
SENATE BILL 6494

State of Washington

66th Legislature

2020 Regular Session

By Senators Rolfes, Van De Wege, Warnick, and McCoy; by request of Department of Ecology

1 AN ACT Relating to trust water rights; amending RCW 90.42.005,
2 90.42.010, 90.42.030, 90.42.040, 90.42.080, 90.42.100, 90.42.110,
3 90.42.130, 90.42.150, 90.42.160, and 90.80.055; reenacting and
4 amending RCW 90.42.020; adding new sections to chapter 90.42 RCW; and
5 repealing RCW 90.42.120.

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

7 **Sec. 1.** RCW 90.42.005 and 2003 c 144 s 1 are each amended to
8 read as follows:

9 (1) It is the policy of the state of Washington to recognize and
10 preserve water rights in accordance with RCW 90.03.010.

11 (2) The legislature finds that:

12 (a) The state of Washington is faced with a shortage of water
13 with which to meet existing and future needs, particularly during the
14 summer and fall months and in dry years when the demand is greatest;

15 (b) Consistent with RCW 90.54.180, issuance of new water rights,
16 voluntary water transfers, and conservation and water use efficiency
17 programs, including storage, all are acceptable methods of addressing
18 water uses because they can relieve current critical water
19 situations, provide for presently unmet needs, and assist in meeting
20 future water needs. Presently unmet needs or current needs includes
21 the water required to increase the frequency of occurrence of base or

1 minimum flow levels in streams of the state, the water necessary to
2 satisfy existing water rights, or the water necessary to provide full
3 supplies to existing water systems with current supply deficiencies;

4 (c) The interests of the state and its citizens will be served by
5 developing programs and regional water resource plans, in cooperation
6 with local governments, federally recognized tribal governments,
7 appropriate federal agencies, private citizens, and the various water
8 users and water interests in the state, that increase the overall
9 ability to manage the state's waters in order to resolve conflicts
10 and to better satisfy both present and future needs for water; and

11 (d) Water banking as a function of the state water trust (~~water~~
12 ~~[rights] program~~) and as authorized by this chapter can provide an
13 effective means to facilitate the voluntary transfer of water rights
14 established through conservation, purchase, lease, or (~~donation~~)
15 other means, to preserve water rights and provide water for presently
16 unmet and future needs; and to achieve a variety of water resource
17 management objectives throughout the state, including drought
18 response, improving streamflows on a voluntary basis, providing water
19 mitigation, or reserving water supply for future uses.

20 **Sec. 2.** RCW 90.42.010 and 1998 c 245 s 173 are each amended to
21 read as follows:

22 (1) The legislature finds that a need exists to develop and test
23 a means to facilitate the voluntary transfer of water and water
24 rights, including conserved water, to provide water for presently
25 unmet needs and emerging needs. Further, the legislature finds that
26 water conservation activities have the potential of affecting the
27 quantity of return flow waters to which existing water right holders
28 have a right to and rely upon. It is the intent of the legislature
29 that persons holding rights to water, including return flows, not be
30 adversely affected in the implementation of the provisions of this
31 chapter.

32 (2) The legislature finds that use of the state water trust for
33 water banking purposes promotes changes from one beneficial use of
34 water to another and provides water availability for uses that may
35 not otherwise have access to water supplies. It is the intent of the
36 legislature that use of the state's water trust should serve
37 community needs. The legislature also finds that transparency
38 regarding use of the state water trust will ensure that water right

1 holders and the public have knowledge of water banking activities and
2 opportunities to express community needs.

3 **Sec. 3.** RCW 90.42.020 and 2009 c 283 s 3 are each reenacted and
4 amended to read as follows:

5 The definitions in this section apply throughout this chapter
6 unless the context clearly requires otherwise.

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

8 (2) "Local government" means a city, town, public utility
9 district, irrigation district, public port, county, sewer district,
10 or water district.

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

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

20 (5) "Trust water right" means any water right (~~acquired by~~)
21 donated, leased, or consigned to the state under this chapter for
22 management in the (~~state's~~) state water trust (~~water rights~~
23 ~~program~~).

24 (6) "Water conservation project" means any project or program
25 that achieves physical or operational improvements that provide for
26 increased water use efficiency in existing systems of diversion,
27 conveyance, application, or use of water under water rights existing
28 on July 28, 1991.

