

Second Regular Session
Seventieth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 16-0307.01 Jennifer Berman x3286

HOUSE BILL 16-1109

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A BILL FOR AN ACT

101 **CONCERNING LIMITS THAT THE BASIC TENETS OF COLORADO WATER**
102 **LAW PLACE ON THE ABILITY OF CERTAIN FEDERAL AGENCIES TO**
103 **IMPOSE CONDITIONS ON A WATER RIGHT OWNER IN EXCHANGE**
104 **FOR PERMISSION TO USE FEDERAL LAND.**

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>.)

Section 1 of the bill states basic tenets of Colorado water law concerning water as a transferable property right.

Section 2 specifies that the United States forest service (USFS) or

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.

the federal bureau of land management (bureau) shall establish federal water rights in accordance with the federal reserved water rights doctrine or Colorado water law. Section 2 prohibits the state and division engineers from enforcing or administering any USFS or bureau effort that:

- ! Requires a full or partial transfer of ownership in a water right to the USFS or the bureau;
- ! Restricts the use or alienability of the water right; or
- ! Requires a third party that supplies water to a federal special use permit holder to supply the water for a set period of time or in a set amount.

Sections 1 and 2 clarify that the bill does not impact any federal government authority to impose bypass flow requirements in connection with a special use permit or other authorization.

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

2 **SECTION 1.** In Colorado Revised Statutes, 37-92-102, **add** (8)
3 as follows:

4 **37-92-102. Legislative declaration - basic tenets of Colorado**
5 **water law.** (8) (a) THE GENERAL ASSEMBLY RECOGNIZES THAT WATER
6 RIGHTS APPROPRIATED UNDER SECTION 6 OF ARTICLE XVI OF THE
7 COLORADO CONSTITUTION ARE PROPERTY RIGHTS PROTECTED UNDER
8 AMENDMENT V OF THE UNITED STATES CONSTITUTION AND SECTION 15 OF
9 ARTICLE II OF THE COLORADO CONSTITUTION.

10 (b) THE GENERAL ASSEMBLY FURTHER RECOGNIZES THAT:

11 (I) THE PRIMARY VALUE OF A WATER RIGHT STEMS FROM ITS
12 PRIORITY DATE AND THE AMOUNT OF WATER THAT IT ALLOWS THE OWNER
13 OF THE WATER RIGHT TO DIVERT AND PLACE TO BENEFICIAL USE;

14 (II) THE RIGHT TO SELL A WATER RIGHT IS AS ESSENTIAL AS THE
15 RIGHT TO POSSESS AND USE THE WATER RIGHT;

16 (III) A WATER RIGHT IS A PROPERTY RIGHT THAT EXISTS SEPARATE
17 AND APART FROM ANY INTEREST IN LAND; AND

1 (IV) WHEN A WATER RIGHT OWNER HAS BEEN DEPRIVED OF A
2 PORTION OF HIS OR HER WATER RIGHT, THE FACT THAT THE OWNER MAY
3 RETAIN THE ABILITY TO USE A PORTION OF THE WATER RIGHT DOES NOT
4 PREVENT A FINDING THAT THE OWNER HAS LOST ALL ECONOMIC BENEFIT
5 IN THE PORTION THAT CAN NO LONGER BE DIVERTED OR PLACED TO
6 BENEFICIAL USE.

7 (c) THIS SUBSECTION (8) DOES NOT IMPACT ANY LEGAL AUTHORITY
8 OF THE FEDERAL GOVERNMENT TO IMPOSE BYPASS FLOW REQUIREMENTS
9 IN CONNECTION WITH A SPECIAL USE PERMIT OR OTHER AUTHORIZATION.

10 **SECTION 2.** In Colorado Revised Statutes, **add** 37-92-310 as
11 follows:

12 **37-92-310. Colorado water law as applied to the United States.**

13 (1) **Short title.** THE SHORT TITLE OF THIS SECTION IS THE "COLORADO
14 WATER RIGHTS PROTECTION ACT".

15 (2) **Legislative declaration.** (a) THE GENERAL ASSEMBLY
16 RECOGNIZES THAT:

17 (I) THE HISTORY BETWEEN THE FEDERAL GOVERNMENT AND THE
18 STATES IN THE RECLAMATION OF THE ARID LANDS OF THE WESTERN
19 STATES IS BOTH LONG AND INVOLVED. THROUGHOUT THAT HISTORY,
20 CONGRESS HAS MAINTAINED A PURPOSEFUL AND CONTINUED DEFERENCE
21 TO STATE WATER LAW.

