
ENGROSSED SUBSTITUTE SENATE BILL 5583

State of Washington

61st Legislature

2009 Regular Session

By Senate Environment, Water & Energy (originally sponsored by Senators Marr, Honeyford, Rockefeller, Morton, Fraser, Sheldon, and Shin; by request of Department of Ecology)

READ FIRST TIME 02/11/09.

1 AN ACT Relating to improving the effectiveness of water bank
2 authorization and exchange provisions; amending RCW 90.42.100,
3 90.42.040, and 90.42.080; adding new sections to chapter 90.42 RCW;
4 adding a new section to chapter 90.03 RCW; and creating a new section.

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

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

1 critical downstream water needs in times of scarcity. The legislature
2 therefore declares that the intent of this act is to provide clear
3 authority for water banking throughout the state and to improve the
4 effectiveness of the state trust water rights program.

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

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

10 (2) Water banking may be used for one or more of the following
11 purposes:

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

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

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

25 (3) The department shall not use water banking to:

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

27 (b) Issue temporary water rights or portions thereof for new
28 potable uses requiring an adequate and reliable water supply under RCW
29 19.27.097;

30 (c) Administer federal project water rights, including federal
31 storage rights; or

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

35 (4) Nothing in this section may be interpreted or administered in
36 a manner that precludes the use of the department's existing authority

1 to process trust water rights applications under this chapter or to
2 process water right applications under chapter 90.03 or 90.44 RCW.

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

8 **Sec. 3.** RCW 90.42.040 and 2002 c 329 s 8 are each amended to read
9 as follows:

10 (1) All trust water rights acquired by the state shall be placed in
11 the state trust water rights program to be managed by the department.
12 Trust water rights acquired by the state shall be held or authorized
13 for use by the department for instream flows, irrigation, municipal, or
14 other beneficial uses consistent with applicable regional plans for
15 pilot planning areas, or to resolve critical water supply problems.
16 The state may acquire a groundwater right to be placed in the state
17 trust water rights program. To the extent practicable and subject to
18 legislative appropriation, trust water rights acquired in an area with
19 an approved watershed plan developed under chapter 90.82 RCW shall be
20 consistent with that plan if the plan calls for such acquisition.

21 (2) The department shall issue a water right certificate in the
22 name of the state of Washington for each permanent trust water right
23 conveyed to the state indicating the quantity of water transferred to
24 trust, the reach or reaches of the stream(, ~~the quantity~~)) or the body
25 of public groundwater that constitutes the place of use of the trust
26 water right, and the use or uses to which it may be applied. A
27 superseding certificate shall be issued that specifies the amount of
28 water the water right holder would continue to be entitled to as a
29 result of the water conservation project. The superseding certificate
30 shall retain the same priority date as the original right. For
31 nonpermanent conveyances, the department shall issue certificates or
32 such other instruments as are necessary to reflect the changes in
33 purpose or place of use or point of diversion or withdrawal.

34 (3) A trust water right retains the same priority date as the water
35 right from which it originated, but as between (~~them~~) the two rights,
36 the trust right shall be deemed to be inferior in priority unless

1 otherwise specified by an agreement between the state and the party
2 holding the original right.

3 (4) Exercise of a trust water right may be authorized only if the
4 department first determines that neither water rights existing at the
5 time the trust water right is established, nor the public interest will
6 be impaired. If impairment becomes apparent during the time a trust
7 water right is being exercised, the department shall cease or modify
8 the use of the trust water right to eliminate the impairment. A trust
9 water right acquired by the state and held or authorized for beneficial
10 use by the department is considered to be exercised as long as it is in
11 the trust water rights program. For the purposes of RCW 90.03.380(1)
12 and 90.42.080(9), the consumptive quantity of a trust water right
13 acquired by the state and held or authorized for use by the department
14 is equal to the consumptive quantity of the right prior to transfer
15 into the trust water rights program.

