

First Regular Session
Seventieth General Assembly
STATE OF COLORADO

REENGROSSED

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

LLS NO. 15-0589.01 Jennifer Berman x3286

HOUSE BILL 15-1038

HOUSE SPONSORSHIP

Arndt,

SENATE SPONSORSHIP

Hodge,

House Committees
Agriculture, Livestock, & Natural Resources

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING FLEXIBLE WATER MARKETS.**

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://www.leg.state.co.us/billsummaries>.)

Currently, water court proceedings governing an application to change the beneficial use of an irrigation water right require the applicant to designate a specific alternative beneficial use identified at the time of the application. The bill creates a more flexible change-in-use system by allowing an applicant who seeks to implement fallowing, regulated deficit irrigation, reduced consumptive use cropping, or other alternatives to the permanent dry-up of irrigated lands to apply for a change in use to any beneficial use, without designating the specific beneficial use to which

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.

HOUSE
3rd Reading Unamended
February 10, 2015

HOUSE
Amended 2nd Reading
February 9, 2015

the water will be applied.

Section 1 of the bill defines "flex use" to mean an application of the fully consumptive portion of water that has been subject to a water right change-in-use proceeding to any beneficial use. It also redefines "appropriation" to exclude flex use from the anti-speculation doctrine.

Section 2 describes the procedures for obtaining a flex use change-in-use decree, and **section 3** describes the procedures for obtaining a flex use substitute water supply plan.

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

2 **SECTION 1.** In Colorado Revised Statutes, 37-92-103, amend
3 (3) (b), (4) (b), and (4) (c); and add (4) (d), (7.3), and (7.5) as follows:

4 **37-92-103. Definitions - repeal.** As used in this article, unless
5 the context otherwise requires:

6 (3) (b) Nothing in this subsection (3) ~~shall affect~~ AFFECTS
7 appropriations by the state of Colorado for minimum streamflows as
8 described in subsection (4) of this section OR APPROVAL OF FLEX USE.

9 (4) "Beneficial use" means the use of that amount of water that is
10 reasonable and appropriate under reasonably efficient practices to
11 accomplish without waste the purpose for which the appropriation is
12 lawfully made. Without limiting the generality of the previous sentence,
13 "beneficial use" includes:

14 (b) FOR RECREATIONAL IN-CHANNEL DIVERSION PURPOSES, the
15 diversion of water by a county, municipality, city and county, water
16 district, water and sanitation district, water conservation district, or water
17 conservancy district; ~~for recreational in-channel diversion purposes; and~~

18 (c) For the benefit and enjoyment of present and future
19 generations, the appropriation by the state of Colorado in the manner
20 prescribed by law of such minimum flows between specific points or
21 levels for and on natural streams and lakes as are required to preserve the

1 natural environment to a reasonable degree; AND

2 (d) (I) A FLEX USE.

3 (II) THIS PARAGRAPH (d) IS REPEALED, EFFECTIVE JULY 1, 2026.

4 (7.3) "FLEX CONSUMPTIVE USE" MEANS:

5 (a) THE FULLY CONSUMPTIVE PORTION OF A WATER RIGHT
6 DECREED FOR IRRIGATION PURPOSES THAT HAS BEEN QUANTIFIED FOR THE
7 FIRST TIME BY A WATER COURT CHANGE-IN-USE DECREE OR QUANTIFIED
8 BY A SUBSTITUTE WATER SUPPLY PLAN APPROVAL, ENTERED OR APPROVED
9 ON OR AFTER JUNE 1, 2015; AND

10 (b) THE RETURN FLOWS ASSOCIATED WITH THE HISTORICAL USE OF
11 THE WATER RIGHT IF APPROPRIATED IN ACCORDANCE WITH THE LAW
12 UNDER A NEW PRIORITY DATE AND CONFIRMED BY THE WATER COURT
13 CHANGE-IN-USE DECREE IN WHICH THE FULLY CONSUMPTIVE USE PORTION
14 OF THE WATER RIGHT IS QUANTIFIED.