29 (7) "Acquire" means to obtain ownership of a water right on a
30 temporary or permanent basis through an agreement or the exchange of
31 money, compensation, or other consideration.

32 (8) "Consignment" means a legally binding agreement that
33 permanently reassigns ownership of a water right through a deed or
34 similar instrument.

35 (9) "Donation" means a gift of a water right from a water right
36 holder to the department on a temporary or permanent basis without
37 expectation of monetary compensation.

38 (10) "Short-term lease" means a lease agreement valid for a term
39 of no more than five years.

1 (11) "Transfer into the state water trust" means a water right
2 that has been permanently consigned or leased for more than five
3 years to the state of Washington to be held in the state water trust.
4 These water rights are available for beneficial use only as specified
5 by a trust water right agreement.

6 (12) "Water banking purposes" means the use of the state water
7 trust to deposit and withdraw water rights for the purpose of
8 mitigating water uses that would otherwise impair existing rights.

9 **Sec. 4.** RCW 90.42.030 and 1993 c 98 s 2 are each amended to read
10 as follows:

11 (1) For purposes of this chapter, the state may enter into
12 contracts to provide moneys to assist in the financing of water
13 conservation projects. In consideration for the financial assistance
14 provided, the state shall obtain public benefits defined in
15 guidelines developed under RCW 90.42.050.

16 (2) If the public benefits to be obtained require (~~conveyance or~~
17 ~~modification of a water right, the recipient of funds shall convey to~~
18 ~~the state the recipient's interest in that part of the water right or~~
19 ~~claim constituting all or a portion of the resulting net water~~
20 ~~savings for deposit in the trust water rights program. The amount to~~
21 ~~be conveyed shall be finitely determined by the parties, in~~
22 ~~accordance with the guidelines developed under RCW 90.42.050, before~~
23 ~~the expenditure of state funds. Conveyance may consist of complete~~
24 ~~transfer, lease contracts, or other legally binding agreements)) a
25 transfer or modification of a water right, the recipient of funds
26 shall consign to the state the recipient's interest in that part of
27 the water right constituting all or a portion of the resulting net
28 water savings for deposit in the state water trust. The amount of
29 water to be transferred must be finitely determined by the parties,
30 in accordance with the guidelines developed under RCW 90.42.050,
31 before the expenditure of state funds. RCW 90.03.380 has no
32 applicability to trust water rights acquired by the state through the
33 funding of water conservation projects. When negotiating for the
34 acquisition of conserved water or net water savings, or a portion
35 thereof, the state may require evidence of a valid water right.~~

36 (3) As part of the contract, the water right holder and the state
37 shall specify the process to determine the amount of water the water
38 right holder would continue to be entitled to once the water
39 conservation project is in place.

1 (4) The state shall cooperate fully with the United States in the
2 implementation of this chapter. Trust water rights may be acquired
3 through expenditure of funds provided by the United States and shall
4 be treated in the same manner as trust water rights resulting from
5 the expenditure of state funds.

6 (5) If water is proposed to be (~~acquired by or conveyed~~)
7 donated or transferred to the state as a trust water right by an
8 irrigation district, evidence of the district's authority to
9 represent the water right holders shall be submitted to and for the
10 satisfaction of the department.

11 (6) The state shall not contract with any person to acquire a
12 water right served by an irrigation district without the approval of
13 the board of directors of the irrigation district. Disapproval by a
14 board shall be factually based on probable adverse effects on the
15 ability of the district to deliver water to other members or on
16 maintenance of the financial integrity of the district.

17 NEW SECTION. **Sec. 5.** A new section is added to chapter 90.42
18 RCW to read as follows:

19 (1) Trust water rights may be donated, leased, or consigned to
20 the state on a temporary or permanent basis.

21 (2) The department may authorize the use of trust water rights
22 leased or transferred to the state for instream flows, irrigation,
23 municipal, or other beneficial uses.

24 (3) A trust water right is considered to be exercised as long as
25 it is in the state water trust.

26 (4) A trust water right retains the same priority date as the
27 water right from which it originated. As between the two rights, the
28 trust right is deemed to be inferior in priority to the water right
29 from which it originated, unless otherwise specified by an agreement
30 between the state and the party holding the original right.

31 (5) RCW 90.14.140 through 90.14.230 have no applicability to
32 trust water rights held by the department under this chapter.

