

Second Regular Session  
Sixty-sixth General Assembly  
STATE OF COLORADO

INTRODUCED

LLS NO. 08-0402.01 Thomas Morris

HOUSE BILL 08-1280

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HOUSE SPONSORSHIP

Fischer, Levy, Madden, and Pommer

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House Committees

Agriculture, Livestock, & Natural Resources

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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.

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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.

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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. AS PART OF ITS EVALUATION OF A PROPOSED  
22 CONTRACT OR AGREEMENT FOR A LEASE OR LOAN OF WATER, WATER  
23 RIGHTS, OR INTERESTS IN WATER PURSUANT TO THIS SUBSECTION (3), THE  
24 BOARD SHALL MAKE A FINDING THAT THE LESSOR OR LENDER OF THE  
25 WATER, WATER RIGHTS, OR INTERESTS IN WATER IS NOT ENTERING INTO  
26 THE CONTRACT OR AGREEMENT FOR SPECULATIVE PURPOSES. ALL  
27 CONTRACTS OR AGREEMENTS ENTERED INTO BY THE BOARD FOR LEASES

1 OR LOANS OF WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT  
2 TO THIS SUBSECTION (3) SHALL REQUIRE THE BOARD TO MAINTAIN  
3 RECORDS OF HOW MUCH WATER THE BOARD USES UNDER THE CONTRACT  
4 OR AGREEMENT EACH YEAR IT IS IN EFFECT AND INSTALL A MEASURING  
5 DEVICE AT OR NEAR THE LOWER TERMINUS OF THE INSTREAM FLOW REACH  
6 IN WHICH THE WATER IS USED OR AT ANOTHER APPROPRIATE LOCATION TO  
7 MEASURE AND RECORD HOW MUCH WATER FLOWS OUT OF THE REACH  
8 AFTER USE BY THE BOARD UNDER THE CONTRACT OR AGREEMENT, UNLESS  
9 A MEASURING DEVICE ALREADY EXISTS ON THE STREAM THAT IS CAPABLE  
10 OF MAKING SUCH MEASUREMENTS AND RECORDINGS. The board may not  
11 accept 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:

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

6 (c) The board's determinations regarding the matters to be  
7 determined by the board under paragraph (c) of subsection (3) of this  
8 section and paragraph (d) of this subsection (4) for new appropriations  
9 shall be subject to judicial review in the water court application and  
10 decree proceedings initiated by the board, based on the board's  
11 administrative record and utilizing the criteria of section 24-4-106 (6) and  
12 (7), C.R.S. The board may file applications for changes of water rights  
13 and augmentation plans, and the water court shall determine matters that  
14 are within the scope of section 37-92-305. AS PART OF ITS EVALUATION  
15 OF A CHANGE OF WATER RIGHT IMPLEMENTING A CONTRACT OR  
16 AGREEMENT FOR A LEASE OR LOAN OF WATER, WATER RIGHTS, OR  
17 INTERESTS IN WATER TO THE BOARD FOR INSTREAM FLOW USE PURSUANT  
18 TO SUBSECTION (3) OF THIS SECTION, THE WATER COURT SHALL MAKE A  
19 FINDING THAT THE LESSOR OR LENDER OF THE WATER, WATER RIGHTS, OR  
20 INTERESTS IN WATER HAS NOT ENTERED INTO THE CONTRACT OR  
21 AGREEMENT FOR SPECULATIVE PURPOSES.

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

26 **37-92-103. Definitions.** As used in this article, unless the context  
27 otherwise requires:

1 (2) "Abandonment of a water right" means the termination of a  
2 water right in whole or in part as a result of the intent of the owner  
3 thereof to discontinue permanently the use of all or part of the water  
4 available thereunder. Any period of nonuse of any portion of a water  
5 right shall be tolled, and no intent to discontinue permanent use shall be  
6 found for purposes of determining an abandonment of a water right for  
7 the duration that:

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

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

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

16 **37-92-305. Standards with respect to rulings of the referee and**  
17 **decisions of the water judge.** (3) (a) A change of water right,  
18 implementation of a rotational crop management contract, or plan for  
19 augmentation, including water exchange project, shall be approved if  
20 such change, contract, or plan will not injuriously affect the owner of or  
21 persons entitled to use water under a vested water right or a decreed  
22 conditional water right. In cases in which a statement of opposition has  
23 been filed, the applicant shall provide to the referee or to the water judge,  
24 as the case may be, a proposed ruling or decree to prevent such injurious  
25 effect in advance of any hearing on the merits of the application, and  
26 notice of such proposed ruling or decree shall be provided to all parties  
27 who have entered the proceedings. If it is determined that the proposed

1 change, contract, or plan as presented in the application and the proposed  
2 ruling or decree would cause such injurious effect, the referee or the  
3 water judge, as the case may be, shall afford the applicant or any person  
4 opposed to the application an opportunity to propose terms or conditions  
5 that would prevent such injurious effect.

6 (b) AN APPLICANT FOR A CHANGE OF A WATER RIGHT LOCATED IN  
7 THE SAME STREAM BASIN AS AN INSTREAM FLOW WATER RIGHT REACH ON  
8 WHICH THE COLORADO WATER CONSERVATION BOARD HAS USED WATER  
9 PROVIDED UNDER A CONTRACT OR AGREEMENT FOR A LEASE OR LOAN OF  
10 WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT TO SECTION  
11 37-92-102 (3) MAY NOT CLAIM ANY HISTORIC CONSUMPTIVE USE  
12 RESULTING FROM WATER DIVERTED AND PUT TO BENEFICIAL USE BY THE  
13 APPLICANT THAT WAS MADE AVAILABLE SOLELY BY VIRTUE OF THE  
14 CONTRACT OR AGREEMENT.

15 **SECTION 4. Applicability.** This act shall apply to water court  
16 determinations of historic consumptive use and abandonment occurring  
17 on or after the effective date of this act.

18 **SECTION 5. Safety clause.** The general assembly hereby finds,  
19 determines, and declares that this act is necessary for the immediate  
20 preservation of the public peace, health, and safety.