

**Second Regular Session
Sixty-sixth General Assembly
STATE OF COLORADO**

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

LLS NO. 08-0402.01 Thomas Morris

HOUSE BILL 08-1280

HOUSE SPONSORSHIP

Fischer, Levy, Madden, and Pommer

SENATE SPONSORSHIP

Schwartz, Gibbs, and Tochtrop

House Committees

Agriculture, Livestock, & Natural Resources

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING PROTECTION OF WATER RIGHTS USED BY THE COLORADO**
102 **WATER CONSERVATION BOARD FOR INSTREAM FLOWS UNDER**
103 **CONTRACTS WITH WATER RIGHTS OWNERS.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Specifies that the time during which the Colorado water conservation board uses water rights for instream flow purposes pursuant to a contract is excluded from the water court's historic consumptive use analysis and shall not be considered as abandonment of the water right. Requires the board to:

! Make a finding that the lessor or lender of the water rights

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

- is not entering into the contract for speculative purposes;
- ! Maintain records of how much water the board uses under the contract each year it is in effect; and
- ! Install a measuring device to record how much water flows out of the instream flow reach unless a suitable measuring device already exists.

Prohibits the water court from approving a change decree in relation to such a contract unless it makes a finding that the lessor or lender of the water rights has not entered into the contract for speculative purposes. Specifies that an application for a change of a water right located in the same stream basin as an instream flow water right reach on which the board has used water provided under such a contract may not claim any historic consumptive use resulting from water that was made available by the contract.

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

2 **SECTION 1.** The introductory portion to 37-92-102 (3) and
3 37-92-102 (4) (c), Colorado Revised Statutes, are amended to read:

4 **37-92-102. Legislative declaration - basic tenets of Colorado**
5 **water law.** (3) Further recognizing the need to correlate the activities of
6 ~~mankind~~ PEOPLE with some reasonable preservation of the natural
7 environment, the Colorado water conservation board is hereby vested
8 with the exclusive authority, on behalf of the people of the state of
9 Colorado, to appropriate in a manner consistent with sections 5 and 6 of
10 article XVI of the state constitution, such waters of natural streams and
11 lakes as the board determines may be required for minimum stream flows
12 or for natural surface water levels or volumes for natural lakes to preserve
13 the natural environment to a reasonable degree. In the adjudication of
14 water rights pursuant to this article and other applicable law, no other
15 person or entity shall be granted a decree adjudicating a right to water or
16 interests in water for instream flows in a stream channel between specific
17 points, or for natural surface water levels or volumes for natural lakes, for

1 any purpose whatsoever. The board also may acquire, by grant, purchase,
2 donation, bequest, devise, lease, exchange, or other contractual
3 agreement, from or with any person, including any governmental entity,
4 such water, water rights, or interests in water in such amount as the board
5 determines is appropriate for stream flows or for natural surface water
6 levels or volumes for natural lakes to preserve or improve the natural
7 environment to a reasonable degree. At the request of any person,
8 including any governmental entity, the board shall determine in a timely
9 manner, not to exceed one hundred twenty days unless further time is
10 granted by the requesting person or entity, what terms and conditions it
11 will accept in a contract or agreement for such acquisition. Any contract
12 or agreement executed between the board and any person or
13 governmental entity that provides water, water rights, or interests in water
14 to the board shall be enforceable by either party thereto as a water matter
15 under this article, according to the terms of the contract or agreement.

16 ALL PERIODS OF TIME DURING WHICH THE BOARD USES WATER, WATER
17 RIGHTS, OR INTERESTS IN WATER TO PRESERVE OR IMPROVE THE NATURAL
18 ENVIRONMENT TO A REASONABLE DEGREE UNDER SUCH A CONTRACT OR
19 AGREEMENT SHALL BE EXCLUDED FROM ANY HISTORIC CONSUMPTIVE USE
20 ANALYSIS OF THE SUBJECT WATER RIGHT REQUIRED UNDER ANY WATER
21 COURT PROCEEDING. THE BOARD SHALL ADOPT CRITERIA FOR
22 EVALUATING PROPOSED CONTRACTS OR AGREEMENTS FOR LEASES OR
23 LOANS OF WATER, WATER RIGHTS, OR INTERESTS IN WATER UNDER THIS
24 SUBSECTION (3), INCLUDING, BUT NOT LIMITED TO, CRITERIA ADDRESSING
25 SPECULATION AND PUBLIC NOTICE. AS PART OF ITS EVALUATION OF A
26 PROPOSED CONTRACT OR AGREEMENT FOR A LEASE OR LOAN OF WATER,
27 WATER RIGHTS, OR INTERESTS IN WATER PURSUANT TO THIS SUBSECTION

