

Second Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO

ENGROSSED

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

LLS NO. 14-0248.01 Jennifer Berman

HOUSE BILL 14-1026

HOUSE SPONSORSHIP

Fischer,

SENATE SPONSORSHIP

Schwartz,

House Committees

Agriculture, Livestock, & Natural Resources

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING THE AUTHORIZATION OF 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>.)

Water Resources Review Committee. Under the anti-speculation doctrine, current 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

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
Amended 2nd Reading
January 30, 2014

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 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.

Sections 2 and 3 describe the procedures for obtaining a flex use change-in-use decree and 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.** As used in this article, unless the context
5 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) The diversion of water by a county, municipality, city and
15 county, water district, water and sanitation district, water conservation
16 district, or water conservancy district for recreational in-channel diversion
17 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

1 levels for and on natural streams and lakes as are required to preserve the
2 natural environment to a reasonable degree; AND

3 (d) A FLEX USE.

4 (7.3) "FLEX CONSUMPTIVE USE" MEANS THE FULLY CONSUMPTIVE
5 PORTION OF A WATER RIGHT THAT HAS BEEN QUANTIFIED BY EITHER A
6 WATER COURT CHANGE-IN-USE DECREE OR A SUBSTITUTE WATER SUPPLY
7 PLAN APPROVAL, ENTERED OR APPROVED ON OR AFTER JUNE 1, 2014, AND
8 THE RETURN FLOWS ASSOCIATED WITH THE HISTORICAL USE OF THE WATER
9 RIGHT IF APPROPRIATED IN ACCORDANCE WITH THE LAW UNDER A NEW
10 PRIORITY DATE AND CONFIRMED BY THE WATER COURT CHANGE-IN-USE
11 DECREE IN WHICH THE FULLY CONSUMPTIVE USE PORTION OF THE WATER
12 RIGHT IS QUANTIFIED, THAT:

13 (a) IDENTIFIES THE WATER RIGHT AS A FLEX USE WATER RIGHT;

14 (b) QUANTIFIES THE HISTORICAL DIVERSIONS AND HISTORICAL
15 CONSUMPTIVE USE OF THE WATER RIGHT;

16 (c) QUANTIFIES THE RETURN FLOWS ASSOCIATED WITH THE
17 HISTORICAL USE OF THE WATER RIGHT IN TIME, PLACE, AND AMOUNT;

18 (d) PROVIDES TERMS AND CONDITIONS FOR A CHANGE IN TYPE OF
19 USE OF THE WATER RIGHT THAT PREVENT MATERIAL INJURY TO OTHER
20 VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS,
21 INCLUDING THE RETURN FLOW OBLIGATIONS IN TIME, PLACE, AND
22 AMOUNT;

23 (e) IF RETURN FLOWS ASSOCIATED WITH THE HISTORICAL USE OF
24 THE WATER RIGHT ARE APPROPRIATED IN ACCORDANCE WITH THE LAW
25 UNDER A NEW PRIORITY DATE, PROVIDES TERMS AND CONDITIONS
26 GOVERNING THE USE OF THE APPROPRIATED RETURN FLOWS;

27 (f) PERMITS DELIVERY AND USE OF ALL OR A PORTION OF THE

1 CONSUMPTIVE USE ASSOCIATED WITH THE WATER RIGHT AND ANY
2 APPROPRIATED RETURN FLOWS TO A FLEX USE THROUGH THE
3 IMPLEMENTATION OF FALLOWING, REGULATED DEFICIT IRRIGATION,
4 REDUCED CONSUMPTIVE USE CROPPING, OR OTHER ALTERNATIVE TO
5 PERMANENT CESSATION OF AGRICULTURAL IRRIGATION ON THE PROPERTY
6 THAT IS SERVED BY THE WATER RIGHT; AND

7 (g) ESTABLISHES A FIXED POINT OR POINTS OF DELIVERY FOR THE
8 FULLY CONSUMPTIVE PORTION OF THE WATER RIGHT AND ANY
9 APPROPRIATED RETURN FLOWS.

10 (7.5) (a) "FLEX USE" MEANS AN APPLICATION OF FLEX
11 CONSUMPTIVE USE TO ANY BENEFICIAL USE, INCLUDING A COMPACT
12 OBLIGATION, WITHIN THE WATER DIVISION OF HISTORICAL USE.

