

Second Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO

ENGROSSED

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

LLS NO. 14-0472.01 Thomas Morris x4218

SENATE BILL 14-023

SENATE SPONSORSHIP

Schwartz,

HOUSE SPONSORSHIP

(None),

Senate Committees

Agriculture, Natural Resources, & Energy

House Committees

A BILL FOR AN ACT

101 **CONCERNING AN AUTHORIZATION OF THE VOLUNTARY TRANSFER OF**
102 **WATER EFFICIENCY SAVINGS TO THE COLORADO WATER**
103 **CONSERVATION BOARD FOR INSTREAM USE PURPOSES IN WATER**
104 **DIVISIONS THAT INCLUDE LANDS WEST OF THE CONTINENTAL**
105 **DIVIDE.**

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/bills summaries>.)

Section 1 of the bill defines "water efficiency savings" as that

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
March 13, 2014

portion of a water right used solely for agricultural irrigation or stock watering purposes in water division 4, 5, 6, or 7 that is nonconsumptive under existing practices and that results from efficiency measures, determined as the difference between:

- ! The lesser of the decreed diversion amount and the maximum amount that had been historically diverted using the existing facilities for a beneficial use under reasonably efficient practices to accomplish without waste the purpose for which the appropriation was lawfully made; and
- ! The diverted amount needed to meet the decreed beneficial use after increased efficiency in the means of diversion, conveyance, storage, application, or use.

Section 2 allows water efficiency savings to be changed or loaned, pursuant to existing water court and water loan statutes, only to the Colorado water conservation board, only for instream use, and only if:

- ! The application was filed within 2 years after the diversions were decreased due to efficiency measures;
- ! The change or loan will not materially injure decreed water rights; and
- ! The change or loan will not adversely affect Colorado's interstate compact entitlements or obligations.

The change decree or loan approval must identify the amount of water efficiency savings and the stream reaches within which water efficiency savings, as changed or loaned, will be used. Water efficiency savings that have been changed or loaned are not subject to abandonment. The parties who enter into a change or loan of water efficiency savings may provide conditions by which the original decreed diversion rate may be preserved for a future use by the water right owner who implements the efficiency measures if use of the efficiency measures is discontinued.

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

2 **SECTION 1.** In Colorado Revised Statutes, 37-92-103, add
3 (11.5) as follows:

4 **37-92-103. Definitions.** As used in this article, unless the context
5 otherwise requires:

6 (11.5) (a) "WATER EFFICIENCY SAVINGS" MEANS AN AMOUNT OF
7 WATER, AS DETERMINED IN A WATER COURT PROCEEDING, BY WHICH DITCH
8 SEEPAGE, SURFACE RUN-OFF, RETURN FLOW, OR TAIL-WATER RETURN WILL

1 BE REDUCED AS A RESULT OF STRUCTURAL IMPROVEMENTS THAT INCREASE
2 THE EFFICIENCY OF WATER STORAGE, DIVERSION, CONVEYANCE,
3 APPLICATION, OR USE PRACTICES ASSOCIATED WITH A WATER RIGHT.

4 (b) WATER EFFICIENCY SAVINGS CAN BE DERIVED ONLY FROM:

5 (I) WATER THAT IS NOT CONSUMED UNDER EXISTING PRACTICES.

6 (II) WATER RIGHTS THAT ARE USED SOLELY FOR AGRICULTURAL
7 IRRIGATION OR STOCK WATERING PURPOSES IN WATER DIVISION 4, 5, 6, OR
8 7.

9 (c) "WATER EFFICIENCY SAVINGS" DOES NOT INCLUDE:

10 (I) WATER DERIVED FROM THE SALVAGE OF TRIBUTARY WATERS
11 BY THE ERADICATION OF PHREATOPHYTES; OR

12 (II) ANY PORTION OF HISTORIC WATER DIVERSIONS THAT WERE
13 NOT DECREED OR THAT WERE NOT REASONABLY EFFICIENT AS
14 DETERMINED BY THE WATER JUDGE.

15 **SECTION 2.** In Colorado Revised Statutes, 37-92-305, **add (3.3)**
16 **as follows:**

17 **37-92-305. Standards with respect to rulings of the referee and**
18 **decisions of the water judge. (3.3) (a) WATER EFFICIENCY SAVINGS ARE**
19 **AN INTEREST IN WATER THAT CAN BE TRANSFERRED TO THE COLORADO**
20 **WATER CONSERVATION BOARD IN WATER DIVISION 4, 5, 6, OR 7 SUBJECT**
21 **TO THE REQUIREMENTS APPLICABLE TO A CHANGE OF WATER RIGHT AND**
22 **THE FOLLOWING STANDARDS AND LIMITATIONS:**

23 (I) THE WATER JUDGE MAY APPROVE A CHANGE OF WATER RIGHT
24 FOR WATER EFFICIENCY SAVINGS TO INSTREAM FLOW USE ONLY IF:

25 (A) THE COLORADO WATER CONSERVATION BOARD HAS ACCEPTED
26 THE TRANSFER OF WATER EFFICIENCY SAVINGS FOR INSTREAM FLOW USE
27 UNDER SECTION 37-92-102 (3);

1 (B) THE WATER RIGHTS OWNER OR COLORADO WATER
2 CONSERVATION BOARD HAS MADE BEST EFFORTS TO PROVIDE WRITTEN
3 NOTICE OF THE PROPOSED APPLICATION AND OF THE BASIS FOR THE
4 PROPOSED APPLICATION BY FIRST-CLASS OR ELECTRONIC MAIL TO THE
5 OWNERS OF VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER
6 RIGHTS IN THE STREAM REACH IN WHICH THE WATER EFFICIENCY SAVINGS
7 WILL BE USED, WITH THE NOTICE BEING PROVIDED BEFORE THE
8 PUBLICATION OF THE APPLICATION WHEN FILED WITH THE WATER JUDGE;