15 (c) THIS SUBSECTION (7.3) IS REPEALED, EFFECTIVE JULY 1, 2026.

16 (7.5) (a) (I) "FLEX USE" MEANS DIVERSION AND USE OF FLEX
17 CONSUMPTIVE USE AT ANY POINT OF DIVERSION WITHIN THE WATER
18 DIVISION OF HISTORICAL USE IDENTIFIED IN AN EXISTING WATER COURT
19 DECREE OR STATE ENGINEER-APPROVED SUBSTITUTE WATER SUPPLY PLAN,
20 FOR ANY BENEFICIAL USES IDENTIFIED IN THE DECREE OR SUBSTITUTE
21 WATER SUPPLY PLAN. "FLEXUSE" INCLUDES WATER DELIVERY TO SATISFY
22 COMPACT OBLIGATIONS.

23 (II) "FLEX USE" DOES NOT INCLUDE THE APPLICATION OF FLEX
24 CONSUMPTIVE USE TO FACILITATE THE DIVERSION OF WATER BETWEEN
25 WATER DIVISIONS BY DIRECT DIVERSION, EXCHANGE, REPLACEMENT, OR
26 OTHER MEANS.

27 (b) FOLLOWING DELIVERY OF FLEX CONSUMPTIVE USE TO THE

1 RIVER AT THE POINT OR POINTS OF DELIVERY IDENTIFIED IN THE FLEX
2 CHANGE-IN-USE DECREE OR SUBSTITUTE WATER SUPPLY PLAN APPROVAL,
3 THE WATER USER MAY ACCOMPLISH FLEX USE BY DIRECT DELIVERY;
4 STORAGE; RECHARGE; AUGMENTATION; EXCHANGE; WATER BANKING;
5 WHERE APPROPRIATE, NONCONSUMPTIVE USE; OR ANY OTHER LAWFUL
6 MEANS THAT COMPLY WITH APPLICABLE DECREES, STATUTORY AND OTHER
7 LEGAL REQUIREMENTS, AND ADMINISTRATION BY THE STATE ENGINEER
8 AND DIVISION ENGINEERS.

9 (c) THIS SUBSECTION (7.5) IS REPEALED, EFFECTIVE JULY 1, 2026.

10 **SECTION 2.** In Colorado Revised Statutes, 37-92-305, **add** (3.7)
11 as follows:

12 **37-92-305. Standards with respect to rulings of the referee and**
13 **decisions of the water judge - repeal. (3.7) Flex use. (a) IF A**
14 **CHANGE-IN-USE APPLICATION SEEKS APPROVAL OF FLEX USE, THE DECREE**
15 **MUST:**

16 (I) COMPLY WITH SECTION 37-92-103 (7.3) AND (7.5);

17 (II) IDENTIFY THE WATER RIGHT AS A FLEX USE WATER RIGHT;

18 (III) QUANTIFY THE HISTORICAL DIVERSIONS AND HISTORICAL
19 CONSUMPTIVE USE OF THE WATER RIGHT;

20 (IV) QUANTIFY THE RETURN FLOWS ASSOCIATED WITH THE
21 HISTORICAL USE OF THE WATER RIGHT IN TIME, PLACE, AND AMOUNT;

22 (V) PROVIDE TERMS AND CONDITIONS FOR A CHANGE IN THE TYPE
23 OF USE OF THE WATER RIGHT, INCLUDING THE RETURN FLOW OBLIGATIONS
24 IN TIME, PLACE, AND AMOUNT, THAT PREVENT MATERIAL INJURY TO OTHER
25 VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS;

26 (VI) IF RETURN FLOWS ASSOCIATED WITH THE HISTORICAL USE OF
27 THE WATER RIGHT ARE APPROPRIATED IN ACCORDANCE WITH THE LAW

