

HOUSE COMMITTEE OF REFERENCE REPORT

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Chairman of Committee

April 8, 2013  
Date

Committee on Agriculture, Livestock, & Natural Resources.

After consideration on the merits, the Committee recommends the following:

HB13-1248 be amended as follows, and as so amended, be referred to the Committee of the Whole with favorable recommendation:

1 Amend printed bill, strike everything below the enacting clause and  
2 substitute:

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

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

11 (b) Recognizes that:

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

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

22 (III) Both the interbasin compact committee and the basin  
23 roundtables, created in section 37-75-104, Colorado Revised Statues,

1 have expressed a desire to minimize permanent agricultural dry-up;  
2 (IV) Following-leasing poses hydrological issues in addition to  
3 those posed by traditional changes of water rights, and an evaluation of  
4 the hydrological issues posed may require further analysis to address  
5 questions of injury to other water rights; and

6 (V) The state needs to evaluate whether fallowing-leasing is a  
7 practical alternative to permanent agricultural dry-up; and

8 (c) Determines that:

9 (I) The board, which was created in section 37-60-102, Colorado  
10 Revised Statutes, "[f]or the purpose of aiding in the protection and  
11 development of the waters of the state, for the benefit of the present and  
12 future inhabitants of the state", is the appropriate agency to test the  
13 efficacy of implementing fallowing-leasing as an alternative to permanent  
14 agricultural dry-up; and

15 (II) It is appropriate to authorize the board, after the state engineer  
16 determines the issue of injury, to approve up to ten pilot projects to test  
17 fallowing-leasing, with each project lasting up to ten years and no more  
18 than three pilot projects to be located in any one of the major river basins,  
19 namely: The South Platte river basin; the Arkansas river basin; the Rio  
20 Grande river basin; and the Colorado river basin, except as further limited  
21 by board.

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

24 **37-60-115. Water studies - rules - repeal. (8) Fallowing and**  
25 **leasing pilot projects.** (a) AFTER A PERIOD OF NOTICE AND COMMENT,  
26 THE BOARD MAY, IN CONSULTATION WITH THE STATE ENGINEER AND UPON  
27 CONSIDERATION OF ANY COMMENTS SUBMITTED, SELECT THE SPONSORS  
28 OF UP TO TEN PILOT PROJECTS PURSUANT TO THE APPROVAL PROCESS SET  
29 FORTH IN PARAGRAPH (f) OF THIS SUBSECTION (8). THE BOARD SHALL NOT  
30 ITSELF SPONSOR A PILOT PROJECT, BUT THE BOARD MAY PROVIDE  
31 FINANCIAL, TECHNICAL, OR OTHER ASSISTANCE TO A PILOT PROJECT  
32 PURSUANT TO THE BOARD'S OTHER ACTIVITIES AND PROGRAMS. NO MORE  
33 THAN THREE PILOT PROJECTS MAY BE LOCATED IN ANY ONE OF THE MAJOR  
34 RIVER BASINS, NAMELY: THE SOUTH PLATTE RIVER BASIN; THE ARKANSAS  
35 RIVER BASIN; THE RIO GRANDE RIVER BASIN; AND THE COLORADO RIVER  
36 BASIN. EACH PROJECT MAY LAST UP TO TEN YEARS IN DURATION AND  
37 MUST DEMONSTRATE THE PRACTICE OF:

38 (I) FALLOWING AGRICULTURAL IRRIGATION LAND; AND

39 (II) LEASING THE ASSOCIATED WATER RIGHTS FOR TEMPORARY  
40 MUNICIPAL USE.