33 (6) A right established in a state adjacent to Washington that
34 authorizes the use of water from a waterbody that extends between
35 Washington and the adjacent state may be transferred into the state
36 water trust to be managed by the department for instream flow
37 purposes. The priority date for such a right is the priority date
38 recognized by the adjacent state where the water right was
39 established.

1 NEW SECTION. **Sec. 6.** A new section is added to chapter 90.42
2 RCW to read as follows:

3 (1) State funds may be expended to acquire all or portions of
4 existing surface water and groundwater rights by purchase or any
5 appropriate means other than by condemnation, from any person or
6 entity or combination of persons or entities. The department may
7 enter into leases, contracts, or such other arrangements with other
8 persons or entities as appropriate. A water right acquired by the
9 state that is expressly conditioned to limit its use to instream
10 purposes must be administered as a trust water right in compliance
11 with that condition.

12 (2) To the extent practicable and subject to legislative
13 appropriation, water rights acquired by the state in an area with an
14 approved watershed plan developed under chapter 90.82 or 90.94 RCW
15 must be consistent with that plan if the plan calls for such an
16 acquisition.

17 (3) No funds may be expended for the purchase of water rights by
18 the state pursuant to this section unless specifically appropriated
19 for this purpose by the legislature.

20 **Sec. 7.** RCW 90.42.040 and 2009 c 283 s 4 are each amended to
21 read as follows:

22 (1) ~~((A trust water right acquired by the state shall be placed
23 in the state trust water rights program to be managed by the
24 department. The department shall exercise its authorities under the
25 law in a manner that protects trust water rights. Trust water rights
26 acquired by the state shall be held in trust and authorized for use
27 by the department for instream flows, irrigation, municipal, or other
28 beneficial uses consistent with applicable regional plans for pilot
29 planning areas, or to resolve critical water supply problems. The
30 state may acquire a groundwater right to be placed in the state trust
31 water rights program. To the extent practicable and subject to
32 legislative appropriation, trust water rights acquired in an area
33 with an approved watershed plan developed under chapter 90.82 RCW
34 shall be consistent with that plan if the plan calls for such
35 acquisition.~~

36 ~~(2) The department shall issue a water right certificate in the
37 name of the state of Washington for each permanent trust water right
38 conveyed to the state indicating the quantity of water transferred to
39 trust, the reach or reaches of the stream or the body of public~~

1 ~~groundwater that constitutes the place of use of the trust water~~
2 ~~right, and the use or uses to which it may be applied. A superseding~~
3 ~~certificate shall be issued that specifies the amount of water the~~
4 ~~water right holder would continue to be entitled to as a result of~~
5 ~~the water conservation project. The superseding certificate shall~~
6 ~~retain the same priority date as the original right. For nonpermanent~~
7 ~~conveyances, the department shall issue certificates or such other~~
8 ~~instruments as are necessary to reflect the changes in purpose or~~
9 ~~place of use or point of diversion or withdrawal.~~

10 ~~(3) A trust water right retains the same priority date as the~~
11 ~~water right from which it originated, but as between the two rights,~~
12 ~~the trust right shall be deemed to be inferior in priority unless~~
13 ~~otherwise specified by an agreement between the state and the party~~
14 ~~holding the original right.~~

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

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

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

25 ~~(d) For the purposes of RCW 90.03.380(1) and 90.42.080(9), the~~
26 ~~consumptive quantity of a trust water right acquired by the state and~~
27 ~~held or authorized for use by the department is equal to the~~
28 ~~consumptive quantity of the right prior to transfer into the trust~~
29 ~~water rights program.~~

30 ~~(5) (a) Before any trust water right is created or modified, the~~
31 ~~department shall, at a minimum, require that a notice be published in~~
32 ~~a newspaper of general circulation published in the county or~~
33 ~~counties in which the storage, diversion, and use are to be made, and~~
34 ~~in other newspapers as the department determines is necessary, once a~~
35 ~~week for two consecutive weeks.~~

36 ~~(b) At the same time the department shall send a notice~~
37 ~~containing pertinent information to all appropriate state agencies,~~
38 ~~potentially affected local governments and federally recognized~~
39 ~~tribal governments, and other interested parties.~~

