

CHAPTER 361

WATER AND IRRIGATION

HOUSE BILL 03-1318

BY REPRESENTATIVE(S) Hoppe, Brophy, Hall, Hefley, Lee, Plant, Tochtrop, Veiga, Wiens, Williams T., Witwer, Boyd, Coleman, Frangas, King, Madden, McFadyen, Paccione, Merrifield, Romanoff, Stafford, Williams S., and Young; also SENATOR(S) Grossman, Entz, Fitz-Gerald, Groff, Hagedorn, Hanna, Hillman, Isgar, Kester, Owen, Tapia, Taylor, Teck, and Tupa.

AN ACT

CONCERNING THE CREATION OF WATER BANKS TO OPERATE IN EACH WATER DIVISION, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

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

SECTION 1. 37-80.5-102, Colorado Revised Statutes, is amended to read:

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~~ AUTHORIZE THE CREATION OF water ~~bank~~ BANKS WITHIN EACH WATER DIVISION 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~~ BANKS 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~~ BANKS. 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~~ EACH 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~~ THE water ~~bank~~ BANKS to assist farmers and ranchers by developing a mechanism to realize the value of their water 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

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

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.

SECTION 2. 37-80.5-103, Colorado Revised Statutes, is amended to read:

37-80.5-103. Definitions. As used in this article, unless the context otherwise requires:

(1) "Bank" means ~~the Arkansas river~~ A water bank operated pursuant to rules promulgated under ~~section 37-80.5-104~~ THIS ARTICLE.

(2) "Program" means ~~the Arkansas river~~ A water bank ~~program~~ **pilot** program created in ~~section 37-80.5-104~~ THIS ARTICLE.

SECTION 3. 37-80.5-104, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

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

(4) THIS SECTION IS REPEALED, EFFECTIVE WHEN THE PERIOD TO FILE AN APPEAL REGARDING PROMULGATION OF THE RULES UNDER SECTION 37-80.5-104.5 HAS EXPIRED OR, IF SUCH AN APPEAL IS FILED, WHEN THE LITIGATION CONCERNING SUCH APPEAL HAS BEEN FULLY RESOLVED.

SECTION 4. Article 80.5 of title 37, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

37-80.5-104.5. Water banks within each water division - duties of state engineer - rules. (1) (a) UPON REQUEST BY A WATER CONSERVANCY DISTRICT OR WATER CONSERVATION DISTRICT, THE STATE ENGINEER SHALL PROMULGATE PROGRAM RULES NECESSARY OR CONVENIENT FOR THE OPERATION OF A WATER BANK WITHIN THE DIVISION IN WHICH SUCH DISTRICT IS LOCATED. THE STATE ENGINEER SHALL HOLD PUBLIC MEETINGS AND 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 OF STORED WATER WITHIN A WATER DIVISION; EXCEPT THAT NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO AUTHORIZE ANY LEASE, EXCHANGE, OR LOAN OF WATER THAT WOULD NEGATIVELY AFFECT ANY OF COLORADO'S INTERSTATE COMPACTS.

(II) THE RULES SHALL NOT PERMIT THE TRANSFER, LEASE, LOAN, EXCHANGE, OR SALE OF WATER FROM THE BANKS TO INSTREAM FLOW USES AS PROVIDED IN SECTION 37-92-102 (3) UNLESS SUCH TRANSFER, LEASE, LOAN, EXCHANGE, OR SALE IS TO THE COLORADO WATER CONSERVATION BOARD.

(III) THE BANKS SHALL OPERATE WITHIN EXISTING REQUIREMENTS OF COLORADO WATER LAW AS SET FORTH IN THE "WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969", ARTICLE 92 OF THIS TITLE, INCLUDING SPECIFICALLY THE REQUIREMENT THAT WATER TRANSFERRED THROUGH THE BANKS 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 BANKS 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.

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

(V) 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 BANKS, AND THE APPROPRIATE LENGTH OF AGREEMENTS IMPLEMENTING BANKING TRANSACTIONS.

(b) THE RULES SHALL ENSURE THAT OPERATION OF THE BANKS 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 A 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 A BANK, INCLUDING THE TERM, LOCATION, AND TYPE OF THE PROPOSED USE OF THE WITHDRAWN WATER;

(III) PUBLISH A SUMMARY OF EACH 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 SHALL DELEGATE ADMINISTRATION OF A BANK TO THE WATER CONSERVANCY DISTRICT OR WATER CONSERVATION DISTRICT THAT SUBMITTED THE

REQUEST FOR THE BANK. SUCH DISTRICT SHALL BE ENTITLED TO CHARGE A TRANSACTION FEE FOR DEPOSITS, WITHDRAWALS, OR BOTH, SUFFICIENT TO COVER THE BANK'S ADMINISTRATION COSTS. NOTWITHSTANDING ANY RESTRICTION ON THE POWER OF A WATER CONSERVANCY DISTRICT OR A WATER CONSERVATION DISTRICT TO ACT OUTSIDE THE GEOGRAPHIC BOUNDARIES OF SUCH DISTRICT, A DISTRICT THAT HAS BEEN DELEGATED AUTHORITY PURSUANT TO THIS PARAGRAPH (d) SHALL HAVE FULL AUTHORITY TO ADMINISTER THE BANK'S OPERATIONS PURSUANT TO THIS SECTION, INCLUDING ANY POWER TO ACT OUTSIDE THE GEOGRAPHIC BOUNDARIES OF SUCH DISTRICT WHEN NECESSARY TO ADMINISTER THE BANK.

(2) THE DEPOSIT OF CREDITS IN A 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 WATER BANK PROGRAM.

(4) (a) THE REPEAL OF SECTION 37-80.5-104 SHALL NOT AFFECT THE VALIDITY OF ANY BANK OPERATING IN THE ARKANSAS RIVER BASIN OR ANY SUCH BANK'S WATER DEPOSIT OR WITHDRAWAL. AFTER SUCH REPEAL, SUCH BANK SHALL OPERATE PURSUANT TO THE RULES PROMULGATED PURSUANT TO THIS SECTION.

(b) THE STATE ENGINEER SHALL PROVIDE THE REVISOR OF STATUTES WITH WRITTEN NOTIFICATION WHEN THE PERIOD TO FILE AN APPEAL REGARDING PROMULGATION OF THE RULES UNDER THIS SECTION HAS EXPIRED OR, IF SUCH AN APPEAL IS FILED, WHEN THE LITIGATION CONCERNING SUCH APPEAL HAS BEEN FULLY RESOLVED.

SECTION 5. 37-80.5-105, Colorado Revised Statutes, is amended to read:

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 APPROPRIATE water judge for EACH water division. ~~two-~~

SECTION 6. 37-80.5-106 (1) (a), Colorado Revised Statutes, is amended to read:

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;

SECTION 7. 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, for the fiscal year beginning July 1, 2003, the sum of one hundred thousand dollars (\$100,000), or so much thereof as may be necessary for the implementation of this act. Of said sum, seventy-five thousand dollars (\$75,000) shall be for allocation to the executive director's office, for legal services, and twenty-five thousand dollars (\$25,000) shall

be for allocation to the division of water resources.

(2) In addition to any other appropriation, there is hereby appropriated, to the department of law, for the fiscal year beginning July 1, 2003, the sum of seventy-five thousand dollars (\$75,000) and 0.7 FTE, or so much thereof as may be necessary, for the implementation of this act. Such sum shall be from cash funds exempt received from the department of natural resources out of the appropriation made in subsection (1) of this section.

(3) The moneys appropriated in subsection (1) of this section shall be available for the designated purposes until the purposes have been achieved.

SECTION 8. 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