

**Second Regular Session
Seventy-second General Assembly
STATE OF COLORADO**

REREVISED

*This Version Includes All Amendments
Adopted in the Second House*

LLS NO. 20-0076.01 Jennifer Berman x3286

HOUSE BILL 20-1157

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A BILL FOR AN ACT

101 **CONCERNING THE COLORADO WATER CONSERVATION BOARD'S**
102 **AUTHORITY TO USE WATER THAT A WATER RIGHT OWNER**
103 **VOLUNTARILY LOANS TO THE BOARD FOR INSTREAM FLOW**
104 **PURPOSES.**

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://leg.colorado.gov>.)

Under current law, the Colorado water conservation board (board), subject to procedural requirements established to prevent injury to water rights and decreed conditional water rights, may use loaned water for

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

SENATE
3rd Reading Unamended
March 4, 2020

SENATE
2nd Reading Unamended
March 3, 2020

HOUSE
3rd Reading Unamended
February 21, 2020

HOUSE
Amended 2nd Reading
February 20, 2020

instream flows if the loaned water is used for preserving the natural environment of a stream reach that is subject to a decreed instream flow water right held by the board. The bill expands the number of years within a 10-year period that a renewable loan may be exercised from 3 years to 5 years, but for no more than 3 consecutive years, and allows a loan to be renewed for up to 2 additional 10-year periods. The bill limits the duration that an expedited loan may be exercised for up to one year, and prohibits an applicant from seeking additional expedited loans regarding a water right following an approved expedited loan of that water right.

The bill also expands the board's ability to use loaned water for instream flows to improve the natural environment to a reasonable degree pursuant to a decreed instream flow water right held by the board.

In considering whether to accept a proposed loan, the board must evaluate the proposed loan based on biological and scientific evidence presented, including a biological analysis performed by the division of parks and wildlife.

The state engineer will review a proposed loan and must consider any comments filed by parties notified of the application in determining whether the loaned water will not cause injury to other vested or conditionally decreed water rights. The filing fee is increased from \$100 to \$300.

The board is required to promulgate rules regarding the necessary steps for reviewing and accepting a loan for instream flow use to improve the natural environment to a reasonable degree.

The state engineer's decision to approve or deny a proposed loan may be appealed to a water judge, who is required to hear and determine the matter on an expedited basis using the procedures and standards established for matters rereferred to the water judge by a water referee.

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

2 **SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend**
3 (1), (2)(a) introductory portion, (2)(a)(IV), (2)(a)(V), (2)(b) introductory
4 portion, (2)(b)(I) introductory portion, (2)(b)(II), (2)(b)(V), (2)(b)(VI),
5 (2)(b)(VII), and (2)(b)(VIII); and **add** (2)(a)(III.5), (2)(a)(III.7),
6 (2)(a)(VI), (2)(b)(II.5), and (3) as follows:

7 **37-83-105. Owner may loan agricultural water right - loans**
8 **to Colorado water conservation board for instream flows - rules.**

9 (1) (a) Subject to the limitations of this subsection (1) and pursuant to the

1 procedures set forth in ~~paragraph (b) of subsection (2)~~ SUBSECTION (2)(b)
2 of this section THAT APPLY TO AN EXPEDITED LOAN DESCRIBED IN
3 SUBSECTION (2)(a)(III.7) OF THIS SECTION, the owner of a water right
4 decreed and used solely for agricultural irrigation purposes may loan all
5 or a portion of the water right to another owner of a decreed water right
6 on the same stream system and that is used solely for agricultural
7 irrigation purposes for no more than one hundred eighty days during any
8 one calendar year if the ~~division~~ STATE engineer approves ~~such~~ THE loan
9 in advance and the loan does not cause injury to other decreed water
10 rights.

11 (b) ~~THE OWNER OF ANY DECREED WATER RIGHT MAY LOAN WATER~~
12 ~~TO THE COLORADO WATER CONSERVATION BOARD FOR USE AS INSTREAM~~
13 ~~FLOWS:~~

14 (I) TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE
15 DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY
16 THE BOARD; OR

17 (II) TO IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE
18 DEGREE FOR A STREAM REACH FOR WHICH THE BOARD HOLDS A DECREED
19 INSTREAM FLOW WATER RIGHT.

