

**ESSB 5583** - H COMM AMD

By Committee on Agriculture & Natural Resources

ADOPTED AS AMENDED 04/13/2009

1 Strike everything after the enacting clause and insert the  
2 following:

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

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

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

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

28 (a) To authorize the use of trust water rights to mitigate for  
29 water resource impacts, future water supply needs, or any beneficial

1 use under chapter 90.03, 90.44, or 90.54 RCW, consistent with any terms  
2 and conditions established by the transferor, except that within the  
3 Yakima river basin return flows from water rights authorized in whole  
4 or in part for any purpose shall remain available as part of the Yakima  
5 basin's total water supply available and to satisfy existing rights for  
6 other downstream uses and users;

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

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

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

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

14 (b) Issue temporary water rights or portions thereof for new  
15 potable uses requiring an adequate and reliable water supply under RCW  
16 19.27.097;

17 (c) Administer federal project water rights, including federal  
18 storage rights; or

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

22 (4) The department shall provide notice and opportunity for comment  
23 to affected local governments and federally recognized tribal  
24 governments prior to utilizing the trust water rights program for water  
25 banking purposes for the first time in each watershed.

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

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

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

1       (~~Unless the context clearly requires otherwise,~~) The definitions  
2 in this section apply throughout this chapter unless the context  
3 clearly requires otherwise.

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

5       (2) "Local government" means a city, town, public utility district,  
6 county, sewer district, or water district.

7       (3) "Net water savings" means the amount of water that is  
8 determined to be conserved and usable within a specified stream reach  
9 or reaches for other purposes without impairment or detriment to water  
10 rights existing at the time that a water conservation project is  
11 undertaken, reducing the ability to deliver water, or reducing the  
12 supply of water that otherwise would have been available to other  
13 existing water uses.

14       (~~(3)~~) (4) "Trust water right" means any water right acquired by  
15 the state under this chapter for management in the state's trust water  
16 rights program.

17       (~~(4)~~) (5) "Pilot planning areas" means the geographic areas  
18 designated under RCW 90.54.045(2).

19       (~~(5)~~) (6) "Water conservation project" means any project or  
20 program that achieves physical or operational improvements that provide  
21 for increased water use efficiency in existing systems of diversion,  
22 conveyance, application, or use of water under water rights existing on  
23 July 28, 1991.

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

26       (1) (~~All trust water rights~~) A trust water right acquired by the  
27 state shall be placed in the state trust water rights program to be  
28 managed by the department. The department shall exercise its  
29 authorities under the law in a manner that protects trust water rights.

30 Trust water rights acquired by the state shall be held (~~or~~) in trust  
31 and authorized for use by the department for instream flows,  
32 irrigation, municipal, or other beneficial uses consistent with  
33 applicable regional plans for pilot planning areas, or to resolve  
34 critical water supply problems. The state may acquire a groundwater  
35 right to be placed in the state trust water rights program. To the  
36 extent practicable and subject to legislative appropriation, trust

1 water rights acquired in an area with an approved watershed plan  
2 developed under chapter 90.82 RCW shall be consistent with that plan if  
3 the plan calls for such acquisition.

4 (2) The department shall issue a water right certificate in the  
5 name of the state of Washington for each permanent trust water right  
6 conveyed to the state indicating the quantity of water transferred to  
7 trust, the reach or reaches of the stream(~~(, the quantity))~~ or the body  
8 of public groundwater that constitutes the place of use of the trust  
9 water right, and the use or uses to which it may be applied. A  
10 superseding certificate shall be issued that specifies the amount of  
11 water the water right holder would continue to be entitled to as a  
12 result of the water conservation project. The superseding certificate  
13 shall retain the same priority date as the original right. For  
14 nonpermanent conveyances, the department shall issue certificates or  
15 such other instruments as are necessary to reflect the changes in  
16 purpose or place of use or point of diversion or withdrawal.

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

22 (4) Exercise of a trust water right may be authorized only if the  
23 department first determines that neither water rights existing at the  
24 time the trust water right is established, nor the public interest will  
25 be impaired. If impairment becomes apparent during the time a trust  
26 water right is being exercised, the department shall cease or modify  
27 the use of the trust water right to eliminate the impairment. A trust  
28 water right acquired by the state and held or authorized for beneficial  
29 use by the department is considered to be exercised as long as it is in  
30 the trust water rights program. For the purposes of RCW 90.03.380(1)  
31 and 90.42.080(9), the consumptive quantity of a trust water right  
32 acquired by the state and held or authorized for use by the department  
33 is equal to the consumptive quantity of the right prior to transfer  
34 into the trust water rights program.

