

**First Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO**

PREAMENDED

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

LLS NO. 13-0760.01 Jennifer Berman x3286

HOUSE BILL 13-1248

HOUSE SPONSORSHIP

Fischer,

SENATE SPONSORSHIP

Schwartz,

House Committees

Agriculture, Livestock, & Natural Resources

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING AN AUTHORIZATION OF PILOT PROJECTS FOR THE**
102 **LEASING OF WATER FOR MUNICIPAL USE.**

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>.)

The bill authorizes the Colorado water conservation board to administer a pilot program consisting of up to 3 pilot projects, each up to 10 years in duration, in the lower Arkansas river basin to demonstrate the practice of fallowing agricultural irrigation land and leasing the associated water rights for temporary municipal use.

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.*

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

2 **SECTION 1. Legislative declaration.** (1) The general assembly
3 hereby:

4 (a) Affirms its commitment to develop and implement programs
5 to advance various agricultural transfer methods as alternatives to
6 permanent agricultural dry-up, which it has funded through the
7 "alternative agricultural water transfer sustainability grant program",
8 enacted in the 2007, 2009, and 2012 Colorado water conservation board
9 (board) projects bills;

10 (b) Recognizes that:

11 (I) If the status quo development trend continues, Colorado may
12 lose over five hundred thousand irrigated acres statewide and some basins
13 may lose as much as thirty-five percent of their irrigated acreage by 2050,
14 as found by the board's 2010 statewide water supply initiative;

15 (II) The board believes that it is urgent to implement alternatives,
16 like fallowing irrigated agricultural land for leasing water for temporary
17 municipal use, referred to in this section as "fallowing-leasing", to
18 traditional transfers resulting in permanent agricultural dry-up, and the
19 board is fostering the development of these alternatives through its
20 alternative agricultural water transfer methods competitive grant program;

21 (III) Both the interbasin compact committee and the basin
22 roundtables, created in section 37-75-104, Colorado Revised Statutes,
23 have expressed a desire to minimize permanent agricultural dry-up;

24 (IV) Fallowing-leasing poses hydrological issues in addition to
25 those posed by traditional changes of water rights, and an evaluation of
26 the hydrological issues posed may require further analysis to address

1 questions of injury to other water rights; and
2 (V) The state needs to evaluate whether fallowing-leasing is a
3 practical alternative to permanent agricultural dry-up; and
4 (c) Determines that:
5 (I) The board, which was created in section 37-60-102, Colorado
6 Revised Statutes, "[f]or the purpose of aiding in the protection and
7 development of the waters of the state, for the benefit of the present and
8 future inhabitants of the state", is the appropriate agency to test the
9 efficacy of implementing fallowing-leasing as an alternative to permanent
10 agricultural dry-up; and
11 (II) It is appropriate to authorize the board, after the state engineer
12 determines the issue of injury, to approve up to ten pilot projects to test
13 fallowing-leasing, with each project lasting up to ten years and no more
14 than three pilot projects to be located in any one of the major river basins,
15 namely: The South Platte river basin; the Arkansas river basin; the Rio
16 Grande river basin; and the Colorado river basin, except as further limited
17 by board.

18 **SECTION 2.** In Colorado Revised Statutes, 37-60-115, **add** (8)
19 as follows:

20 **37-60-115. Water studies - rules - repeal. (8) Fallowing and**
21 **leasing pilot projects.** (a) AFTER A PERIOD OF NOTICE AND COMMENT,
22 THE BOARD MAY, IN CONSULTATION WITH THE STATE ENGINEER AND UPON
23 CONSIDERATION OF ANY COMMENTS SUBMITTED, SELECT THE SPONSORS
24 OF UP TO TEN PILOT PROJECTS PURSUANT TO THE APPROVAL PROCESS SET
25 FORTH IN PARAGRAPH (f) OF THIS SUBSECTION (8). THE BOARD SHALL NOT
26 ITSELF SPONSOR A PILOT PROJECT, BUT THE BOARD MAY PROVIDE
27 FINANCIAL, TECHNICAL, OR OTHER ASSISTANCE TO A PILOT PROJECT

