

CHAPTER 284

WATER AND IRRIGATION

HOUSE BILL 01-1354

BY REPRESENTATIVE(S) Hoppe, Young, Kester, Dean, Fairbank, Hefley, Lawrence, Snook, Spradley, Tapia, Webster, White, Alexander, Cloer, Hodge, Jameson, Johnson, Madden, Miller, Plant, Spence, Stengel, Tochtrop, and Weddig; also SENATOR(S) Entz, Hagedorn, Hillman, Lamborn, Matsunaka, Musgrave, Phillips, Taylor, and Thiebaut.

AN ACT

CONCERNING THE ESTABLISHMENT OF A WATER BANKING SYSTEM, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

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

SECTION 1. Title 37, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW ARTICLE to read:

ARTICLE 80.5
Arkansas River Water Bank Pilot Program

37-80.5-101. Short title. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS THE "ARKANSAS RIVER PILOT WATER BANKING ACT".

37-80.5-102. Legislative declaration. THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT THE PURPOSE OF THIS ARTICLE IS TO TEST THE CONCEPT OF A WATER BANK TO BE OPERATED UNDER STRICT PARAMETERS ESTABLISHED BY RULES APPROVED BY THE WATER COURT. ACCORDINGLY, THIS ARTICLE PROVIDES FOR THE PROMULGATION OF RULES CONCERNING A WATER BANK AND REQUIRES THE WATER COURT TO APPROVE THE RULES AND THE STATE ENGINEER TO REPORT TO THE GENERAL ASSEMBLY REGARDING THE PROPOSED OPERATION OF THE BANK. THE PILOT WATER BANK PROGRAM CREATED BY THIS ARTICLE IS INTENDED TO SIMPLIFY AND IMPROVE THE APPROVAL OF WATER LEASES, LOANS, AND EXCHANGES, INCLUDING INTERRUPTIBLE SUPPLY AGREEMENTS, OF STORED WATER WITHIN THE ARKANSAS RIVER BASIN, REDUCE THE COSTS ASSOCIATED WITH SUCH TRANSACTIONS, AND INCREASE THE AVAILABILITY OF WATER-RELATED INFORMATION. IT IS ALSO THE PURPOSE OF THIS PILOT WATER BANK TO ASSIST FARMERS AND RANCHERS BY DEVELOPING A MECHANISM TO REALIZE THE VALUE OF THEIR WATER

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

RIGHTS ASSETS WITHOUT FORCING THE PERMANENT SEVERANCE OF THOSE WATER RIGHTS FROM THE LAND. THE GENERAL ASSEMBLY AFFIRMS THE STATE CONSTITUTION'S RECOGNITION OF WATER RIGHTS AS A PRIVATE USUFRUCTUARY PROPERTY RIGHT, AND THIS ARTICLE IS NOT INTENDED TO RESTRICT THE ABILITY OF THE HOLDER OF A WATER RIGHT TO SELL, LEASE, OR EXCHANGE THAT WATER RIGHT IN ANY OTHER MANNER THAT IS CURRENTLY PERMITTED UNDER COLORADO LAW. FURTHER, THIS ARTICLE IS NOT INTENDED TO BE IMPLEMENTED IN ANY WAY THAT WOULD CAUSE MATERIAL INJURY TO THE OWNER OF OR PERSONS ENTITLED TO USE WATER UNDER A VESTED WATER RIGHT OR A DECREED CONDITIONAL WATER RIGHT, NOR TO REPEAL OR IN ANY MANNER AMEND THE EXISTING WATER RIGHTS ADJUDICATION SYSTEM EXCEPT AS MAY BE SPECIFICALLY SET FORTH IN THIS ARTICLE.

37-80.5-103. Definitions. AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "BANK" MEANS THE ARKANSAS RIVER WATER BANK OPERATED PURSUANT TO RULES PROMULGATED UNDER SECTION 37-80.5-104.

(2) "PROGRAM" MEANS THE ARKANSAS RIVER WATER BANK PILOT PROGRAM CREATED IN SECTION 37-80.5-104.

37-80.5-104. Water bank - creation - duties of state engineer - rules.

