

## CHAPTER 363

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**WATER AND IRRIGATION**


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**HOUSE BILL 03-1334**

BY REPRESENTATIVE(S) Mitchell, Brophy, Fritz, Hodge, Hoppe, McCluskey, Schultheis, Stafford, and Weddig;  
also SENATOR(S) Hillman, Entz, Groff, Grossman, Johnson S., Kester, and Teck.

**AN ACT**

**CONCERNING THE STATE ENGINEER'S AUTHORITY TO APPROVE THE TEMPORARY OPERATION OF INTERRUPTIBLE WATER SUPPLY AGREEMENTS, AND MAKING AN APPROPRIATION IN CONNECTION THEREWITH.**

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

**SECTION 1.** Part 3 of article 92 of title 37, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

**37-92-309. Interruptible water supply agreements - special review procedures - rules - legislative declaration.** (1) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT THERE ARE CERTAIN CIRCUMSTANCES UNDER WHICH ADMINISTRATIVE APPROVAL OF THE USE OF INTERRUPTIBLE WATER SUPPLY AGREEMENTS CAN MAXIMIZE THE BENEFICIAL USE OF COLORADO WATER RESOURCES WITHOUT THE NEED FOR AN ADJUDICATION AND WITHOUT INJURY TO VESTED WATER RIGHTS OR DECREED CONDITIONAL WATER RIGHTS. THIS SECTION IS INTENDED TO ENABLE WATER USERS TO TRANSFER THE HISTORICAL CONSUMPTIVE USE OF AN ABSOLUTE WATER RIGHT FOR APPLICATION TO ANOTHER TYPE OR PLACE OF USE ON A TEMPORARY BASIS WITHOUT PERMANENTLY CHANGING THE WATER RIGHT.

(2) FOR PURPOSES OF THIS SECTION, "INTERRUPTIBLE WATER SUPPLY AGREEMENT" MEANS AN OPTION AGREEMENT BETWEEN TWO OR MORE WATER RIGHT OWNERS WHEREBY:

(a) THE LOANING WATER RIGHT OWNER AGREES THAT, DURING THE TERM OF SUCH AGREEMENT, IT WILL STOP ITS USE OF THE LOANED WATER RIGHT FOR A SPECIFIED LENGTH OF TIME IF THE OPTION IS EXERCISED BY THE BORROWING WATER RIGHT OWNER IN ACCORDANCE WITH THE AGREEMENT; AND

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

(b) THE BORROWING WATER RIGHT OWNER MAY DIVERT THE LOANED WATER RIGHT FOR SUCH OWNER'S PURPOSES, SUBJECT TO THE PRIORITY SYSTEM AND SUBJECT TO TEMPORARY APPROVAL BY THE STATE ENGINEER IN ACCORDANCE WITH THIS SECTION.

(3) THE STATE ENGINEER IS AUTHORIZED TO APPROVE AND ADMINISTER INTERRUPTIBLE WATER SUPPLY AGREEMENTS THAT PERMIT A TEMPORARY CHANGE IN THE POINT OF DIVERSION, LOCATION OF USE, AND TYPE OF USE OF AN ABSOLUTE WATER RIGHT WITHOUT THE NEED FOR AN ADJUDICATION PURSUANT TO THIS ARTICLE, SUBJECT TO THE FOLLOWING:

