

Second Regular Session
Seventieth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 16-0560.01 Jennifer Berman x3286

HOUSE BILL 16-1228

HOUSE SPONSORSHIP

Arndt and Becker J., Brown

SENATE SPONSORSHIP

Donovan,

House Committees

Agriculture, Livestock, & Natural Resources

Senate Committees

A BILL FOR AN ACT

101 CONCERNING AN ALTERNATIVE TRANSFER MECHANISM FOR WATER
102 RIGHTS THAT PROTECTS THE AGRICULTURAL USE FOR WHICH A
103 WATER RIGHT WAS ORIGINALLY DECREED WHILE PERMITTING
104 RENEWABLE ONE-YEAR TRANSFERS OF A PORTION OF THE
105 WATER SUBJECT TO THE WATER RIGHT.

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>.)

Currently, water court proceedings governing an application to change the beneficial use of an agricultural water right require 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.

applicant to designate a specific beneficial use identified at the time of the application. The bill authorizes an owner of an agricultural water right to seek a change-in-use decree in water court to allow the transfer of up to 50% of the water subject to the water right to any beneficial use for renewable one-year periods, without designating the specific beneficial use, if the owner has obtained substitute water supply plan approval and the following conditions are met:

- ! In accordance with rules established by the state engineer, the state engineer must approve a one-year lease, loan, or exchange transferring a portion of the water subject to the water right;
- ! The owner of the water right may transfer up to 50% of the historical consumptive use portion of the water right;
- ! The remaining portion of the water subject to the water right must continue to be used for agricultural purposes;
- ! The water right must be protected by the owner's participation in a conservation program or water banking program or establishment of a conservation easement;
- ! Ownership must remain with the owner who applied for the change-in-use decree;
- ! The owner shall not transfer water subject to the water right outside of the water division with jurisdiction over the location of historical consumptive use; and
- ! The transferable portion of the water subject to the water right must be delivered to a point of diversion that is subject to an existing water court decree.

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

2 **SECTION 1.** In Colorado Revised Statutes, **add** 37-80-123 as
3 follows:

4 **37-80-123. Lease, loan, or exchange of agricultural water**
5 **protection water right - rules - definition.** (1) (a) ON OR BEFORE
6 JANUARY 1, 2017, THE STATE ENGINEER SHALL PROMULGATE RULES
7 GOVERNING THE REVIEW OF A LEASE, LOAN, OR EXCHANGE OF WATER
8 UNDER AN AGRICULTURAL WATER PROTECTION WATER RIGHT PURSUANT
9 TO SECTION 37-92-305 (19) (b) (I).

10 (b) THE RULES MUST INCLUDE:

1 (I) GENERAL TERMS AND CONDITIONS THAT THE STATE ENGINEER
2 MAY IMPOSE ON AN APPROVED LEASE, LOAN, OR EXCHANGE TO ENSURE
3 THE LEASE, LOAN, OR EXCHANGE DOES NOT MATERIALLY INJURE OTHER
4 WATER USERS;

5 (II) CRITERIA THAT THE STATE ENGINEER SHOULD CONSIDER IN
6 REVIEWING AN APPLICATION; AND

7 (III) PROCEDURES BY WHICH THE STATE ENGINEER MAY
8 RECONSIDER AN APPROVAL UPON RECEIPT OF A CLAIM OF INJURY FROM A
9 WATER USER.

10 (2) AS USED IN THIS SECTION, "AGRICULTURAL WATER PROTECTION
11 WATER RIGHT" HAS THE SAME MEANING AS IN SECTION 37-92-305 (19) (a).

12 **SECTION 2.** In Colorado Revised Statutes, 37-92-305, **add** (4)
13 (c) and (19) as follows:

14 **37-92-305. Standards with respect to rulings of the referee and**
15 **decisions of the water judge.** (4) (c) WITH RESPECT TO A
16 CHANGE-IN-USE APPLICATION THAT SEEKS APPROVAL TO CHANGE AN
17 ABSOLUTE DECREED AGRICULTURAL WATER RIGHT TO AN AGRICULTURAL
18 WATER PROTECTION WATER RIGHT, AS DESCRIBED IN SUBSECTION (19) OF
19 THIS SECTION, THE DECREE MUST:

20 (I) QUANTIFY THE HISTORICAL DIVERSIONS AND HISTORICAL
21 CONSUMPTIVE USE OF THE ABSOLUTE DECREED AGRICULTURAL WATER
22 RIGHT;

23 (II) QUANTIFY THE RETURN FLOWS ASSOCIATED WITH THE
24 HISTORICAL USE OF THE WATER RIGHT IN TIME, PLACE, AND AMOUNT;

25 (III) PROVIDE TERMS AND CONDITIONS FOR A CHANGE IN THE TYPE
26 OF USE OF THE WATER RIGHT, INCLUDING THE RETURN FLOW OBLIGATIONS
27 IN TIME, PLACE, AND AMOUNT, THAT PREVENT MATERIAL INJURY TO OTHER

1 VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS;
2 (IV) IN ACCORDANCE WITH SUBPARAGRAPH (II) OF PARAGRAPH (b)
3 OF SUBSECTION (19) OF THIS SECTION, ALLOW AN AMOUNT OF THE
4 CONSUMPTIVE PORTION OF THE CHANGED WATER RIGHT AND ANY
5 APPROPRIATED RETURN FLOWS TO BE DELIVERED TO A POINT OR POINTS OF
6 DIVERSION WITHIN THE WATER DIVISION OF HISTORICAL USE WITHOUT
7 DESIGNATING THE SPECIFIC BENEFICIAL USE OR DECREE TO WHICH THE
8 WATER WILL BE APPLIED. DELIVERY MUST BE TO A POINT OR POINTS OF
9 DIVERSION THAT ARE APPROVED BY THE STATE ENGINEER IN ACCORDANCE
10 WITH CONDITIONS:

11 (A) SET FORTH IN SECTION 37-92-308 (12); AND

12 (B) DEVELOPED BY THE STATE ENGINEER PURSUANT TO SECTION
13 37-80-123.

14 (V) FOR A PERIOD THAT THE WATER JUDGE DEEMS NECESSARY AND
15 DESIRABLE TO REMEDY OR PRECLUDE INJURY, BE SUBJECT TO
16 RECONSIDERATION BY THE WATER JUDGE ON THE QUESTION OF INJURY TO
17 OTHER VESTED WATER RIGHTS.

18 (19) **Agricultural water protection.** (a) BEGINNING JULY 1,
19 2017, THE OWNER OF AN ABSOLUTE DECREED AGRICULTURAL WATER
20 RIGHT MAY APPLY IN WATER COURT TO CHANGE THE USE OF THE WATER
21 RIGHT TO A WATER RIGHT ESTABLISHED TO ALLOW THE TRANSFER OF A
22 PORTION OF THE WATER SUBJECT TO THE WATER RIGHT WHILE
23 MAINTAINING THE AGRICULTURAL USE OF THE WATER RIGHT, REFERRED TO
24 IN THIS SECTION AS AN "AGRICULTURAL WATER PROTECTION WATER
25 RIGHT". THE WATER RIGHT OWNER SEEKING A CHANGE-IN-USE TO AN
26 AGRICULTURAL WATER PROTECTION WATER RIGHT MUST APPLY FOR
27 SUBSTITUTE WATER SUPPLY PLAN APPROVAL FROM THE STATE ENGINEER

1 PURSUANT TO SECTION 37-92-308 (12).

2 (b) AN AGRICULTURAL WATER PROTECTION WATER RIGHT IS
3 SUBJECT TO THE FOLLOWING CONDITIONS:

4 (I) THE OWNER MAY TRANSFER UP TO FIFTY PERCENT OF THE
5 HISTORICAL CONSUMPTIVE USE OF THE WATER SUBJECT TO THE
6 AGRICULTURAL WATER PROTECTION WATER RIGHT BY MEANS OF A
7 RENEWABLE ONE-YEAR LEASE, LOAN, OR EXCHANGE. AN INITIAL OR
8 RENEWAL ONE-YEAR LEASE, LOAN, OR EXCHANGE IS SUBJECT TO A
9 SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO SECTION
10 37-92-308 (12) AND APPROVAL BY THE STATE ENGINEER PURSUANT TO
11 RULES THAT THE STATE ENGINEER ESTABLISHES IN ACCORDANCE WITH
12 SECTION 37-80-123.