1 PURSUANT TO THE BOARD'S OTHER ACTIVITIES AND PROGRAMS. NO MORE
2 THAN THREE PILOT PROJECTS MAY BE LOCATED IN ANY ONE OF THE MAJOR
3 RIVER BASINS, NAMELY: THE SOUTH PLATTE RIVER BASIN; THE ARKANSAS
4 RIVER BASIN; THE RIO GRANDE RIVER BASIN; AND THE COLORADO RIVER
5 BASIN. EACH PROJECT MAY LAST UP TO TEN YEARS IN DURATION AND
6 MUST DEMONSTRATE THE PRACTICE OF:

- 7 (I) FOLLOWING AGRICULTURAL IRRIGATION LAND; AND
- 8 (II) LEASING THE ASSOCIATED WATER RIGHTS FOR TEMPORARY
9 MUNICIPAL USE.

10 (b) THE PURPOSE OF THE PILOT PROGRAM IS TO:

- 11 (I) IN FOLLOWING IRRIGATED AGRICULTURAL LAND FOR LEASING
12 WATER FOR TEMPORARY MUNICIPAL USE, DEMONSTRATE COOPERATION:

- 13 (A) AMONG SHAREHOLDERS LOCATED ON THE SAME DITCH;
- 14 (B) BETWEEN SHAREHOLDERS ON THE SAME DITCH AND THE DITCH
15 COMPANY;
- 16 (C) AMONG DIFFERENT DITCH COMPANIES; AND
- 17 (D) AMONG SHAREHOLDERS, DITCH COMPANIES, AND
18 MUNICIPALITIES;

- 19 (II) EVALUATE THE FEASIBILITY OF DELIVERING LEASED WATER TO
20 THE TEMPORARY MUNICIPAL USERS;

- 21 (III) PROVIDE SUFFICIENT DATA FROM WHICH THE BOARD, IN
22 CONSULTATION WITH THE STATE ENGINEER, CAN EVALUATE THE EFFICACY
23 OF USING A STREAMLINED APPROACH, SUCH AS AN ACCOUNTING AND
24 ADMINISTRATIVE TOOL, FOR DETERMINING:

- 25 (A) HISTORICAL CONSUMPTIVE USE;
- 26 (B) RETURN FLOWS;
- 27 (C) THE POTENTIAL FOR MATERIAL INJURY TO OTHER WATER

1 RIGHTS; AND
2 (D) CONDITIONS TO PREVENT MATERIAL INJURY; AND
3 (IV) DEMONSTRATE HOW TO OPERATE, ADMINISTER, AND
4 ACCOUNT FOR THE PRACTICE OF FALLOWING IRRIGATED AGRICULTURAL
5 LAND FOR LEASING WATER FOR TEMPORARY MUNICIPAL USE WITHOUT
6 CAUSING MATERIAL INJURY TO OTHER VESTED WATER RIGHTS, DECREED
7 CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER.
8 (c) THE BOARD SHALL NOT SELECT A PILOT PROJECT THAT
9 INVOLVES:
10 (I) THE FALLOWING OF THE SAME LAND FOR MORE THAN THREE
11 YEARS IN A TEN-YEAR PERIOD;
12 (II) THE FALLOWING OF MORE THAN THIRTY PERCENT OF A SINGLE
13 IRRIGATED FARM FOR MORE THAN TEN CONSECUTIVE YEARS;
14 (III) THE TRANSFER OF WATER ACROSS THE CONTINENTAL DIVIDE;
15 OR
16 (IV) THE TRANSFER OF WATER OUT OF THE RIO GRANDE BASIN.
17 (d) AFTER PROVIDING A REASONABLE OPPORTUNITY FOR PUBLIC
18 COMMENT AND CONSIDERATION OF ANY COMMENTS RECEIVED, THE
19 BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL ESTABLISH
20 CRITERIA AND GUIDELINES INCLUDING AT LEAST THE FOLLOWING:
21 (I) AN APPLICATION FEE AND, FOR SELECTED PILOT PROJECTS, AN
22 ANNUAL REVIEW FEE;
23 (II) THE INFORMATION TO BE INCLUDED IN THE APPLICATION,
24 INCLUDING A DESCRIPTION OF THE PROPOSED PILOT PROJECT;
25 (III) THE MAXIMUM QUANTITY OF TRANSFERABLE CONSUMPTIVE
26 WATER USE PER YEAR FOR ANY SINGLE PILOT PROJECT;
27 (IV) NOTWITHSTANDING PARAGRAPH (a) OF THIS SUBSECTION (8),