1 UNDER A NEW PRIORITY DATE, PROVIDE TERMS AND CONDITIONS
2 GOVERNING THE USE OF THE APPROPRIATED RETURN FLOWS;

3 (VII) PERMIT DELIVERY AND USE OF ALL OR A PORTION OF THE
4 CONSUMPTIVE USE ASSOCIATED WITH THE WATER RIGHT AND ANY
5 APPROPRIATED RETURN FLOWS TO A FLEX USE THROUGH THE
6 IMPLEMENTATION OF FALLOWING, REGULATED DEFICIT IRRIGATION,
7 REDUCED CONSUMPTIVE USE CROPPING, OR OTHER ALTERNATIVE TO
8 PERMANENT CESSATION OF AGRICULTURAL IRRIGATION ON THE PROPERTY
9 THAT IS SERVED BY THE WATER RIGHT; AND

10 (VIII) ESTABLISH A FIXED POINT OR POINTS OF DELIVERY FOR THE
11 FULLY CONSUMPTIVE PORTION OF THE WATER RIGHT AND ANY
12 APPROPRIATED RETURN FLOWS TO THE RIVER.

13 (b) A DECREED FLEX USE IS SUBJECT TO RECONSIDERATION BY THE
14 WATER JUDGE ON THE QUESTION OF INJURY TO THE VESTED WATER RIGHTS
15 OF OTHERS FOR SUCH PERIOD AFTER THE ENTRY OF THE DECREE AS IS
16 NECESSARY OR DESIRABLE TO REMEDY OR PRECLUDE INJURY.

17 (c) (I) THE GENERAL ASSEMBLY INTENDS THAT ANY DECREED FLEX
18 USE BE IMPLEMENTED IN A MANNER DESIGNED TO PROMOTE THE USE OF
19 ALTERNATIVE TRANSFER METHODS THAT ENCOURAGE AND SUPPORT
20 CONTINUATION OF IRRIGATED AGRICULTURE, WHILE APPLYING THE
21 DECREED FLEX USE TO ADDITIONAL USES. AS SUCH, A DECREED FLEX USE
22 MUST BE CONDITIONED UPON THE CONTINUATION OF IRRIGATION OF A
23 PORTION OF THE PROPERTY SERVED BY THE WATER RIGHT DECREED FOR
24 FLEX USE, SUBJECT TO FALLOWING FOR FLEX USE. THE WATER JUDGE MAY
25 ESTABLISH TERMS AND CONDITIONS COMMENSURATE WITH THE INTENT OF
26 THE GENERAL ASSEMBLY EXPRESSED IN THIS SUBPARAGRAPH (I).

27 (II) AT A MINIMUM, A CHANGE-IN-USE DECREE APPROVING A FLEX

1 USE MUST PROVIDE THAT DELIVERY OF MORE THAN FIFTY PERCENT OF THE
2 FLEX CONSUMPTIVE USE OVER ANY TEN-YEAR PERIOD FOR USES OTHER
3 THAN IRRIGATION OF THE PROPERTY SERVED BY THE WATER RIGHT OR
4 ANOTHER PROPERTY SERVED BY THE SAME DITCH SYSTEM NULLIFIES THE
5 DECREED FLEX USE WITHOUT ANY FURTHER ACTION OF THE WATER JUDGE.
6 IF SUCH NULLIFICATION OCCURS, THE WATER RIGHT MAY ONLY BE USED
7 FOR THE DECREED IRRIGATION USE UNLESS THE OWNER OF THE WATER
8 RIGHT OBTAINS A SUBSEQUENT WATER COURT CHANGE-IN-USE DECREE OR
9 SUBSEQUENT SUBSTITUTE WATER SUPPLY PLAN IDENTIFYING THE
10 SPECIFIED END USES OF THE WATER RIGHT AND ESTABLISHING ANY
11 ADDITIONAL TERMS AND CONDITIONS NECESSARY TO PREVENT INJURY.