13 (II) THE REMAINING PORTION OF THE AGRICULTURAL WATER
14 PROTECTION WATER RIGHT MUST CONTINUE TO BE USED FOR
15 AGRICULTURAL PURPOSES ON THE PROPERTY SERVED BY THE ABSOLUTE
16 DECREED AGRICULTURAL WATER RIGHT OR, AS PERMITTED BY LAW, ON
17 ANOTHER PROPERTY SERVED BY THE SAME DITCH SYSTEM;

18 (III) THE OWNER OF THE WATER RIGHT MUST BE CONTRACTUALLY
19 REQUIRED TO PARTICIPATE IN ONE OR MORE OF THE FOLLOWING:

20 (A) A FEDERAL, STATE, MUNICIPAL, OR NONPROFIT CONSERVATION
21 PROGRAM THAT CONSERVES THE LAND HISTORICALLY SERVED BY THE
22 WATER RIGHT AND THE WATER SUBJECT TO THE WATER RIGHT;

23 (B) A WATER CONSERVATION PROGRAM THAT CONSERVES THE
24 WATER RIGHT, AS APPROVED BY A STATE AGENCY, WATER CONSERVATION
25 DISTRICT, OR WATER CONSERVANCY DISTRICT OR ESTABLISHED THROUGH
26 FORMAL WRITTEN ACTION OR ORDINANCE OF A MUNICIPALITY, ITS
27 MUNICIPAL WATER SUPPLIER, OR OTHER WATER PROVIDER WITHIN THE

1 MUNICIPALITY'S JURISDICTIONAL BOUNDARIES;

2 (C) A WATER BANKING PROGRAM; OR

3 (D) COLORADO'S CONSERVATION EASEMENT PROGRAM IN
4 ACCORDANCE WITH ARTICLE 30.5 OF TITLE 38, C.R.S.;

5 (IV) IF THE OWNER'S PARTICIPATION IN ONE OF THE PROGRAMS
6 LISTED IN SUBPARAGRAPH (III) OF THIS PARAGRAPH (b) CEASES, THE
7 OWNER'S ELIGIBILITY TO TRANSFER WATER SUBJECT TO THE
8 AGRICULTURAL WATER PROTECTION WATER RIGHT BY LEASE, LOAN, OR
9 EXCHANGE OR TO OBTAIN A SUBSTITUTE WATER SUPPLY PLAN PURSUANT
10 TO SECTION 37-92-308 (12) IS SUSPENDED UNTIL THE OWNER AGAIN
11 PARTICIPATES IN ONE OF THE PROGRAMS;

12 (V) OWNERSHIP OF THE WATER RIGHT MUST REMAIN WITH THE
13 OWNER WHO APPLIED TO CHANGE THE ABSOLUTE DECREED AGRICULTURAL
14 WATER RIGHT TO AN AGRICULTURAL WATER PROTECTION WATER RIGHT;
15 AND

16 (VI) THE OWNER SHALL NOT LEASE, LOAN, OR EXCHANGE WATER
17 SUBJECT TO THE AGRICULTURAL WATER PROTECTION WATER RIGHT
18 OUTSIDE OF THE WATER DIVISION WITH JURISDICTION OVER THE LOCATION
19 OF HISTORICAL CONSUMPTIVE USE.

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

22 **37-92-308. Substitute water supply plans - special procedures**
23 **for review - water adjudication cash fund - legislative declaration -**
24 **repeal. (12) Agricultural water protection. (a) BEGINNING JULY 1,**
25 **2017, IF AN APPLICATION FOR APPROVAL OF A CHANGE OF WATER RIGHT TO**
26 **AN AGRICULTURAL WATER PROTECTION WATER RIGHT HAS BEEN FILED**
27 **WITH A WATER COURT PURSUANT TO SECTION 37-92-305 (19), THE STATE**

1 ENGINEER MAY APPROVE A SUBSTITUTE WATER SUPPLY PLAN APPLICATION
2 IN WHICH APPROVAL IS SOUGHT FOR A RENEWABLE ONE-YEAR SUBSTITUTE
3 WATER SUPPLY PLAN.

4 (b) (I) WHEN THE STATE ENGINEER APPROVES OR DENIES A
5 SUBSTITUTE WATER SUPPLY PLAN, THE STATE ENGINEER SHALL SERVE A
6 COPY OF THE DECISION ON ALL PARTIES TO THE APPLICATION AND THE
7 WATER COURT APPLICATION BY FIRST-CLASS MAIL OR, IF A PARTY HAS SO
8 ELECTED, BY ELECTRONIC MAIL.

