

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

REVISED

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

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

Agriculture, Natural Resources & Energy

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.*

SENATE
Am ended 2nd Reading
March 26, 2008

HOUSE
3rd Reading Unamended
February 27, 2008

HOUSE
Am ended 2nd Reading
February 25, 2008

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

1 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 THAT ARE NOT ON THE
5 DIVISION ENGINEER'S ABANDONMENT LIST in such amount as the board
6 determines is appropriate for stream flows or for natural surface water
7 levels or volumes for natural lakes to preserve or improve the natural
8 environment to a reasonable degree. At the request of any person,
9 including any governmental entity, the board shall determine in a timely
10 manner, not to exceed one hundred twenty days unless further time is
11 granted by the requesting person or entity, what terms and conditions it
12 will accept in a contract or agreement for such acquisition. Any contract
13 or agreement executed between the board and any person or
14 governmental entity that provides water, water rights, or interests in water
15 to the board shall be enforceable by either party thereto as a water matter
16 under this article, according to the terms of the contract or agreement.

17 THE BOARD SHALL ADOPT CRITERIA FOR EVALUATING PROPOSED
18 CONTRACTS OR AGREEMENTS FOR LEASES OR LOANS OF WATER, WATER
19 RIGHTS, OR INTERESTS IN WATER UNDER THIS SUBSECTION (3), INCLUDING,
20 BUT NOT LIMITED TO, CRITERIA ADDRESSING PUBLIC NOTICE, THE
21 EXTENT TO WHICH THE LEASED OR LOANED WATER WILL BENEFIT THE
22 NATURAL ENVIRONMENT TO A REASONABLE DEGREE, AND CALCULATION
23 OF THE COMPENSATION PAID TO THE LESSOR OF THE WATER BASED UPON
24 THE USE OF THE WATER AFTER THE TERM OF THE LEASE. AS A CONDITION
25 OF APPROVAL OF A PROPOSED CONTRACT OR AGREEMENT FOR A LEASE OR
26 LOAN OF WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT TO
27 THIS SUBSECTION (3), THE BOARD SHALL OBTAIN CONFIRMATION FROM THE

1 DIVISION ENGINEER THAT THE PROPOSAL IS ADMINISTRABLE AND IS
2 CAPABLE OF MEETING ALL APPLICABLE STATUTORY REQUIREMENTS. ALL
3 CONTRACTS OR AGREEMENTS ENTERED INTO BY THE BOARD FOR LEASES
4 OR LOANS OF WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT
5 TO THIS SUBSECTION (3) SHALL REQUIRE THE BOARD TO MAINTAIN
6 RECORDS OF HOW MUCH WATER THE BOARD USES UNDER THE CONTRACT
7 OR AGREEMENT EACH YEAR IT IS IN EFFECT AND TO INSTALL ANY
8 MEASURING DEVICES DEEMED NECESSARY BY THE DIVISION ENGINEER TO
9 ADMINISTER THE CONTRACT OR AGREEMENT AND TO MEASURE AND
10 RECORD HOW MUCH WATER FLOWS OUT OF THE REACH AFTER USE BY THE
11 BOARD UNDER THE CONTRACT OR AGREEMENT, UNLESS A MEASURING
12 DEVICE ALREADY EXISTS ON THE STREAM THAT MEETS THE DIVISION
13 ENGINEER'S REQUIREMENTS. ALL CONTRACTS OR AGREEMENTS FOR
14 WATER, WATER RIGHTS, OR INTERESTS IN WATER UNDER THIS SUBSECTION
15 (3) SHALL PROVIDE THAT, PURSUANT TO THE WATER COURT DECREE
16 IMPLEMENTING THE CONTRACT OR AGREEMENT, THE BOARD OR THE
17 LESSOR, LENDER, OR DONOR OF THE WATER MAY BRING ABOUT
18 BENEFICIAL USE OF THE HISTORICAL CONSUMPTIVE USE OF THE LEASED,
19 LOANED, OR DONATED WATER RIGHT DOWNSTREAM OF THE INSTREAM
20 FLOW REACH AS FULLY CONSUMABLE REUSABLE WATER. THE BOARD
21 SHALL FILE A CHANGE OF WATER RIGHT APPLICATION OR OTHER
22 APPLICATION WITH THE WATER COURT TO OBTAIN A DECREED RIGHT TO
23 USE WATER FOR INSTREAM FLOW PURPOSES UNDER A CONTRACT OR
24 AGREEMENT FOR A LEASE OR LOAN OF WATER, WATER RIGHTS, OR
25 INTERESTS IN WATER PURSUANT TO THIS SUBSECTION (3). THE RESULTING
26 WATER COURT DECREE SHALL QUANTIFY THE HISTORICAL CONSUMPTIVE
27 USE OF THE LEASED OR LOANED WATER RIGHT AND DETERMINE THE

