

Second Regular Session
Seventy-second General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 20-0076.01 Jennifer Berman x3286

HOUSE BILL 20-1157

HOUSE SPONSORSHIP

Roberts and Will,

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Donovan,

House Committees

Rural Affairs & Agriculture

Senate Committees

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.

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), 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) A WATER RIGHT OWNER MAY LOAN WATER TO THE COLORADO
12 WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOWS:

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

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

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

24 (III.5) WATER RIGHTS LOANED PURSUANT TO THIS SECTION ARE
25 NOT PRECLUDED FROM CONCURRENT OR SUBSEQUENT INCLUSION IN A
26 WATER CONSERVATION, DEMAND MANAGEMENT, COMPACT COMPLIANCE,
27 OR WATER BANKING PROGRAM OR PLAN, AS IS OR MAY BE SUBSEQUENTLY

1 DEFINED OR DESCRIBED IN STATUTE.

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

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

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

26 (C) IN EACH YEAR THAT A RENEWABLE LOAN IS EXERCISED, THE
27 APPLICANT SHALL PROVIDE THE WRITTEN NOTICE DESCRIBED IN

1 SUBSECTION (2)(b)(II) OF THIS SECTION.

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

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

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

22 (I) The ~~proponent~~ APPLICANT has filed a request for approval of
23 the loan with the ~~division~~ STATE engineer, together with a filing fee in the
24 amount of ~~one~~ THREE hundred dollars. ~~Moneys from~~ THE STATE
25 ENGINEER SHALL TRANSMIT the fee ~~shall be transmitted~~ to the state
26 treasurer, ~~and deposited~~ WHO SHALL DEPOSIT THE FEE in the water
27 resources cash fund created in section 37-80-111.7 (1). The request for

1 approval ~~shall~~ MUST include:

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

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

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

14 (V) The ~~division~~ STATE engineer has given the owners of water
15 rights and decreed conditional water rights ~~fifteen days after the date of~~
16 ~~mailing of notice under subparagraph (II) of this paragraph (b) THE~~
17 OPPORTUNITY to file comments on the proposed loan ~~except that the~~
18 ~~division engineer may act on the application immediately after the~~
19 ~~applicant provides evidence that all persons entitled to notice of the~~
20 ~~application under subparagraph (II) of this paragraph (b) have either~~
21 ~~consented to or commented on the application. Such~~ WITHIN THE
22 RELEVANT TIME FRAME INDICATED IN THIS SUBSECTION (2)(b)(V). THE
23 comments ~~shall~~ MUST include any claim of injury or any terms and
24 conditions that should be imposed upon the proposed loan to prevent
25 injury to a party's water ~~right~~ RIGHTS and any other information the
26 commenting party wishes the ~~division~~ STATE engineer to consider in
27 reviewing the proposed loan. THE STATE ENGINEER SHALL PROVIDE THE

1 PARTIES ENTITLED TO NOTICE UNDER SUBSECTION (2)(b)(II) OF THIS
2 SECTION:

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

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

9 (VI) The ~~division~~ STATE engineer, after consideration of any
10 comments received, has determined that the operation and administration
11 of the proposed loan will not cause injury to other decreed water rights
12 and, for loans made pursuant to ~~paragraph (a) of this subsection (2)~~
13 SUBSECTION (2)(a) OF THIS SECTION, will not affect Colorado's compact
14 entitlements. The ~~division~~ STATE engineer shall impose such terms and
15 conditions as are necessary to ensure that these standards are met. In
16 making the determinations specified in this ~~subparagraph (VI)~~
17 SUBSECTION (2)(b)(VI), the ~~division~~ STATE engineer ~~shall~~ NEED not be
18 ~~required to~~ hold any formal hearings or conduct any other formal
19 proceedings, but may conduct a hearing or formal proceeding if the
20 ~~division~~ STATE engineer finds it necessary to address the issues.

21 (VII) The ~~division~~ STATE engineer shall approve or deny the
22 proposed loan within ~~twenty~~ TEN days after the ~~date of mailing of notice~~
23 ~~under subparagraph (II) of this paragraph (b), or within five days after the~~
24 ~~applicant provides evidence that all persons entitled to notice of the~~
25 ~~application under subparagraph (II) of this paragraph (b) have either~~
26 ~~consented to or commented on the application, whichever is earlier~~
27 PERIOD FOR COMMENTS ON THE PROPOSED LOAN SPECIFIED IN SUBSECTION

1 (2)(b)(V) OF THIS SECTION HAS EXPIRED.

2 (VIII) When the ~~division~~ STATE engineer approves or denies a
3 proposed loan, the ~~division~~ STATE engineer shall serve a copy of the
4 decision on all parties to the application by first-class mail or, if ~~such~~ THE
5 parties have so elected, by electronic mail. Neither the approval nor the
6 denial by the ~~division~~ STATE engineer ~~shall create~~ CREATES any
7 presumptions ~~shift the burden of proof, or serve~~ OR SERVES as a defense
8 in any legal action that may be initiated concerning the loan. ~~Any~~ A
9 PARTY MAY FILE AN appeal of a decision by the ~~division~~ STATE engineer
10 concerning the loan pursuant to this section ~~shall be made~~ to the water
11 judge in the applicable water division within fifteen days after the date ~~on~~
12 ~~which~~ THAT THE STATE ENGINEER SERVES the decision ~~is served~~ on the
13 parties to the application. THE APPLICANT HAS THE BURDEN OF PROOF TO
14 DEMONSTRATE THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY
15 TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS. The water
16 judge shall hear ~~such~~ AND DETERMINE THE appeal on an expedited basis
17 USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTION
18 37-92-304 (3) CONCERNING MATTERS REREFERRED TO THE WATER JUDGE
19 BY THE WATER REFEREE.

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

24 (a) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A
25 REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL
26 ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE
27 EXTENT TO WHICH THE PROPOSED LOAN WILL IMPROVE THE NATURAL

1 ENVIRONMENT TO A REASONABLE DEGREE;

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

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

7 **SECTION 2. Act subject to petition - effective date -**
8 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
9 the expiration of the ninety-day period after final adjournment of the
10 general assembly (August 5, 2020, if adjournment sine die is on May 6,
11 2020); except that, if a referendum petition is filed pursuant to section 1
12 (3) of article V of the state constitution against this act or an item, section,
13 or part of this act within such period, then the act, item, section, or part
14 will not take effect unless approved by the people at the general election
15 to be held in November 2020 and, in such case, will take effect on the
16 date of the official declaration of the vote thereon by the governor.

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