1 ~~(c) For a trust water right donation described in RCW~~
2 ~~90.42.080(1)(b), or for a trust water right lease described in RCW~~
3 ~~90.42.080(8) that does not exceed five years, the department may post~~
4 ~~equivalent information on its web site to meet the notice~~
5 ~~requirements in (a) of this subsection and may send pertinent~~
6 ~~information by email to meet the notice requirements in (b) of this~~
7 ~~subsection.~~

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

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

14 ~~(8) Subsection (4)(a) of this section does not apply to a trust~~
15 ~~water right resulting from a donation for instream flows described in~~
16 ~~RCW 90.42.080(1)(b) or to a trust water right leased under RCW~~
17 ~~90.42.080(8) if the period of the lease does not exceed five years.~~

18 ~~(9) Where a portion of an existing water right that is acquired~~
19 ~~or donated to the trust water rights program will assist in achieving~~
20 ~~established instream flows)) The transfer of a water right into the~~
21 ~~state water trust may be authorized only if the department determines~~
22 ~~that exercise of the trust water right will: (a) Not impair water~~
23 ~~rights existing at the time the trust water right is established; and~~
24 ~~(b) serve the public interest. If impairment becomes apparent during~~
25 ~~the time a trust water right is being exercised, the department shall~~
26 ~~cease or modify the trust water right to eliminate the impairment.~~

27 ~~(2) Before any water right is transferred into trust, the~~
28 ~~department shall follow notification consistent with RCW 90.03.280~~
29 ~~and provide electronic notification to all appropriate state~~
30 ~~agencies, affected local governments, federally recognized tribal~~
31 ~~governments, and other interested parties.~~

32 ~~(3) Prior to a water right being transferred into trust, the~~
33 ~~water right holder shall make an application to change the purpose of~~
34 ~~use of the water right under RCW 90.03.380 to instream flow, or to~~
35 ~~instream flow for the mitigation of out-of-stream uses. The total~~
36 ~~quantity of water eligible to be transferred into trust must be~~
37 ~~determined by the department as prescribed in RCW 90.03.380.~~

38 ~~(4) For each water right permanently transferred into trust, the~~
39 ~~department shall issue a water right certificate in the name of the~~
40 ~~department. The certificate must indicate:~~

1 (a) The quantity of water transferred to trust;

2 (b) The reach or reaches of the stream or the body of public
3 groundwater that constitutes the place of use of the trust water
4 right; and

5 (c) The purposes of use to which the trust water right may be
6 applied.

7 (5) A superseding certificate must be issued that specifies the
8 amount of water the water right holder retains if a trust water right
9 results from a water conservation project. The superseding
10 certificate retains the same priority date as the original right.

11 (6) For a water right transferred into trust on a temporary
12 basis, the department shall issue certificates or such other
13 instruments as are necessary to reflect the changes in purpose or
14 place of use or point of diversion or withdrawal. These water rights
15 revert to the original water right holder when the trust period ends.
16 The quantity of water available for use after reversion is the
17 consumptive quantity of the right prior to transfer into the state
18 water trust.

19 (7) If a transfer is for only a portion of a water right, the
20 quantity transferred to the department plus the portion of the water
21 right remaining with the original water right holder may not exceed
22 the total quantity of water eligible to be transferred under this
23 section.

24 (8) A water right holder who believes his or her water right has
25 been impaired by a trust water right transferred under this
26 subsection may request that the department review the impairment
27 claim. If the department determines that a trust water right
28 transferred under this subsection is impairing existing water rights
29 in violation of RCW 90.42.070, the trust water right must be altered
30 by the department to eliminate the impairment. Any decision of the
31 department to alter or not to alter a trust water right transferred
32 under this subsection is appealable to the pollution control hearings
33 board under RCW 43.21B.230.

34 (9) Where a portion of an existing water right is transferred to
35 the state and expressly conditioned to limit its use to instream flow
36 purposes or groundwater preservation, the department shall process
37 the change or amendment of the existing right without conducting a
38 review of the extent and validity of the portion of the water right
39 that will remain with the water right holder.

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

3 (1) The department may enter into a short-term lease and hold a
4 water right in the state water trust only if the department
5 determines that:

6 (a) Exercise of the trust water right will not impair water
7 rights existing at the time the trust water right is established. If
8 impairment becomes apparent during the time a trust water right is
9 being exercised, the department shall cease or modify the trust water
10 right to eliminate the impairment; and

11 (b) Exercise of the trust water right will serve the public
12 interest.

