the Yakima river  
21 basin water enhancement project, so long as the conserved water is  
22 reallocated in accordance with the provisions of P.L. 103-434;

23 (j) Reliance by an irrigation water user on the transitory presence  
24 of return flows in lieu of diversion or withdrawal of water from the  
25 primary source of supply, if such return flows are measured or reliably  
26 estimated using a scientific methodology generally accepted as reliable  
27 within the scientific community; or

28 (k) The reduced use of irrigation water resulting from crop  
29 rotation. For purposes of this subsection, crop rotation means the  
30 temporary change in the type of crops grown resulting from the exercise  
31 of generally recognized sound farming practices. Unused water  
32 resulting from crop rotation will not be relinquished if the remaining  
33 portion of the water continues to be beneficially used.

34 (2) Notwithstanding any other provisions of RCW 90.14.130 through  
35 90.14.180, there shall be no relinquishment of any water right:

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

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

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

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

10 (e) If such waters are not subject to appropriation under the  
11 applicable provisions of RCW 90.40.030;

12 (f) If such right or portion of the right is leased to another  
13 person for use on land other than the land to which the right is  
14 appurtenant as long as the lessee makes beneficial use of the right in  
15 accordance with this chapter and a transfer or change of the right has  
16 been approved by the department in accordance with RCW 90.03.380,  
17 90.03.383, 90.03.390, or 90.44.100;

18 (g) If such a right or portion of the right is authorized for a  
19 purpose that is satisfied by the use of agricultural industrial process  
20 water as authorized under RCW 90.46.150; (~~(e)~~)

21 (h) If such a right or portion of the right consists of reduced  
22 annual diversions or withdrawals of irrigation water from bodies of  
23 water set forth in RCW 90.90.030(12) resulting from conservation  
24 operation and maintenance savings as defined in RCW 90.90.030. This  
25 subsection is intended to apply to any reductions in withdrawals  
26 resulting from such conservation operation and maintenance savings,  
27 provided that where operation of this subsection with respect to  
28 withdrawals prior to the effective date of this section would actually  
29 result in detriment or injury to existing rights, the priority of  
30 changes and transfers pursuant to RCW 90.03.380(9) and 90.03.390 must  
31 be modified to the extent necessary to prevent such impairment; or

32 (i) If such right is a trust water right under chapter 90.38 or  
33 90.42 RCW.

34 (3) In adding provisions to this section by chapter 237, Laws of  
35 2001, the legislature does not intend to imply legislative approval or  
36 disapproval of any existing administrative policy regarding, or any  
37 existing administrative or judicial interpretation of, the provisions  
38 of this section not expressly added or revised.

1       **Sec. 4.** RCW 90.90.030 and 2006 c 6 s 4 are each amended to read as  
2 follows:

3       (1) The department of ecology may enter into voluntary regional  
4 agreements for the purpose of providing new water for out-of-stream  
5 use, streamlining the application process, achieving conservation  
6 operation and maintenance savings, and protecting instream flow.

7       (2) Such agreements shall ensure that:

8       (a) For water rights issued from the Columbia river mainstem, there  
9 is no negative impact on Columbia river mainstem instream flows in the  
10 months of July and August as a result of the new appropriations issued  
11 under the agreement;

12       (b) For water rights issued from the lower Snake river mainstem,  
13 there is no negative impact on Snake river mainstem instream flows from  
14 April through August as a result of the new appropriations issued under  
15 the agreement; and

16       (c) Efforts are made to harmonize such agreements with watershed  
17 plans adopted under the authority of chapter 90.82 RCW that are  
18 applicable to the area covered by the agreement.

19       (3) The protection of instream flow as set forth in subsection (2)  
20 of this section is adequate for purposes of mitigating instream flow  
21 impacts resulting from any appropriations for out-of-stream use made  
22 under a voluntary regional agreement, and the only applicable  
23 consultation provisions under state law regarding instream flow impacts  
24 shall be those set forth in subsection (4) of this section.