20 (2) (a) ~~A water right owner may loan water to the Colorado water~~
21 ~~conservation board for use as~~ WATER MAY BE USED FOR instream flows
22 pursuant to a ~~decreed instream flow water right held by the board~~ LOAN
23 AUTHORIZED UNDER THIS SECTION for a period not to exceed one hundred
24 twenty days IN A SINGLE CALENDAR YEAR, subject to the following:

25 (III.5) WATER RIGHTS LOANED PURSUANT TO THIS SECTION ARE
26 NOT PRECLUDED FROM CONCURRENT OR SUBSEQUENT INCLUSION IN A
27 WATER CONSERVATION, DEMAND MANAGEMENT, COMPACT COMPLIANCE,

1 OR WATER BANKING PROGRAM OR PLAN, AS IS OR MAY BE SUBSEQUENTLY
2 DEFINED OR DESCRIBED IN STATUTE.

3 (III.7) AN EXPEDITED LOAN APPROVED TO PRESERVE THE NATURAL
4 ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO THIS SUBSECTION
5 (2)(a) HAS A TERM OF UP TO ONE YEAR. THE LOAN PERIOD BEGINS WHEN
6 THE STATE ENGINEER APPROVES THE EXPEDITED LOAN. IF AN EXPEDITED
7 LOAN IS APPROVED, THE APPLICANT SHALL NOT REAPPLY FOR AN
8 ADDITIONAL EXPEDITED LOAN OF THE WATER RIGHT.

9 (IV) (A) A RENEWABLE loan approved TO PRESERVE OR IMPROVE
10 THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE pursuant to this
11 ~~paragraph (a) shall~~ SUBSECTION (2)(a) MUST not be exercised for more
12 than ~~three~~ FIVE years in a ten-year period AND FOR NO MORE THAN THREE
13 CONSECUTIVE YEARS, for which only a single approval by the state
14 engineer is required. The ten-year period ~~shall begin~~ BEGINS when the
15 state engineer approves the loan. AN APPLICANT MAY REAPPLY FOR AND
16 the state engineer ~~shall not~~ MAY approve a RENEWABLE loan pursuant to
17 this ~~paragraph (a)~~ SUBSECTION (2)(a) for ~~another~~ UP TO TWO ADDITIONAL
18 ten-year ~~period; except that, if the agreement has not been exercised~~
19 ~~during the term of the agreement, an applicant may reapply one time by~~
20 ~~repeating the application process pursuant to this subsection (2)~~ PERIODS.

21 (B) IF AN APPLICANT HAD PREVIOUSLY BEEN APPROVED FOR AND
22 HAD EXERCISED AN EXPEDITED LOAN PURSUANT TO SUBSECTION
23 (2)(a)(III.7) OF THIS SECTION AND SUBSEQUENTLY APPLIES AND IS
24 APPROVED FOR A RENEWABLE LOAN, THE ONE-YEAR LOAN PERIOD OF THE
25 EXPEDITED LOAN COUNTS AS THE FIRST YEAR OF THE FIVE-YEAR
26 ALLOWANCE FOR THE SUBSEQUENT RENEWABLE LOAN.

27 (C) IN EACH YEAR THAT A RENEWABLE LOAN IS EXERCISED, THE

1 APPLICANT SHALL PROVIDE THE WRITTEN NOTICE DESCRIBED IN
2 SUBSECTION (2)(b)(II) OF THIS SECTION.

3 (V) A party may file comments concerning potential injury to ~~such~~
4 THE party's water rights or decreed conditional water rights due to the
5 operations of the loan of a THE water right to a ~~decreed instream flow~~
6 ~~right~~ with the state engineer by January 1 of the year following each year
7 that the loan is exercised. The procedures of ~~paragraph (b) of this~~
8 ~~subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice,
9 opportunity to comment, the state engineer's decision, and an appeal of
10 ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's
11 comments. IN AN APPEAL TO THE WATER JUDGE IN THE APPLICABLE WATER
12 DIVISION OF THE DETERMINATION MADE BY THE STATE ENGINEER
13 PURSUANT TO THIS SECTION, THE APPLICANT HAS THE BURDEN OF PROOF
14 THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER
15 VESTED OR CONDITIONALLY DECREED WATER RIGHTS. ANY APPEAL OF A
16 DECISION BY THE STATE ENGINEER CONCERNING THE LOAN PURSUANT TO
17 THIS SECTION SHALL BE MADE IN ACCORDANCE WITH THE PROCEDURES SET
18 FORTH IN SUBSECTION (2)(b)(VIII) OF THIS SECTION.

