

## CHAPTER 362

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**WATER AND IRRIGATION**


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**HOUSE BILL 03-1320**

BY REPRESENTATIVE(S) Rippy, Borodkin, Crane, Decker, Fritz, Hall, Harvey, Hoppe, Jahn, Madden, Marshall, Miller, Paccione, Rose, Schultheis, Smith, Stafford, Weddig, Williams S., and Williams T.;  
also SENATOR(S) McElhany, Groff, Grossman, Jones, Lamborn, and May R.

**AN ACT**

**CONCERNING THE STATE ENGINEER'S AUTHORITY TO ADMINISTER TEMPORARY INSTREAM FLOWS HELD BY THE COLORADO WATER CONSERVATION BOARD, AND, IN CONNECTION THEREWITH, REQUIRING THE STATE ENGINEER TO DETERMINE WHETHER SUCH TEMPORARY INSTREAM FLOWS WOULD INJURE EXISTING WATER RIGHTS, AND MAKING AN APPROPRIATION.**

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

**SECTION 1.** 37-83-105, Colorado Revised Statutes, is amended to read:

**37-83-105. Owner may loan water right - drought loans to Colorado water conservation board for instream flows.** (1) It is lawful for the owners of ditches and water rights taking water from the same stream to exchange with, and loan to, each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or using the water in a more economical manner; except that the owners making such loan or exchange shall give notice in writing, signed by all the owners participating in said loan or exchange, stating that such loan or exchange has been made and for what length of time the same shall continue, whereupon said division engineer shall recognize the same in his OR HER distribution of water.

(2) (a) IN ANY BASIN OR COUNTY IN WHICH THE GOVERNOR DECLARES A DROUGHT EMERGENCY OR IN WHICH ANY OTHER EMERGENCY IS DECLARED, WATER RIGHT OWNERS MAY LOAN WATER TO THE COLORADO WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOWS FOR A PERIOD NOT TO EXCEED ONE HUNDRED TWENTY DAYS, SUBJECT TO THE FOLLOWING:

(I) PRIOR TO ACCEPTING THE LOAN, THE COLORADO WATER CONSERVATION BOARD SHALL COMPILE A STATEMENT ABOUT THE DURATION OF THE LOAN, A DESCRIPTION OF THE ORIGINAL POINTS OF DIVERSION, AND OTHER RELEVANT INFORMATION SUFFICIENT

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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.*

FOR THE STATE ENGINEER TO DETERMINE THAT SUCH LOAN DOES NOT INJURE EXISTING DECREED WATER RIGHTS.

(II) CONSISTENT WITH CURRENT LAW, ONLY THE COLORADO WATER CONSERVATION BOARD IS ENTITLED TO HOLD INSTREAM FLOW WATER RIGHTS AND MAY ACCEPT PROPOSED LOANS IN ACCORDANCE WITH SECTION 37-92-102 (3).

(III) THE LOAN SHALL NOT BE ACCEPTED UNLESS THE STATE ENGINEER DETERMINES THAT THE COLORADO WATER CONSERVATION BOARD'S TEMPORARY INSTREAM FLOW USE WILL NOT INJURE EXISTING WATER RIGHTS OF OTHERS.

(b) IN DETERMINING WHETHER OR NOT INJURY WILL OCCUR, THE DIVISION ENGINEER SHALL ENSURE THE FOLLOWING CONDITIONS ARE MET:

(I) THE PROPONENT HAS FILED A REQUEST FOR APPROVAL OF THE LOAN WITH THE DIVISION ENGINEER, TOGETHER WITH A FILING FEE IN THE AMOUNT OF ONE HUNDRED DOLLARS. MONEYS FROM THE FEE SHALL BE TRANSMITTED TO THE STATE TREASURER AND DEPOSITED IN THE GROUND WATER MANAGEMENT CASH FUND, CREATED IN SECTION 37-80-111.5. THE REQUEST FOR APPROVAL SHALL INCLUDE:

(A) EVIDENCE OF THE PROPONENT'S LEGAL RIGHT TO USE THE LOANED WATER RIGHT;

(B) A STATEMENT OF THE DURATION OF THE PROPOSED LOAN;

(C) A DESCRIPTION OF THE ORIGINAL POINTS OF DIVERSION, THE RETURN FLOW PATTERN, THE STREAM REACH, AND THE TIME, PLACE, AND TYPES OF USE OF THE LOANED WATER RIGHT;

(D) A DESCRIPTION OF THE NEW PROPOSED POINTS OF DIVERSION, THE RETURN FLOW PATTERN, THE STREAM REACH, AND THE TIME, PLACE, AND TYPES OF USE OF THE LOANED WATER RIGHT; AND

(E) A REASONABLE ESTIMATE OF THE HISTORIC CONSUMPTIVE USE OF THE LOANED WATER RIGHT.