1 (3), THE BOARD SHALL MAKE A FINDING THAT THE LESSOR OR LENDER OF
2 THE WATER, WATER RIGHTS, OR INTERESTS IN WATER IS NOT ENTERING
3 INTO THE CONTRACT OR AGREEMENT FOR SPECULATIVE PURPOSES. AS A
4 CONDITION OF APPROVAL OF A PROPOSED CONTRACT OR AGREEMENT FOR
5 A LEASE OR LOAN OF WATER, WATER RIGHTS, OR INTERESTS IN WATER
6 PURSUANT TO THIS SUBSECTION (3), THE BOARD SHALL OBTAIN
7 CONFIRMATION FROM THE STATE AND DIVISION ENGINEERS THAT THE
8 PROPOSAL IS ADMINISTERABLE AND IS CAPABLE OF MEETING ALL
9 APPLICABLE STATUTORY REQUIREMENTS. ALL CONTRACTS OR
10 AGREEMENTS ENTERED INTO BY THE BOARD FOR LEASES OR LOANS OF
11 WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT TO THIS
12 SUBSECTION (3) SHALL REQUIRE THE BOARD TO MAINTAIN RECORDS OF
13 HOW MUCH WATER THE BOARD USES UNDER THE CONTRACT OR
14 AGREEMENT EACH YEAR IT IS IN EFFECT AND INSTALL A MEASURING
15 DEVICE AT OR NEAR THE LOWER TERMINUS OF THE INSTREAM FLOW REACH
16 IN WHICH THE WATER IS USED OR AT ANOTHER APPROPRIATE LOCATION TO
17 MEASURE AND RECORD HOW MUCH WATER FLOWS OUT OF THE REACH
18 AFTER USE BY THE BOARD UNDER THE CONTRACT OR AGREEMENT, UNLESS
19 A MEASURING DEVICE ALREADY EXISTS ON THE STREAM THAT IS CAPABLE
20 OF MAKING SUCH MEASUREMENTS AND RECORDINGS. THE BOARD SHALL
21 FILE A CHANGE OF WATER RIGHT APPLICATION OR OTHER APPLICATION
22 WITH THE WATER COURT TO OBTAIN A DECREED RIGHT TO USE WATER FOR
23 INSTREAM FLOW PURPOSES UNDER A CONTRACT OR AGREEMENT FOR A
24 LEASE OR LOAN OF WATER, WATER RIGHTS, OR INTERESTS IN WATER
25 PURSUANT TO THIS SUBSECTION (3). The board may not accept a donation
26 of water rights that either would require the removal of existing
27 infrastructure without approval of the current owner of such infrastructure

1 or that were acquired by condemnation. The board may use any funds
2 available to it, other than the construction fund created in section
3 37-60-121, for acquisition of water rights and their conversion to instream
4 flow rights. The board may initiate such applications as it determines are
5 necessary or desirable for utilizing water, water rights, or interests in
6 water appropriated, acquired, or held by the board, including applications
7 for changes of water rights, exchanges, or augmentation plans. Prior to
8 the initiation of any such appropriation or acquisition, the board shall
9 request recommendations from the division of wildlife and the division
10 of parks and outdoor recreation. The board also shall request
11 recommendations from the United States department of agriculture and
12 the United States department of the interior. Nothing in this article shall
13 be construed as authorizing any state agency to acquire water by eminent
14 domain or to deprive the people of the state of Colorado of the beneficial
15 use of those waters available by law and interstate compact. Nothing in
16 this subsection (3) shall impact section 37-60-121 (2.5). Any
17 appropriation made pursuant to this subsection (3) shall be subject to the
18 following principles and limitations:

19 (4) Any appropriation made pursuant to subsection (3) of this
20 section shall also be subject to the following principles and limitations:

21 (c) The board's determinations regarding the matters to be
22 determined by the board under paragraph (c) of subsection (3) of this
23 section and paragraph (d) of this subsection (4) for new appropriations
24 shall be subject to judicial review in the water court application and
25 decree proceedings initiated by the board, based on the board's
26 administrative record and utilizing the criteria of section 24-4-106 (6) and
27 (7), C.R.S. The board may file applications for changes of water rights

1 and augmentation plans, and the water court shall determine matters that
2 are within the scope of section 37-92-305. AS PART OF ITS EVALUATION
3 OF A CHANGE OF WATER RIGHT IMPLEMENTING A CONTRACT OR
4 AGREEMENT FOR A LEASE OR LOAN OF WATER, WATER RIGHTS, OR
5 INTERESTS IN WATER TO THE BOARD FOR INSTREAM FLOW USE PURSUANT
6 TO SUBSECTION (3) OF THIS SECTION, THE WATER COURT SHALL MAKE A
7 FINDING THAT THE LESSOR OR LENDER OF THE WATER, WATER RIGHTS, OR
8 INTERESTS IN WATER HAS NOT ENTERED INTO THE CONTRACT OR
9 AGREEMENT FOR SPECULATIVE PURPOSES.