(a) THE APPLICANT FOR APPROVAL OF AN INTERRUPTIBLE WATER SUPPLY AGREEMENT SHALL PROVIDE WRITTEN NOTICE OF THE APPLICATION BY FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST, AS DESCRIBED IN SECTION 37-92-308 (6), FOR THE DIVISION OR DIVISIONS IN WHICH THE WATER RIGHT IS LOCATED AND IN WHICH IT WILL BE USED, AND PROOF OF SUCH NOTICE SHALL BE FILED WITH THE STATE ENGINEER. THE APPLICATION SHALL BE ACCOMPANIED BY A DETAILED WRITTEN REPORT, PREPARED BY A PROFESSIONAL ENGINEER OR OTHER PROFESSIONAL ACCEPTABLE TO THE STATE ENGINEER, THAT EVALUATES THE HISTORICAL CONSUMPTIVE USE, RETURN FLOWS, AND THE POTENTIAL FOR MATERIAL INJURY TO OTHER WATER RIGHTS RELATING TO THE INTERRUPTIBLE WATER SUPPLY AGREEMENT AND THAT PROPOSES CONDITIONS TO PREVENT SUCH INJURY. THE STATE ENGINEER SHALL GIVE THE OWNERS OF WATER RIGHTS THIRTY DAYS AFTER THE DATE OF MAILING OF SUCH NOTICE TO FILE COMMENTS ON THE OPERATION OF THE INTERRUPTIBLE WATER SUPPLY AGREEMENT. SUCH COMMENTS SHALL INCLUDE ANY CLAIM OF INJURY OR ANY TERMS AND CONDITIONS THAT SHOULD BE IMPOSED UPON THE AGREEMENT SO THAT IT WILL NOT CAUSE INJURY TO A PARTY'S WATER RIGHTS OR DECREED CONDITIONAL WATER RIGHTS, IF SUCH CONDITIONAL RIGHTS WILL BE EXERCISED DURING OPERATION OF THE INTERRUPTIBLE WATER SUPPLY AGREEMENT, AND ANY OTHER INFORMATION THE PARTY WISHES THE STATE ENGINEER TO CONSIDER IN REVIEWING THE APPLICATION.

(b) THE STATE ENGINEER, AFTER CONSIDERATION OF THE COMMENTS FROM ANY PARTY SUBMITTING COMMENTS, SHALL MAKE A DETERMINATION OF THE OPERATION AND ADMINISTRATION OF THE INTERRUPTIBLE WATER SUPPLY AGREEMENT TO ASSURE THAT SUCH OPERATION AND ADMINISTRATION WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT CAUSE INJURY TO OTHER WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS, IF SUCH CONDITIONAL RIGHTS WILL BE EXERCISED DURING OPERATION OF THE INTERRUPTIBLE WATER SUPPLY AGREEMENT, AND WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACT. THE INTERRUPTIBLE WATER SUPPLY AGREEMENT SHALL INCLUDE, BUT SHALL NOT BE LIMITED TO, A QUANTIFICATION OF THE HISTORICAL CONSUMPTIVE USE OF THE WATER RIGHT, AN ACCURATE DESCRIPTION OF THE LAND WHERE THE WATER IS DECREED FOR USE, AND, IF THE LOANED WATER RIGHT IS BEING USED FOR IRRIGATION, A PLAN TO PREVENT EROSION AND BLOWING SOILS AND A DESCRIPTION OF COMPLIANCE WITH LOCAL COUNTY NOXIOUS WEED REGULATIONS AND OTHER LAND USE PROVISIONS. THE STATE ENGINEER SHALL IMPOSE SUCH TERMS AND CONDITIONS AS ARE NECESSARY TO ENSURE THAT THESE STANDARDS ARE MET. IN MAKING THE DETERMINATIONS SPECIFIED IN THIS PARAGRAPH (b), THE STATE ENGINEER SHALL NOT BE REQUIRED TO HOLD ANY FORMAL HEARING OR CONDUCT ANY OTHER FORMAL PROCEEDINGS, BUT MAY CONDUCT A

HEARING OR FORMAL PROCEEDING IF THE STATE ENGINEER FINDS IT NECESSARY TO ADDRESS THE ISSUES.

(c) AN INTERRUPTIBLE WATER SUPPLY AGREEMENT APPROVED PURSUANT TO THIS SECTION SHALL BE OPERATED ONLY:

(I) DURING THE CALENDAR YEAR IN WHICH A DROUGHT OR OTHER EMERGENCY DECLARED BY THE GOVERNOR PURSUANT TO SECTION 24-32-2104, C.R.S., IN THE COUNTY OF ORIGIN OR USE; AND

(II) DURING THE FIRST FULL CALENDAR YEAR AFTER THE CALENDAR YEAR DURING WHICH THE EMERGENCY DECLARED PURSUANT TO SUBPARAGRAPH (I) OF THIS PARAGRAPH (c) TERMINATES.

(d) THE APPLICANT SHALL GIVE NOTICE BY MARCH 1 OF ANY YEAR THAT THE OPTION IS TO BE EXERCISED TO ALL PARTIES WHO FILED COMMENTS WITH THE STATE ENGINEER PURSUANT TO THIS SECTION, UNLESS EARLIER REQUIRED IN THE AGREEMENT; EXCEPT THAT THE OPTION MAY BE EXERCISED AT ANY TIME DURING 2003.