25       (4) Before executing a voluntary agreement under this section, the  
26 department of ecology shall:

27       (a) Provide a sixty-day period for consultation with county  
28 legislative authorities and watershed planning groups with jurisdiction  
29 over the area where the water rights included in the agreement are  
30 located, the department of fish and wildlife, and affected tribal  
31 governments, and federal agencies. The department of fish and wildlife  
32 shall provide written comments within that time period. The  
33 consultation process for voluntary regional agreements developed under  
34 the provisions of this section is deemed adequate for the issuance of  
35 new water rights provided for in this section and satisfies all  
36 consultation requirements under state law related to the issuance of  
37 new water rights; and

1 (b) Provide a thirty-day public review and comment period for a  
2 draft agreement, and publish a summary of any public comments received.  
3 The thirty-day review period shall not begin until after the department  
4 of ecology has concluded its consultation under (a) of this subsection  
5 and the comments that have been received by the department are made  
6 available to the public.

7 (5) The provisions of subsection (4) of this section satisfy all  
8 applicable consultation requirements under state law.

9 (6) The provisions of this section and any voluntary regional  
10 agreements developed under such provisions may not be relied upon by  
11 the department of ecology as a precedent, standard, or model that must  
12 be followed in any other voluntary regional agreements.

13 (7) Nothing in this section may be interpreted or administered in  
14 a manner that precludes the processing of water right applications  
15 under chapter 90.03 or 90.44 RCW that are not included in a voluntary  
16 regional agreement.

17 (8) Nothing in this section may be interpreted or administered in  
18 a manner that impairs or diminishes a valid water right or a habitat  
19 conservation plan approved for purposes of compliance with the federal  
20 endangered species act.

21 (9) The department of ecology shall monitor and evaluate the water  
22 allocated to instream and out-of-stream uses under this section,  
23 evaluate the program, and provide an interim report to the appropriate  
24 committees of the legislature by June 30, 2008. A final report shall  
25 be provided to the appropriate committees of the legislature by June  
26 30, 2011.

27 (10) If the department of ecology executes a voluntary agreement  
28 under this section that includes water rights appropriated from the  
29 lower Snake river mainstem, the department shall develop aggregate data  
30 in accordance with the provisions of RCW 90.90.050 for the lower Snake  
31 river mainstem.

32 (11) Any agreement entered into under this section shall remain in  
33 full force and effect through the term of the agreement regardless of  
34 the expiration of this section.

35 (12) The definitions in this subsection apply to this section  
36 ((and)), RCW 90.03.380, 90.14.140, and 90.90.050, and may only be used  
37 for purposes of implementing these sections.



1 (a) "Columbia river mainstem" means all water in the Columbia river  
2 within the ordinary high water mark of the main channel of the Columbia  
3 river between the border of the United States and Canada and the  
4 Bonneville dam, and all groundwater within one mile of the high water  
5 mark.

6 (b) "Lower Snake river mainstem" means all water in the lower Snake  
7 river within the ordinary high water mark of the main channel of the  
8 lower Snake river from the head of Ice Harbor pool to the confluence of  
9 the Snake and Columbia rivers, and all groundwater within one mile of  
10 the high water mark.

11 (c) "Conservation operation and maintenance savings" includes any  
12 present or future water savings, with respect to water rights issued  
13 for waters in the lower Snake river within the ordinary high water mark  
14 of the main channel of the lower Snake river from the head of Ice  
15 Harbor pool to the confluence of the Snake and Columbia rivers,  
16 including those achieved under voluntary regional agreements, arising  
17 from use of soil moisture and monitoring probes, weather forecast and  
18 crop use data, irrigation scheduling, and other seasonal water  
19 management practices. "Conservation operation and maintenance savings"  
20 does not include savings achieved through fixed capital investments  
21 such as higher efficiency irrigation systems, canal linings, and pipe  
22 conversions or modifications.

23 (i) Conservation operation and maintenance savings is deemed to  
24 save seventeen percent of usage.

25 (ii) Fifty percent of such conservation operation and maintenance  
26 savings, or eight and one-half percent of usage, must be available for  
27 change and transfer under RCW 90.03.380(9) and 90.03.390, and the  
28 remaining fifty percent of the savings must be placed in trust.

29 (iii) Changes and transfers of conservation operation and  
30 maintenance savings are deemed to have no negative impact within the  
31 meaning of subsection (2) of this section.

32 (13) This section expires June 30, 2012.

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