(II) THE PROPONENT HAS PROVIDED WRITTEN NOTICE OF THE REQUEST FOR APPROVAL OF THE LOAN BY FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES ON THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST ESTABLISHED PURSUANT TO SECTION 37-92-308 (6) FOR THE WATER DIVISION IN WHICH THE PROPOSED LOAN IS LOCATED AND PROOF OF SUCH NOTICE IS FILED WITH THE DIVISION ENGINEER;

(III) THE PROPOSED USE OF THE LOANED WATER RIGHT IS FOR INSTREAM FLOW PURPOSES;

(IV) NONE OF THE WATER RIGHTS INVOLVED IN THE LOAN IS ADJUDICATED TO OR DIVERTED AT A WELL LOCATED MORE THAN ONE HUNDRED FEET FROM THE BANK OF THE NEAREST FLOWING STREAM;

(V) THE DIVISION ENGINEER HAS GIVEN THE OWNERS OF WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS FIFTEEN DAYS AFTER THE DATE OF MAILING OF

NOTICE UNDER SUBPARAGRAPH (II) OF THIS PARAGRAPH (b) TO FILE COMMENTS ON THE PROPOSED LOAN; EXCEPT THAT, THE DIVISION ENGINEER MAY ACT ON THE APPLICATION IMMEDIATELY AFTER THE APPLICANT PROVIDES EVIDENCE THAT ALL PERSONS ENTITLED TO NOTICE OF THE APPLICATION UNDER SUBPARAGRAPH (II) OF THIS PARAGRAPH (b) HAVE EITHER CONSENTED TO OR COMMENTED ON THE APPLICATION. SUCH COMMENTS SHALL INCLUDE ANY CLAIM OF INJURY OR ANY TERMS AND CONDITIONS THAT SHOULD BE IMPOSED UPON THE PROPOSED LOAN TO PREVENT INJURY TO A PARTY'S WATER RIGHT AND ANY OTHER INFORMATION THE COMMENTING PARTY WISHES THE DIVISION ENGINEER TO CONSIDER IN REVIEWING THE PROPOSED LOAN; AND

(VI) THE DIVISION ENGINEER, AFTER CONSIDERATION OF ANY COMMENTS RECEIVED, HAS DETERMINED THAT THE OPERATION AND ADMINISTRATION OF THE PROPOSED LOAN WILL NOT CAUSE MATERIAL INJURY TO OTHER WATER RIGHTS OR IMPACT COLORADO'S COMPACT ENTITLEMENTS. THE DIVISION ENGINEER SHALL IMPOSE SUCH TERMS AND CONDITIONS AS ARE NECESSARY TO ENSURE THAT THESE STANDARDS ARE MET. IN MAKING THE DETERMINATIONS SPECIFIED IN THIS SUBPARAGRAPH (VI), THE DIVISION ENGINEER SHALL NOT BE REQUIRED TO HOLD ANY FORMAL HEARINGS OR CONDUCT ANY OTHER FORMAL PROCEEDINGS, BUT MAY CONDUCT A HEARING OR FORMAL PROCEEDING IF THE DIVISION ENGINEER FINDS IT NECESSARY TO ADDRESS THE ISSUES.

(VII) THE DIVISION ENGINEER SHALL APPROVE OR DENY THE PROPOSED LOAN WITHIN TWENTY DAYS AFTER THE DATE OF MAILING OF NOTICE UNDER SUBPARAGRAPH (II) OF THIS PARAGRAPH (b), OR WITHIN FIVE DAYS AFTER THE APPLICANT PROVIDES EVIDENCE THAT ALL PERSONS ENTITLED TO NOTICE OF THE APPLICATION UNDER SUBPARAGRAPH (II) OF THIS PARAGRAPH (b) HAVE EITHER CONSENTED TO OR COMMENTED ON THE APPLICATION.

(VIII) WHEN THE DIVISION ENGINEER APPROVES OR DENIES A PROPOSED LOAN, THE DIVISION ENGINEER SHALL SERVE A COPY OF THE DECISION ON 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 BY THE DIVISION 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 LOAN. ANY APPEAL OF A DECISION BY THE DIVISION ENGINEER CONCERNING THE LOAN PURSUANT TO THIS SECTION SHALL BE MADE TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION WITHIN FIFTEEN DAYS AFTER THE DATE ON WHICH THE DECISION IS SERVED ON THE PARTIES TO THE APPLICATION. THE WATER JUDGE SHALL HEAR SUCH APPEAL ON AN EXPEDITED BASIS.

**SECTION 2. Appropriation.** In addition to any other appropriation, there is hereby appropriated, out of any moneys in the ground water management cash fund created in section 37-80-111.5, Colorado Revised Statutes, not otherwise appropriated, to the department of natural resources, division of water resources, for the fiscal year beginning July 1, 2003, the sum of five thousand dollars (\$5,000), 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