19 (VI) RULES PROMULGATED BY THE COLORADO WATER
20 CONSERVATION BOARD PURSUANT TO SUBSECTION (3) OF THIS SECTION.

21 (b) In determining whether injury will occur, the ~~division~~ STATE
22 engineer shall ensure that the following conditions are met:

23 (I) The ~~proponent~~ APPLICANT has filed a request for approval of
24 the loan with the ~~division~~ STATE engineer, together with a filing fee in the
25 amount of ~~one~~ THREE hundred dollars. ~~Moneys from~~ THE STATE
26 ENGINEER SHALL TRANSMIT the fee ~~shall be transmitted~~ to the state
27 treasurer, ~~and deposited~~ WHO SHALL DEPOSIT THE FEE in the water

1 resources cash fund created in section 37-80-111.7 (1). The request for
2 approval ~~shall~~ MUST include:

3 (II) The ~~proponent~~ APPLICANT has SUBMITTED PROOF TO THE
4 STATE ENGINEER, IN A FORM AND MANNER DETERMINED BY THE STATE
5 ENGINEER, DEMONSTRATING THAT THE APPLICANT provided written notice
6 of the request for approval of the loan by first-class mail or electronic
7 mail to:

8 (A) All parties on the substitute water supply plan notification list
9 established pursuant to section 37-92-308 (6) for the water division in
10 which the proposed loan is located; and ~~proof of such notice is filed with~~
11 ~~the division engineer;~~

12 (B) A REGISTERED AGENT OF A DITCH COMPANY, IRRIGATION
13 DISTRICT, WATER USERS' ASSOCIATION, OR OTHER WATER SUPPLY OR
14 DELIVERY ENTITY WITHIN WHOSE SYSTEM THE WATER RIGHTS FALL.

15 (II.5) THE APPLICANT HAS PROVEN THAT THE LOAN WILL NOT
16 INJURE DECREED WATER RIGHTS, DECREED EXCHANGES OF WATER, OR
17 OTHER WATER USERS' UNDECREED EXISTING EXCHANGES OF WATER TO
18 THE EXTENT THAT THE UNDECREED EXISTING EXCHANGES HAVE BEEN
19 ADMINISTRATIVELY APPROVED BEFORE THE DATE OF THE FILING OF THE
20 REQUEST FOR APPROVAL OF THE LOAN.

21 (V) The ~~division~~ STATE engineer has given the owners of water
22 rights and decreed conditional water rights ~~fifteen days after the date of~~
23 ~~mailing of notice under subparagraph (II) of this paragraph (b)~~ THE
24 OPPORTUNITY to file comments on the proposed loan ~~except that the~~
25 ~~division engineer may act on the application immediately after the~~
26 ~~applicant provides evidence that all persons entitled to notice of the~~
27 ~~application under subparagraph (II) of this paragraph (b) have either~~

1 ~~consented to or commented on the application. Such~~ WITHIN THE
2 RELEVANT TIME FRAME INDICATED IN THIS SUBSECTION (2)(b)(V). THE
3 comments ~~shall~~ MUST include any claim of injury or any terms and
4 conditions that should be imposed upon the proposed loan to prevent
5 injury to a party's water ~~right~~ RIGHTS and any other information the
6 commenting party wishes the ~~division~~ STATE engineer to consider in
7 reviewing the proposed loan. THE STATE ENGINEER SHALL PROVIDE THE
8 PARTIES ENTITLED TO NOTICE UNDER SUBSECTION (2)(b)(II) OF THIS
9 SECTION:

10 (A) FIFTEEN DAYS AFTER THE DATE OF MAILING OF NOTICE FOR
11 EXPEDITED LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(III.7) OF THIS
12 SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN; AND

13 (B) SIXTY DAYS AFTER THE DATE OF MAILING OF NOTICE FOR
14 RENEWABLE LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(IV) OF THIS
15 SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN.

16 (VI) The ~~division~~ STATE engineer, after consideration of any
17 comments received, has determined that the operation and administration
18 of the proposed loan will not cause injury to other decreed water rights,
19 DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN
20 SUBSECTION (2)(b)(II.5) OF THIS SECTION and, for loans made pursuant to
21 ~~paragraph (a) of this subsection (2)~~ SUBSECTION (2)(a) OF THIS SECTION,
22 will not affect Colorado's compact entitlements. The ~~division~~ STATE
23 engineer shall impose such terms and conditions as are necessary to
24 ensure that these standards are met. In making the determinations
25 specified in this ~~subparagraph (VI)~~ SUBSECTION (2)(b)(VI), the ~~division~~
26 STATE engineer ~~shall~~ NEED not be required to hold any formal hearings or
27 conduct any other formal proceedings, but may conduct a hearing or

1 formal proceeding if the ~~division~~ STATE engineer finds it necessary to
2 address the issues.