10 **SECTION 2.** The introductory portion to 37-92-103 (2) (b),
11 Colorado Revised Statutes, is amended, and the said 37-92-103 (2) (b) is
12 further amended BY THE ADDITION OF A NEW SUBPARAGRAPH,
13 to read:

14 **37-92-103. Definitions.** As used in this article, unless the context
15 otherwise requires:

16 (2) "Abandonment of a water right" means the termination of a
17 water right in whole or in part as a result of the intent of the owner
18 thereof to discontinue permanently the use of all or part of the water
19 available thereunder. Any period of nonuse of any portion of a water
20 right shall be tolled, and no intent to discontinue permanent use shall be
21 found for purposes of determining an abandonment of a water right for
22 the duration that:

23 (b) The nonuse of a water right BY ITS OWNER is a result of
24 participation in:

25 (VI) ANY CONTRACT OR AGREEMENT WITH THE COLORADO WATER
26 CONSERVATION BOARD THAT ALLOWS THE BOARD TO USE ALL OR A PART
27 OF A WATER RIGHT TO PRESERVE OR IMPROVE THE NATURAL

1 ENVIRONMENT TO A REASONABLE DEGREE UNDER SECTION 37-92-102 (3).

2 **SECTION 3.** 37-92-305 (3), Colorado Revised Statutes, is
3 amended to read:

4 **37-92-305. Standards with respect to rulings of the referee and**
5 **decisions of the water judge.** (3) (a) A change of water right,
6 implementation of a rotational crop management contract, or plan for
7 augmentation, including water exchange project, shall be approved if
8 such change, contract, or plan will not injuriously affect the owner of or
9 persons entitled to use water under a vested water right or a decreed
10 conditional water right. In cases in which a statement of opposition has
11 been filed, the applicant shall provide to the referee or to the water judge,
12 as the case may be, a proposed ruling or decree to prevent such injurious
13 effect in advance of any hearing on the merits of the application, and
14 notice of such proposed ruling or decree shall be provided to all parties
15 who have entered the proceedings. If it is determined that the proposed
16 change, contract, or plan as presented in the application and the proposed
17 ruling or decree would cause such injurious effect, the referee or the
18 water judge, as the case may be, shall afford the applicant or any person
19 opposed to the application an opportunity to propose terms or conditions
20 that would prevent such injurious effect.

21 (b) AN APPLICANT FOR A CHANGE OF A WATER RIGHT LOCATED IN
22 THE SAME STREAM BASIN AS AN INSTREAM FLOW WATER RIGHT REACH ON
23 WHICH THE COLORADO WATER CONSERVATION BOARD HAS USED WATER
24 PROVIDED UNDER A CONTRACT OR AGREEMENT FOR A LEASE OR LOAN OF
25 WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT TO SECTION
26 37-92-102 (3) MAY NOT CLAIM ANY HISTORIC CONSUMPTIVE USE
27 RESULTING FROM WATER DIVERTED AND PUT TO BENEFICIAL USE BY THE

1 APPLICANT THAT WAS MADE AVAILABLE SOLELY BY VIRTUE OF THE
2 CONTRACT OR AGREEMENT.

3 **SECTION 4. Effective date - applicability.** (1) This act shall
4 take effect at 12:01 a.m. on the day following the expiration of the
5 ninety-day period after final adjournment of the general assembly that is
6 allowed for submitting a referendum petition pursuant to article V,
7 section 1 (3) of the state constitution, (August 6, 2008, if adjournment
8 sine die is on May 7, 2008); except that, if a referendum petition is filed
9 against this act or an item, section, or part of this act within such period,
10 then the act, item, section, or part, if approved by the people, shall take
11 effect on the date of the official declaration of the vote thereon by
12 proclamation of the governor.

13 (2) The provisions of this act shall apply to water court
14 determinations of historic consumptive use and abandonment occurring
15 on or after the applicable effective date of this act.