16 (5) Before any trust water right is created or modified, the
17 department shall, at a minimum, require that a notice be published in
18 a newspaper of general circulation published in the county or counties
19 in which the storage, diversion, and use are to be made, and in other
20 newspapers as the department determines is necessary, once a week for
21 two consecutive weeks. At the same time the department shall send a
22 notice containing pertinent information to all appropriate state
23 agencies, potentially affected local governments and federally
24 recognized tribal governments, and other interested parties.

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

28 (7) RCW 90.03.380 has no applicability to trust water rights
29 acquired by the state through the funding of water conservation
30 projects.

31 ~~(8) ((Subsections (4) and (5) of this section do not apply to a~~
32 ~~trust water right resulting from a donation for instream flows~~
33 ~~described in RCW 90.42.080(1)(b) or to a trust water right leased under~~
34 ~~RCW 90.42.080(8) if the period of the lease does not exceed five years.~~
35 ~~However, the department shall provide the notice described in~~
36 ~~subsection (5) of this section the first time the trust water right~~
37 ~~resulting from the donation is exercised.~~

1 (9)) Where a portion of an existing water right that is acquired
2 or donated to the trust water rights program will assist in achieving
3 established instream flows, the department shall process the change or
4 amendment of the existing right without conducting a review of the
5 extent and validity of the portion of the water right that will remain
6 with the water right holder.

7 **Sec. 4.** RCW 90.42.080 and 2002 c 329 s 9 are each amended to read
8 as follows:

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

16 (b) If the holder of a right to surface water (~~((from a body of~~
17 ~~water))~~ or groundwater chooses to donate all or a portion of the
18 person's water right to the trust water system to assist in providing
19 instream flows or to preserve surface water or groundwater resources on
20 a temporary or permanent basis, the department shall accept the
21 donation on such terms as the person may prescribe as long as the
22 donation satisfies the requirements of subsection (4) of this section
23 and the other applicable requirements of this chapter and the terms
24 prescribed are relevant and material to protecting any interest in the
25 water right retained by the donor. Once accepted, such rights are
26 trust water rights within the conditions prescribed by the donor.

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

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

33 (4) Except as provided in subsections (10) and (11) of this
34 section, a water right donated under subsection (1)(b) of this section
35 shall not exceed the extent to which the water right was exercised
36 during the five years before the donation nor may the total of any
37 portion of the water right remaining with the donor plus the donated

1 portion of the water right exceed the extent to which the water right
2 was exercised during the five years before the donation. A water right
3 holder who believes his or her water right has been impaired by a trust
4 water right donated under subsection (1)(b) of this section may request
5 that the department review the impairment claim. If the department
6 determines that ~~((exercising the))~~ a trust water right resulting from
7 ~~((the))~~ a donation ~~((or exercising a portion of that trust water right~~
8 ~~donated))~~ under subsection (1)(b) of this section is impairing existing
9 water rights in violation of RCW 90.42.070, the trust water right shall
10 be altered by the department to eliminate the impairment. Any decision
11 of the department to alter or not to alter a trust water right donated
12 under subsection (1)(b) of this section is appealable to the pollution
13 control hearings board under RCW 43.21B.230. A donated water right's
14 status as a trust water right under this subsection is not evidence of
15 the validity or quantity of the water right.

16 (5) The provisions of RCW 90.03.380 and 90.03.390 do not apply to
17 donations for instream flows described in subsection (1)(b) of this
18 section, but do apply to other transfers of water rights under this
19 section except that the consumptive quantity of a trust water right
20 acquired by the state and held or authorized for use by the department
21 is equal to the consumptive quantity of the right prior to transfer
22 into the trust water rights program.

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

26 (7) Any water right conveyed to the trust water right system as a
27 gift that is expressly conditioned to limit its use to instream
28 purposes shall be managed by the department for public purposes to
29 ensure that it qualifies as a gift that is deductible for federal
30 income taxation purposes for the person or entity conveying the water
31 right.