13 (2) For each short-term lease executed, the department may issue
14 documentation necessary to reflect changes in purpose of use, place
15 of use, point of diversion, or point of withdrawal. The department
16 shall post relevant information on its web site for each short-term
17 lease.

18 (3) Water rights may be held in the state water trust through a
19 short-term lease without a change to the purpose of use. The total
20 quantity of water eligible to be leased by the department may not
21 exceed the extent to which the water right was exercised during the
22 five years before the lease was executed, except:

23 (a) The department shall exclude time periods where nonuse of the
24 water right was excused from relinquishment under RCW 90.14.140(1);

25 (b) If a water right is exempt from relinquishment under RCW
26 90.14.140(2) (a) or (d), the department shall calculate the amount of
27 water eligible to be leased based on historical beneficial use.

28 (4) If a lease is for only a portion of a water right, the
29 quantity leased by the department, plus the portion of the water
30 right remaining with the original water right holder, may not exceed
31 the total quantity of water eligible to be leased under this section.

32 (5) A water right holder who believes his or her water right has
33 been impaired by a trust water right leased under this section may
34 request that the department review the impairment claim. If the
35 department determines that a trust water right leased under this
36 section is impairing existing water rights in violation of RCW
37 90.42.070, the trust water right must be altered by the department to
38 eliminate the impairment. Any decision of the department to alter or
39 not to alter a trust water right leased under this subsection is

1 appealable to the pollution control hearings board under RCW
2 43.21B.230.

3 (6) The department's leasing of a water right under this section
4 is not evidence of the validity or quantity of the water right.

5 (7) A water right leased by the department on a temporary basis
6 reverts to the original water right holder when the lease period
7 ends. The quantity of water available for use is the consumptive
8 quantity of the right prior to lease into trust.

9 (8) A trust water right leased to the state is considered to be
10 exercised as long as it is held in the state water trust.

11 **Sec. 9.** RCW 90.42.080 and 2009 c 283 s 5 are each amended to
12 read as follows:

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

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

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

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

38 ~~(4) Except as provided in subsections (10) and (11) of this~~
39 ~~section, a water right donated under subsection (1)(b) of this~~

1 ~~section shall not exceed the extent to which the water right was~~
2 ~~exercised during the five years before the donation nor may the total~~
3 ~~of any portion of the water right remaining with the donor plus the~~
4 ~~donated portion of the water right exceed the extent to which the~~
5 ~~water right was exercised during the five years before the donation))~~

6 A holder of a right to surface water or groundwater may choose to
7 donate all or a portion of the person's water right to the state
8 water trust on a temporary or permanent basis solely to assist in
9 providing instream flows or to preserve surface water or groundwater
10 resources. The department shall accept the donation, in quantities as
11 determined under this section, on such terms as the person may
12 prescribe. A water right that is donated cannot be used for the
13 purpose of instream flow for the mitigation of out-of-stream uses.

14 (2) The total quantity of water eligible to be donated may not
15 exceed the extent to which the water right was exercised during the
16 five years before the donation was requested, except:

17 (a) The department shall exclude time periods where nonuse of the
18 water right was excused from relinquishment under RCW 90.14.140(1);

19 (b) If a water right is exempt from relinquishment under RCW
20 90.14.140(2) (a) or (d), the department shall calculate the amount of
21 water eligible to be donated based on historical beneficial use.

22 (3) A water right holder who believes his or her water right has
23 been impaired by a trust water right donated under ((~~subsection~~
24 ~~(1)(b) of~~)) this section may request that the department review the
25 impairment claim. If the department determines that a trust water
26 right resulting from a donation under ((~~subsection (1)(b) of~~)) this
27 section is impairing existing water rights in violation of RCW
28 90.42.070, the trust water right shall be altered by the department
29 to eliminate the impairment. Any decision of the department to alter
30 or not to alter a trust water right donated under ((~~subsection (1)(b)~~
31 ~~of~~)) this section is appealable to the pollution control hearings
32 board under RCW 43.21B.230. A donated water right's status as a trust
33 water right under this subsection is not evidence of the validity or
34 quantity of the water right.