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

1 (I) IN FALLOWING IRRIGATED AGRICULTURAL LAND FOR LEASING  
2 WATER FOR TEMPORARY MUNICIPAL USE, DEMONSTRATE COOPERATION:  
3 (A) AMONG SHAREHOLDERS LOCATED ON THE SAME DITCH;  
4 (B) BETWEEN SHAREHOLDERS ON THE SAME DITCH AND THE DITCH  
5 COMPANY;  
6 (C) AMONG DIFFERENT DITCH COMPANIES; AND  
7 (D) AMONG SHAREHOLDERS, DITCH COMPANIES, AND  
8 MUNICIPALITIES;  
9 (II) EVALUATE THE FEASIBILITY OF DELIVERING LEASED WATER TO  
10 THE TEMPORARY MUNICIPAL USERS;  
11 (III) PROVIDE SUFFICIENT DATA FROM WHICH THE BOARD, IN  
12 CONSULTATION WITH THE STATE ENGINEER, CAN EVALUATE THE EFFICACY  
13 OF USING A STREAMLINED APPROACH, SUCH AS AN ACCOUNTING AND  
14 ADMINISTRATIVE TOOL, FOR DETERMINING:  
15 (A) HISTORICAL CONSUMPTIVE USE;  
16 (B) RETURN FLOWS;  
17 (C) THE POTENTIAL FOR MATERIAL INJURY TO OTHER WATER  
18 RIGHTS; AND  
19 (D) CONDITIONS TO PREVENT MATERIAL INJURY; AND  
20 (IV) DEMONSTRATE HOW TO OPERATE, ADMINISTER, AND  
21 ACCOUNT FOR THE PRACTICE OF FALLOWING IRRIGATED AGRICULTURAL  
22 LAND FOR LEASING WATER FOR TEMPORARY MUNICIPAL USE WITHOUT  
23 CAUSING MATERIAL INJURY TO OTHER VESTED WATER RIGHTS, DECREED  
24 CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER.  
25 (c) THE BOARD SHALL NOT SELECT A PILOT PROJECT THAT  
26 INVOLVES:  
27 (I) THE FALLOWING OF THE SAME LAND FOR MORE THAN THREE  
28 YEARS IN A TEN-YEAR PERIOD;  
29 (II) THE FALLOWING OF MORE THAN THIRTY PERCENT OF A SINGLE  
30 IRRIGATED FARM FOR MORE THAN TEN CONSECUTIVE YEARS;  
31 (III) THE TRANSFER OF WATER ACROSS THE CONTINENTAL DIVIDE;  
32 OR  
33 (IV) THE TRANSFER OF WATER OUT OF THE RIO GRANDE BASIN.  
34 (d) AFTER PROVIDING A REASONABLE OPPORTUNITY FOR PUBLIC  
35 COMMENT AND CONSIDERATION OF ANY COMMENTS RECEIVED, THE  
36 BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL ESTABLISH  
37 CRITERIA AND GUIDELINES INCLUDING AT LEAST THE FOLLOWING:  
38 (I) AN APPLICATION FEE AND, FOR SELECTED PILOT PROJECTS, AN  
39 ANNUAL REVIEW FEE;  
40 (II) THE INFORMATION TO BE INCLUDED IN THE APPLICATION,  
41 INCLUDING A DESCRIPTION OF THE PROPOSED PILOT PROJECT;

