

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 5583

Chapter 283, Laws of 2009

61st Legislature
2009 Regular Session

TRUST WATER RIGHTS PROGRAM--WATER BANKING

EFFECTIVE DATE: 07/26/09

Passed by the Senate April 20, 2009
YEAS 46 NAYS 1

BRAD OWEN

President of the Senate

Passed by the House April 13, 2009
YEAS 93 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved April 29, 2009, 10:49 a.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5583** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

April 29, 2009

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 5583

AS AMENDED BY THE HOUSE

Passed Legislature - 2009 Regular Session

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 90.42.020, 90.42.040, and 90.42.080; adding new sections to chapter
4 90.42 RCW; adding a new section to chapter 90.03 RCW; and creating a
5 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 watershed planning
9 units operating under chapter 90.82 RCW, have proposed or considered
10 using the state trust water rights program for water banking purposes
11 to meet vital instream and out-of-stream needs within a watershed or
12 region. The legislature also finds that water banking can: Provide
13 critical tools to make water supplies available when and where needed
14 during times of drought; improve stream flows and preserve instream
15 values during fish critical periods; reduce water transaction costs,
16 time, and risk to purchasers; facilitate fair and efficient
17 reallocation of water from one beneficial use to another; provide water
18 supplies to offset impacts related to future development and the
19 issuance of new water rights; and facilitate water agreements that

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

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

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

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

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

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

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

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

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

28 (b) Issue temporary water rights or portions thereof for new
29 potable uses requiring an adequate and reliable water supply under RCW
30 19.27.097;

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

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

36 (4) The department shall provide electronic notice and opportunity
37 for comment to affected local governments and affected federally

1 recognized tribal governments prior to initiating use of the trust
2 water rights program for water banking purposes for the first time in
3 each water resource inventory area.

4 (5) Nothing in this section may be interpreted or administered in
5 a manner that precludes the use of the department's existing authority
6 to process trust water rights applications under this chapter or to
7 process water right applications under chapter 90.03 or 90.44 RCW.

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

13 **Sec. 3.** RCW 90.42.020 and 1991 c 347 s 6 are each amended to read
14 as follows:

15 ~~((Unless the context clearly requires otherwise,))~~ The definitions
16 in this section apply throughout this chapter unless the context
17 clearly requires otherwise.

18 (1) "Department" means the department of ecology.

19 (2) "Local government" means a city, town, public utility district,
20 irrigation district, public port, county, sewer district, or water
21 district.

22 (3) "Net water savings" means the amount of water that is
23 determined to be conserved and usable within a specified stream reach
24 or reaches for other purposes without impairment or detriment to water
25 rights existing at the time that a water conservation project is
26 undertaken, reducing the ability to deliver water, or reducing the
27 supply of water that otherwise would have been available to other
28 existing water uses.

29 ~~((3))~~ (4) "Trust water right" means any water right acquired by
30 the state under this chapter for management in the state's trust water
31 rights program.

32 ~~((4))~~ (5) "Pilot planning areas" means the geographic areas
33 designated under RCW 90.54.045(2).

34 ~~((5))~~ (6) "Water conservation project" means any project or
35 program that achieves physical or operational improvements that provide
36 for increased water use efficiency in existing systems of diversion,

1 conveyance, application, or use of water under water rights existing on
2 July 28, 1991.

3 **Sec. 4.** RCW 90.42.040 and 2002 c 329 s 8 are each amended to read
4 as follows:

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

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

32 (3) A trust water right retains the same priority date as the water
33 right from which it originated, but as between (~~them~~) the two rights,
34 the trust right shall be deemed to be inferior in priority unless
35 otherwise specified by an agreement between the state and the party
36 holding the original right.

1 (4)(a) Exercise of a trust water right may be authorized only if
2 the department first determines that neither water rights existing at
3 the time the trust water right is established, nor the public interest
4 will be impaired.

5 (b) If impairment becomes apparent during the time a trust water
6 right is being exercised, the department shall cease or modify the use
7 of the trust water right to eliminate the impairment.

8 (c) A trust water right acquired by the state and held or
9 authorized for beneficial use by the department is considered to be
10 exercised as long as it is in the trust water rights program.

11 (d) For the purposes of RCW 90.03.380(1) and 90.42.080(9), the
12 consumptive quantity of a trust water right acquired by the state and
13 held or authorized for use by the department is equal to the
14 consumptive quantity of the right prior to transfer into the trust
15 water rights program.

16 (5)(a) 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.

22 (b) At the same time the department shall send a notice containing
23 pertinent information to all appropriate state agencies, potentially
24 affected local governments and federally recognized tribal governments,
25 and other interested parties.

26 (c) For a trust water right donation described in RCW
27 90.42.080(1)(b), or for a trust water right lease described in RCW
28 90.42.080(8) that does not exceed five years, the department may post
29 equivalent information on its web site to meet the notice requirements
30 in (a) of this subsection and may send pertinent information by e-mail
31 to meet the notice requirements in (b) of this subsection.