3 (VII) The ~~division~~ STATE engineer shall approve or deny the
4 proposed loan within ~~twenty~~ TEN days after the ~~date of mailing of notice~~
5 ~~under subparagraph (H) of this paragraph (b), or within five days after the~~
6 ~~applicant provides evidence that all persons entitled to notice of the~~
7 ~~application under subparagraph (H) of this paragraph (b) have either~~
8 ~~consented to or commented on the application, whichever is earlier~~
9 PERIOD FOR COMMENTS ON THE PROPOSED LOAN SPECIFIED IN SUBSECTION
10 (2)(b)(V) OF THIS SECTION HAS EXPIRED.

11 (VIII) When the ~~division~~ STATE engineer approves or denies a
12 proposed loan, the ~~division~~ STATE engineer shall serve a copy of the
13 decision on all parties to the application by first-class mail or, if ~~such~~ THE
14 parties have so elected, by electronic mail. Neither the approval nor the
15 denial by the ~~division~~ STATE engineer ~~shall create~~ CREATES any
16 presumptions ~~shift the burden of proof, or serve~~ OR SERVES as a defense
17 in any legal action that may be initiated concerning the loan. ~~Any~~ A
18 PARTY MAY FILE AN appeal of a decision by the ~~division~~ STATE engineer
19 concerning the loan pursuant to this section ~~shall be made~~ to the water
20 judge in the applicable water division within fifteen days after the date ~~on~~
21 ~~which~~ THAT THE STATE ENGINEER, FOLLOWING THE STATE ENGINEER'S
22 CONSIDERATION OF ANY COMMENTS SUBMITTED PURSUANT TO
23 SUBSECTION (2)(a)(V) OF THIS SECTION, SERVES the decision ~~is served~~ on
24 the parties to the application. THE APPLICANT HAS THE BURDEN OF PROOF
25 TO DEMONSTRATE THAT THE LOANED WATER RIGHT DOES NOT CAUSE
26 INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS,
27 DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN

1 ~~SUBSECTION (2)(b)(II.5) OF THIS SECTION.~~ The water judge shall hear ~~such~~
2 AND DETERMINE THE appeal on an expedited basis USING THE
3 PROCEDURES AND STANDARDS SET FORTH IN SECTION 37-92-304 (3)
4 CONCERNING MATTERS REREFERRED TO THE WATER JUDGE BY THE WATER
5 REFEREE.

6 (3) THE COLORADO WATER CONSERVATION BOARD SHALL
7 PROMULGATE RULES REGARDING THE FOLLOWING NECESSARY STEPS FOR
8 ITS REVIEW AND ACCEPTANCE OF LOANS FOR INSTREAM FLOW USE
9 PURSUANT TO SUBSECTION (1)(b)(II) OF THIS SECTION:

10 (a) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A
11 REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL
12 ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE
13 EXTENT TO WHICH THE PROPOSED LOAN WILL IMPROVE THE NATURAL
14 ENVIRONMENT TO A REASONABLE DEGREE;

15 (b) A REQUIREMENT THAT WHEN CONSIDERING A PROPOSED LOAN,
16 THE BOARD SHALL GIVE PREFERENCE TO LOANS OF STORED WATER, WHEN
17 AVAILABLE, OVER LOANS OF DIRECT FLOW WATER; AND

18 (c) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE
19 MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

20 **SECTION 2. Act subject to petition - effective date -**
21 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
22 the expiration of the ninety-day period after final adjournment of the
23 general assembly (August 5, 2020, if adjournment sine die is on May 6,
24 2020); except that, if a referendum petition is filed pursuant to section 1
25 (3) of article V of the state constitution against this act or an item, section,
26 or part of this act within such period, then the act, item, section, or part
27 will not take effect unless approved by the people at the general election

1 to be held in November 2020 and, in such case, will take effect on the
2 date of the official declaration of the vote thereon by the governor.

3 (2) This act applies to conduct occurring on or after the applicable
4 effective date of this act.