
SENATE BILL 5583

State of Washington

61st Legislature

2009 Regular Session

By Senators Marr, Honeyford, Rockefeller, Morton, Fraser, Sheldon, and Shin; by request of Department of Ecology

Read first time 01/27/09. Referred to Committee on Environment, Water & Energy.

1 AN ACT Relating to improving the effectiveness of water bank
2 authorization and exchange provisions; amending RCW 90.42.100,
3 39.34.200, 90.42.080, 90.03.255, and 90.44.055; adding new sections to
4 chapter 90.42 RCW; adding a new section to chapter 90.03 RCW; and
5 creating a new section.

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

7 NEW SECTION. **Sec. 1.** The legislature finds that many watershed
8 groups and programs, including but not limited to many watershed
9 planning units operating under chapter 90.82 RCW, have proposed or
10 considered the establishment of water banks to meet vital instream and
11 out-of-stream needs within a watershed or region. The legislature also
12 finds that water banks and exchanges can: Provide critical tools to
13 make water supplies available when and where needed during times of
14 drought; improve stream flows and preserve instream values during fish
15 critical periods; reduce water transaction costs, time, and risk to
16 purchasers; facilitate fair and efficient reallocation of water from
17 one beneficial use to another; provide banked water supplies to offset
18 impacts related to future development and the issuance of new water
19 rights; and facilitate water agreements that protect upstream community

1 values while retaining flexibility to meet critical downstream water
2 needs in times of scarcity. The legislature therefore declares that
3 the intent of this act is to provide clear authority for water banks
4 throughout the state, to improve the effectiveness of water bank and
5 exchange provisions, and to use the interlocal cooperation act to
6 establish watershed management partnerships for water banking purposes.

7 **Sec. 2.** RCW 90.42.100 and 2003 c 144 s 2 are each amended to read
8 as follows:

9 (1) The department is hereby authorized to use the trust water
10 rights program (~~(in the Yakima river basin)~~) for water banking purposes
11 statewide.

12 (2) Public agencies, as defined under RCW 39.34.020, are authorized
13 to enter into interlocal agreements with the department to form
14 watershed management partnerships under the interlocal cooperation act,
15 chapter 39.34 RCW, for the purpose of establishing and operating local
16 water banks under the state trust water rights program. The department
17 shall invite any federally recognized Indian tribe with a reservation
18 located within the area proposed to be covered by the water bank to be
19 a party to the interlocal agreement. The geographic area served by a
20 water bank established under this subsection must be contiguous except
21 that the water bank may not operate within the reservation boundaries
22 of a federally recognized Indian tribe, or within lands held in trust
23 by the federal government on behalf of a federally recognized Indian
24 tribe, without written consent from the tribe.

25 (3) Water banking may be used for one or more of the following
26 purposes:

27 (a) To authorize the use of trust water rights to mitigate for
28 water resource impacts, future water supply needs, or any beneficial
29 use under chapter 90.03, 90.44, or 90.54 RCW, consistent with any terms
30 and conditions established by the transferor, except that within the
31 Yakima river basin return flows from water rights authorized in whole
32 or in part for any purpose shall remain available as part of the Yakima
33 basin's total water supply available and to satisfy existing rights for
34 other downstream uses and users;

35 (b) To document transfers of water rights to and from the trust
36 water rights program; and

1 (c) To provide a source of water rights the department can make
2 available to third parties on a temporary or permanent basis for any
3 beneficial use under chapter 90.03, 90.44, or 90.54 RCW.

4 ~~((+3))~~ (4) The department shall not use or agree to the use of
5 water banking to:

6 (a) Cause detriment or injury to existing rights;

7 (b) Issue temporary water rights or portions thereof for new
8 potable uses requiring an adequate and reliable water supply under RCW
9 19.27.097;

10 (c) Administer federal project water rights, including federal
11 storage rights; or

12 (d) Allow carryover of stored water in the Yakima basin from one
13 water year to another water year if it would negatively impact the
14 total water supply available.

15 ~~((+4))~~ (5) Nothing in this section may be interpreted or
16 administered in a manner that precludes the use of the department's
17 existing authority to process trust water rights applications under
18 this chapter or to process water right applications under chapter 90.03
19 or 90.44 RCW. The interlocal agreement process to establish a
20 watershed management partnership under subsection (2) of this section
21 is not required for water banks or exchanges operating under existing
22 authority as of the effective date of this section.

23 (6) For purposes of this section and RCW 90.42.135, "total water
24 supply available" shall be defined as provided in the 1945 consent
25 decree between the United States and water users in the Yakima river
26 basin, and consistent with later interpretation by state and federal
27 courts.

