

# HOUSE BILL REPORT

## ESSB 5583

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### As Passed House - Amended:

April 13, 2009

**Title:** An act relating to improving the effectiveness of water bank authorization and exchange provisions.

**Brief Description:** Improving the effectiveness of water bank and exchange provisions.

**Sponsors:** Senate Committee on Environment, Water & Energy (originally sponsored by Senators Marr, Honeyford, Rockefeller, Morton, Fraser, Sheldon and Shin; by request of Department of Ecology).

### Brief History:

#### Committee Activity:

Agriculture & Natural Resources: 3/19/09, 3/26/09 [DPA].

#### Floor Activity

Passed House - Amended: 4/13/09, 93-0.

### Brief Summary of Engrossed Substitute Bill (As Amended by House)

- Authorizes the Department of Ecology to use the Trust Water Rights Program for water banking purposes statewide.
- Sets provisions for calculating annual consumptive quantity for trust water rights.
- Allows the Department of Ecology to recover costs associated with water service contracts with federal agencies.
- Authorizes the Department of Ecology to adopt rules.

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## HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

**Majority Report:** Do pass as amended. Signed by 13 members: Representatives Blake, Chair; Grant-Herriot, Vice Chair; Chandler, Ranking Minority Member; Smith, Assistant Ranking Minority Member; Jacks, Kretz, Liias, McCoy, Nelson, Ormsby, Pearson, Van De Wege and Warnick.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Staff:** Jaclyn Ford (786-7339)

**Background:**

Trust water rights are water rights that have been placed into the state's Trust Water Rights Program (Program).

Acquisition.

The state may acquire a trust water right by donation, purchase, lease, or means other than condemnation. Trust water rights acquired in areas with an approved watershed plan must be consistent with the plan's acquisition provisions.

For donations and for leases not exceeding five years, the quantity of water placed into trust (or the total of the trust amount and amount remaining with the water right holder) cannot exceed the amount exercised during the five years preceding acquisition.

Management.

Trust water rights must be held in trust and managed by the Department of Ecology (DOE). Water rights donated for instream flow purposes must be managed to ensure the donation qualifies as a gift for federal income tax purposes.

For temporary trust water rights, the full quantity of the original right reverts to the water right holder when the trust period ends.

Funding.

Funds may not be used to purchase water rights unless specifically appropriated by the Legislature. The state must cooperate with the United States in implementing the Program and must treat trust water rights acquired with federal funds in the same manner as those acquired with state funds.

Uses.

Trust water rights may be held or used for instream flows, irrigation, municipal, or other beneficial uses consistent with applicable regional plans. Trust water rights also may be used to resolve critical water supply problems.

Priority.

Trust water rights retain the same priority date as the originating water right. Between the trust water right and its originating right, the trust water right is junior in priority unless otherwise specified by the water right holder and the DOE.

Water Conservation Projects.

The state receives the "net water savings" achieved through state funding of a water conservation project. Conveyance of a trust water right pursuant to water conservation project funding can be achieved through transfer, lease, or other agreements. The state and water right holder must determine the amount of water the water right holder retains.

Irrigation Districts.

An irrigation district proposing to transfer water to the Program must provide evidence of its authority to represent the water rights holders. The state may not contract to acquire a water right served by an irrigation district without approval of the district's board of directors. The board's disapproval of an acquisition must be based on factual evidence of probable adverse effects on the district's financial stability or ability to deliver water to the district.

#### Impairment.

The trust water rights statutes do not authorize the involuntary impairment of any existing water right. The DOE must determine that a trust water right will not impair existing water rights or the public interest before such a right may be exercised. The DOE also must stop or modify trust water right use if impairment occurs. Impairment provisions do not apply to a donated trust water right for instream flows or a right leased for fewer than five years.

For donated and leased trust water rights, the DOE must review an impairment claim from any person who believes his or her water right has been impaired by a donated or leased right and must alter the trust water right to eliminate any impairment.

#### Transfers, Changes, or Amendments.

Statutory provisions regarding water rights transfers, changes, or amendments do not apply to trust water rights acquired through the funding of water conservation projects. Change and transfer provisions do not apply to trust water rights donated for instream flows but do apply to other transfers of water rights through the Program.

