
SUBSTITUTE SENATE BILL 5361

State of Washington

57th Legislature

2001 Regular Session

By Senate Committee on Environment, Energy & Water (originally sponsored by Senators Parlette, Honeyford, Hewitt, Hale, Morton, Swecker, Hochstatter, Long, Oke, McCaslin, Sheahan and Fraser)

READ FIRST TIME 02/22/01.

1 AN ACT Relating to trust water rights; and amending RCW 90.14.140,
2 90.38.020, 90.38.040, 90.42.040, and 90.42.080.

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

4 **Sec. 1.** RCW 90.14.140 and 1998 c 258 s 1 are each amended to read
5 as follows:

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

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

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

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

14 (d) The operation of legal proceedings;

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

18 (f) Federal laws imposing land or water use restrictions either
19 directly or through the voluntary enrollment of a landowner in a

1 federal program implementing those laws, or acreage limitations, or
2 production quotas.

3 (2) Notwithstanding any other provisions of RCW 90.14.130 through
4 90.14.180, there shall be no relinquishment of any water right:

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

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

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

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

17 (e) If such waters are not subject to appropriation under the
18 applicable provisions of RCW 90.40.030; (~~(e)~~)

19 (f) If such right or portion of the right is leased to another
20 person for use on land other than the land to which the right is
21 appurtenant as long as the lessee makes beneficial use of the right in
22 accordance with this chapter and a transfer or change of the right has
23 been approved by the department in accordance with RCW 90.03.380,
24 90.03.383, 90.03.390, or 90.44.100; or

25 (g) If such right is a trust water right under chapter 90.38 or
26 90.42 RCW.

27 **Sec. 2.** RCW 90.38.020 and 1989 c 429 s 3 are each amended to read
28 as follows:

29 (1)(a) The department may acquire water rights, including but not
30 limited to storage rights, by purchase, gift, or other appropriate
31 means other than by condemnation, from any person or entity or
32 combination of persons or entities. Once acquired, such rights are
33 trust water rights. A water right acquired by the state that is
34 expressly conditioned to limit its use to instream purposes shall be
35 administered as a trust water right in compliance with that condition.

36 (b) If an aquatic species is listed as threatened or endangered
37 under the federal endangered species act (16 U.S.C. Sec. 1531 et seq.)
38 for a body of water, certain instream flows are needed for the species,

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

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

16 (3) The trust water rights may be acquired on a temporary or
17 permanent basis.

18 (4) A water right donated under subsection (1)(b) of this section
19 shall not exceed the extent to which the water right was exercised
20 during any of the five years before the donation nor may the total of
21 any portion of the water right remaining with the donor plus the
22 donated portion of the water right exceed the extent to which the water
23 right was exercised during any of the five years before the donation.
24 If, upon appeal from a determination by the department, it is found
25 that exercising the trust water right resulting from the donation or
26 exercising a portion of that trust water right impairs existing water
27 rights in violation of RCW 90.38.902, the trust water right shall be
28 altered to eliminate the impairment. A donated water right's status as
29 a trust water right shall not be evidence of the validity or quantity
30 of the water right.

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

36 **Sec. 3.** RCW 90.38.040 and 1994 c 264 s 90 are each amended to read
37 as follows:

1 (1) All trust water rights acquired by the department shall be
2 placed in the Yakima river basin trust water rights program to be
3 managed by the department. The department shall issue a water right
4 certificate in the name of the state of Washington for each trust water
5 right it acquires.

6 (2) Trust water rights shall retain the same priority date as the
7 water right from which they originated. Trust water rights may be
8 modified as to purpose or place of use or point of diversion, including
9 modification from a diversionary use to a nondiversionary instream use.

10 (3) Trust water rights may be held by the department for instream
11 flows and/or irrigation use.

12 (4) A schedule of the amount of net water saved as a result of
13 water conservation projects carried out in accordance with this
14 chapter, shall be developed annually to reflect the predicted
15 hydrologic and water supply conditions, as well as anticipated water
16 demands, for the upcoming irrigation season. This schedule shall serve
17 as the basis for the distribution and management of trust water rights
18 each year.

19 (5)(a) No exercise of a trust water right may be authorized unless
20 the department first determines that no existing water rights, junior
21 or senior in priority, will be impaired as to their exercise or injured
22 in any manner whatever by such authorization.

23 (b) Before any trust water right is exercised, the department shall
24 publish notice thereof in a newspaper of general circulation published
25 in the county or counties in which the storage, diversion, and use are
26 to be made, and in such other newspapers as the department determines
27 are necessary, once a week for two consecutive weeks. At the same time
28 the department may also send notice thereof containing pertinent
29 information to the director of fish and wildlife.