35 ((~~5) The provisions of RCW 90.03.380 and 90.03.390 do not apply~~
36 to donations for instream flows described in subsection (1)(b) of
37 this section, but do apply to other transfers of water rights under
38 this section except that the consumptive quantity of a trust water
39 right acquired by the state and held or authorized for use by the

1 ~~department is equal to the consumptive quantity of the right prior to~~
2 ~~transfer into the trust water rights program.~~

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

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

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

32 ~~(9) For a water right donated to or acquired by the trust water~~
33 ~~rights program on a temporary basis, the full quantity of water~~
34 ~~diverted or withdrawn to exercise the right before the donation or~~
35 ~~acquisition shall be placed in the trust water rights program and~~
36 ~~shall revert to the donor or person from whom it was acquired when~~
37 ~~the trust period ends. For a trust water right acquired by the state~~
38 ~~and held or authorized for use by the department, the consumptive~~
39 ~~quantity of the right when it reverts to the donor or person from~~

1 ~~whom it was acquired is equal to the consumptive quantity of the~~
2 ~~right prior to transfer into the trust water rights program.~~

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

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

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

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

19 ~~(a) The amount of water eligible to be acquired shall be based on~~
20 ~~historical beneficial use; and~~

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

25 (4) The provisions of RCW 90.03.380 and 90.03.390 do not apply to
26 donations described in this section.

27 (5) Any water right donated to the state as a gift that is
28 expressly conditioned to limit its use to instream purposes or
29 groundwater preservation must be managed by the department as a trust
30 water right for public purposes to ensure that it qualifies as a gift
31 that is deductible for federal income tax purposes for the person or
32 entity donating the water right.

33 (6) For a water right donated to the state water trust on a
34 temporary basis, the full quantity of water diverted or withdrawn to
35 exercise the right before the donation must be placed in the state
36 water trust and reverts to the donor or person from whom it was
37 acquired when the trust period ends.

38 (7) The department shall provide electronic notice of the trust
39 water donation and send notice containing pertinent information to
40 all appropriate state agencies, potentially affected local

1 governments, federally recognized tribal governments, and other
2 interested parties.

3 **Sec. 10.** RCW 90.42.100 and 2009 c 283 s 2 are each amended to
4 read as follows:

5 (1) (~~The department is hereby authorized to use the trust water~~
6 ~~rights program for water banking purposes statewide.~~) Water banks
7 provide an efficient means to allow changes from one beneficial use
8 of water to another and to provide water for uses that may not
9 otherwise have water available. Use of the state water trust for
10 water banking purposes statewide is hereby authorized when the
11 department finds that such a use will serve community needs and not
12 impair existing rights.

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

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

24 (b) (~~To document transfers of water rights to and from the trust~~
25 ~~water rights program; and~~

26 ~~(e))~~ To provide a source of water rights the department can make
27 available to third parties on a temporary or permanent basis for any
28 beneficial use under chapter 90.03, 90.44, or 90.54 RCW.

29 (3) (~~The department shall not use water~~) Water banking may not
30 be used to:

31 (a) (~~Cause detriment or injury to existing rights;~~

32 ~~b))~~ Issue temporary water rights or portions thereof for new
33 potable uses requiring an adequate and reliable water supply under
34 RCW 19.27.097;

35 (~~e))~~ (b) Administer federal project water rights, including
36 federal storage rights; or

37 (~~d))~~ (c) Allow carryover of stored water in the Yakima basin
38 from one water year to another water year if it would negatively
39 impact the total water supply available.

1 (4) (~~The department shall provide electronic notice and~~
2 ~~opportunity for comment to affected local governments and affected~~
3 ~~federally recognized tribal governments prior to initiating use of~~
4 ~~the trust water rights program for water banking purposes for the~~
5 ~~first time in each water resource inventory area.~~

6 ~~(5) Nothing in this section may be interpreted or administered in~~
7 ~~a manner that precludes the use of the department's existing~~
8 ~~authority to process trust water rights applications under this~~
9 ~~chapter or to process water right applications under chapter 90.03 or~~
10 ~~90.44 RCW.~~

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

16 NEW SECTION. **Sec. 11.** A new section is added to chapter 90.42
17 RCW to read as follows:

18 (1) An entity seeking to use the state water trust for water
19 banking purposes must submit a water banking application to the
20 department requesting approval for the establishment of a water bank.

