

**First Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO**

REVISED

*This Version Includes All Amendments Adopted
on Second Reading in the Second House*

LLS NO. 13-0231.01 Thomas Morris x4218

HOUSE BILL 13-1130

HOUSE SPONSORSHIP

Sonnenberg and Fischer,

SENATE SPONSORSHIP

Todd and Baumgardner,

House Committees

Agriculture, Livestock, & Natural Resources

Senate Committees

Agriculture, Natural Resources, & Energy

A BILL FOR AN ACT

101 **CONCERNING EXTENDED OPERATION OF INTERRUPTIBLE WATER**
102 **SUPPLY AGREEMENTS.**

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>.)

Current law allows the state engineer to approve the operation of an interruptible water supply agreement for 3 years out of a single 10-year period; once the agreement has been operated, the state engineer cannot approve the agreement for operation in any later period. The bill allows the state engineer to reapprove an agreement up to 2 additional times by

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.

SENATE
Amended 2nd Reading
April 22, 2013

HOUSE
3rd Reading Unamended
February 26, 2013

HOUSE
Amended 2nd Reading
February 22, 2013

following the same procedures for approval of the original agreement.

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

2 **SECTION 1.** In Colorado Revised Statutes, 37-92-309, **amend**
3 (2), (3) (a), (3) (b), (3) (c), and (4); and **add** (6) as follows:

4 **37-92-309. Interruptible water supply agreements - special**
5 **review procedures - rules - water adjudication cash fund - legislative**
6 **declaration.** (2) For purposes of this section:

7 (a) "Interruptible water supply agreement" means an option
8 agreement between two or more water right owners whereby:

9 (a) (I) The ~~loaning~~ OWNER OF THE LOANED water right ~~owner~~
10 agrees that, during the term of ~~such~~ THE agreement, it will stop its use of
11 the loaned water right for a specified length of time if the option is
12 exercised by the borrowing water right owner in accordance with the
13 agreement; and

14 (b) (II) The borrowing water right owner may divert the loaned
15 water right for such owner's purposes, subject to the priority system and
16 subject to temporary approval by the state engineer in accordance with
17 this section.

18 (b) "LOANED WATER RIGHT" MEANS ANY IDENTIFIED WATER
19 RIGHT, OR IDENTIFIED PORTION OF A WATER RIGHT, SPECIFICALLY
20 DESCRIBED IN THE INTERRUPTIBLE WATER SUPPLY AGREEMENT.

21 (3) The state engineer is authorized to approve and administer
22 interruptible water supply agreements that permit a temporary change in
23 the point of diversion, location of use, and type of use of an absolute
24 water right without the need for an adjudication pursuant to this article,
25 subject to the following:

1 (a) The AN applicant for approval of an interruptible water supply
2 agreement shall provide written notice of the application by first-class
3 mail or electronic mail to all parties who have subscribed to the substitute
4 water supply plan notification list, as described in section 37-92-308 (6),
5 for the division or divisions in which the water right is located and in
6 which it will be used, and proof of such notice shall be filed with the state
7 engineer. MUST:

8 (I) SUBMIT TO THE WATER CLERK IN EACH WATER DIVISION IN
9 WHICH A LOANED WATER RIGHT IS LOCATED A RESUME OF THE
10 APPLICATION FOR APPROVAL OF AN INTERRUPTIBLE WATER SUPPLY
11 AGREEMENT SUBMITTED TO THE STATE ENGINEER, AND THE WATER CLERK
12 SHALL PUBLISH THE RESUMES IN THE MANNER SET FORTH IN SECTION
13 37-92-302 (3) (a) AND (3) (b), NOTWITHSTANDING THE FACT THAT THE
14 APPLICATIONS WERE FILED WITH THE STATE ENGINEER;

15 (II) FILE PROOF OF THE SUBMISSION OF THE RESUME TO THE WATER
16 CLERK WITH THE STATE ENGINEER NOT LATER THAN TEN DAYS AFTER THE
17 SUBMISSION;

18 (III) FILE PROOF OF THE NOTICE TO ALL PARTIES WHO HAVE
19 SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST,
20 AS DESCRIBED IN SECTION 37-92-308 (6), WITH THE STATE ENGINEER
21 WITHIN TEN DAYS AFTER PROVIDING THE NOTICE; AND

22 (IV) ENSURE THAT the application shall be IS accompanied by a
23 detailed written report, prepared by a professional engineer or other
24 professional acceptable to the state engineer, that evaluates the historical
25 consumptive use, return flows, and the potential for material injury to
26 other water rights relating to the interruptible water supply agreement,
27 and that proposes conditions to prevent such injury AND MITIGATE SUCH

1 IMPACTS. The state engineer shall give the owners of water rights
2 thirty-five ONE HUNDRED TWENTY-SIX days after the date of mailing of
3 such THE LAST notice REQUIRED UNDER THIS SECTION IS PROVIDED to file
4 comments on the operation of the interruptible water supply agreement.
5 Such comments shall MAY include any claim of injury or any terms and
6 conditions that should be imposed upon the agreement so that it will not
7 cause injury to a party's water rights or decreed conditional water rights,
8 if such conditional rights will be exercised during operation of the
9 interruptible water supply agreement, and any other information the party
10 wishes the state engineer to consider in reviewing the application.