22 (II) PURSUANT TO 43 U.S.C. SEC. 666, COMMONLY KNOWN AS THE
23 "McCARRAN AMENDMENT", THE FEDERAL GOVERNMENT WAIVED THE
24 SOVEREIGN IMMUNITY OF THE UNITED STATES FOR LAWSUITS IN STATE
25 COURTS REGARDING THE ADJUDICATION OR ADMINISTRATION OF WATER
26 RIGHTS;

27 (III) WHEN THE FEDERAL GOVERNMENT WITHDRAWS LAND FROM

1 THE PUBLIC DOMAIN AND RESERVES IT FOR A FEDERAL PURPOSE, THE
2 FEDERAL GOVERNMENT, BY IMPLICATION, ALSO RESERVES APPURTENANT,
3 UNAPPROPRIATED WATER, BUT ONLY TO THE EXTENT NEEDED TO
4 ACCOMPLISH THE PRIMARY PURPOSE OF THE RESERVATION;

5 (IV) AS ACKNOWLEDGED BY THE UNITED STATES SUPREME COURT
6 IN *UNITED STATES V. NEW MEXICO*, 438 U.S. 696 (1978), IF THE FEDERAL
7 GOVERNMENT DESIRES AN ADDITIONAL WATER RIGHT FOR A SECONDARY
8 USE OF THE RESERVED LAND, THE FEDERAL GOVERNMENT MUST ACQUIRE
9 THE ADDITIONAL WATER RIGHT IN THE SAME MANNER AS ANY OTHER
10 PUBLIC OR PRIVATE APPROPRIATOR; AND

11 (V) IN COLORADO, WATER RIGHTS ARE ESTABLISHED BY MAKING
12 AN APPROPRIATION AS DEFINED UNDER SECTION 37-92-103 (3) AND ARE
13 CONFIRMED BY STATE WATER COURTS.

14 (b) THEREFORE, PURSUANT TO FEDERAL AND COLORADO LAW, THE
15 GENERAL ASSEMBLY DETERMINES AND DECLARES THAT:

16 (I) THE UNITED STATES FOREST SERVICE AND THE BUREAU OF
17 LAND MANAGEMENT'S ABILITY TO ESTABLISH WATER RIGHTS IN
18 COLORADO IS PURSUANT TO THE FEDERAL RESERVED WATER RIGHTS
19 DOCTRINE OR THE LAWS OF THE STATE OF COLORADO; AND

20 (II) NOTHING IN THIS SUBSECTION (2) PREVENTS THE FEDERAL
21 GOVERNMENT FROM:

22 (A) PARTICIPATING IN WATER COURT PROCEEDINGS IN COLORADO;

23 OR

24 (B) SEEKING TERMS AND CONDITIONS IN WATER COURT TO
25 PROTECT WATER RIGHTS ESTABLISHED UNDER THE FEDERAL RESERVED
26 WATER RIGHTS DOCTRINE OR COLORADO LAW.

27 (3) **Limitation on actions.** THE STATE ENGINEER AND THE

1 DIVISION ENGINEERS SHALL NOT ENFORCE OR ADMINISTER EFFORTS BY THE
2 UNITED STATES FOREST SERVICE OR BUREAU OF LAND MANAGEMENT
3 THAT:

4 (a) REQUIRE FULL OR PARTIAL TRANSFER OF TITLE TO WATER
5 RIGHTS TO THE UNITED STATES FOREST SERVICE OR BUREAU OF LAND
6 MANAGEMENT OR RESTRICT THE USE OR ALIENABILITY OF THE WATER
7 RIGHT PROPERTY INTEREST DESCRIBED IN SECTION 37-92-102 (8) (b) AS A
8 CONDITION TO A RIGHT OF WAY, SPECIAL USE PERMIT, OR OTHER
9 AUTHORIZATIONS TO USE FEDERALLY OWNED LANDS; OR

10 (b) REQUIRE A THIRD PARTY SUPPLYING WATER TO A FEDERAL
11 SPECIAL USE PERMITTEE TO SUPPLY SUCH WATER FOR A SET PERIOD OF
12 TIME OR IN A SET AMOUNT.

13 (4) THIS SECTION DOES NOT IMPACT ANY LEGAL AUTHORITY OF
14 THE FEDERAL GOVERNMENT TO IMPOSE BYPASS FLOW REQUIREMENTS IN
15 CONNECTION WITH A SPECIAL USE PERMIT OR OTHER AUTHORIZATION.

16 **SECTION 3. Act subject to petition - effective date.** This act
17 takes effect at 12:01 a.m. on the day following the expiration of the
18 ninety-day period after final adjournment of the general assembly (August
19 10, 2016, if adjournment sine die is on May 11, 2016); except that, if a
20 referendum petition is filed pursuant to section 1 (3) of article V of the
21 state constitution against this act or an item, section, or part of this act
22 within such period, then the act, item, section, or part will not take effect
23 unless approved by the people at the general election to be held in
24 November 2016 and, in such case, will take effect on the date of the
25 official declaration of the vote thereon by the governor.