35 (5) Before any trust water right is created or modified, the  
36 department shall, at a minimum, require that a notice be published in  
37 a newspaper of general circulation published in the county or counties  
38 in which the storage, diversion, and use are to be made, and in other

1 newspapers as the department determines is necessary, once a week for  
2 two consecutive weeks. At the same time the department shall send a  
3 notice containing pertinent information to all appropriate state  
4 agencies, potentially affected local governments and federally  
5 recognized tribal governments, and other interested parties.

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

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

12 ~~(8) ((Subsections (4) and (5) of this section do not apply to a  
13 trust water right resulting from a donation for instream flows  
14 described in RCW 90.42.080(1)(b) or to a trust water right leased under  
15 RCW 90.42.080(8) if the period of the lease does not exceed five years.  
16 However, the department shall provide the notice described in  
17 subsection (5) of this section the first time the trust water right  
18 resulting from the donation is exercised.~~

19 ~~(9))~~ Where a portion of an existing water right that is acquired  
20 or donated to the trust water rights program will assist in achieving  
21 established instream flows, the department shall process the change or  
22 amendment of the existing right without conducting a review of the  
23 extent and validity of the portion of the water right that will remain  
24 with the water right holder.

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

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

34 (b) If the holder of a right to surface water ~~((from a body of  
35 water))~~ or groundwater chooses to donate all or a portion of the  
36 person's water right to the trust water system to assist in providing  
37 instream flows or to preserve surface water or groundwater resources on

1 a temporary or permanent basis, the department shall accept the  
2 donation on such terms as the person may prescribe as long as the  
3 donation satisfies the requirements of subsection (4) of this section  
4 and the other applicable requirements of this chapter and the terms  
5 prescribed are relevant and material to protecting any interest in the  
6 water right retained by the donor. Once accepted, such rights are  
7 trust water rights within the conditions prescribed by the donor.

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

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

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

34 (5) The provisions of RCW 90.03.380 and 90.03.390 do not apply to  
35 donations for instream flows described in subsection (1)(b) of this  
36 section, but do apply to other transfers of water rights under this  
37 section except that the consumptive quantity of a trust water right

1 acquired by the state and held or authorized for use by the department  
2 is equal to the consumptive quantity of the right prior to transfer  
3 into the trust water rights program.

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

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

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

34 (9) For a water right donated to or acquired by the trust water  
35 rights program on a temporary basis, the full quantity of water  
36 diverted or withdrawn to exercise the right before the donation or  
37 acquisition shall be placed in the trust water rights program and shall  
38 revert to the donor or person from whom it was acquired when the trust

1 period ends. For a trust water right acquired by the state and held or  
2 authorized for use by the department, the consumptive quantity of the  
3 right when it reverts to the donor or person from whom it was acquired  
4 is equal to the consumptive quantity of the right prior to transfer  
5 into the trust water rights program.

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

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

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

18 (11) For water rights donated or leased under subsection (4) or (8)  
19 of this section where nonuse of the water right is exempt under RCW  
20 90.14.140(2) (a) or (d):

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

23 (b) The total of the donated or leased portion of the water right  
24 and the portion of the water right the water right holder continues to  
25 use shall not exceed the historical beneficial use of that right during  
26 the duration of the trust.

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

29 Costs incurred by the department associated with water service  
30 contracts with federal agencies may be recovered by the department from  
31 persons withdrawing water or credits for water associated with water  
32 banking purposes as a condition of the exercise of a water right  
33 supplied from a federal water project.

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

36 For purposes of calculating annual consumptive quantity as defined



1 under RCW 90.03.380(1), if, within the most recent five-year period,  
2 the water right has been in the trust water rights program under  
3 chapter 90.38 or 90.42 RCW, or the nonuse of the water right has been  
4 excused from relinquishment under RCW 90.14.140, the department shall  
5 look to the most recent five-year period of continuous beneficial use  
6 preceding the date where the excuse for nonuse under RCW 90.14.140 was  
7 established and remained in effect.

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

10 The department may adopt rules as necessary to implement this  
11 chapter.

12 NEW SECTION. **Sec. 9.** If any provision of this act or its  
13 application to any person or circumstance is held invalid, the  
14 remainder of the act or the application of the provision to other  
15 persons or circumstances is not affected."

16 Correct the title.

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