

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**

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**HOUSE SPONSORSHIP**

**Arndt,**

**SENATE SPONSORSHIP**

**Hodge,**

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**House Committees**

Agriculture, Livestock, & Natural Resources

**Senate Committees**

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**A BILL FOR AN ACT**

101 **CONCERNING FLEXIBLE WATER MARKETS.**

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**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.

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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. "FLEX USE" 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.