

**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. 13-0760.01 Jennifer Berman x3286

HOUSE BILL 13-1248

HOUSE SPONSORSHIP

Fischer,

SENATE SPONSORSHIP

Schwartz,

House Committees

Agriculture, Livestock, & Natural Resources

Senate Committees

Agriculture, Natural Resources, & Energy
Finance

A BILL FOR AN ACT

101 **CONCERNING AN AUTHORIZATION OF PILOT PROJECTS FOR THE**
102 **LEASING OF WATER FOR MUNICIPAL USE.**

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>.)

The bill authorizes the Colorado water conservation board to administer a pilot program consisting of up to 3 pilot projects, each up to 10 years in duration, in the lower Arkansas river basin to demonstrate the practice of fallowing agricultural irrigation land and leasing the associated water rights for temporary municipal use.

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
May 2, 2013

HOUSE
3rd Reading Unamended
April 11, 2013

HOUSE
Amended 2nd Reading
April 10, 2013

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

2 **SECTION 1. Legislative declaration.** (1) The general assembly
3 hereby:

4 (a) Affirms its commitment to develop and implement programs
5 to advance various agricultural transfer methods as alternatives to
6 permanent agricultural dry-up, which it has funded through the
7 "alternative agricultural water transfer sustainability grant program",
8 enacted in the 2007, 2009, and 2012 Colorado water conservation board
9 (board) projects bills;

10 (b) Recognizes that:

11 (I) If the status quo development trend continues, Colorado may
12 lose over five hundred thousand irrigated acres statewide and some basins
13 may lose as much as thirty-five percent of their irrigated acreage by 2050,
14 as found by the board's 2010 statewide water supply initiative;

15 (II) The board believes that it is urgent to implement alternatives,
16 like fallowing irrigated agricultural land for leasing water for temporary
17 municipal use, referred to in this section as "fallowing-leasing", to
18 traditional transfers resulting in permanent agricultural dry-up, and the
19 board is fostering the development of these alternatives through its
20 alternative agricultural water transfer methods competitive grant program;

21 (III) Both the interbasin compact committee and the basin
22 roundtables, created in section 37-75-104, Colorado Revised Statutes,
23 have expressed a desire to minimize permanent agricultural dry-up;

24 (IV) Fallowing-leasing poses hydrological issues in addition to
25 those posed by traditional changes of water rights, and an evaluation of
26 the hydrological issues posed may require further analysis to address

1 questions of injury to other water rights; and
2 (V) The state needs to evaluate whether fallowing-leasing is a
3 practical alternative to permanent agricultural dry-up; and
4 (c) Determines that:
5 (I) The board, which was created in section 37-60-102, Colorado
6 Revised Statutes, "[f]or the purpose of aiding in the protection and
7 development of the waters of the state, for the benefit of the present and
8 future inhabitants of the state", is the appropriate agency to test the
9 efficacy of implementing fallowing-leasing as an alternative to permanent
10 agricultural dry-up; and
11 (II) It is appropriate to authorize the board, after the state engineer
12 determines the issue of injury, to approve up to ten pilot projects to test
13 fallowing-leasing, with each project lasting up to ten years and no more
14 than three pilot projects to be located in any one of the major river basins,
15 namely: The South Platte river basin; the Arkansas river basin; the Rio
16 Grande river basin; and the Colorado river basin, except as further limited
17 by board.

18 **SECTION 2.** In Colorado Revised Statutes, 37-60-115, **add** (8)
19 as follows:

20 **37-60-115. Water studies - rules - repeal. (8) Fallowing and**
21 **leasing pilot projects.** (a) AFTER A PERIOD OF NOTICE AND COMMENT,
22 THE BOARD MAY, IN CONSULTATION WITH THE STATE ENGINEER AND UPON
23 CONSIDERATION OF ANY COMMENTS SUBMITTED, SELECT THE SPONSORS
24 OF UP TO TEN PILOT PROJECTS PURSUANT TO THE APPROVAL PROCESS SET
25 FORTH IN PARAGRAPH (f) OF THIS SUBSECTION (8). THE BOARD SHALL NOT
26 ITSELF SPONSOR A PILOT PROJECT, BUT THE BOARD MAY PROVIDE
27 FINANCIAL, TECHNICAL, OR OTHER ASSISTANCE TO A PILOT PROJECT