(4) WHEN THE STATE ENGINEER APPROVES OR DENIES AN INTERRUPTIBLE WATER SUPPLY AGREEMENT, THE STATE ENGINEER SHALL SERVE A COPY OF THE DECISION UPON ALL PARTIES TO THE APPLICATION BY FIRST-CLASS MAIL OR, IF SUCH PARTIES HAVE SO ELECTED, BY ELECTRONIC MAIL. NEITHER THE APPROVAL NOR THE DENIAL OF THE AGREEMENT BY THE STATE ENGINEER SHALL CREATE ANY PRESUMPTIONS, SHIFT THE BURDEN OF PROOF, OR SERVE AS A DEFENSE IN ANY LEGAL ACTION THAT MAY BE INITIATED CONCERNING THE INTERRUPTIBLE WATER SUPPLY AGREEMENT. ANY APPEAL OF A DECISION MADE BY THE STATE ENGINEER CONCERNING THE OPERATION OF AN INTERRUPTIBLE WATER SUPPLY AGREEMENT PURSUANT TO THIS SECTION SHALL BE EXPEDITED, SHALL BE LIMITED TO THE ISSUE OF INJURY, AND SHALL BE MADE WITHIN THIRTY DAYS TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION. ALL PARTIES TO THE APPEAL SHALL PAY TO THE WATER CLERK A FEE TO COVER THE DIRECT COSTS ASSOCIATED WITH THE EXPEDITED APPEAL. THE WATER JUDGE SHALL HEAR AND DETERMINE SUCH APPEAL USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTIONS 37-92-304 AND 37-92-305 FOR DETERMINATION OF MATTERS REREFERRED TO THE WATER JUDGE BY THE REFEREE; EXCEPT THAT THE WATER JUDGE SHALL NOT DEEM ANY FAILURE TO APPEAL ALL OR ANY PART OF THE DECISION OF THE STATE ENGINEER OR FAILURE TO STATE ANY GROUNDS FOR APPEAL TO PRECLUDE ANY PARTY FROM RAISING ANY CLAIMS OF INJURY IN A FUTURE PROCEEDING BEFORE THE WATER JUDGE. THE PROPONENT OF THE INTERRUPTIBLE WATER SUPPLY AGREEMENT SHALL BE DEEMED TO BE THE APPLICANT FOR PURPOSES OF APPLICATION OF SUCH PROCEDURES AND STANDARDS. MONEYS FROM SUCH FEE SHALL BE TRANSMITTED TO THE STATE TREASURER AND DEPOSITED IN THE WATER ADJUDICATION CASH FUND, WHICH FUND IS HEREBY CREATED IN THE STATE TREASURY. THE GENERAL ASSEMBLY SHALL APPROPRIATE MONEYS IN THE FUND FOR THE JUDICIAL DEPARTMENT'S EXPEDITED ADJUDICATIONS PURSUANT TO THIS SECTION.

(5) APPLICANTS FOR APPROVAL OF AN INTERRUPTIBLE WATER SUPPLY AGREEMENT PURSUANT TO THIS SECTION SHALL PAY A FEE ESTABLISHED BY THE STATE ENGINEER PURSUANT TO RULES PROMULGATED BY THE STATE ENGINEER. THE FEES SHALL BE USED BY THE STATE ENGINEER FOR THE PUBLISHING AND ADMINISTRATIVE COSTS FOR

PROCESSING THE APPLICATIONS, THE REVIEW OF THE ENGINEERING REPORTS, AND THE ADMINISTRATION OF THE INTERRUPTIBLE WATER SUPPLY AGREEMENTS. THE STATE ENGINEER SHALL TRANSMIT SUCH FEES TO THE STATE TREASURER, WHO SHALL DEPOSIT THEM IN THE GROUND WATER MANAGEMENT CASH FUND CREATED PURSUANT TO SECTION 37-80-111.5.

**SECTION 2. Appropriation.** In addition to any other appropriation, there is hereby appropriated, to the department of natural resources, division of water resources, out of any moneys in the ground water management cash fund created in section 37-80-111.5 (1) (d), Colorado Revised Statutes, not otherwise appropriated, for the fiscal year beginning July 1, 2003, the sum of sixty-five thousand two hundred eighty dollars (\$65,280), or so much thereof as may be necessary, for the implementation of this act.

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

Approved: June 5, 2003