13 (b) FOLLOWING DELIVERY OF FLEX CONSUMPTIVE USE AT THE
14 POINT OR POINTS OF DELIVERY IDENTIFIED IN THE APPLICABLE
15 CHANGE-IN-USE DECREE OR SUBSTITUTE WATER SUPPLY PLAN APPROVAL,
16 THE WATER USER MAY ACCOMPLISH FLEX USE BY DIRECT DELIVERY;
17 STORAGE; RECHARGE; EXCHANGE; WATER BANKING; WHERE APPROPRIATE,
18 NONCONSUMPTIVE USE; OR ANY OTHER LAWFUL MEANS THAT COMPLY
19 WITH APPLICABLE DECREES, STATUTORY AND OTHER LEGAL
20 REQUIREMENTS, AND ADMINISTRATION BY THE STATE ENGINEER AND
21 DIVISION ENGINEERS.

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

24 **37-92-305. Standards with respect to rulings of the referee and**
25 **decisions of the water judge.** (3.7) **Flex use.** (a) IF A CHANGE-IN-USE
26 APPLICATION SEEKS APPROVAL OF FLEX USE, THE TERMS AND CONDITIONS
27 OF THE DECREE MUST COMPLY WITH SECTION 37-92-103 (7.3) AND (7.5).

1 THE TERMS AND CONDITIONS OF THE DECREE MUST ALSO REQUIRE THAT
2 THE APPLICANT REPLACE HISTORICAL RETURN FLOWS IN TIME, PLACE, AND
3 AMOUNT TO PREVENT MATERIAL INJURY TO THE OWNERS OF VESTED
4 WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS.

5 (b) A DECREED FLEX USE IS SUBJECT TO RECONSIDERATION BY THE
6 WATER JUDGE ON THE QUESTION OF INJURY TO THE VESTED WATER RIGHTS
7 OF OTHERS FOR SUCH PERIOD AFTER THE ENTRY OF SUCH DECREE AS IS
8 NECESSARY OR DESIRABLE TO REMEDY OR PRECLUDE SUCH INJURY. IT IS
9 THE GENERAL ASSEMBLY'S INTENT THAT ANY DECREED FLEX USE BE
10 IMPLEMENTED IN A MANNER DESIGNED TO PROMOTE THE USE OF
11 ALTERNATIVE TRANSFER METHODS THAT ENCOURAGE AND SUPPORT
12 CONTINUATION OF IRRIGATED AGRICULTURE, WHILE APPLYING THE
13 DECREED FLEX USE TO ADDITIONAL USES. AS SUCH, A DECREED FLEX USE
14 MUST BE CONDITIONED UPON THE CONTINUATION OF IRRIGATION OF A
15 PORTION OF THE PROPERTY SERVED BY THE WATER RIGHT DECREED FOR
16 FLEX USE, SUBJECT TO FALLOWING FOR FLEX USE. THE WATER JUDGE MAY
17 ESTABLISH TERMS AND CONDITIONS COMMENSURATE WITH THE INTENT OF
18 THE GENERAL ASSEMBLY EXPRESSED HEREIN. AT A MINIMUM, A
19 CHANGE-IN-USE DECREE APPROVING A FLEX USE MUST PROVIDE THAT THE
20 DISCONTINUANCE OF IRRIGATION OF THE ENTIRE PROPERTY SERVED BY THE
21 WATER RIGHT DECREED FOR FLEX USE FOR ANY SINGLE PERIOD IN EXCESS
22 OF THREE CONSECUTIVE YEARS NULLIFIES THE DECREED FLEX USE
23 WITHOUT ANY FURTHER ACTION OF THE WATER JUDGE. IN SUCH EVENT,
24 THE WATER RIGHT MAY ONLY BE USED FOR THE DECREED IRRIGATION USE
25 UNLESS THE OWNER OF THE WATER RIGHT OBTAINS A SUBSEQUENT WATER
26 COURT CHANGE-IN-USE IDENTIFYING THE SPECIFIED END USES OF THE
27 WATER RIGHT AND ESTABLISHING ANY ADDITIONAL TERMS AND

1 CONDITIONS NECESSARY TO PREVENT INJURY.

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

4 **37-92-308. Substitute water supply plans - special procedures**
5 **for review - water adjudication cash fund - legislative declaration -**
6 **repeal.** (12) **Flex use.** IF THE STATE ENGINEER APPROVES A SUBSTITUTE
7 WATER SUPPLY PLAN APPLICATION IN WHICH THE PLAN SOUGHT IS FOR A
8 FLEX USE, THE TERMS AND CONDITIONS OF THE APPROVAL MUST COMPLY
9 WITH SECTION 37-92-103 (7.3) AND (7.5). THE TERMS AND CONDITIONS OF
10 THE APPROVAL MUST ALSO REQUIRE THAT THE APPLICANT REPLACE
11 HISTORICAL RETURN FLOWS IN TIME, PLACE, AND AMOUNT TO PREVENT
12 MATERIAL INJURY TO THE OWNERS OF VESTED WATER RIGHTS AND
13 DECREEED CONDITIONAL WATER RIGHTS.

14 **SECTION 4. Effective date.** This act takes effect June 1, 2014.

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