1 PURSUANT TO THE BOARD'S OTHER ACTIVITIES AND PROGRAMS. NO MORE
2 THAN THREE PILOT PROJECTS MAY BE LOCATED IN ANY ONE OF THE MAJOR
3 RIVER BASINS, NAMELY: THE SOUTH PLATTE RIVER BASIN; THE ARKANSAS
4 RIVER BASIN; THE RIO GRANDE RIVER BASIN; AND THE COLORADO RIVER
5 BASIN. EACH PROJECT MAY LAST UP TO TEN YEARS IN DURATION AND
6 MUST DEMONSTRATE THE PRACTICE OF:

- 7 (I) FOLLOWING AGRICULTURAL IRRIGATION LAND; AND
- 8 (II) LEASING THE ASSOCIATED WATER RIGHTS FOR TEMPORARY
9 MUNICIPAL USE.

10 (b) THE PURPOSE OF THE PILOT PROGRAM IS TO:

- 11 (I) IN FOLLOWING IRRIGATED AGRICULTURAL LAND FOR LEASING
12 WATER FOR TEMPORARY MUNICIPAL USE, DEMONSTRATE COOPERATION
13 AMONG DIFFERENT TYPES OF WATER USERS, INCLUDING COOPERATION
14 AMONG SHAREHOLDERS, DITCH COMPANIES, WATER USER ASSOCIATIONS,
15 IRRIGATION DISTRICTS, WATER CONSERVANCY DISTRICTS, WATER
16 CONSERVATION DISTRICTS, AND MUNICIPALITIES;

- 17 (II) EVALUATE THE FEASIBILITY OF DELIVERING LEASED WATER TO
18 THE TEMPORARY MUNICIPAL USERS;

- 19 (III) PROVIDE SUFFICIENT DATA FROM WHICH THE BOARD, IN
20 CONSULTATION WITH THE STATE ENGINEER, CAN EVALUATE THE EFFICACY
21 OF USING A STREAMLINED APPROACH, SUCH AS AN ACCOUNTING AND
22 ADMINISTRATIVE TOOL, FOR DETERMINING:

- 23 (A) HISTORICAL CONSUMPTIVE USE;
- 24 (B) RETURN FLOWS;
- 25 (C) THE POTENTIAL FOR MATERIAL INJURY TO OTHER WATER
26 RIGHTS; AND
- 27 (D) CONDITIONS TO PREVENT MATERIAL INJURY; AND

1 (IV) DEMONSTRATE HOW TO OPERATE, ADMINISTER, AND
2 ACCOUNT FOR THE PRACTICE OF FALLOWING IRRIGATED AGRICULTURAL
3 LAND FOR LEASING WATER FOR TEMPORARY MUNICIPAL USE WITHOUT
4 CAUSING MATERIAL INJURY TO OTHER VESTED WATER RIGHTS, DECREED
5 CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER.

6 (c) THE BOARD SHALL NOT SELECT A PILOT PROJECT THAT
7 INVOLVES:

8 (I) THE FALLOWING OF THE SAME LAND FOR MORE THAN THREE
9 YEARS IN A TEN-YEAR PERIOD;

10 (II) THE FALLOWING OF MORE THAN THIRTY PERCENT OF A SINGLE
11 IRRIGATED FARM FOR MORE THAN TEN CONSECUTIVE YEARS;

12 (III) THE TRANSFER OR FACILITATION OF THE TRANSFER OF WATER
13 ACROSS THE CONTINENTAL DIVIDE BY DIRECT DIVERSION, EXCHANGE, OR
14 OTHERWISE; OR

15 (IV) THE TRANSFER OR FACILITATION OF THE TRANSFER OF WATER
16 OUT OF THE RIO GRANDE BASIN BY DIRECT DIVERSION, EXCHANGE, OR
17 OTHERWISE.