1 METHOD BY WHICH THE HISTORICAL CONSUMPTIVE USE SHOULD BE
2 QUANTIFIED AND CREDITED DURING THE TERM OF THE AGREEMENT FOR
3 THE LEASE OR LOAN OF THE WATER RIGHT. SAID METHOD SHALL
4 RECOGNIZE THE ACTUAL AMOUNT OF CONSUMPTIVE USE AVAILABLE
5 UNDER THE LEASED OR LOANED WATER RIGHT AND SHALL NOT RESULT IN
6 A REDUCTION OF THE HISTORICAL CONSUMPTIVE USE OF THAT WATER
7 RIGHT DURING THE TERM OF THE LEASE OR LOAN, EXCEPT TO THE EXTENT
8 SUCH REDUCTION IS BASED UPON THE ACTUAL AMOUNT OF WATER
9 AVAILABLE UNDER SAID RIGHTS. ALL WATER RIGHTS UNDER SUCH
10 DECREES SHALL BE ADMINISTERED IN PRIORITY. The board may not accept
11 a donation of water rights that either would require the removal of
12 existing infrastructure without approval of the current owner of such
13 infrastructure or that were acquired by condemnation. The board may use
14 any funds available to it, other than the construction fund created in
15 section 37-60-121, for acquisition of water rights and their conversion to
16 instream flow rights. The board may initiate such applications as it
17 determines are necessary or desirable for utilizing water, water rights, or
18 interests in water appropriated, acquired, or held by the board, including
19 applications for changes of water rights, exchanges, or augmentation
20 plans. Prior to the initiation of any such appropriation or acquisition, the
21 board shall request recommendations from the division of wildlife and the
22 division of parks and outdoor recreation. The board also shall request
23 recommendations from the United States department of agriculture and
24 the United States department of the interior. Nothing in this article shall
25 be construed as authorizing any state agency to acquire water by eminent
26 domain or to deprive the people of the state of Colorado of the beneficial
27 use of those waters available by law and interstate compact. Nothing in

1 this subsection (3) shall impact section 37-60-121 (2.5). Any
2 appropriation made pursuant to this subsection (3) shall be subject to the
3 following principles and limitations:

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

9 **37-92-103. Definitions.** As used in this article, unless the context
10 otherwise requires:

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

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

20 (VI) ANY CONTRACT OR AGREEMENT WITH THE COLORADO WATER
21 CONSERVATION BOARD THAT ALLOWS THE BOARD TO USE ALL OR A PART
22 OF A WATER RIGHT TO PRESERVE OR IMPROVE THE NATURAL
23 ENVIRONMENT TO A REASONABLE DEGREE UNDER SECTION 37-92-102 (3).

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

26 **37-92-305. Standards with respect to rulings of the referee and**
27 **decisions of the water judge.** (3) (a) A change of water right,

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

16

17 (b) DECREES FOR CHANGES OF WATER RIGHTS THAT IMPLEMENT A
18 CONTRACT OR AGREEMENT FOR A LEASE, LOAN, OR DONATION OF WATER,
19 WATER RIGHTS, OR INTERESTS IN WATER TO THE COLORADO WATER
20 CONSERVATION BOARD FOR INSTREAM FLOW USE UNDER SECTION
21 37-92-102 (3) (b) SHALL PROVIDE THAT THE BOARD OR THE LESSOR,
22 LENDER, OR DONOR OF THE WATER ___ MAY BRING ABOUT BENEFICIAL USE
23 OF THE HISTORICAL CONSUMPTIVE USE OF THE CHANGED WATER RIGHT
24 DOWNSTREAM OF THE INSTREAM FLOW REACH AS FULLY CONSUMABLE
25 REUSABLE WATER, SUBJECT TO SUCH TERMS AND CONDITIONS AS THE
26 WATER COURT DEEMS NECESSARY TO PREVENT INJURY TO VESTED WATER
27 RIGHTS OR DECREED CONDITIONAL WATER RIGHTS.

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

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