12 (d) NO MORE THAN TEN FLEX USE CHANGE-IN-USE DECREES SHALL
13 BE APPROVED IN EACH WATER DIVISION. IF TEN FLEX USE CHANGE-IN-USE
14 DECREES HAVE BEEN APPROVED IN A DIVISION AND ONE OF THE DECREES
15 IS NULLIFIED PURSUANT TO PARAGRAPH (c) OF THIS SUBSECTION (3.7),
16 ANOTHER FLEX USE CHANGE-IN-USE DECREE MAY BE APPROVED.

17 (e) THIS SUBSECTION (3.7) IS REPEALED, EFFECTIVE JULY 1, 2026.

18 **SECTION 3.** In Colorado Revised Statutes, 37-92-308, **add** (12)
19 as follows:

20 **37-92-308. Substitute water supply plans - special procedures**
21 **for review - water adjudication cash fund - legislative declaration -**
22 **repeal.** (12) (a) **Flex use.** IF THE STATE ENGINEER APPROVES A
23 SUBSTITUTE WATER SUPPLY PLAN APPLICATION IN WHICH THE PLAN
24 SOUGHT IS FOR A FLEX USE, THE APPROVAL MUST:

- 25 (I) COMPLY WITH SECTION 37-92-103 (7.3) AND (7.5);
26 (II) IDENTIFY THE WATER RIGHT AS A FLEX USE WATER RIGHT;
27 (III) QUANTIFY THE HISTORICAL DIVERSIONS AND HISTORICAL

1 CONSUMPTIVE USE OF THE WATER RIGHT;

2 (IV) QUANTIFY THE RETURN FLOWS ASSOCIATED WITH THE
3 HISTORICAL USE OF THE WATER RIGHT IN TIME, PLACE, AND AMOUNT;

4 (V) PROVIDE TERMS AND CONDITIONS FOR A CHANGE IN THE TYPE
5 OF USE OF THE WATER RIGHT THAT PREVENT MATERIAL INJURY TO OTHER
6 VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS,
7 INCLUDING THE RETURN FLOW OBLIGATIONS IN TIME, PLACE, AND
8 AMOUNT;

9 (VI) IF RETURN FLOWS ASSOCIATED WITH THE HISTORICAL USE OF
10 THE WATER RIGHT ARE APPROPRIATED IN ACCORDANCE WITH THE LAW
11 UNDER A NEW PRIORITY DATE, PROVIDE TERMS AND CONDITIONS
12 GOVERNING THE USE OF THE APPROPRIATED RETURN FLOWS;

13 (VII) PERMIT DELIVERY AND USE OF ALL OR A PORTION OF THE
14 CONSUMPTIVE USE ASSOCIATED WITH THE WATER RIGHT AND ANY
15 APPROPRIATED RETURN FLOWS TO A FLEX USE THROUGH THE
16 IMPLEMENTATION OF FALLOWING, REGULATED DEFICIT IRRIGATION,
17 REDUCED CONSUMPTIVE USE CROPPING, OR OTHER ALTERNATIVE TO
18 PERMANENT CESSATION OF AGRICULTURAL IRRIGATION ON THE PROPERTY
19 THAT IS SERVED BY THE WATER RIGHT; AND

20 (VIII) ESTABLISH A FIXED POINT OR POINTS OF DELIVERY FOR THE
21 FULLY CONSUMPTIVE PORTION OF THE WATER RIGHT AND ANY
22 APPROPRIATED RETURN FLOWS.

