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**SUBSTITUTE SENATE BILL 5882**

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**State of Washington 67th Legislature 2022 Regular Session**

**By** Senate Agriculture, Water, Natural Resources & Parks (originally sponsored by Senators Muzzall, Mullet, Honeyford, Sefzik, Short, and Van De Wege)

AN ACT Relating to clarifying the existence of riparian stock watering rights; amending RCW 90.03.010; and creating a new section.

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

NEW SECTION. **Sec.**  (1) The legislature finds that riparian rights derive from the ownership of land that abuts surface water. These rights were initially granted as part of the federal land grants pursuant to the donation land claim act and the homestead act. Because livestock were essential for the cultivation of the land, riparian rights for stock watering were included in those land grants and therefore date to the inception of title by the government patentee. The territorial legislature recognized riparian rights when adopting English common law in 1862. Provision for the condemnation of riparian rights in the 1890 act makes clear that riparian rights continued to exist. Common law continued to acknowledge the existence of riparian rights even as the state moved towards an appropriative system. The Washington state supreme court recognized a "California" or dual system of riparian and appropriative rights in 1897.

(2) In 1917, the water code was enacted and is now codified in chapter 90.03 RCW. RCW 90.03.010 states that the 1917 water code could not be construed to "lessen, enlarge, or modify the existing rights of any riparian owner." Riparian rights are also included in the statutes that dictate the process for adjudication.

(3) Purportedly, the only purpose of limiting riparian rights is to further the state policy of encouraging beneficial use. Any taking of riparian rights can only be done through a legal process with full compensation. In fact, riparian rights may only be limited through eminent domain and condemnation actions. The legislature finds that there are legal structures in place if riparian rights are to be limited for any purpose.

(4) Stock watering has been already found to be a beneficial use of water as recognized by the exception to the requirement of a certificated water right to groundwater use. Currently, many areas of the state are designated by the state as open range. This designation requires a riparian stock watering right and shows that the state intends for livestock to be able to access surface water. Surface water stock watering rights are to be considered in an adjudication and have been taken into account recently as part of adjudicative actions in the state. Surface stock watering rights are to be considered as part of the instream flow rules as long as there is no unconscionable waste within the carrying capacity of the land. Historically, agents of the state and federal government have provided aid in the exercise of these rights to serve the public purpose of maintaining the water quality of these riparian streams. Therefore, the legislature finds that surface riparian stock watering rights exist without the need for certification under chapter 90.03 RCW.

(5) The legislature also finds that the 1994 policy adopted by the department of ecology and the support provided for off-channel watering infers the existence of a riparian water right put to a beneficial use of stock watering. The legislature finds that maintaining water quality is important to the state and that off- channel watering of livestock is a means of maintaining water quality. A simple diversion of surface water for the beneficial use of watering livestock and the simultaneous state interest of maintaining water quality therefore does not trigger a requirement of an additional certificated water right. Finally, the legislature finds that requiring a certificated water right for the purpose of watering livestock in riparian areas would trigger a legal quagmire for the state. Therefore, the legislature recognizes a de facto riparian stock watering right that may be exercised through an off-channel diversion.

(6) The legislature acknowledges that instream flows have many demands on them including the protection of treaty hunting and fishing rights as well as the maintenance of water quality. Because of the need for the coexistence of treaty rights and historic riparian rights as well as the need to protect water quality for the collaborative good, the legislature finds that some notice of livestock watering through a diversion is important.

**Sec.**  RCW 90.03.010 and 1917 c 117 s 1 are each amended to read as follows:

(1) The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, including riparian stock watering rights, or any existing right acquired by appropriation, or otherwise. They shall, however, be subject to condemnation as provided in RCW 90.03.040, and the amount and priority thereof may be determined by the procedure set out in RCW 90.03.110 through 90.03.240.

(2)(a) A riparian landowner who implements a de minimis surface water diversion to water livestock in a manner that enhances and protects water quality and provides environmental protection and value to the stream must provide notice of such use to the department within two years of the effective date of this section or within two years of commencement of such a diversion.

(b) For the purposes of this section, "notice" means providing the name of the landowner and identification of the water source electronically or by United States mail to the department. The department shall also provide an electronic portal to receive such a notice.

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