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**SENATE BILL 6036**

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**State of Washington**

**66th Legislature**

**2020 Regular Session**

**By** Senators Honeyford, Van De Wege, Warnick, Muzzall, Short, and Wagoner

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1 AN ACT Relating to providing opportunities for drought mitigation  
2 using trust water rights; amending RCW 90.38.020, 90.38.040,  
3 90.42.005, 90.42.040, and 90.42.100; and adding a new section to  
4 chapter 43.83B RCW.

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

6 NEW SECTION. **Sec. 1.** A new section is added to chapter 43.83B  
7 RCW to read as follows:

8 The department of ecology may allow water rights donated to the  
9 trust water rights program to be used for drought mitigation in  
10 accordance with an order issued under this chapter, subject to  
11 chapters 90.38 and 90.42 RCW.

12 **Sec. 2.** RCW 90.38.020 and 2002 c 329 s 7 are each amended to  
13 read as follows:

14 (1)(a) The department may acquire water rights, including but not  
15 limited to storage rights, by purchase, lease, gift, or other  
16 appropriate means other than by condemnation, from any person or  
17 entity or combination of persons or entities. Once acquired, such  
18 rights are trust water rights. A water right acquired by the state  
19 that is expressly conditioned to limit its use to instream purposes

1 shall be administered as a trust water right in compliance with that  
2 condition.

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

13 (c) When a person donates a water right to the Yakima river basin  
14 trust water rights program, the department shall inform the person  
15 that he or she may agree to allow the trust water right to be used  
16 for drought mitigation in accordance with an order issued for the  
17 Yakima river basin under chapter 43.83B RCW. The donor is not  
18 required to allow any trust water right to be used for drought  
19 mitigation. The conditions under which a trust water right may be  
20 used for drought mitigation under this subsection must be approved by  
21 the donor before they take effect, and the donor may terminate the  
22 approval at any time.

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

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

29 (4) A water right donated under subsection (1)(b) or (c) of this  
30 section shall not exceed the extent to which the water right was  
31 exercised during the five years before the donation nor may the total  
32 of any portion of the water right remaining with the donor plus the  
33 donated portion of the water right exceed the extent to which the  
34 water right was exercised during the five years before the donation.  
35 A water right holder who believes his or her water right has been  
36 impaired by a trust water right donated under subsection (1)(b) or  
37 (c) of this section may request that the department review the  
38 impairment claim. If the department determines that exercising the  
39 trust water right resulting from the donation or exercising a portion  
40 of that trust water right donated under subsection (1)(b) or (c) of

1 this section is impairing existing water rights in violation of RCW  
2 90.38.902, the trust water right shall be altered by the department  
3 to eliminate the impairment. Any decision of the department to alter  
4 or not alter a trust water right donated under subsection (1)(b) or  
5 (c) of this section is appealable to the pollution control hearings  
6 board under RCW 43.21B.230. A donated water right's status as a trust  
7 water right under this subsection is not evidence of the validity or  
8 quantity of the water right.

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

15 (6) If the department acquires a trust water right by lease, the  
16 amount of the trust water right shall not exceed the extent to which  
17 the water right was exercised during the five years before the  
18 acquisition was made nor may the total of any portion of the water  
19 right remaining with the original water right holder plus the portion  
20 of the water right leased by the department exceed the extent to  
21 which the water right was exercised during the five years before the  
22 acquisition. A water right holder who believes his or her water right  
23 has been impaired by a trust water right leased under this subsection  
24 may request that the department review the impairment claim. If the  
25 department determines that exercising the trust water right resulting  
26 from the leasing or exercising of a portion of that trust water right  
27 leased under this subsection is impairing existing water rights in  
28 violation of RCW 90.38.902, the trust water right shall be altered by  
29 the department to eliminate the impairment. Any decision of the  
30 department to alter or not to alter a trust water right leased under  
31 this subsection is appealable to the pollution control hearings board  
32 under RCW 43.21B.230. The department's leasing of a trust water right  
33 under this subsection is not evidence of the validity or quantity of  
34 the water right.

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

1       **Sec. 3.** RCW 90.38.040 and 2001 c 237 s 29 are each amended to  
2 read as follows:

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

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

13       (3) Trust water rights may be held by the department for instream  
14 flows, irrigation use, drought mitigation, or other beneficial use.  
15 Trust water rights may be acquired on a temporary or permanent basis.  
16 To the extent practicable and subject to legislative appropriation,  
17 trust water rights acquired in an area with an approved watershed  
18 plan developed under chapter 90.82 RCW shall be consistent with that  
19 plan if the plan calls for such acquisition.

20       (4) A schedule of the amount of net water saved as a result of  
21 water conservation projects carried out in accordance with this  
22 chapter(~~(7)~~) shall be developed annually to reflect the predicted  
23 hydrologic and water supply conditions, as well as anticipated water  
24 demands, for the upcoming irrigation season. This schedule shall  
25 serve as the basis for the distribution and management of trust water  
26 rights each year.

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

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

39       (c) Subsections (4) and (5)(b) of this section do not apply to a  
40 trust water right resulting from a donation for instream flows

1 described in RCW 90.38.020(1)(b), a donation for drought mitigation,  
2 or (~~from~~) the lease of a water right under RCW 90.38.020(6) if the  
3 period of the lease does not exceed five years. However, the  
4 department shall provide the notice described in (b) of this  
5 subsection the first time the trust water right resulting from the  
6 donation is exercised.