23 (b) A SUBSTITUTE WATER SUPPLY PLAN APPROVING FLEX USE MUST
24 BE CONDITIONED UPON THE CONTINUATION OF IRRIGATION OF A PORTION
25 OF THE PROPERTY SERVED BY THE WATER RIGHT, SUBJECT TO FALLOWING
26 FOR FLEX USE. AT A MINIMUM, A SUBSTITUTE WATER SUPPLY PLAN
27 APPROVING FLEX USE IS CONDITIONED ON A SHOWING THAT NO MORE THAN

1 FIFTY PERCENT OF THE FLEX CONSUMPTIVE USE WILL BE DELIVERED
2 DURING THE PERIOD OF THE SUBSTITUTE WATER SUPPLY PLAN APPROVAL
3 FOR USES OTHER THAN IRRIGATION OF THE PROPERTY SERVED BY THE
4 WATER RIGHT OR ANOTHER PROPERTY SERVED BY THE SAME DITCH
5 SYSTEM. IF THIS CONDITION IS VIOLATED DURING THE PERIOD OF THE
6 SUBSTITUTE WATER SUPPLY PLAN APPROVAL, THE APPROVAL WILL
7 TERMINATE WITHOUT FURTHER ACTION OF THE STATE ENGINEER.

8 (c) (I) COMMENCING ON JULY 1, 2015, AND ON AN ANNUAL BASIS
9 THEREAFTER, THE STATE ENGINEER MAY, FOR EACH WATER DIVISION,
10 APPROVE UP TO TEN SUBSTITUTE WATER SUPPLY PLANS FOR APPLICATION
11 OF FLEX USE.

12 (II) IF THE STATE ENGINEER HAS APPROVED THE MAXIMUM
13 NUMBER OF FLEX USE SUBSTITUTE WATER SUPPLY PLANS PERMITTED FOR
14 A WATER DIVISION UNDER THIS PARAGRAPH (c) BUT ONE OF THE APPROVED
15 PLANS IS TERMINATED PURSUANT TO PARAGRAPH (b) OF THIS SUBSECTION
16 (12), THE STATE ENGINEER MAY APPROVE AN ADDITIONAL FLEX USE
17 SUBSTITUTE WATER SUPPLY PLAN WITHIN THE SAME WATER DIVISION.

18 (d) THIS SUBSECTION (12) IS REPEALED, EFFECTIVE JULY 1, 2026.

19 SECTION 4. In Colorado Revised Statutes, 37-60-115, add (10)
20 as follows:

21 **37-60-115. Water studies - rules - repeal. (10) Flex use.**

22 (a) THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL
23 REVIEW THE UTILIZATION OF FLEX USE CHANGE-IN-USE DECREES,
24 PERMITTED UNDER SECTION 37-92-305 (3.7), AND SUBSTITUTE WATER
25 SUPPLY PLANS APPROVING FLEX USE, PERMITTED UNDER SECTION
26 37-92-308 (12).

27 (b) THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER,

1 SHALL DETERMINE THE EXTENT TO WHICH FLEX USE IS BEING UTILIZED,
2 THE MANNER IN WHICH IT IS BEING UTILIZED, AND ANY ISSUES ARISING
3 FROM ITS UTILIZATION.

4 (c) ON OR BEFORE OCTOBER 1, 2016, AND ANNUALLY
5 THEREAFTER, THE BOARD SHALL REPORT ON THE UTILIZATION OF FLEX USE
6 TO THE WATER RESOURCES REVIEW COMMITTEE CREATED IN SECTION
7 37-98-102 OR ITS SUCCESSOR COMMITTEE. THE BOARD SHALL PROVIDE A
8 FINAL REPORT TO THE WATER RESOURCES REVIEW COMMITTEE ON OR
9 BEFORE OCTOBER 1, 2025.

10 (d) THIS SUBSECTION (10) IS REPEALED, EFFECTIVE JULY 1, 2026.

11 **SECTION 5. Effective date.** This act takes effect June 1, 2015.

12 **SECTION 6. Safety clause.** The general assembly hereby finds,
13 determines, and declares that this act is necessary for the immediate
14 preservation of the public peace, health, and safety.