(1) (a) THERE IS HEREBY CREATED THE ARKANSAS RIVER WATER BANK PILOT PROGRAM. ON OR BEFORE JULY 1, 2002, THE STATE ENGINEER SHALL PROMULGATE PILOT PROGRAM RULES NECESSARY OR CONVENIENT FOR OPERATION OF THE PROGRAM. THE STATE ENGINEER, AFTER PUBLIC MEETINGS IN THE ARKANSAS RIVER BASIN AND IN CONSULTATION WITH THE COLORADO WATER CONSERVATION BOARD, SHALL CONSULT WITH THE COLORADO WATER CONSERVATION BOARD REGARDING FORMULATION OF THE RULES. THE RULES SHALL BE PROMULGATED IN ACCORDANCE WITH THE FOLLOWING:

(I) THE RULES SHALL AUTHORIZE, FACILITATE, AND PERMIT THE LEASE, EXCHANGE, OR LOAN, INCLUDING THE USE OF INTERRUPTIBLE SUPPLY AGREEMENTS, OF STORED WATER WITHIN OR FROM THE BASIN OF THE ARKANSAS RIVER LOCATED WITHIN COLORADO; EXCEPT THAT NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO AUTHORIZE ANY LEASE, EXCHANGE, OR LOAN OF WATER BELOW JOHN MARTIN RESERVOIR TO POINTS OF DIVERSION OR STORAGE ABOVE JOHN MARTIN RESERVOIR WITHOUT THE APPROVAL OF THE ARKANSAS RIVER COMPACT ADMINISTRATION.

(II) THE RULES SHALL IMPOSE CONDITIONS UPON THE LEASE, EXCHANGE, OR LOAN OF WATER IN THE BANK OUT OF THE ARKANSAS RIVER BASIN SO AS TO BALANCE IN-BASIN SUPPLY DEMANDS AND IMPACTS OF THE TRANSFER, OUT-OF-BASIN SUPPLY DEMANDS, AND MAINTENANCE OF THE VALUE OF THE WATER BANKED. THE RULES SHALL SPECIFY THAT THE BANK SHALL NOT BE OPERATED SO AS TO INCREASE WATER DIVERTED FROM ANOTHER WATER DIVISION AS SET FORTH IN SECTION 37-92-201. AT A MINIMUM, SUCH RULES SHALL INCLUDE CONDITIONS REQUIRING WATER AVAILABLE IN THE BANK TO BE MADE AVAILABLE FOR USE WITHIN THE BASIN OF THE ARKANSAS RIVER PRIOR TO MAKING SUCH WATER AVAILABLE FOR USE IN OTHER RIVER BASINS IN COLORADO.

(III) THE RULES SHALL NOT PERMIT THE TRANSFER OF WATER FROM THE BANK TO

INSTREAM FLOW USES AS PROVIDED IN SECTION 37-92-102 (3) EXCEPT WHERE SUCH TRANSFER, LEASE, LOAN, EXCHANGE, OR SALE IS TO THE COLORADO WATER CONSERVATION BOARD.

(IV) THE BANK SHALL OPERATE WITHIN EXISTING REQUIREMENTS OF COLORADO WATER LAW, INCLUDING SPECIFICALLY THE ARKANSAS RIVER COMPACT, ARTICLE 69 OF THIS TITLE; THE "WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969", ARTICLE 92 OF THIS TITLE, INCLUDING SPECIFICALLY THE REQUIREMENT THAT WATER TRANSFERRED THROUGH THE BANK BE PUT TO A BENEFICIAL USE; AND THE "COLORADO GROUND WATER MANAGEMENT ACT", ARTICLE 90 OF THIS TITLE; EXCEPT THAT, IN COMPLIANCE WITH RULES PROMULGATED PURSUANT TO THIS ARTICLE, LEASES, LOANS, AND EXCHANGES EFFECTUATED THROUGH THE BANK NEED NOT REQUIRE ADJUDICATION PURSUANT TO ARTICLE 92 OF THIS TITLE, AND THE STATE ENGINEER SHALL ADMINISTER SUCH LEASES, LOANS, AND EXCHANGES NOTWITHSTANDING THE FACT THAT THEY MAY NOT HAVE BEEN ADJUDICATED.

(V) THE RULES SHALL DEFINE THE TERMS "INTERRUPTIBLE SUPPLY" AND "WATER BANKING".

(VI) THE RULES SHALL TAKE INTO ACCOUNT AND ADDRESS, AS APPROPRIATE, ANY NECESSARY OR DESIRABLE LIMITATIONS UPON THE TIME, PLACE, OR TYPE OF USE OF WATERS MADE AVAILABLE THROUGH THE WATER BANK, AND THE APPROPRIATE LENGTH OF AGREEMENTS IMPLEMENTING BANKING TRANSACTIONS.