18 (d) AFTER PROVIDING A REASONABLE OPPORTUNITY FOR PUBLIC
19 COMMENT AND CONSIDERATION OF ANY COMMENTS RECEIVED, THE
20 BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL ESTABLISH
21 CRITERIA AND GUIDELINES INCLUDING AT LEAST THE FOLLOWING:

22 (I) AN APPLICATION FEE AND, FOR SELECTED PILOT PROJECTS, AN
23 ANNUAL REVIEW FEE;

24 (II) THE INFORMATION TO BE INCLUDED IN THE APPLICATION,
25 INCLUDING A DESCRIPTION OF THE PROPOSED PILOT PROJECT;

26 (III) THE MAXIMUM QUANTITY OF TRANSFERABLE CONSUMPTIVE
27 WATER USE PER YEAR FOR ANY SINGLE PILOT PROJECT;

1 (IV) NOTWITHSTANDING PARAGRAPH (a) OF THIS SUBSECTION (8),
2 ANY GEOGRAPHIC AREAS THAT ARE NOT ELIGIBLE FOR PILOT PROJECTS;

3 (V) A TIME PERIOD OF AT LEAST SEVENTY-FIVE DAYS WITHIN
4 WHICH THE BOARD SHALL RECEIVE COMMENTS ON THE APPLICATION AFTER
5 PROVIDING NOTICE PURSUANT TO THE PROCESS SET FORTH IN PARAGRAPHS
6 (e) AND (f) OF THIS SUBSECTION (8). THE COMMENTS MAY INCLUDE:

7 (A) ANY CLAIM OF INJURY;

8 (B) ANY TERMS AND CONDITIONS THAT THE PERSON FILING A
9 COMMENT BELIEVES SHOULD BE IMPOSED ON THE PILOT PROJECT IN ORDER
10 TO PREVENT INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL
11 WATER RIGHTS, OR CONTRACT RIGHTS TO WATER; AND

12 (C) OTHER INFORMATION THAT THE PERSON FILING THE COMMENT
13 BELIEVES THE BOARD SHOULD CONSIDER IN REVIEWING THE APPLICATION;

14 (VI) CRITERIA FOR A CONFERENCE BETWEEN A PILOT PROJECT
15 APPLICANT, THE STATE ENGINEER, AND OWNERS OF WATER RIGHTS OR A
16 CONTRACT RIGHTS TO WATER THAT FILE COMMENTS ON THE APPLICATION,
17 INCLUDING THE FOLLOWING REQUIREMENTS:

18 (A) THE CONFERENCE PARTICIPANTS MUST MEET WITHIN THIRTY
19 DAYS AFTER FINAL COMMENTS ON THE APPLICATION HAVE BEEN
20 SUBMITTED;

21 (B) AT THE CONFERENCE, THE CONFERENCE PARTICIPANTS MUST
22 DISCUSS HOW THE PILOT PROJECT COULD BE STRUCTURED TO PREVENT
23 MATERIAL INJURY TO OTHER WATER RIGHTS AND CONTRACT RIGHTS TO
24 WATER; AND

25 (C) WITHIN FIFTEEN DAYS AFTER THE CONFERENCE, THE PILOT
26 PROJECT APPLICANT AND THE OWNERS OF WATER RIGHTS OR CONTRACT
27 RIGHTS TO WATER MUST FILE A JOINT REPORT WITH THE BOARD AND WITH

1 THE STATE ENGINEER OUTLINING ANY AGREED-UPON TERMS AND
2 CONDITIONS FOR THE PROPOSED PILOT PROJECT AND EXPLAINING THE
3 REASONS FOR FAILING TO AGREE ON ANY TERMS AND CONDITIONS FOR THE
4 PROPOSED PILOT PROJECT IF THE APPLICANT AND THE OWNERS FAIL TO
5 REACH A FULL AGREEMENT AT THE CONFERENCE;

6 (VII) GUIDELINES FOR THE OPERATION AND ADMINISTRATION OF
7 THE PILOT PROJECTS TO ASSURE THAT A PILOT PROJECT:

8 (A) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL
9 CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT
10 CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER
11 RIGHTS, OR CONTRACT RIGHTS TO WATER; AND