#### Relinquishment.

Statutory relinquishment provisions do not apply to trust water rights.

#### Instream Flows.

A trust water right expressly conditioned for instream flow purposes must be administered according to that condition. The DOE must process a donated water right without reviewing the extent and validity of the portion of the right remaining with the water right holder.

#### Notice.

The DOE is required to publish notice in a newspaper of general circulation in the relevant county once a week for two consecutive weeks. The DOE also must send notice to all appropriate state agencies, local and tribal governments, and other interested parties.

#### Documentation.

The DOE must issue a water rights certificate in the state's name for a permanent trust water right. For trust water rights acquired through the funding of water conservation projects, the DOE must issue a superseding certificate reflecting the amount of water to which the water right holder is entitled. The DOE must issue certificates or other instruments for temporary trust water rights.

#### Appeals.

The DOE's impairment decisions may be appealed to the Pollution Control Hearings Board.

#### Water Banking.

In 2003 the Legislature enacted provisions allowing the DOE to use the Program for water banking purposes in the Yakima River Basin. The 2003 legislation specified authorized purposes of water banking, including mitigation, water supply needs, beneficial uses, documentation of trust water rights transfers, and new water rights sources. This legislation also included prohibitions against using the water banking authority to injure existing water rights, issue temporary rights for new potable water uses, administer federal project rights, or allow carryover of stored water from one water year to another. The legislation also established a process for applications and appeals related to water banking activities.

### **Summary of Amended Bill:**

#### Trust Water Rights Program.

The DOE may use the Program for water banking purposes statewide. The state may acquire all or portions of existing surface water or groundwater rights for the Program.

The DOE must issue a water right certificate for each permanent trust water right conveyed to the state indicating the quantity of water transferred to trust, the reach or reaches of the stream or the body of public groundwater, and the use or uses to which it may be applied. The DOE must exercise its authorities under the law in a manner that protects trust water rights.

Prior to initiating use of the Trust Water Rights Program for water banking purposes for the first time in each water resource inventory area, the DOE must provide electronic notice and opportunity for comment to affected governments and affected federally recognized tribal governments. "Local government" is defined as a city, town, public utility district, irrigation district, public port, county, sewer district, or water district.

#### Annual Consumptive Quantity.

The consumptive quantity of a trust water right acquired by the state is equal to the consumptive quantity of the right prior to its transfer into the Program, and the consumptive quantity of the right when it reverts to the donor is equal to the consumptive quantity of the right prior to its transfer into the Program.

For purposes of calculating annual consumptive quantity, if the water right has been in the Program within the most recent five-year period, or the nonuse of the water right has been excused from relinquishment, the DOE must look to the most recent five-year period of continuous beneficial use preceding the date where the excuse for nonuse was established and remained in effect.

#### Relinquishment.

For water rights put into the Program that are exempt from relinquishment because the water is claimed for power development or municipal water supply, the DOE must look at the amount of water eligible to be acquired based on historical beneficial use.

#### Cost Recovery.

Costs incurred by the DOE associated with water service contracts with federal agencies may be recovered by the DOE from persons withdrawing water or credits for water associated with water banking purposes as a condition of the exercise of a water right supplied from a

federal water project.

Rule-Making.

The DOE may adopt rules as necessary to implement these provisions.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Amended Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) This was worked over in the Senate. It is time for this bill. Fifteen watersheds call for water banking to help manage their water. It can be interpreted that Yakima Basin is the only place where water banking can be used; this bill will clarify that it is statewide. This will clarify that groundwater can be put in trust. This clarifies that trust water rights do not have to comply with annual consumptive quantity under RCW 90.03.380. Trust water rights should be protected once placed in trust. This will help water rights holders and improve instream flows. This gives increased flexibility for trust water right donations.

(Opposed) None.

**Persons Testifying:** Ken Slattery, Department of Ecology; David McClure, Klickitat County; Paul Eisenberg and Joe Mentor, Suncadia; Peter Dykstra, Washington Rivers Conservancy; Richard Reich, Muckleshoot Tribe; and Kathleen Collins, Washington Water Policy Alliance.

**Persons Signed In To Testify But Not Testifying:** None.