11 (b) The state engineer, after consideration of the comments from
12 any party submitting comments, shall make a determination of the
13 operation and administration of the interruptible water supply agreement
14 to assure that such operation and administration will effect only a
15 temporary change in the historical consumptive use of the water right in
16 a manner that will not cause injury to other water rights and decreed
17 conditional water rights, if such conditional rights will be exercised
18 during operation of the interruptible water supply agreement, and will not
19 impair compliance with any interstate compact. The interruptible water
20 supply agreement shall MUST include but shall not be limited to, a
21 quantification of the historical consumptive use of the water right, an
22 accurate description of the land where the water is decreed for use, and,
23 if the loaned water right is being used for irrigation, a plan to prevent
24 erosion and blowing soils, PROOF OF COMPLIANCE WITH DITCH COMPANY
25 BYLAWS, and a description of compliance with local county noxious weed
26 regulations and other land use provisions. The state engineer shall impose
27 such terms and conditions as are necessary to ensure that these standards

1 are met. In making the determinations specified in this paragraph (b), the
2 state engineer shall IS not be required to hold any formal hearing or
3 conduct any other formal proceedings, but may conduct a hearing or
4 formal proceeding if the state engineer finds it necessary to address the
5 issues. THE STATE ENGINEER'S APPROVAL OR DISAPPROVAL OF AN
6 APPLICATION FOR AN INTERRUPTIBLE WATER SUPPLY AGREEMENT
7 CONSTITUTES FINAL AGENCY ACTION SUBJECT TO APPEAL IN THE WATER
8 COURT IN THE WATER DIVISION IN WHICH THE LOANED WATER RIGHTS ARE
9 LOCATED.

10 (c) An interruptible water supply agreement approved pursuant to
11 this section ~~shall not~~ CANNOT be exercised for more than three years in a
12 ten-year period, for which only a single approval is required. The ten-year
13 period ~~shall begin~~ BEGINS with the granting of ~~such~~ THE approval. A
14 water right subject to the agreement under this section ~~may not~~ CANNOT
15 use section 37-92-308 (5). THE STATE ENGINEER SHALL NOT APPROVE an
16 interruptible water supply agreement ~~approved~~ pursuant to this subsection
17 (3) ~~shall not be approved~~ for another ten-year period; except:

18 (I) ~~that,~~ If ~~such~~ THE agreement has not been exercised during the
19 term of the agreement, an applicant may reapply one time by repeating the
20 application process pursuant to this subsection (3); AND

21 (II) AS SPECIFIED IN SUBSECTION (6) OF THIS SECTION.

22 (4) (a) When the state engineer approves or denies an interruptible
23 water supply agreement, the state engineer shall serve a copy of the
24 decision upon all parties to the application by first-class mail or, if such
25 parties have so elected, by electronic mail. Neither the approval nor the
26 denial of the agreement by the state engineer shall create CREATES any
27 presumptions, shift SHIFTS the burden of proof, or serve SERVES as a

1 defense in any legal action that may be initiated concerning the
2 interruptible water supply agreement. Any THE WATER JUDGE SHALL
3 EXPEDITE AN appeal of a decision made by the state engineer concerning
4 the operation of an interruptible water supply agreement pursuant to this
5 section shall be expedited, shall be ONLY UPON THE REQUEST OF A PARTY
6 TO THE APPEAL. THE APPEAL IS limited to the issue ISSUES of injury. and
7 shall THE APPEAL MUST be made within thirty-five days after mailing of
8 the decision to the water judge in the applicable water division. All
9 parties to the appeal shall pay to the water clerk a fee to cover the direct
10 costs associated with the ANY expedited appeal. FOR PURPOSES OF
11 DETERMINING FILING FEES, THE APPLICANT OR COMMENTER THAT
12 INITIATES THE APPEAL SHALL PAY FEES ESTABLISHED FOR WATER COURT
13 CHANGE APPLICANTS, AND ALL OTHERS SHALL PAY FEES ESTABLISHED FOR
14 PERSONS FILING STATEMENTS OF OPPOSITION. The water judge shall hear
15 and determine such appeal DE NOVO using the procedures and standards
16 set forth in sections 37-92-304 and 37-92-305 for determination of
17 matters CHANGES OF WATER RIGHTS AND AUGMENTATION PLANS
18 rereferred to the water judge by the referee; except that the water judge
19 shall not deem any failure to appeal all or any part of the decision of the
20 state engineer or failure to state any grounds for appeal to preclude any
21 party from raising any claims of injury in a future proceeding before the
22 water judge. The proponent of the interruptible water supply agreement
23 shall be IS deemed to be the applicant for purposes of application of such
24 procedures and standards. Moneys from such fee shall be transmitted to
25 the state treasurer and deposited in the water adjudication cash fund,
26 which fund is hereby created in the state treasury. The general assembly
27 shall appropriate moneys in the fund for the judicial department's

1 expedited adjudications pursuant to this section.