12 (B) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE
13 COMPACT;

14 (VIII) CRITERIA FOR SELECTING PILOT PROJECTS THAT RANGE IN
15 SIZE AND COMPLEXITY;

16 (IX) CRITERIA FOR SELECTING PILOT PROJECTS OVER A FIVE-YEAR
17 PERIOD ENDING ON DECEMBER 31, 2018, TO PROVIDE A WINDOW FOR
18 POTENTIAL PILOT PROJECT SPONSORS TO APPLY;

19 (X) A REQUIREMENT THAT A PROPOSED PILOT PROJECT:

20 (A) MEET APPLICABLE LOCAL GOVERNMENT LAND USE
21 REQUIREMENTS;

22 (B) PREVENT EROSION AND BLOWING SOILS; AND

23 (C) COMPLY WITH LOCAL COUNTY NOXIOUS WEED REGULATIONS;

24 (XI) A REQUIREMENT THAT, DURING THE TERM OF THE PILOT
25 PROJECT, LAND AND WATER INCLUDED IN A PILOT PROJECT IS NOT ALSO
26 INCLUDED IN A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO SECTION
27 37-92-308 (5) OR (7), AN INTERRUPTIBLE WATER SUPPLY AGREEMENT

1 PURSUANT TO SECTION 37-92-309, OR ANOTHER PILOT PROJECT;

2 (XII) A REQUIREMENT FOR PERIODIC REPORTS TO THE BOARD ON

3 THE OPERATION OF THE PILOT PROJECT; AND

4 (XIII) A REQUIREMENT THAT PRIORITY IS GIVEN TO PILOT

5 PROJECTS THAT CAN BE IMPLEMENTED USING EXISTING INFRASTRUCTURE.

6 (e) (I) FOR APPROVAL OF A PILOT PROJECT, THE APPLICANT MUST

7 PROVIDE WRITTEN NOTICE OF THE APPLICATION, INCLUDING, AT A

8 MINIMUM:

9 (A) A DESCRIPTION OF THE PROPOSED PILOT PROJECT;

10 (B) AN ANALYSIS OF THE HISTORICAL USE, THE HISTORICAL

11 CONSUMPTIVE USE, AND THE HISTORICAL RETURN FLOWS OF THE WATER

12 RIGHTS OR CONTRACT RIGHTS TO WATER PROPOSED TO BE USED FOR

13 TEMPORARY MUNICIPAL USE; AND

14 (C) A DESCRIPTION OF THE SOURCE OF WATER TO BE USED TO

15 REPLACE HISTORICAL RETURN FLOWS DURING THE PILOT PROJECT AND

16 AFTER COMPLETION OF THE PILOT PROJECT; AND

17 (II) THE APPLICANT MUST PROVIDE THE WRITTEN NOTICE BY

18 FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES THAT HAVE

19 SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST,

20 AS DESCRIBED IN SECTION 37-92-308 (6) FOR THE DIVISION OR DIVISIONS

21 IN WHICH THE WATER RIGHT IS LOCATED AND IN WHICH IT WILL BE USED.

22 THE APPLICANT MUST FILE PROOF OF THE WRITTEN NOTICE WITH THE

23 BOARD.

24 (f) AFTER CONSIDERATION OF THE COMMENTS AND ANY

25 CONFERENCE REPORTS SUBMITTED PURSUANT TO SUBPARAGRAPH (IV) OF

26 PARAGRAPH (d) OF THIS SUBSECTION (8), THE BOARD MAY APPROVE THE

27 PILOT PROJECT APPLICATION IF THE STATE ENGINEER HAS MADE A WRITTEN

1 DETERMINATION THAT THE OPERATION AND ADMINISTRATION OF THE
2 PILOT PROJECT:

3 (I) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL
4 CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT
5 CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER
6 RIGHTS, OR CONTRACT RIGHTS TO WATER;

7 (II) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE
8 COMPACT; AND

9 (III) THE BOARD ADOPTS ALL TERMS AND CONDITONS
10 RECOMMENDED BY THE STATE ENGINEER.