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

10 **Sec. 4.** RCW 90.42.005 and 2003 c 144 s 1 are each amended to  
11 read as follows:

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

14 (2) The legislature finds that:

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

18 (b) Consistent with RCW 90.54.180, issuance of new water rights,  
19 voluntary water transfers, and conservation and water use efficiency  
20 programs, including storage, all are acceptable methods of addressing  
21 water uses because they can relieve current critical water  
22 situations, provide for presently unmet needs, and assist in meeting  
23 future water needs. Presently unmet needs or current needs includes  
24 the water required to increase the frequency of occurrence of base or  
25 minimum flow levels in streams of the state, the water necessary to  
26 satisfy existing water rights, or the water necessary to provide full  
27 supplies to existing water systems with current supply deficiencies;

28 (c) The interests of the state and its citizens will be served by  
29 developing programs and regional water resource plans, in cooperation  
30 with local governments, federally recognized tribal governments,  
31 appropriate federal agencies, private citizens, and the various water  
32 users and water interests in the state, that increase the overall  
33 ability to manage the state's waters in order to resolve conflicts  
34 and to better satisfy both present and future needs for water;  
35 (~~and~~)

36 (d) Water banking as a function of the trust water (~~(rights)~~)  
37 rights program and as authorized by this chapter can provide an  
38 effective means to facilitate the voluntary transfer of water rights  
39 established through conservation, purchase, lease, or donation, to

1 preserve water rights and provide water for presently unmet and  
2 future needs; and to achieve a variety of water resource management  
3 objectives throughout the state, including drought response,  
4 improving streamflows on a voluntary basis, providing water  
5 mitigation, or reserving water supply for future uses; and

6 (e) Trust water rights donated to the trust water rights program  
7 are a potential source of water that may be used for drought  
8 mitigation in accordance with this chapter.

9 **Sec. 5.** RCW 90.42.040 and 2009 c 283 s 4 are each amended to  
10 read as follows:

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

25 (b) When a person donates a water right to the state trust water  
26 rights program, the department shall inform the person that he or she  
27 may agree to allow the trust water right to be used for drought  
28 mitigation in accordance with an order issued under chapter 43.83B  
29 RCW. The donor is not required to allow any trust water right to be  
30 used for drought mitigation. The conditions under which a trust water  
31 right may be used for drought mitigation under this subsection (1)(b)  
32 must be approved by the donor before they take effect, and the donor  
33 may terminate the approval at any time.

34 (2) The department shall issue a water right certificate in the  
35 name of the state of Washington for each permanent trust water right  
36 conveyed to the state indicating the quantity of water transferred to  
37 trust, the reach or reaches of the stream or the body of public  
38 groundwater that constitutes the place of use of the trust water  
39 right, and the use or uses to which it may be applied. A superseding

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

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

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

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

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

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

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

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

38 (c) For a trust water right donation described in RCW  
39 90.42.080(1)(b), or for a trust water right lease described in RCW  
40 90.42.080(8) that does not exceed five years, the department may post

1 equivalent information on its web site to meet the notice  
2 requirements in (a) of this subsection and may send pertinent  
3 information by email to meet the notice requirements in (b) of this  
4 subsection.

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

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

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

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

21 **Sec. 6.** RCW 90.42.100 and 2009 c 283 s 2 are each amended to  
22 read as follows:

23 (1) The department is hereby authorized to use the trust water  
24 rights program for water banking purposes statewide.

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

27 (a) To authorize the use of trust water rights to mitigate for  
28 water resource impacts, future water supply needs, or any beneficial  
29 use under chapter 43.83B, 90.03, 90.44, or 90.54 RCW, consistent with  
30 any terms and conditions established by the transferor, except that  
31 within the Yakima river basin return flows from water rights  
32 authorized in whole or in part for any purpose shall remain available  
33 as part of the Yakima basin's total water supply available and to  
34 satisfy existing rights for other downstream uses and users;

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

37 (c) To provide a source of water rights the department can make  
38 available to third parties on a temporary or permanent basis for any  
39 beneficial use under chapter 43.83B, 90.03, 90.44, or 90.54 RCW.



1 (3) The department shall not use water banking to:  
2 (a) Cause detriment or injury to existing rights;  
3 (b) Issue temporary water rights or portions thereof for new  
4 potable uses requiring an adequate and reliable water supply under  
5 RCW 19.27.097;  
6 (c) Administer federal project water rights, including federal  
7 storage rights; or  
8 (d) Allow carryover of stored water in the Yakima basin from one  
9 water year to another water year if it would negatively impact the  
10 total water supply available.  
11 (4) The department shall provide electronic notice and  
12 opportunity for comment to affected local governments and affected  
13 federally recognized tribal governments prior to initiating use of  
14 the trust water rights program for water banking purposes for the  
15 first time in each water resource inventory area.  
16 (5) Nothing in this section may be interpreted or administered in  
17 a manner that precludes the use of the department's existing  
18 authority to process trust water rights applications under this  
19 chapter or to process water right applications under chapter 90.03 or  
20 90.44 RCW.  
21 (6) For purposes of this section and RCW 90.42.135, "total water  
22 supply available" shall be defined as provided in the 1945 consent  
23 decree between the United States and water users in the Yakima river  
24 basin, and consistent with later interpretation by state and federal  
25 courts.

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