1 (III) THE MAXIMUM QUANTITY OF TRANSFERABLE CONSUMPTIVE  
2 WATER USE PER YEAR FOR ANY SINGLE PILOT PROJECT;  
3 (IV) NOTWITHSTANDING PARAGRAPH (a) OF THIS SUBSECTION (8),  
4 ANY GEOGRAPHIC AREAS THAT ARE NOT ELIGIBLE FOR PILOT PROJECTS;  
5 (V) A TIME PERIOD OF AT LEAST SEVENTY-FIVE DAYS WITHIN  
6 WHICH THE BOARD SHALL RECEIVE COMMENTS ON THE APPLICATION AFTER  
7 PROVIDING NOTICE PURSUANT TO THE PROCESS SET FORTH IN PARAGRAPHS  
8 (e) AND (f) OF THIS SUBSECTION (8). THE COMMENTS MAY INCLUDE:  
9 (A) ANY CLAIM OF INJURY;  
10 (B) ANY TERMS AND CONDITIONS THAT THE PERSON FILING A  
11 COMMENT BELIEVES SHOULD BE IMPOSED ON THE PILOT PROJECT IN ORDER  
12 TO PREVENT INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL  
13 WATER RIGHTS, OR CONTRACT RIGHTS TO WATER; AND  
14 (C) OTHER INFORMATION THAT THE PERSON FILING THE COMMENT  
15 BELIEVES THE BOARD SHOULD CONSIDER IN REVIEWING THE APPLICATION;  
16 (VI) CRITERIA FOR A CONFERENCE BETWEEN A PILOT PROJECT  
17 APPLICANT, THE STATE ENGINEER, AND OWNERS OF WATER RIGHTS OR A  
18 CONTRACT RIGHTS TO WATER THAT FILE COMMENTS ON THE APPLICATION,  
19 INCLUDING THE FOLLOWING REQUIREMENTS:  
20 (A) THE PARTICIPANTS MUST MEET WITHIN THIRTY DAYS AFTER  
21 FINAL COMMENTS ON THE APPLICATION HAVE BEEN SUBMITTED;  
22 (B) AT THE CONFERENCE, THE PARTICIPANTS MUST DISCUSS HOW  
23 THE PILOT PROJECT COULD BE STRUCTURED TO PREVENT MATERIAL INJURY  
24 TO OTHER WATER RIGHTS AND CONTRACT RIGHTS TO WATER; AND  
25 (C) WITHIN FIFTEEN DAYS AFTER THE CONFERENCE, THE PILOT  
26 PROJECT APPLICANT AND THE OWNERS OF WATER RIGHTS OR CONTRACT  
27 RIGHTS TO WATER MUST FILE A JOINT REPORT WITH THE BOARD AND WITH  
28 THE STATE ENGINEER OUTLINING ANY AGREED-UPON TERMS AND  
29 CONDITIONS FOR THE PROPOSED PILOT PROJECT AND EXPLAINING THE  
30 REASONS FOR FAILING TO AGREE ON ANY TERMS AND CONDITIONS FOR THE  
31 PROPOSED PILOT PROJECT IF THE APPLICANT AND THE OWNERS FAIL TO  
32 REACH A FULL AGREEMENT AT THE CONFERENCE;  
33 (VII) GUIDELINES FOR THE OPERATION AND ADMINISTRATION OF  
34 THE PILOT PROJECTS TO ASSURE THAT A PILOT PROJECT:  
35 (A) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL  
36 CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT  
37 CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER  
38 RIGHTS, OR CONTRACT RIGHTS TO WATER; AND  
39 (B) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE  
40 COMPACT;  
41 (VIII) CRITERIA FOR SELECTING PILOT PROJECTS THAT RANGE IN