2 (b) A party to the original application may file comments
3 concerning potential injury to such A party's water rights or decreed
4 conditional water rights due to the operation of the interruptible water
5 supply agreement with the state engineer by January 1 of the year
6 following the first year that the interruptible water supply agreement has
7 been exercised. The procedures of subsection (3) of this section regarding
8 notice, opportunity to comment, and the state engineer's decision, and the
9 procedures of this subsection (4) regarding an appeal of such decision,
10 shall again be followed with regard to such party's comments.

11 (6) (a) (I) THE STATE ENGINEER MAY ALSO APPROVE AN
12 INTERRUPTIBLE WATER SUPPLY AGREEMENT PURSUANT TO THIS
13 SUBSECTION (6) FOR ANOTHER TEN-YEAR PERIOD WITHIN WATER DISTRICTS
14 14, 17, AND 67 IN WATER DIVISION 2 IF THE AGREEMENT MEETS ALL OF THE
15 REQUIREMENTS OF THIS SUBSECTION (6).

16 (II) ALL OF THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS
17 OF SUBSECTIONS (2) TO (5) OF THIS SECTION APPLY TO A SUBSEQUENT
18 APPROVAL OF AN INTERRUPTIBLE WATER SUPPLY AGREEMENT EXCEPT AS
19 SPECIFICALLY PROVIDED OTHERWISE IN THIS SUBSECTION (6).

20 (III) THIS SUBSECTION (6) APPLIES ONLY TO A SUBSEQUENT
21 APPROVAL OF AN INTERRUPTIBLE WATER SUPPLY AGREEMENT.

22 (b) A PERSON MAY APPLY FOR NO MORE THAN TWO SUBSEQUENT
23 APPROVALS OF THE SAME INTERRUPTIBLE WATER SUPPLY AGREEMENT.

24 ==

25 (c) THE STATE ENGINEER SHALL NOT APPROVE AN APPLICATION
26 FOR SUBSEQUENT APPROVAL THAT WOULD TRANSFER OR FACILITATE THE
27 TRANSFER OF WATER ACROSS THE CONTINENTAL DIVIDE BY DIRECT

1 DIVERSION, EXCHANGE, OR OTHERWISE; AND

2 (d) THE STATE ENGINEER MAY APPROVE A SUBSEQUENT
3 APPLICATION FOR INTERRUPTIBLE WATER SUPPLY AGREEMENT UNDER THIS
4 SUBSECTION (6) ONLY;

5 (I) AFTER MAKING A DETERMINATION OF THE OPERATION AND
6 ADMINISTRATION OF THE INTERRUPTIBLE WATER SUPPLY AGREEMENT TO
7 ASSURE THAT SUCH OPERATION AND ADMINISTRATION WILL NOT PERMIT
8 A BORROWING WATER RIGHT USER TO RELY ON THE EXERCISE OF MULTIPLE
9 INTERRUPTIBLE WATER SUPPLY AGREEMENTS AS ITS PRIMARY SOURCE OF
10 SUPPLY;

11 (II) IF THE TERMS AND CONDITIONS IMPOSED PURSUANT TO
12 PARAGRAPH (b) OF SUBSECTION (3) OF THIS SECTION ARE NO LESS
13 RESTRICTIVE THAN THOSE IMPOSED UPON PREVIOUSLY APPROVED
14 APPLICATIONS;

15 (III) IF THE AGREEMENT DOES NOT INCLUDE A LOANED WATER
16 RIGHT THAT HAS ALREADY BEEN APPROVED AS A LOANED WATER RIGHT IN
17 A SEPARATE, UNEXPIRED INTERRUPTIBLE WATER SUPPLY AGREEMENT; AND

18 (IV) IF THE LOANED WATER RIGHT SUBJECT TO THE AGREEMENT IS
19 NOT SUBJECT TO MORE THAN TWO SUBSEQUENT APPROVALS REGARDLESS
20 OF THE APPLICANT, AND ANY SUCH SUBSEQUENT APPROVAL CANNOT TAKE
21 EFFECT UNTIL AFTER ANY PRIOR TEN-YEAR APPROVAL PERIOD HAS
22 EXPIRED.

23

24 **SECTION 2. Act subject to petition - effective date -**
25 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
26 the expiration of the ninety-day period after final adjournment of the
27 general assembly (August 7, 2013, if adjournment sine die is on May 8,

1 2013); except that, if a referendum petition is filed pursuant to section 1
2 (3) of article V of the state constitution against this act or an item, section,
3 or part of this act within such period, then the act, item, section, or part
4 will not take effect unless approved by the people at the general election
5 to be held in November 2014 and, in such case, will take effect on the
6 date of the official declaration of the vote thereon by the governor.

7 (2) This act applies to applications filed on or after the applicable
8 effective date of this act.