
SENATE BILL 6036

State of Washington

66th Legislature

2020 Regular Session

By Senators Honeyford, Van De Wege, Warnick, Muzzall, and Short
Prefiled 12/03/19.

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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