(b) THE RULES SHALL ENSURE THAT OPERATION OF THE BANK SHALL NOT CAUSE ANY MATERIAL INJURY TO THE OWNER OF OR PERSONS ENTITLED TO USE WATER UNDER A VESTED WATER RIGHT OR A DECREED CONDITIONAL WATER RIGHT.

(c) THE RULES SHALL ESTABLISH CRITERIA PURSUANT TO WHICH THE STATE ENGINEER SHALL:

(I) ACCEPT A DEPOSIT OF A QUANTITY OF WATER IN THE BANK, INCLUDING NECESSARY PROOF OF:

(A) OWNERSHIP OR A LEASE OR CONTRACT THAT INCLUDES THE RIGHT TO USE AND CONTROL THE DISPOSITION OF WATER; AND

(B) THE LEGAL PARAMETERS OF THE WATER FOR USE SUBJECT TO THE PROPOSED DEPOSIT, WHETHER BY DECREE OR BY CONTRACT;

(II) CREDIT A WITHDRAWAL OF A QUANTITY OF WATER FROM THE BANK, INCLUDING THE TERM, LOCATION, AND TYPE OF THE PROPOSED USE OF THE WITHDRAWN WATER;

(III) PUBLISH A SUMMARY OF THE WATER BANK'S TRANSACTIONS, INCLUDING THE AMOUNTS OF WATER SUBJECT TO SUCH TRANSACTIONS; AND

(IV) ADMINISTER THE WITHDRAWN WATER:

(A) WITHIN THE PRIORITY SYSTEM IF THE WITHDRAWN WATER IS SUBJECT TO PRIOR APPROPRIATION;

(B) WITH OR WITHOUT THE NEED FOR AN ADJUDICATION; AND

(C) WITHOUT CAUSING MATERIAL INJURY TO THE OWNER OF OR PERSONS ENTITLED TO USE WATER UNDER A VESTED WATER RIGHT OR A DECREED CONDITIONAL WATER RIGHT.

(d) THE RULES MAY ALLOW THE STATE ENGINEER TO DELEGATE ADMINISTRATION OF THE BANK TO A PUBLIC ENTITY OR PUBLIC-PRIVATE PARTNERSHIP. THE STATE ENGINEER, THE PUBLIC ENTITY, OR THE PUBLIC-PRIVATE PARTNERSHIP SHALL BE ENTITLED TO CHARGE A TRANSACTION FEE FOR DEPOSITS, WITHDRAWALS, OR BOTH, SUFFICIENT TO COVER THE BANK'S ADMINISTRATION COSTS.

(2) THE DEPOSIT OF CREDITS IN THE BANK IS VOLUNTARY, AND CREDITS MAY BE REMOVED BY THE OWNER AT ANY TIME PRIOR TO AN ACTUAL TRANSACTION IN WHICH CONTROL OF A CREDIT IS TRANSFERRED, SUBJECT TO THE TERMS AND CONDITIONS OF THE DEPOSIT AGREEMENT EXECUTED WITH THE OPERATOR OF THE BANK.

(3) THE STATE ENGINEER SHALL SEEK A WAIVER OR CLARIFICATION OF ANY FEDERAL LAWS, RULES, OR REGULATIONS THAT MAY IMPEDE THE IMPLEMENTATION OF THE PILOT PROJECT IN THE ARKANSAS RIVER BASIN.

37-80.5-105. Review of rules. JUDICIAL REVIEW OF ALL RULES PROMULGATED PURSUANT TO THIS ARTICLE SHALL BE IN ACCORDANCE WITH THE "STATE ADMINISTRATIVE PROCEDURE ACT", ARTICLE 4 OF TITLE 24, C.R.S.; EXCEPT THAT VENUE FOR SUCH REVIEW SHALL LIE EXCLUSIVELY WITH THE WATER JUDGE FOR WATER DIVISION TWO.