1 SIZE AND COMPLEXITY;

2 (IX) CRITERIA FOR SELECTING PILOT PROJECTS OVER A FIVE-YEAR

3 PERIOD ENDING ON DECEMBER 31, 2018, TO PROVIDE A WINDOW FOR

4 POTENTIAL PILOT PROJECT SPONSORS TO APPLY;

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

6 (A) MEET APPLICABLE LOCAL GOVERNMENT LAND USE

7 REQUIREMENTS;

8 (B) PREVENT EROSION AND BLOWING SOILS; AND

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

10 (XI) A REQUIREMENT THAT, DURING THE TERM OF THE PILOT

11 PROJECT, LAND AND WATER INCLUDED IN A PILOT PROJECT IS NOT ALSO

12 INCLUDED IN A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO SECTION

13 37-92-308 (5) OR (7), AN INTERRUPTIBLE WATER SUPPLY AGREEMENT

14 PURSUANT TO SECTION 37-92-309, OR ANOTHER PILOT PROJECT;

15 (XII) A REQUIREMENT FOR PERIODIC REPORTS TO THE BOARD ON

16 THE OPERATION OF THE PILOT PROJECT; AND

17 (XIII) A REQUIREMENT THAT PRIORITY IS GIVEN TO PILOT

18 PROJECTS THAT CAN BE IMPLEMENTED USING EXISTING INFRASTRUCTURE.

19 (e) (I) FOR APPROVAL OF A PILOT PROJECT, THE APPLICANT MUST

20 PROVIDE WRITTEN NOTICE OF THE APPLICATION, INCLUDING, AT A

21 MINIMUM:

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

23 (B) AN ANALYSIS OF THE HISTORICAL USE, THE HISTORICAL

24 CONSUMPTIVE USE, AND THE HISTORICAL RETURN FLOWS OF THE WATER

25 RIGHTS OR CONTRACT RIGHTS TO WATER PROPOSED TO BE USED FOR

26 TEMPORARY MUNICIPAL USE; AND

27 (C) A DESCRIPTION OF THE SOURCE OF WATER TO BE USED TO

28 REPLACE HISTORICAL RETURN FLOWS DURING THE PILOT PROJECT AND

29 AFTER COMPLETION OF THE PILOT PROJECT; AND

30 (II) THE APPLICANT MUST PROVIDE THE WRITTEN NOTICE BY

31 FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES THAT HAVE

32 SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST,

33 AS DESCRIBED IN SECTION 37-92-308 (6) FOR THE DIVISION OR DIVISIONS

34 IN WHICH THE WATER RIGHT IS LOCATED AND IN WHICH IT WILL BE USED.

35 THE APPLICANT MUST FILE PROOF OF THE WRITTEN NOTICE WITH THE

36 BOARD.

37 (f) AFTER CONSIDERATION OF THE COMMENTS AND ANY

38 CONFERENCE REPORTS SUBMITTED PURSUANT TO SUBPARAGRAPH (IV) OF

39 PARAGRAPH (d) OF THIS SUBSECTION (8), THE BOARD MAY APPROVE THE

40 PILOT PROJECT APPLICATION IF THE STATE ENGINEER HAS MADE A WRITTEN

41 DETERMINATION THAT THE OPERATION AND ADMINISTRATION OF THE

1 PILOT PROJECT:

2 (I) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL  
3 CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT  
4 CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER  
5 RIGHTS, OR CONTRACT RIGHTS TO WATER;

6 (II) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE  
7 COMPACT; AND

8 (III) THE BOARD ADOPTS ALL TERMS AND CONDITONS  
9 RECOMMENDED BY THE STATE ENGINEER.

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

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

29 (II) THE WATER JUDGE SHALL EXPEDITE THE APPEAL, WHICH SHALL  
30 BE DE NOVO AND USE THE PROCEDURES AND STANDARDS SET FORTH IN  
31 SECTIONS 37-92-304 AND 37-92-305 FOR DETERMINATION OF MATTERS  
32 REREFERRED TO THE WATER JUDGE BY THE REFEREE; EXCEPT THAT THE  
33 WATER JUDGE SHALL NOT DEEM A PARTY'S FAILURE EITHER TO APPEAL ALL  
34 OR ANY PART OF THE BOARD'S DECISION OR THE STATE ENGINEER'S  
35 WRITTEN DETERMINATION OR TO STATE ANY GROUNDS FOR THE APPEAL TO  
36 PRECLUDE THE PARTY FROM RAISING A CLAIM OF INJURY IN A FUTURE  
37 PROCEEDING BEFORE THE WATER JUDGE. THE PILOT PROJECT APPLICANT  
38 IS DEEMED TO BE THE APPLICANT FOR PURPOSES OF THE PROCEDURES AND  
39 STANDARDS THAT THE WATER JUDGE APPLIES TO THE APPEAL.

40 (i) THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER,  
41 SHALL ANNUALLY REPORT TO THE WATER RESOURCES REVIEW COMMITTEE,

1    CREATED IN SECTION 37-98-102, OR ITS SUCCESSOR COMMITTEE, ON THE  
2    REPORTED RESULTS OF THE PILOT PROJECTS. THE BOARD, IN  
3    CONSULTATION WITH THE STATE ENGINEER, SHALL PROVIDE A FINAL  
4    REPORT TO THE WATER RESOURCES REVIEW COMMITTEE, OR ITS  
5    SUCCESSOR COMMITTEE, BY JULY 1, 2029, OR THE YEAR IN WHICH THE  
6    FINAL PILOT PROJECT IS COMPLETED, IF BEFORE 2029.  
7       (j) THIS SUBSECTION (8) IS REPEALED, EFFECTIVE JULY 1, 2030.  
8       **SECTION 3. Safety clause.** The general assembly hereby finds,  
9    determines, and declares that this act is necessary for the immediate  
10   preservation of the public peace, health, and safety."

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