

**First Regular Session
Seventy-second General Assembly
STATE OF COLORADO**

ENGROSSED

*This Version Includes All Amendments Adopted
on Second Reading in the House of Introduction*

LLS NO. 19-0327.01 Jennifer Berman x3286

HOUSE BILL 19-1218

HOUSE SPONSORSHIP

Roberts,

SENATE SPONSORSHIP

(None),

House Committees
Energy & Environment

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING THE COLORADO WATER CONSERVATION BOARD'S**
102 **AUTHORITY TO USE WATER THAT A WATER RIGHT OWNER**
103 **VOLUNTARILY LOANS TO THE BOARD FOR INSTREAM FLOW**
104 **PURPOSES.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

Under current law, the Colorado water conservation board (board), subject to procedural requirements established to prevent injury to water rights or decreed conditional water rights, may use loaned water for

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

HOUSE
Amended 2nd Reading
March 29, 2019

instream flows if the loaned water is used for preserving the natural environment of a stream reach that is subject to a decreed instream flow water right held by the board. The bill expands the number of years within a 10-year period that a loan may be exercised from 3 years to 5 years and allows a loan to be renewed for up to 2 additional 10-year periods.

The bill also expands the board's ability to use loaned water for instream flows to allow loans to:

- ! Improve the natural environment to a reasonable degree pursuant to a decreed instream flow water right held by the board; or
- ! Preserve or improve the natural environment to a reasonable degree for a stream reach for which the board does not hold a decreed instream flow water right.

In considering whether to accept one of the new types of loans authorized by the bill, the board must evaluate the proposed loan based on a biological analysis performed by the division of parks and wildlife. The board is required to promulgate rules regarding the necessary steps for reviewing and accepting such a loan.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend**
3 (1), (2)(a) introductory portion, (2)(a)(IV), and (2)(a)(V), and
4 (2)(b)(VIII); and **add** (2)(a)(VI) and (2)(a)(VII) as follows:

5 **37-83-105. Owner may loan agricultural water right - loans**
6 **to Colorado water conservation board for instream flows - rules.**

7 (1) (a) Subject to the limitations of this subsection (1) and pursuant to the
8 procedures set forth in ~~paragraph (b) of subsection (2)~~ SUBSECTION (2)(b)
9 of this section, the owner of a water right decreed and used solely for
10 agricultural irrigation purposes may loan all or a portion of the water right
11 to another owner of a decreed water right on the same stream system and
12 that is used solely for agricultural irrigation purposes for no more than
13 one hundred eighty days during any one calendar year if the division
14 engineer approves ~~such~~ THE loan in advance and the loan does not cause
15 injury to other decreed water rights.

1 (b) A WATER RIGHT OWNER MAY LOAN WATER TO THE COLORADO
2 WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOW:

3 (I) TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE
4 DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY
5 THE BOARD; OR

6 (II) BASED ON THE BOARD'S REVIEW OF BIOLOGICAL AND
7 SCIENTIFIC EVIDENCE PRESENTED TO IT INCLUDING A BIOLOGICAL
8 ANALYSIS THAT THE BOARD REQUESTS THAT THE DIVISION OF PARKS AND
9 WILDLIFE CREATED IN SECTION 33-9-104 PERFORM TO IMPROVE THE
10 NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A STREAM REACH
11 FOR WHICH THE BOARD HOLDS A DECREED INSTREAM FLOW WATER RIGHT.

12 (2) (a) ~~A Water right owner may loan water to the Colorado water~~
13 ~~conservation board for use as~~ BE USED FOR instream flows pursuant to a
14 ~~decreed instream flow water right held by the board~~ LOAN AUTHORIZED
15 UNDER THIS SECTION for a period not to exceed one hundred twenty days,
16 subject to the following:

17 (IV) A loan approved pursuant to this ~~paragraph (a)~~ shall
18 SUBSECTION (2)(a) MUST not be exercised for more than ~~three~~ FIVE years
19 in a ten-year ~~period~~ AND FOR NO MORE THAN THREE CONSECUTIVE YEARS,
20 for which only a single approval by the state engineer is required. The
21 ten-year period ~~shall begin~~ BEGINS when the state engineer approves the
22 loan. AN APPLICANT MAY REAPPLY FOR AND the state engineer shall not
23 MAY approve a loan pursuant to this ~~paragraph (a)~~ SUBSECTION (2)(a) for
24 ~~another~~ UP TO TWO ADDITIONAL ten-year ~~period~~ PERIODS; except that, if
25 the agreement has not been exercised during the term of ANY TEN-YEAR
26 PERIOD OF the agreement, an applicant may reapply one ADDITIONAL time
27 by repeating the application process pursuant to this subsection (2).

1 (V) A party may file comments concerning potential injury to ~~such~~
2 THE party's water rights or decreed conditional water rights due to the
3 operations of the loan of a THE water right to a ~~decreed in-stream flow~~
4 ~~right~~ with the state engineer by January 1 of the year following each year
5 that the loan is exercised. The procedures of ~~paragraph (b) of this~~
6 ~~subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice,
7 opportunity to comment, the state engineer's decision, and an appeal of
8 ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's
9 comments. IN AN APPEAL TO THE WATER JUDGE IN THE APPLICABLE WATER
10 DIVISION OF THE DETERMINATION MADE BY THE STATE ENGINEER
11 PURSUANT TO THIS SECTION, THE APPLICANT HAS THE BURDEN OF PROOF
12 THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER
13 VESTED OR CONDITIONALLY DECREED WATER RIGHTS. THE WATER JUDGE
14 SHALL HEAR THE APPEAL ON AN EXPEDITED BASIS AND REVIEW, ON A DE
15 NOVO BASIS, ONLY THE EVIDENCE THAT WAS TAKEN IN THE
16 ADMINISTRATIVE PROCEEDING APPEALED FROM AND INCLUDED IN THE
17 RECORD. THE WATER JUDGE SHALL CONSIDER EVIDENCE IN ITS
18 DETERMINATION OF THE MATTER IF THE EVIDENCE:

19 (A) WAS WRONGLY EXCLUDED AT THE ADMINISTRATIVE
20 PROCEEDING; OR

21 (B) EXISTED AT THE TIME OF THE ADMINISTRATIVE PROCEEDING
22 BUT WAS DISCOVERED AFTER THE ADMINISTRATIVE PROCEEDING AND, IN
23 THE EXERCISE OF GOOD FAITH AND REASONABLE DILIGENCE, COULD NOT
24 HAVE BEEN MADE AVAILABLE AND OFFERED AT THE ADMINISTRATIVE
25 PROCEEDING.

26 (VI) IT IS THE DUTY OF THE STATE ENGINEER, UPON BEING SERVED
27 WITH A NOTICE OF APPEAL PURSUANT TO THIS SECTION, TO TRANSMIT TO

1 THE WATER JUDGE TO WHICH THE APPEAL IS TAKEN THE PAPERS, MAPS,
2 PLATS, FIELD NOTES, ORDERS, DECISIONS, AND OTHER AVAILABLE DATA
3 AFFECTING THE MATTER IN CONTROVERSY OR CERTIFIED COPIES THEREOF,
4 WHICH CERTIFIED COPIES SHALL BE ADMITTED IN EVIDENCE AS OF EQUAL
5 VALIDITY WITH THE ORIGINALS.

6 (VII) THE BOARD SHALL PROMULGATE RULES REGARDING THE
7 FOLLOWING NECESSARY STEPS FOR REVIEWING AND ACCEPTING LOANS FOR
8 INSTREAM FLOW USE TO IMPROVE THE NATURAL ENVIRONMENT TO A
9 REASONABLE DEGREE PURSUANT TO SUBSECTION (1)(b)(II) OF THIS
10 SECTION:

11 (A) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A
12 REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL
13 ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE
14 EXTENT TO WHICH THE PROPOSED LOAN WILL IMPROVE THE NATURAL
15 ENVIRONMENT TO A REASONABLE DEGREE; AND

16 (B) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE
17 MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

18 (b) In determining whether injury will occur, the division engineer
19 shall ensure that the following conditions are met:

20 (VIII) When the division engineer approves or denies a proposed
21 loan, the division engineer shall serve a copy of the decision on all parties
22 to the application by first-class mail or, if such THE parties have so
23 elected, by electronic mail. Neither the approval nor the denial by the
24 division engineer shall create CREATES any presumptions shift the burden
25 of proof, or serve SERVES as a defense in any legal action that may be
26 initiated concerning the loan. Any AN appeal of a decision by the division
27 engineer concerning the loan pursuant to this section shall be made to the

1 water judge in the applicable water division within fifteen days after the
2 date on which the decision is served on the parties to the application. THE
3 PROPONENTS HAVE THE BURDEN OF PROOF TO DEMONSTRATE THAT THE
4 LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR
5 CONDITIONALLY DECREED WATER RIGHTS. IT IS THE DUTY OF THE DIVISION
6 ENGINEER, UPON BEING SERVED WITH A NOTICE OF APPEAL PURSUANT TO
7 THIS SECTION, TO TRANSMIT TO THE WATER JUDGE TO WHICH THE APPEAL
8 IS TAKEN THE PAPERS, MAPS, PLATS, FIELD NOTES, ORDERS, DECISIONS,
9 AND OTHER AVAILABLE DATA AFFECTING THE MATTER IN CONTROVERSY
10 OR CERTIFIED COPIES THEREOF, WHICH CERTIFIED COPIES SHALL BE
11 ADMITTED IN EVIDENCE AS OF EQUAL VALIDITY WITH THE ORIGINALS. The
12 water judge shall hear ~~such~~ THE appeal on an expedited basis AND
13 REVIEW, ON A DE NOVO BASIS, ONLY THE EVIDENCE THAT WAS TAKEN IN
14 THE ADMINISTRATIVE PROCEEDING APPEALED FROM AND INCLUDED IN THE
15 RECORD. THE WATER JUDGE SHALL CONSIDER EVIDENCE IN ITS
16 DETERMINATION OF THE MATTER IF THE EVIDENCE:

17 (A) WAS WRONGLY EXCLUDED AT THE ADMINISTRATIVE
18 PROCEEDING; OR

19 (B) EXISTED AT THE TIME OF THE ADMINISTRATIVE PROCEEDING
20 BUT WAS DISCOVERED AFTER THE ADMINISTRATIVE PROCEEDING AND, IN
21 THE EXERCISE OF GOOD FAITH AND REASONABLE DILIGENCE, COULD NOT
22 HAVE BEEN MADE AVAILABLE AND OFFERED AT THE ADMINISTRATIVE
23 PROCEEDING.

24 **SECTION 2. Act subject to petition - effective date -**
25 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
26 the expiration of the ninety-day period after final adjournment of the
27 general assembly (August 2, 2019, if adjournment sine die is on May 3,

1 2019); except that, if a referendum petition is filed pursuant to section 1
2 (3) of article V of the state constitution against this act or an item, section,
3 or part of this act within such period, then the act, item, section, or part
4 will not take effect unless approved by the people at the general election
5 to be held in November 2020 and, in such case, will take effect on the
6 date of the official declaration of the vote thereon by the governor.

7 (2) This act applies to conduct occurring on or after the applicable
8 effective date of this act.