21 (2) The entity submitting the water banking application must
22 provide the department information that includes, but is not limited
23 to:

24 (a) The water rights proposed for transfer to the state water
25 trust for mitigation;

26 (b) The beneficial uses of water that the bank intends to serve;

27 (c) The anticipated geographic area to be served by bank
28 operations;

29 (d) The anticipated demand to be served by the bank, including
30 the water quantities, timing, and other information identified by the
31 department to evaluate the impacts from the potential new uses; and

32 (e) Description of anticipated community benefits.

33 (3) A water banking agreement between the department and the
34 entity seeking to use the state water trust for banking purposes must
35 establish bank administration responsibilities including, at a
36 minimum:

37 (a) The roles and responsibilities of the water banking entity,
38 the department, and any third parties;

1 (b) The process by which the department or water banking entity
2 will authorize mitigated water uses;

3 (c) Identification of specific water rights and the legal
4 mechanism for assignment of mitigation;

5 (d) Conditions and limitations on use of water, including manner
6 of use, limits on assignment of use, and geographic and quantitative
7 limits; and

8 (e) The process and conditions for modifying or terminating the
9 banking agreement.

10 **Sec. 12.** RCW 90.42.110 and 2003 c 144 s 3 are each amended to
11 read as follows:

12 (1) The department, with the consent of the water right holder,
13 may identify trust water rights for administration for water banking
14 purposes, including trust water rights established before May 7,
15 2003.

16 (2) ~~An ((application to transfer a water right to the trust water
17 [rights] program shall be reviewed under RCW 90.03.380 at the time
18 the water right is transferred to the trust water [rights] program
19 for administration for water banking purposes, and notice of the
20 application shall be published by the applicant as provided under RCW
21 90.03.280. The application must indicate the reach or reaches of the
22 stream where the trust water right will be established before the
23 transfer of the water right or portion thereof from the trust water
24 [rights] program, and identify reasonably foreseeable future
25 temporary or permanent beneficial uses for which the water right or
26 portion thereof may be used by a third party upon transfer from the
27 trust water right[s] program. In the event the future place of use,
28 period of use, or other elements of the water right are not
29 specifically identified at the time of the transfer into the trust
30 water [rights] program, another review under RCW 90.03.380 will be
31 necessary at the time of a proposed transfer from the trust water
32 [rights] program)) entity applying to use the state water trust for
33 banking purposes shall submit a water right change application under
34 RCW 90.03.380 to change the purpose of use of the water right to
35 instream flow for the mitigation of out-of-stream uses. The
36 department shall process the water right change application under the
37 cost-reimbursement procedure established under RCW 90.03.265. The
38 applicant shall provide public notice of the application as provided
39 under RCW 90.03.280.~~

1 NEW SECTION. **Sec. 13.** A new section is added to chapter 90.42
2 RCW to read as follows:

3 (1) The department shall publish its preliminary decision
4 relating to each water banking application on its web site. The
5 department publication must include the water banking application,
6 proposed banking agreement, and corresponding draft report of the
7 examination for the water right transfer. The department shall
8 provide electronic notice of the preliminary decision to all affected
9 local governments and federally recognized tribal governments. The
10 department shall accept public comments for a minimum of fourteen
11 days.

12 (2) Approval of the water banking application requires the
13 following:

14 (a) The report of examination issued under RCW 90.03.380 includes
15 an approval of the water right change and no parties appeal;

16 (b) The department determines that water rights identified in the
17 water banking application are sufficient to serve current and
18 projected demand; and

19 (c) The department determines that the water bank will serve
20 community needs.

21 (3) After a water banking application is approved, the department
22 shall include a copy of the executed water banking agreement with the
23 information maintained pursuant to RCW 90.42.170.

24 (4) An approved water bank that seeks to modify operations from
25 their existing banking agreement shall submit a new banking
26 application to the department before authorizing new uses. A water
27 bank operating prior to the effective date of this section that seeks
28 to modify operations from its existing banking agreement shall submit
29 an application under section 11 of this act.

30 (5) The department's decision on a water banking application
31 under this section or the transfer of a water right or portion
32 thereof for water banking purposes may be appealed to the pollution
33 control hearings board under RCW 43.21B.230 or to a superior court
34 conducting a general adjudication under RCW 90.03.210.