1 ANY GEOGRAPHIC AREAS THAT ARE NOT ELIGIBLE FOR PILOT PROJECTS;
2 (V) A TIME PERIOD OF AT LEAST SEVENTY-FIVE DAYS WITHIN
3 WHICH THE BOARD SHALL RECEIVE COMMENTS ON THE APPLICATION AFTER
4 PROVIDING NOTICE PURSUANT TO THE PROCESS SET FORTH IN PARAGRAPHS
5 (e) AND (f) OF THIS SUBSECTION (8). THE COMMENTS MAY INCLUDE:
6 (A) ANY CLAIM OF INJURY;
7 (B) ANY TERMS AND CONDITIONS THAT THE PERSON FILING A
8 COMMENT BELIEVES SHOULD BE IMPOSED ON THE PILOT PROJECT IN ORDER
9 TO PREVENT INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL
10 WATER RIGHTS, OR CONTRACT RIGHTS TO WATER; AND
11 (C) OTHER INFORMATION THAT THE PERSON FILING THE COMMENT
12 BELIEVES THE BOARD SHOULD CONSIDER IN REVIEWING THE APPLICATION;
13 (VI) CRITERIA FOR A CONFERENCE BETWEEN A PILOT PROJECT
14 APPLICANT, THE STATE ENGINEER, AND OWNERS OF WATER RIGHTS OR A
15 CONTRACT RIGHTS TO WATER THAT FILE COMMENTS ON THE APPLICATION,
16 INCLUDING THE FOLLOWING REQUIREMENTS:
17 (A) THE PARTICIPANTS MUST MEET WITHIN THIRTY DAYS AFTER
18 FINAL COMMENTS ON THE APPLICATION HAVE BEEN SUBMITTED;
19 (B) AT THE CONFERENCE, THE PARTICIPANTS MUST DISCUSS HOW
20 THE PILOT PROJECT COULD BE STRUCTURED TO PREVENT MATERIAL INJURY
21 TO OTHER WATER RIGHTS AND CONTRACT RIGHTS TO WATER; AND
22 (C) WITHIN FIFTEEN DAYS AFTER THE CONFERENCE, THE PILOT
23 PROJECT APPLICANT AND THE OWNERS OF WATER RIGHTS OR CONTRACT
24 RIGHTS TO WATER MUST FILE A JOINT REPORT WITH THE BOARD AND WITH
25 THE STATE ENGINEER OUTLINING ANY AGREED-UPON TERMS AND
26 CONDITIONS FOR THE PROPOSED PILOT PROJECT AND EXPLAINING THE
27 REASONS FOR FAILING TO AGREE ON ANY TERMS AND CONDITIONS FOR THE

1 PROPOSED PILOT PROJECT IF THE APPLICANT AND THE OWNERS FAIL TO
2 REACH A FULL AGREEMENT AT THE CONFERENCE;

3 (VII) GUIDELINES FOR THE OPERATION AND ADMINISTRATION OF
4 THE PILOT PROJECTS TO ASSURE THAT A PILOT PROJECT:

5 (A) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL
6 CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT
7 CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER
8 RIGHTS, OR CONTRACT RIGHTS TO WATER; AND

9 (B) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE
10 COMPACT;

11 (VIII) CRITERIA FOR SELECTING PILOT PROJECTS THAT RANGE IN
12 SIZE AND COMPLEXITY;

