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**SUBSTITUTE SENATE BILL 5583**

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**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 many watershed  
8 planning units operating under chapter 90.82 RCW, have proposed or  
9 considered the establishment of water banks to meet vital instream and  
10 out-of-stream needs within a watershed or region. The legislature also  
11 finds that water banks and exchanges can: Provide critical tools to  
12 make water supplies available when and where needed during times of  
13 drought; improve stream flows and preserve instream values during fish  
14 critical periods; reduce water transaction costs, time, and risk to  
15 purchasers; facilitate fair and efficient reallocation of water from  
16 one beneficial use to another; provide banked water supplies to offset  
17 impacts related to future development and the issuance of new water  
18 rights; and facilitate water agreements that protect upstream community  
19 values while retaining flexibility to meet critical downstream water

1 needs in times of scarcity. The legislature therefore declares that  
2 the intent of this act is to provide clear authority for water banks  
3 throughout the state, to improve the effectiveness of water bank and  
4 exchange provisions, and to use the interlocal cooperation act to  
5 establish watershed management partnerships for water banking purposes.

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) Nothing in this section may be interpreted or administered in

1 a manner that precludes the use of the department's existing authority  
2 to process trust water rights applications under this chapter or to  
3 process water right applications under chapter 90.03 or 90.44 RCW.

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

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

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

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

35 (3) A trust water right retains the same priority date as the water  
36 right from which it originated, but as between (~~them~~) the two rights,

1 the trust right shall be deemed to be inferior in priority unless  
2 otherwise specified by an agreement between the state and the party  
3 holding the original right.

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

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

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

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

32 ~~(8) ((Subsections (4) and (5) of this section do not apply to a~~  
33 ~~trust water right resulting from a donation for instream flows~~  
34 ~~described in RCW 90.42.080(1)(b) or to a trust water right leased under~~  
35 ~~RCW 90.42.080(8) if the period of the lease does not exceed five years.~~  
36 ~~However, the department shall provide the notice described in~~  
37 ~~subsection (5) of this section the first time the trust water right~~  
38 ~~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 subsection (10) of this section, a water  
34 right donated under subsection (1)(b) of this section shall not exceed  
35 the extent to which the water right was exercised during the five years  
36 before the donation nor may the total of any portion of the water right  
37 remaining with the donor plus the donated portion of the water right

1 exceed the extent to which the water right was exercised during the  
2 five years before the donation. A water right holder who believes his  
3 or her water right has been impaired by a trust water right donated  
4 under subsection (1)(b) of this section may request that the department  
5 review the impairment claim. If the department determines that  
6 ~~((exercising the))~~ a trust water right resulting from ~~((the))~~ a  
7 donation ~~((or exercising a portion of that trust water right donated))~~  
8 under subsection (1)(b) of this section is impairing existing water  
9 rights in violation of RCW 90.42.070, the trust water right shall be  
10 altered by the department to eliminate the impairment. Any decision of  
11 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 subsection (10) of this section, if the  
33 department acquires a trust water right by lease, the amount of the  
34 trust water right shall not exceed the extent to which the water right  
35 was exercised during the five years before the acquisition was made nor  
36 may the total of any portion of the water right remaining with the  
37 original water right holder plus the portion of the water right leased  
38 by the department exceed the extent to which the water right was

1 exercised during the five years before the acquisition. A water right  
2 holder who believes his or her water right has been impaired by a trust  
3 water right leased under this subsection may request that the  
4 department review the impairment claim. If the department determines  
5 that (~~exercising the~~) a trust water right resulting from the leasing  
6 (~~or exercising of a portion~~) of that trust water right leased under  
7 this subsection is impairing existing water rights in violation of RCW  
8 90.42.070, the trust water right shall be altered by the department to  
9 eliminate the impairment. Any decision of the department to alter or  
10 not to alter a trust water right leased under this subsection is  
11 appealable to the pollution control hearings board under RCW  
12 43.21B.230. The department's leasing of a trust water right under this  
13 subsection is not evidence of the validity or quantity of the water  
14 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, and where the nonuse occurred in the five years preceding  
28 the donation or lease, the department shall calculate the amount of  
29 water to be acquired by looking at the extent to which the right was  
30 exercised during the most recent five-year period preceding the date  
31 where excuse for nonuse under RCW 90.14.140 was established and  
32 remained in effect.

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

35 Costs incurred by the department associated with water service  
36 contracts with federal agencies may be recovered by the department from

1 persons withdrawing water or credits for water associated with water  
2 banking purposes as a condition of the exercise of a water right  
3 supplied from a federal water project.

4 NEW SECTION. **Sec. 6.** A new section is added to chapter 90.03 RCW  
5 to read as follows:

6 For purposes of calculating annual consumptive quantity as defined  
7 under RCW 90.03.380(1), if, within the most recent five-year period,  
8 the water right has been in the trust water rights program under  
9 chapter 90.38 or 90.42 RCW, or the nonuse of the water right has been  
10 excused from relinquishment under RCW 90.14.140, the department shall  
11 look to the most recent five-year period of continuous beneficial use  
12 preceding the date where the excuse for nonuse under RCW 90.14.140 was  
13 established and remained in effect.

14 NEW SECTION. **Sec. 7.** A new section is added to chapter 90.42 RCW  
15 to read as follows:

16 The department may adopt rules as necessary to implement this  
17 chapter.

18 NEW SECTION. **Sec. 8.** If any provision of this act or its  
19 application to any person or circumstance is held invalid, the  
20 remainder of the act or the application of the provision to other  
21 persons or circumstances is not affected.

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