9 (II) THE STATE ENGINEER MUST PROVIDE A DETAILED STATEMENT
10 OF THE BASIS AND RATIONALE FOR THE DECISION. FOR A DECISION
11 APPROVING THE APPLICATION, THE STATEMENT OF THE BASIS AND
12 RATIONALE MUST INCLUDE A COMPLETE EXPLANATION OF THE TERMS AND
13 CONDITIONS IMPOSED TO PREVENT INJURY TO OTHER WATER RIGHTS AND
14 WHY THEY ARE IMPOSED. THE DECISION MUST INCLUDE A DESCRIPTION OF
15 THE CONSIDERATION GIVEN TO ANY WRITTEN COMMENTS THAT WERE
16 FILED BY OTHER PARTIES.

17 (III) NEITHER THE STATE ENGINEER'S APPROVAL NOR DENIAL OF
18 AN APPLICATION CREATES ANY PRESUMPTIONS, SHIFTS THE BURDEN OF
19 PROOF, OR SERVES AS A DEFENSE IN ANY LEGAL ACTION THAT MAY BE
20 INITIATED CONCERNING THE SUBSTITUTE WATER SUPPLY PLAN.

21 (IV) AN APPEAL OF THE DECISION MUST BE FILED WITH THE
22 APPROPRIATE WATER JUDGE WITHIN THIRTY-FIVE DAYS AFTER THE DATE
23 OF SERVICE OF THE DECISION. THE WATER JUDGE SHALL HEAR AND
24 DETERMINE THE APPEAL USING THE PROCEDURES AND STANDARDS SET
25 FORTH IN SECTIONS 37-91-304 AND 37-92-305 FOR DETERMINATION OF
26 MATTERS REFERRED TO THE WATER JUDGE BY THE REFEREE.

27 (c) IF THE STATE ENGINEER APPROVES A SUBSTITUTE WATER

1 SUPPLY PLAN PURSUANT TO THIS SUBSECTION (12), THE APPROVAL MUST:

2 (I) COMPLY WITH CONDITIONS:

3 (A) SET FORTH IN SECTION 37-92-305 (19); AND

4 (B) DEVELOPED BY THE STATE ENGINEER PURSUANT TO SECTION
5 37-80-123;

6 (II) IDENTIFY THE WATER RIGHT AS AN AGRICULTURAL WATER
7 PROTECTION WATER RIGHT;

8 (III) QUANTIFY THE HISTORICAL DIVERSIONS AND HISTORICAL
9 CONSUMPTIVE USE OF THE WATER RIGHT;

10 (IV) QUANTIFY THE RETURN FLOWS ASSOCIATED WITH THE
11 HISTORICAL USE OF THE WATER RIGHT IN TIME, PLACE, AND AMOUNT;

12 (V) PROVIDE TERMS AND CONDITIONS FOR A CHANGE IN THE TYPE
13 OF USE OF THE WATER RIGHT, INCLUDING THE RETURN FLOW OBLIGATIONS
14 IN TIME, PLACE, AND AMOUNT, THAT PREVENT MATERIAL INJURY TO OTHER
15 VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS; AND

16 (VI) IN ACCORDANCE WITH SECTION 37-92-305 (19) (b) (I), ALLOW
17 DELIVERY OF AN AMOUNT OF THE CONSUMPTIVE USE ASSOCIATED WITH
18 THE WATER RIGHT. Delivery MUST BE TO A POINT OF DIVERSION THAT IS
19 SUBJECT TO AN EXISTING WATER COURT DECREE. DELIVERY MAY BE TO A
20 POINT OF DIVERSION THAT IS LOCATED WITHIN A STREAM REACH THAT IS
21 SUBJECT TO A DECREED INSTREAM FLOW WATER RIGHT.

22 (d) A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO
23 THIS SUBSECTION (12) EXPIRES AFTER ONE YEAR AND MAY BE RENEWED
24 UPON APPLICATION TO, AND APPROVAL BY, THE STATE ENGINEER.

25 **SECTION 4. Safety clause.** The general assembly hereby finds,
26 determines, and declares that this act is necessary for the immediate
27 preservation of the public peace, health, and safety.