30 (c) This subsection (5) does not apply to a trust water right
31 resulting from a donation for instream flows described in RCW
32 90.38.020(1). However, the department shall provide the notice
33 described in (b) of this subsection the first time the trust water
34 right resulting from the donation is exercised.

35 (6) RCW 90.03.380 and 90.14.140 through 90.14.910 shall have no
36 applicability to trust water rights held by the department under this
37 chapter or exercised under this section.

1 **Sec. 4.** RCW 90.42.040 and 1993 c 98 s 3 are each amended to read
2 as follows:

3 (1) All trust water rights acquired by the state shall be placed in
4 the state trust water rights program to be managed by the department.
5 Trust water rights acquired by the state shall be held or authorized
6 for use by the department for instream flows, irrigation, municipal, or
7 other beneficial uses consistent with applicable regional plans for
8 pilot planning areas, or to resolve critical water supply problems.

9 (2) The department shall issue a water right certificate in the
10 name of the state of Washington for each permanent trust water right
11 conveyed to the state indicating the reach or reaches of the stream,
12 the quantity, and the use or uses to which it may be applied. A
13 superseding certificate shall be issued that specifies the amount of
14 water the water right holder would continue to be entitled to as a
15 result of the water conservation project. The superseding certificate
16 shall retain the same priority date as the original right. For
17 nonpermanent conveyances, the department shall issue certificates or
18 such other instruments as are necessary to reflect the changes in
19 purpose or place of use or point of diversion or withdrawal. Water
20 rights for which such nonpermanent conveyances are arranged shall not
21 be subject to relinquishment for nonuse.

22 (3) A trust water right retains the same priority date as the water
23 right from which it originated, but as between them the trust right
24 shall be deemed to be inferior in priority unless otherwise specified
25 by an agreement between the state and the party holding the original
26 right.

27 (4) Exercise of a trust water right may be authorized only if the
28 department first determines that neither water rights existing at the
29 time the trust water right is established, nor the public interest will
30 be impaired. If impairment becomes apparent during the time a trust
31 water right is being exercised, the department shall cease or modify
32 the use of the trust water right to eliminate the impairment.

33 (5) Before any trust water right is created or modified, the
34 department shall, at a minimum, require that a notice be published in
35 a newspaper of general circulation published in the county or counties
36 in which the storage, diversion, and use are to be made, and in other
37 newspapers as the department determines is necessary, once a week for
38 two consecutive weeks. At the same time the department shall send a
39 notice containing pertinent information to all appropriate state

1 agencies, potentially affected local governments and federally
2 recognized tribal governments, and other interested parties.

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

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

9 (8) Subsections (4) and (5) of this section do not apply to a trust
10 water right resulting from a donation for instream flows described in
11 RCW 90.42.080(1)(b). However, the department shall provide the notice
12 described in subsection (5) of this section the first time the trust
13 water right resulting from the donation is exercised.

14 **Sec. 5.** RCW 90.42.080 and 1993 c 98 s 4 are each amended to read
15 as follows:

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

23 (b) If an aquatic species is listed as threatened or endangered
24 under the federal endangered species act (16 U.S.C. Sec. 1531 et seq.)
25 for a body of water, certain instream flows are needed for the species,
26 and the holder of a right to water from the body of water chooses to
27 donate all or a portion of the person's water right to the trust water
28 system to assist in providing those instream flows on a temporary or
29 permanent basis, the department shall accept the donation on such terms
30 as the person may prescribe as long as the donation satisfies the
31 requirements of subsection (4) of this section and otherwise satisfies
32 the requirements of this chapter and the terms prescribed are relevant
33 and material to protecting any interest in the water right that is
34 retained by the donor and are mutually acceptable. Once accepted, such
35 rights are trust water rights within the conditions prescribed by the
36 donor.

37 (2) The department may enter into leases, contracts, or such other
38 arrangements with other persons or entities as appropriate, to ensure

1 that trust water rights acquired in accordance with this chapter may be
2 exercised to the fullest possible extent.

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

5 (4) A water right donated under subsection (1)(b) of this section
6 shall not exceed the extent to which the water right was exercised
7 during any of the five years before the donation nor may the total of
8 any portion of the water right remaining with the donor plus the
9 donated portion of the water right exceed the extent to which the water
10 right was exercised during any of the five years before the donation.
11 If, upon appeal from a determination by the department, it is found
12 that exercising the trust water right resulting from the donation or
13 exercising a portion of that trust water right impairs existing water
14 rights in violation of RCW 90.42.070, the trust water right shall be
15 altered to eliminate the impairment. A donated water right's status as
16 a trust water right shall not be evidence of the validity or quantity
17 of the water right.

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

22 ~~((+5))~~ (6) No funds may be expended for the purchase of water
23 rights by the state pursuant to this section unless specifically
24 appropriated for this purpose by the legislature.

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

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