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

35 (7) RCW 90.03.380 has no applicability to trust water rights
36 acquired by the state through the funding of water conservation
37 projects.

1 (8) Subsection(~~(s)~~) (4) (~~(and (5))~~) (a) of this section (~~(d)~~) does
2 not apply to a trust water right resulting from a donation for instream
3 flows described in RCW 90.42.080(1)(b) or to a trust water right leased
4 under RCW 90.42.080(8) if the period of the lease does not exceed five
5 years. (~~However, the department shall provide the notice described in~~
6 ~~subsection (5) of this section the first time the trust water right~~
7 ~~resulting from the donation is exercised.~~)

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

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

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

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

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

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

3 (4) Except as provided in subsections (10) and (11) of this
4 section, a water right donated under subsection (1)(b) of this section
5 shall not exceed the extent to which the water right was exercised
6 during the five years before the donation nor may the total of any
7 portion of the water right remaining with the donor plus the donated
8 portion of the water right exceed the extent to which the water right
9 was exercised during the five years before the donation. A water right
10 holder who believes his or her water right has been impaired by a trust
11 water right donated under subsection (1)(b) of this section may request
12 that the department review the impairment claim. If the department
13 determines that (~~exercising the~~) a trust water right resulting from
14 (~~the~~) a donation (~~or exercising a portion of that trust water right~~
15 ~~donated~~) under subsection (1)(b) of this section is impairing existing
16 water rights in violation of RCW 90.42.070, the trust water right shall
17 be altered by the department to eliminate the impairment. Any decision
18 of the department to alter or not to alter a trust water right donated
19 under subsection (1)(b) of this section is appealable to the pollution
20 control hearings board under RCW 43.21B.230. A donated water right's
21 status as a trust water right under this subsection is not evidence of
22 the validity or quantity of the water right.

23 (5) The provisions of RCW 90.03.380 and 90.03.390 do not apply to
24 donations for instream flows described in subsection (1)(b) of this
25 section, but do apply to other transfers of water rights under this
26 section except that the consumptive quantity of a trust water right
27 acquired by the state and held or authorized for use by the department
28 is equal to the consumptive quantity of the right prior to transfer
29 into the trust water rights program.

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

33 (7) Any water right conveyed to the trust water right system as a
34 gift that is expressly conditioned to limit its use to instream
35 purposes shall be managed by the department for public purposes to
36 ensure that it qualifies as a gift that is deductible for federal
37 income taxation purposes for the person or entity conveying the water
38 right.

1 (8) Except as provided in subsections (10) and (11) of this
2 section, if the department acquires a trust water right by lease, the
3 amount of the trust water right shall not exceed the extent to which
4 the water right was exercised during the five years before the
5 acquisition was made nor may the total of any portion of the water
6 right remaining with the original water right holder plus the portion
7 of the water right leased by the department exceed the extent to which
8 the water right was exercised during the five years before the
9 acquisition. A water right holder who believes his or her water right
10 has been impaired by a trust water right leased under this subsection
11 may request that the department review the impairment claim. If the
12 department determines that ~~((exercising—the))~~ a trust water right
13 resulting from the leasing ~~((or exercising of a portion))~~ of that trust
14 water right leased under this subsection is impairing existing water
15 rights in violation of RCW 90.42.070, the trust water right shall be
16 altered by the department to eliminate the impairment. Any decision of
17 the department to alter or not to alter a trust water right leased
18 under this subsection is appealable to the pollution control hearings
19 board under RCW 43.21B.230. The department's leasing of a trust water
20 right under this subsection is not evidence of the validity or quantity
21 of the water right.

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

32 (10) For water rights donated or leased under subsection (4) or (8)
33 of this section where nonuse of the water right is excused under RCW
34 90.14.140(1):

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

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

6 (11) For water rights donated or leased under subsection (4) or (8)
7 of this section where nonuse of the water right is exempt under RCW
8 90.14.140(2) (a) or (d):

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

11 (b) The total of the donated or leased portion of the water right
12 and the portion of the water right the water right holder continues to
13 use shall not exceed the historical beneficial use of that right during
14 the duration of the trust.

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

17 Costs incurred by the department associated with water service
18 contracts with federal agencies may be recovered by the department from
19 persons withdrawing water or credits for water associated with water
20 banking purposes as a condition of the exercise of a water right
21 supplied from a federal water project.

22 NEW SECTION. Sec. 7. A new section is added to chapter 90.03 RCW
23 to read as follows:

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

32 NEW SECTION. Sec. 8. A new section is added to chapter 90.42 RCW
33 to read as follows:

34 The department may adopt rules as necessary to implement this
35 chapter.

1 NEW_SECTION. **Sec. 9.** If any provision of this act or its
2 application to any person or circumstance is held invalid, the
3 remainder of the act or the application of the provision to other
4 persons or circumstances is not affected.

 Passed by the Senate April 20, 2009.

 Passed by the House April 13, 2009.

 Approved by the Governor April 29, 2009.

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