37-80.5-106. Report. (1) THE STATE ENGINEER SHALL SUBMIT A REPORT TO THE GENERAL ASSEMBLY AND THE GOVERNOR ON OR BEFORE NOVEMBER 1, 2005, REGARDING:

(a) THE EFFECTIVENESS OF THE PILOT PROGRAM;

(b) EXISTING STATUTORY, REGULATORY, OR CONTRACTUAL CONSTRAINTS ON THE SUCCESSFUL USE OF WATER BANKING WITHIN COLORADO;

(c) INSTITUTIONAL CONSTRAINTS UPON THE SUCCESSFUL USE OF WATER BANKING WITHIN COLORADO;

(d) INTERSTATE COMPACT CONSTRAINTS UPON THE SUCCESSFUL USE OF WATER BANKING WITHIN COLORADO;

(e) SOCIAL OR ECONOMIC CONSTRAINTS UPON THE SUCCESSFUL USE OF WATER BANKING WITHIN COLORADO; AND

(f) ANY RECOMMENDED LIMITATIONS UPON THE USE OF WATER BANKS WITHIN COLORADO, WITH SPECIFIC REFERENCE TO THE TIME, PLACE, OR TYPE OF USE OF WATERS MADE AVAILABLE UNDER SUCH RECOMMENDED LIMITATIONS AND THE LENGTH OF AGREEMENTS IMPLEMENTING THE SAME.

37-80.5-107. Repeal of article. THIS ARTICLE AND ANY RULES PROMULGATED

PURSUANT TO THIS ARTICLE ARE REPEALED, EFFECTIVE JULY 1, 2007. ANY WATERS HELD BY THE BANK ON JULY 1, 2007, SHALL BELONG TO THE OWNER OF RECORD THEREOF AND BE SUBJECT TO DISPOSITION AS PROVIDED UNDER ARTICLE 92 OF THIS TITLE.

SECTION 2. 24-32-3203 (3) (c), Colorado Revised Statutes, is amended to read:

24-32-3203. Office of smart growth - creation - powers and duties of executive director. (3) The executive director shall have the following powers and duties in administering this part 32:

(c) To review and approve applications for Colorado heritage planning grants awarded by the office out of moneys in the fund in accordance with the requirements of this part 32, and to determine the amount of money to be awarded under each such grant. An application for such a grant shall:

(I) Be submitted jointly by the governing bodies of at least two local governments; EXCEPT THAT APPLICATIONS REGARDING WATER BANKING PURSUANT TO SUBPARAGRAPH (II) OF THIS PARAGRAPH (c) MAY ALSO BE SUBMITTED SINGLY OR IN COMBINATION BY THE GOVERNING BODY OF A LOCAL GOVERNMENT OR BY AN IRRIGATION DISTRICT, DITCH COMPANY, OR CONSERVANCY DISTRICT; and

(II) Address critical planning issues, including, without limitation, land use and development patterns, transportation planning, mitigation of environmental hazards, WATER BANKING PURSUANT TO ARTICLE 80.5 OF TITLE 37, C.R.S., and energy use.

SECTION 3. 24-32-3202 (7), Colorado Revised Statutes, is amended to read:

24-32-3202. Definitions. As used in this part 32, unless the context otherwise requires:

(7) "Local government" means any county, city and county, city, town, or special district created pursuant to article 1 of title 32, C.R.S.; EXCEPT THAT, FOR PURPOSES OF THIS PART 32 IN CONNECTION WITH SECTION 24-32-3203 (3) (c) (I), "LOCAL GOVERNMENT" SHALL BE DEEMED TO INCLUDE AN IRRIGATION DISTRICT, DITCH COMPANY, OR CONSERVANCY DISTRICT.

SECTION 4. Appropriation. (1) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the Colorado water conservation board construction fund created in section 37-60-121, Colorado Revised Statutes, not otherwise appropriated, to the department of natural resources, executive director's office, for legal services, for the fiscal year beginning July 1, 2001, the sum of nineteen thousand five hundred thirty-four dollars (\$19,534), or so much thereof as may be necessary, for the implementation of this act.

(2) In addition to any other appropriation, there is hereby appropriated, to the department of natural resources, water conservation board, for allocation to the state engineer, for the fiscal year beginning July 1, 2001, the sum of fifty-six thousand two hundred fifty-three dollars (\$56,253) and 0.1 FTE, or so much thereof as may be necessary, for the implementation of this act.

(3) In addition to any other appropriation, there is hereby appropriated, to the department of law, the sum of nineteen thousand five hundred thirty-four dollars (\$19,534) and 0.2 FTE, or so much thereof as may be necessary, for the provision of legal services to the department of natural resources related to implementation of this act. Such sum shall be from cash funds exempt out of the appropriation made in subsection (1) of this section.

SECTION 5. 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, 2001