13 (IX) CRITERIA FOR SELECTING PILOT PROJECTS OVER A FIVE-YEAR
14 PERIOD ENDING ON DECEMBER 31, 2018, TO PROVIDE A WINDOW FOR
15 POTENTIAL PILOT PROJECT SPONSORS TO APPLY;

16 (X) A REQUIREMENT THAT A PROPOSED PILOT PROJECT:

17 (A) MEET APPLICABLE LOCAL GOVERNMENT LAND USE
18 REQUIREMENTS;

19 (B) PREVENT EROSION AND BLOWING SOILS; AND

20 (C) COMPLY WITH LOCAL COUNTY NOXIOUS WEED REGULATIONS;

21 (XI) A REQUIREMENT THAT, DURING THE TERM OF THE PILOT
22 PROJECT, LAND AND WATER INCLUDED IN A PILOT PROJECT IS NOT ALSO
23 INCLUDED IN A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO SECTION
24 37-92-308 (5) OR (7), AN INTERRUPTIBLE WATER SUPPLY AGREEMENT
25 PURSUANT TO SECTION 37-92-309, OR ANOTHER PILOT PROJECT;

26 (XII) A REQUIREMENT FOR PERIODIC REPORTS TO THE BOARD ON
27 THE OPERATION OF THE PILOT PROJECT; AND

1 (XIII) A REQUIREMENT THAT PRIORITY IS GIVEN TO PILOT
2 PROJECTS THAT CAN BE IMPLEMENTED USING EXISTING INFRASTRUCTURE.

3 (e) (I) FOR APPROVAL OF A PILOT PROJECT, THE APPLICANT MUST
4 PROVIDE WRITTEN NOTICE OF THE APPLICATION, INCLUDING, AT A
5 MINIMUM:

6 (A) A DESCRIPTION OF THE PROPOSED PILOT PROJECT;

7 (B) AN ANALYSIS OF THE HISTORICAL USE, THE HISTORICAL
8 CONSUMPTIVE USE, AND THE HISTORICAL RETURN FLOWS OF THE WATER
9 RIGHTS OR CONTRACT RIGHTS TO WATER PROPOSED TO BE USED FOR
10 TEMPORARY MUNICIPAL USE; AND

11 (C) A DESCRIPTION OF THE SOURCE OF WATER TO BE USED TO
12 REPLACE HISTORICAL RETURN FLOWS DURING THE PILOT PROJECT AND
13 AFTER COMPLETION OF THE PILOT PROJECT; AND

14 (II) THE APPLICANT MUST PROVIDE THE WRITTEN NOTICE BY
15 FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES THAT HAVE
16 SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST,
17 AS DESCRIBED IN SECTION 37-92-308 (6) FOR THE DIVISION OR DIVISIONS
18 IN WHICH THE WATER RIGHT IS LOCATED AND IN WHICH IT WILL BE USED.
19 THE APPLICANT MUST FILE PROOF OF THE WRITTEN NOTICE WITH THE
20 BOARD.

21 (f) AFTER CONSIDERATION OF THE COMMENTS AND ANY
22 CONFERENCE REPORTS SUBMITTED PURSUANT TO SUBPARAGRAPH (IV) OF
23 PARAGRAPH (d) OF THIS SUBSECTION (8), THE BOARD MAY APPROVE THE
24 PILOT PROJECT APPLICATION IF THE STATE ENGINEER HAS MADE A WRITTEN
25 DETERMINATION THAT THE OPERATION AND ADMINISTRATION OF THE
26 PILOT PROJECT:

27 (I) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL

1 CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT
2 CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER
3 RIGHTS, OR CONTRACT RIGHTS TO WATER;

4 (II) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE
5 COMPACT; AND

6 (III) THE BOARD ADOPTS ALL TERMS AND CONDITONS
7 RECOMMENDED BY THE STATE ENGINEER.