28 (7) In operating a water bank, a watershed management partnership
29 may acquire, purchase, hold, lease, manage, occupy, and sell real and
30 personal property or any interest therein, enter into and perform all
31 necessary contracts, appoint and employ necessary agents and employees
32 and fix their compensation, employ contractors including contracts for
33 professional services, sue and be sued, and do all lawful acts required
34 and expedient to carry out the purposes of this chapter.

35 (8) A watershed management partnership operating a water bank may
36 establish a revolving fund for the purpose of acquiring and disbursing
37 water rights.

1 **Sec. 3.** RCW 39.34.200 and 2003 c 327 s 4 are each amended to read
2 as follows:

3 (1) Any two or more public agencies may enter into agreements with
4 one another to form a watershed management partnership for the purpose
5 of implementing any portion or all elements of a watershed management
6 plan, including the coordination and oversight of plan implementation.
7 The plan may be any plan or plan element described in RCW 39.34.190(3).

8 (2) Public agencies may enter into agreements with the department
9 of ecology to form watershed management partnerships for the purpose of
10 establishing and operating local water banks under the state trust
11 water rights program, chapter 90.42 RCW.

12 (3) The watershed partnership agreement shall include the
13 provisions required of all interlocal agreements under RCW
14 39.34.030(3). The agreement shall be filed pursuant to RCW 39.34.040
15 with the county auditor of each county lying within the geographical
16 watershed area to be addressed by the partnership. The public agencies
17 forming the partnership shall designate a treasurer for the deposit,
18 accounting, and handling of the funds of the partnership. The
19 treasurer shall be either a county treasurer or a city treasurer of a
20 county or city participating in the agreement to form the partnership.

21 NEW SECTION. **Sec. 4.** A new section is added to chapter 90.42 RCW
22 to read as follows:

23 Costs incurred by the department or a water bank established under
24 RCW 90.42.100 associated with water service contracts with federal
25 agencies may be recovered by the department from persons withdrawing
26 water or credits from the water bank or the water bank as a condition
27 of the exercise of a water right supplied from a federal water project.

28 **Sec. 5.** RCW 90.42.080 and 2002 c 329 s 9 are each amended to read
29 as follows:

30 (1)(a) The state may acquire all or portions of existing (~~water~~)
31 surface or groundwater rights, by purchase, gift, or other appropriate
32 means other than by condemnation, from any person or entity or
33 combination of persons or entities. Once acquired, such rights are
34 trust water rights. A water right acquired by the state that is
35 expressly conditioned to limit its use to instream purposes shall be
36 administered as a trust water right in compliance with that condition.

1 (b) If the holder of a right to surface water (~~(from a body of~~
2 ~~water))~~ or groundwater chooses to donate all or a portion of the
3 person's water right to the trust water system to assist in providing
4 instream flows or to preserve surface or groundwater resources on a
5 temporary or permanent basis, the department shall accept the donation
6 on such terms as the person may prescribe as long as the donation
7 satisfies the requirements of subsection (4) of this section and the
8 other applicable requirements of this chapter and the terms prescribed
9 are relevant and material to protecting any interest in the water right
10 retained by the donor. Once accepted, such rights are trust water
11 rights within the conditions prescribed by the donor.

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

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

18 (4) Except as provided in subsection (10) of this section, a water
19 right donated under subsection (1)(b) of this section shall not exceed
20 the extent to which the water right was exercised during the five years
21 before the donation nor may the total of any portion of the water right
22 remaining with the donor plus the donated portion of the water right
23 exceed the extent to which the water right was exercised during the
24 five years before the donation. A water right holder who believes his
25 or her water right has been impaired by a trust water right donated
26 under subsection (1)(b) of this section may request that the department
27 review the impairment claim. If the department determines that
28 exercising the trust water right resulting from the donation or
29 exercising a portion of that trust water right donated under subsection
30 (1)(b) of this section is impairing existing water rights in violation
31 of RCW 90.42.070, the trust water right shall be altered by the
32 department to eliminate the impairment. Any decision of the department
33 to alter or not to alter a trust water right donated under subsection
34 (1)(b) of this section is appealable to the pollution control hearings
35 board under RCW 43.21B.230. A donated water right's status as a trust
36 water right under this subsection is not evidence of the validity or
37 quantity of the water right.

1 (5) The provisions of RCW 90.03.380 and 90.03.390 do not apply to
2 donations for instream flows described in subsection (1)(b) of this
3 section, but do apply to other transfers of water rights under this
4 section.

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

8 (7) Any water right conveyed to the trust water right system as a
9 gift that is expressly conditioned to limit its use to instream
10 purposes shall be managed by the department for public purposes to
11 ensure that it qualifies as a gift that is deductible for federal
12 income taxation purposes for the person or entity conveying the water
13 right.