11 (g) WHEN THE BOARD APPROVES OR DENIES A PILOT PROJECT
12 APPLICATION, IT SHALL SERVE A COPY OF THE DECISION, ALONG WITH A
13 COPY OF THE STATE ENGINEER'S WRITTEN DETERMINATION AND ANY
14 CONFERENCE REPORTS SUBMITTED PURSUANT TO SUBPARAGRAPH (IV) OF
15 PARAGRAPH (d) OF THIS SUBSECTION (8), UPON ALL PARTIES TO THE
16 APPLICATION BY FIRST-CLASS MAIL OR, IF ELECTED BY THE PARTIES, BY
17 ELECTRONIC MAIL. THE BOARD SHALL MAIL A COPY OF THE DECISION, THE
18 STATE ENGINEER'S WRITTEN DETERMINATION, AND ANY CONFERENCE
19 REPORTS TO THE APPROPRIATE WATER CLERK.

20 (h) (I) NEITHER THE BOARD'S APPROVAL NOR THE DENIAL OF A
21 PILOT PROJECT CREATES ANY PRESUMPTIONS, SHIFTS THE BURDEN OF
22 PROOF, OR SERVES AS A DEFENSE IN ANY LEGAL ACTION THAT MAY ARISE
23 CONCERNING THE PILOT PROJECT. THE BOARD'S APPROVAL OR DENIAL OF
24 A PILOT PROJECT APPLICATION AND THE STATE ENGINEER'S WRITTEN
25 DETERMINATION ON THE APPLICATION ARE FINAL AGENCY ACTIONS THAT
26 MAY BE APPEALED. AN APPEAL PURSUANT TO THIS SUBSECTION (8) MUST
27 BE FILED WITH THE APPROPRIATE WATER JUDGE AND BE MADE WITHIN

1 THIRTY-FIVE DAYS AFTER THE BOARD'S DECISION HAS BEEN MAILED TO
2 THE APPROPRIATE WATER CLERK.

3 (II) THE WATER JUDGE SHALL EXPEDITE THE APPEAL, WHICH SHALL
4 BE DE NOVO AND USE THE PROCEDURES AND STANDARDS SET FORTH IN
5 SECTIONS 37-92-304 AND 37-92-305 FOR DETERMINATION OF MATTERS
6 REREFERRED TO THE WATER JUDGE BY THE REFEREE; EXCEPT THAT THE
7 WATER JUDGE SHALL NOT DEEM A PARTY'S FAILURE EITHER TO APPEAL ALL
8 OR ANY PART OF THE BOARD'S DECISION OR THE STATE ENGINEER'S
9 WRITTEN DETERMINATION OR TO STATE ANY GROUNDS FOR THE APPEAL TO
10 PRECLUDE THE PARTY FROM RAISING A CLAIM OF INJURY IN A FUTURE
11 PROCEEDING BEFORE THE WATER JUDGE. THE PILOT PROJECT APPLICANT
12 IS DEEMED TO BE THE APPLICANT FOR PURPOSES OF THE PROCEDURES AND
13 STANDARDS THAT THE WATER JUDGE APPLIES TO THE APPEAL.

14 (i) THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER,
15 SHALL ANNUALLY REPORT TO THE WATER RESOURCES REVIEW COMMITTEE,
16 CREATED IN SECTION 37-98-102, OR ITS SUCCESSOR COMMITTEE, ON THE
17 REPORTED RESULTS OF THE PILOT PROJECTS. THE BOARD, IN
18 CONSULTATION WITH THE STATE ENGINEER, SHALL PROVIDE A FINAL
19 REPORT TO THE WATER RESOURCES REVIEW COMMITTEE, OR ITS
20 SUCCESSOR COMMITTEE, BY JULY 1, 2029, OR THE YEAR IN WHICH THE
21 FINAL PILOT PROJECT IS COMPLETED, IF BEFORE 2029.

22 (j) THIS SUBSECTION (8) IS REPEALED, EFFECTIVE JULY 1, 2030.

23 **SECTION 3. Safety clause.** The general assembly hereby finds,
24 determines, and declares that this act is necessary for the immediate
25 preservation of the public peace, health, and safety.