35 **Sec. 14.** RCW 90.42.130 and 2016 c 215 s 1 are each amended to
36 read as follows:

37 (1) The department shall seek input from agricultural
38 organizations, federal agencies, tribal governments, local
39 governments, watershed groups, conservation groups, and developers on

1 water banking, including water banking procedures and identification
2 of areas in Washington where water banking could assist in providing
3 water supplies for instream and out-of-stream uses.

4 (2) The department shall convene a work group of affected
5 entities to study the design and use of the state water trust, water
6 banking, and the water transfer process in the state, and to make
7 recommendations on policy improvements. The department shall invite
8 diverse water resource interests to serve on the work group. The
9 department shall submit a report to the legislature by November 15,
10 2020, documenting the work group's findings and policy
11 recommendations.

12 **Sec. 15.** RCW 90.42.150 and 2009 c 283 s 6 are each amended to
13 read as follows:

14 (1) Costs incurred by the department associated with water
15 service contracts with federal agencies may be recovered by the
16 department from persons withdrawing water or credits for water
17 associated with water banking purposes as a condition of the exercise
18 of a water right supplied from a federal water project.

19 (2) The department may recover the costs for work associated with
20 the evaluation and processing of water bank applications received
21 under section 11 of this act and water right change applications
22 received under RCW 90.42.110.

23 **Sec. 16.** RCW 90.42.160 and 2009 c 283 s 8 are each amended to
24 read as follows:

25 The department may adopt rules as necessary to implement this
26 chapter, including rules to establish fees related to cost recovery
27 established under RCW 90.42.150(2).

28 **Sec. 17.** RCW 90.80.055 and 2001 c 237 s 9 are each amended to
29 read as follows:

30 (1) Except as provided in subsection (2) of this section, a board
31 shall operate on a countywide basis or on an area-wide basis in the
32 case of a board with jurisdiction in more than one county or water
33 resource inventory area, and have the following powers, in addition
34 to any other powers granted in this chapter:

35 (a) Except as provided in subsections (2) and (3) of this
36 section, a board may act upon applications for the same kinds of
37 transfers that the department itself is authorized to act upon((7

1 ~~including an application to establish a trust water right under~~
2 ~~chapter 90.38 or 90.42 RCW~~). A board may not act upon an application
3 for the type of transfer within an irrigation district as described
4 in RCW 90.03.380(3). If a board receives an application for a
5 transfer between two irrigation districts as described in RCW
6 90.03.380(2), the board must, before publication of notice of the
7 application, receive the concurrence specified in that section.

8 (b) A board may act upon an application to transfer a water right
9 claim filed under chapter 90.14 RCW. In acting upon such an
10 application, the board must make a tentative determination as to the
11 validity and extent of the right, if any, embodied in the claim and
12 may only issue a record of decision regarding a transfer of such a
13 claim to the extent it is tentatively determined to be valid. Neither
14 the board's tentative determination, nor the director's acceptance of
15 such a tentative determination, constitutes an adjudication of the
16 right under RCW 90.03.110 through 90.03.240 or 90.44.220, and such a
17 determination does not preclude or prejudice a subsequent challenge
18 to the validity, priority, or quantity of the right in a general
19 adjudication under those sections.

20 (c) A board may establish a water right transfer information
21 exchange through which all or part of a water right may be listed for
22 sale or lease. The board may also accept and post notices in the
23 exchange from persons interested in acquiring or leasing water rights
24 from willing sellers.

25 (d) The director shall assign a representative of the department
26 to provide technical assistance to each board. If requested by the
27 board, the representative shall work with the board as it reviews
28 applications for formal acceptance, prepares draft records of
29 decision, and considers other technical or legal factors affecting
30 the board's development of a final record of decision. A board may
31 request and accept additional technical assistance from the
32 department. A board may also request and accept assistance and
33 support from the county government or governments of the county or
34 counties in which it operates.

35 (2) The jurisdiction of a board shall not apply within the
36 boundaries of a federal Indian reservation or to lands held in trust
37 for an Indian band, tribe, or nation by the federal government.

38 (3) A board may not process or act upon an application to
39 transfer a water right into the state water trust under chapter 90.38

1 or 90.42 RCW to change the purpose of use of a water right to
2 instream flow for the mitigation of out-of-stream uses.

3 NEW SECTION. **Sec. 18.** RCW 90.42.120 (Water banking—Transfer of
4 water rights—Requirements—Appeals) and 2003 c 144 s 4 are each
5 repealed.

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