14 (8) Except as provided in subsection (10) of this section, if the
15 department acquires a trust water right by lease, the amount of the
16 trust water right shall not exceed the extent to which the water right
17 was exercised during the five years before the acquisition was made nor
18 may the total of any portion of the water right remaining with the
19 original water right holder plus the portion of the water right leased
20 by the department exceed the extent to which the water right was
21 exercised during the five years before the acquisition. A water right
22 holder who believes his or her water right has been impaired by a trust
23 water right leased under this subsection may request that the
24 department review the impairment claim. If the department determines
25 that exercising the trust water right resulting from the leasing or
26 exercising of a portion of that trust water right leased under this
27 subsection is impairing existing water rights in violation of RCW
28 90.42.070, the trust water right shall be altered by the department to
29 eliminate the impairment. Any decision of the department to alter or
30 not to alter a trust water right leased under this subsection is
31 appealable to the pollution control hearings board under RCW
32 43.21B.230. The department's leasing of a trust water right under this
33 subsection is not evidence of the validity or quantity of the water
34 right.

35 (9) For a water right donated to or acquired by the trust water
36 rights program on a temporary basis, the full quantity of water
37 diverted or withdrawn to exercise the right before the donation or

1 acquisition shall be placed in the trust water rights program and shall
2 revert to the donor or person from whom it was acquired when the trust
3 period ends.

4 (10) For water rights donated or leased under subsection (4) or (8)
5 of this section where nonuse of the water right is excused for
6 sufficient cause under RCW 90.14.140, and where the nonuse occurred in
7 the five years preceding the donation or lease, the department shall
8 calculate the amount of water to be acquired by looking at the extent
9 to which the right was exercised during the most recent five-year
10 period preceding the date where sufficient cause for nonuse under RCW
11 90.14.140 was established.

12 NEW SECTION. Sec. 6. A new section is added to chapter 90.42 RCW
13 to read as follows:

14 The department may adopt rules as necessary to implement this
15 chapter.

16 **Sec. 7.** RCW 90.03.255 and 1997 c 360 s 2 are each amended to read
17 as follows:

18 The department shall, when evaluating an application for a water
19 right, transfer, or change filed pursuant to RCW 90.03.250 or 90.03.380
20 that includes provision for any water impoundment or other resource
21 management technique, take into consideration the benefits and costs,
22 including environmental effects, of any water impoundment or other
23 resource management technique that is included as a component of the
24 application. The department's consideration shall extend to any
25 increased water supply that results from the impoundment or other
26 resource management technique, including but not limited to any
27 recharge of groundwater that may occur, as a means of making water
28 available or otherwise offsetting the impact of the diversion of
29 surface water proposed in the application for the water right,
30 transfer, or change. Except when used as a condition for approving
31 applications that identify use of trust water rights held in water
32 banks for mitigation purposes, provision for an impoundment or other
33 resource management technique in an application shall be made solely at
34 the discretion of the applicant and shall not otherwise be made by the
35 department as a condition for approving an application that does not
36 include such provision.

1 This section does not lessen, enlarge, or modify the rights of any
2 riparian owner, or any existing water right acquired by appropriation
3 or otherwise.

4 **Sec. 8.** RCW 90.44.055 and 1997 c 360 s 3 are each amended to read
5 as follows:

6 The department shall, when evaluating an application for a water
7 right or an amendment filed pursuant to RCW 90.44.050 or 90.44.100 that
8 includes provision for any water impoundment or other resource
9 management technique, take into consideration the benefits and costs,
10 including environmental effects, of any water impoundment or other
11 resource management technique that is included as a component of the
12 application. The department's consideration shall extend to any
13 increased water supply that results from the impoundment or other
14 resource management technique, including but not limited to any
15 recharge of groundwater that may occur, as a means of making water
16 available or otherwise offsetting the impact of the withdrawal of
17 groundwater proposed in the application for the water right or
18 amendment in the same water resource inventory area. Except when used
19 as a condition for approving applications that identify use of trust
20 water rights held in water banks for mitigation purposes, provision for
21 an impoundment or other resource management technique in an application
22 shall be made solely at the discretion of the applicant and shall not
23 be made by the department as a condition for approving an application
24 that does not include such provision.

25 This section does not lessen, enlarge, or modify the rights of any
26 riparian owner, or any existing water right acquired by appropriation
27 or otherwise.

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

30 For purposes of calculating annual consumptive quantity as defined
31 under RCW 90.03.380(1), if, within the most recent five-year period,
32 the water right has been in the trust water rights program under
33 chapter 90.38 or 90.42 RCW, or the water right has been in a water bank
34 under RCW 90.42.100, or partial nonuse of the water right is excused
35 from relinquishment under RCW 90.14.140, the department shall look to

1 the most recent five-year period of continuous beneficial use preceding
2 one of these three events.

3 NEW SECTION. **Sec. 10.** If any provision of this act or its
4 application to any person or circumstance is held invalid, the
5 remainder of the act or the application of the provision to other
6 persons or circumstances is not affected.

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