8 (g) WHEN THE BOARD APPROVES OR DENIES A PILOT PROJECT
9 APPLICATION, IT SHALL SERVE A COPY OF THE DECISION, ALONG WITH A
10 COPY OF THE STATE ENGINEER'S WRITTEN DETERMINATION AND ANY
11 SETTLEMENT CONFERENCE REPORTS SUBMITTED PURSUANT TO
12 SUBPARAGRAPH (IV) OF PARAGRAPH (d) OF THIS SUBSECTION (8), UPON
13 ALL PARTIES TO THE APPLICATION BY FIRST-CLASS MAIL OR, IF ELECTED BY
14 THE PARTIES, BY ELECTRONIC MAIL. THE BOARD SHALL MAIL A COPY OF
15 THE DECISION, THE STATE ENGINEER'S WRITTEN DETERMINATION, AND ANY
16 SETTLEMENT CONFERENCE REPORTS TO THE APPROPRIATE WATER CLERK.

17 (h) (I) NEITHER THE BOARD'S APPROVAL NOR THE DENIAL OF A
18 PILOT PROJECT CREATES ANY PRESUMPTIONS, SHIFTS THE BURDEN OF
19 PROOF, OR SERVES AS A DEFENSE IN ANY LEGAL ACTION THAT MAY ARISE
20 CONCERNING THE PILOT PROJECT. THE BOARD'S APPROVAL OR DENIAL OF
21 A PILOT PROJECT APPLICATION AND THE STATE ENGINEER'S WRITTEN
22 DETERMINATION ON THE APPLICATION ARE FINAL AGENCY ACTIONS THAT
23 MAY BE APPEALED. AN APPEAL PURSUANT TO THIS SUBSECTION (8) MUST
24 BE FILED WITH THE APPROPRIATE WATER JUDGE AND BE MADE WITHIN
25 THIRTY-FIVE DAYS AFTER THE BOARD'S DECISION HAS BEEN MAILED TO
26 THE APPROPRIATE WATER CLERK.

27 (II) THE WATER JUDGE SHALL EXPEDITE THE APPEAL, WHICH SHALL

1 BE DE NOVO AND USE THE PROCEDURES AND STANDARDS SET FORTH IN
2 SECTIONS 37-92-304 AND 37-92-305 FOR DETERMINATION OF MATTERS
3 REREFERRED TO THE WATER JUDGE BY THE REFEREE; EXCEPT THAT THE
4 WATER JUDGE SHALL NOT DEEM A PARTY'S FAILURE EITHER TO APPEAL ALL
5 OR ANY PART OF THE BOARD'S DECISION OR THE STATE ENGINEER'S
6 WRITTEN DETERMINATION OR TO STATE ANY GROUNDS FOR THE APPEAL TO
7 PRECLUDE THE PARTY FROM RAISING A CLAIM OF INJURY IN A FUTURE
8 PROCEEDING BEFORE THE WATER JUDGE. THE PILOT PROJECT APPLICANT
9 IS DEEMED TO BE THE APPLICANT FOR PURPOSES OF THE PROCEDURES AND
10 STANDARDS THAT THE WATER JUDGE APPLIES TO THE APPEAL.

11 (i) THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER,
12 SHALL ANNUALLY REPORT TO THE WATER RESOURCES REVIEW COMMITTEE,
13 CREATED IN SECTION 37-98-102, OR ITS SUCCESSOR COMMITTEE, ON THE
14 REPORTED RESULTS OF THE PILOT PROJECTS. THE BOARD, IN
15 CONSULTATION WITH THE STATE ENGINEER, SHALL PROVIDE A FINAL
16 REPORT TO THE WATER RESOURCES REVIEW COMMITTEE, OR ITS
17 SUCCESSOR COMMITTEE, BY JULY 1, 2029, OR THE YEAR IN WHICH THE
18 FINAL PILOT PROJECT IS COMPLETED, IF BEFORE 2029.

19 (j) THIS SUBSECTION (8) IS REPEALED, EFFECTIVE JULY 1, 2030.

20 **SECTION 3. Safety clause.** The general assembly hereby finds,
21 determines, and declares that this act is necessary for the immediate
22 preservation of the public peace, health, and safety.