32 (8) Except as provided in subsections (10) and (11) of this
33 section, if the department acquires a trust water right by lease, the
34 amount of the trust water right shall not exceed the extent to which
35 the water right was exercised during the five years before the
36 acquisition was made nor may the total of any portion of the water
37 right remaining with the original water right holder plus the portion
38 of the water right leased by the department exceed the extent to which

1 the water right was exercised during the five years before the
2 acquisition. A water right holder who believes his or her water right
3 has been impaired by a trust water right leased under this subsection
4 may request that the department review the impairment claim. If the
5 department determines that (~~exercising the~~) a trust water right
6 resulting from the leasing (~~or exercising of a portion~~) of that trust
7 water right leased under this subsection is impairing existing water
8 rights in violation of RCW 90.42.070, the trust water right shall be
9 altered by the department to eliminate the impairment. Any decision of
10 the department to alter or not to alter a trust water right leased
11 under this subsection is appealable to the pollution control hearings
12 board under RCW 43.21B.230. The department's leasing of a trust water
13 right under this subsection is not evidence of the validity or quantity
14 of the water right.

15 (9) For a water right donated to or acquired by the trust water
16 rights program on a temporary basis, the full quantity of water
17 diverted or withdrawn to exercise the right before the donation or
18 acquisition shall be placed in the trust water rights program and shall
19 revert to the donor or person from whom it was acquired when the trust
20 period ends. For a trust water right acquired by the state and held or
21 authorized for use by the department, the consumptive quantity of the
22 right when it reverts to the donor or person from whom it was acquired
23 is equal to the consumptive quantity of the right prior to transfer
24 into the trust water rights program.

25 (10) For water rights donated or leased under subsection (4) or (8)
26 of this section where nonuse of the water right is excused under RCW
27 90.14.140(1):

28 (a) The department shall calculate the amount of water eligible to
29 be acquired by looking at the extent to which the right was exercised
30 during the most recent five-year period preceding the date where nonuse
31 of the water right was excused under RCW 90.14.140(1); and

32 (b) The total of the donated or leased portion of the water right
33 and the portion of the water right remaining with the water right
34 holder shall not exceed the extent to which the water right was
35 exercised during the most recent five-year period preceding the date
36 nonuse of the water right was excused under RCW 90.14.140(1).

37 (11) For water rights donated or leased under subsection (4) or (8)

1 of this section where nonuse of the water right is exempt under RCW
2 90.14.140(2) (a) or (d):

3 (a) The amount of water eligible to be acquired shall be based on
4 historical beneficial use; and

5 (b) The total of the donated or leased portion of the water right
6 and the portion of the water right the water right holder continues to
7 use shall not exceed the historical beneficial use of that right during
8 the duration of the trust.

9 NEW SECTION. Sec. 5. A new section is added to chapter 90.42 RCW
10 to read as follows:

11 Costs incurred by the department associated with water service
12 contracts with federal agencies may be recovered by the department from
13 persons withdrawing water or credits for water associated with water
14 banking purposes as a condition of the exercise of a water right
15 supplied from a federal water project.

16 NEW SECTION. Sec. 6. A new section is added to chapter 90.03 RCW
17 to read as follows:

18 For purposes of calculating annual consumptive quantity as defined
19 under RCW 90.03.380(1), if, within the most recent five-year period,
20 the water right has been in the trust water rights program under
21 chapter 90.38 or 90.42 RCW, or the nonuse of the water right has been
22 excused from relinquishment under RCW 90.14.140, the department shall
23 look to the most recent five-year period of continuous beneficial use
24 preceding the date where the excuse for nonuse under RCW 90.14.140 was
25 established and remained in effect.

26 NEW SECTION. Sec. 7. A new section is added to chapter 90.42 RCW
27 to read as follows:

28 The department may adopt rules as necessary to implement this
29 chapter.

30 NEW SECTION. Sec. 8. If any provision of this act or its
31 application to any person or circumstance is held invalid, the
32 remainder of the act or the application of the provision to other

1 persons or circumstances is not affected.

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