9 (C) THE CHANGE WILL NOT MATERIALLY INJURE VESTED WATER
10 RIGHTS OR DECREED CONDITIONAL WATER RIGHTS AND STREAM
11 CONDITIONS ARE MAINTAINED IN TIME, PLACE, AND AMOUNT, INCLUDING
12 REPLACEMENT OF RETURN FLOWS, AS NECESSARY TO AVOID SUCH INJURY;
13 AND

14 (D) THE CHANGE WILL NOT ADVERSELY AFFECT COLORADO'S
15 ENTITLEMENTS OR OBLIGATIONS UNDER INTERSTATE COMPACTS OR
16 UNITED STATES SUPREME COURT EQUITABLE APPORTIONMENT DECREES;

17 (E) THE AMOUNT OF CHANGED WATER IS NOT MORE THAN THE
18 AMOUNT THAT THE COLORADO WATER CONSERVATION BOARD, AFTER
19 TAKING INTO ACCOUNT THE WATER EFFICIENCY SAVINGS TO BE DERIVED
20 FROM THE STRUCTURAL IMPROVEMENTS REFERENCED IN SECTION
21 37-92-103 (11.5) (a), DETERMINES IS APPROPRIATE AS THE MINIMUM
22 AMOUNT NECESSARY TO ADD TO THE STREAM FLOWS TO THE EXTENT
23 NECESSARY TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE
24 DEGREE PURSUANT TO SECTION 37-92-102 (3).

25 (II) THE CHANGE DECREE MUST IDENTIFY:

26 (A) THE AMOUNT OF WATER EFFICIENCY SAVINGS AND THE
27 REDUCED RATE OF DIVERSION;

1 (B) THE FLOW RATE OF THE INSTREAM FLOW RIGHT;

2 (C) THE STREAM REACH WITHIN WHICH THE WATER EFFICIENCY
3 SAVINGS WILL BE USED AS INSTREAM FLOW, THE UPSTREAM TERMINUS OF
4 WHICH MUST BE NO HIGHER THAN THE HISTORIC POINT OF DIVERSION AND
5 THE DOWNSTREAM TERMINUS OF WHICH MUST BE NO LOWER THAN THE
6 LOWEST POINT OF HISTORIC RETURN FLOWS; AND

7 (D) ALL TERMS AND CONDITIONS NECESSARY TO AVOID INJURY. IF
8 THERE ARE VESTED WATER RIGHTS OR DECREED CONDITIONAL WATER
9 RIGHTS BETWEEN THE UPSTREAM TERMINUS AND DOWNSTREAM TERMINUS
10 OF THE IDENTIFIED INSTREAM FLOW REACH, THE WATER JUDGE SHALL
11 ENSURE THE MAINTENANCE OF THE STREAM CONDITIONS ON WHICH SUCH
12 INTERVENING WATER RIGHTS HISTORICALLY RELIED, INCLUDING
13 REPLACEMENT OF RETURN FLOWS IN THE IDENTIFIED REACH, AS
14 NECESSARY TO AVOID MATERIAL INJURY.

15 (b) WATER EFFICIENCY SAVINGS THAT HAVE BEEN CHANGED
16 PURSUANT TO THIS SUBSECTION (3.3) ARE NOT SUBJECT TO ABANDONMENT
17 DURING THE PERIOD OF THE INSTREAM FLOW USE BY THE COLORADO
18 WATER CONSERVATION BOARD.

19 (c) THE WATER JUDGE MAY INCLUDE IN THE CHANGE DECREE
20 CONDITIONS PURSUANT TO WHICH THE ORIGINAL DECREED DIVERSION
21 RATE MAY BE PRESERVED FOR A FUTURE USE BY THE WATER RIGHT OWNER
22 WHO IMPLEMENTS THE STRUCTURAL IMPROVEMENTS REFERRED TO IN
23 SECTION 37-92-103 (11.5) (a) IF USE OF THE STRUCTURAL IMPROVEMENTS
24 IS DISCONTINUED.

25 (d) IN THE PROCEEDINGS TO CHANGE WATER EFFICIENCY SAVINGS
26 TO INSTREAM FLOW USE, THE WATER JUDGE SHALL QUANTIFY HISTORIC
27 CONSUMPTIVE USE ONLY IF NECESSARY TO CALCULATE THE AMOUNT OF

1 WATER BY WHICH DITCH SEEPAGE, SURFACE RUN-OFF, RETURN FLOW, OR
2 TAIL-WATER RETURN WILL BE REDUCED OR IF NECESSARY TO DETERMINE
3 WHETHER ANY PORTION OF HISTORIC WATER DIVERSIONS WERE NOT
4 REASONABLY EFFICIENT.

5 **SECTION 3.** In Colorado Revised Statutes, 37-92-102, **add** (3)
6 (f) as follows:

7 **37-92-102. Legislative declaration - basic tenets of Colorado**
8 **water law.** (3) Further recognizing the need to correlate the activities of
9 mankind with some reasonable preservation of the natural environment,
10 the Colorado water conservation board is hereby vested with the
11 exclusive authority, on behalf of the people of the state of Colorado, to
12 appropriate in a manner consistent with sections 5 and 6 of article XVI of
13 the state constitution, such waters of natural streams and lakes as the
14 board determines may be required for minimum stream flows or for
15 natural surface water levels or volumes for natural lakes to preserve the
16 natural environment to a reasonable degree. In the adjudication of water
17 rights pursuant to this article and other applicable law, no other person or
18 entity shall be granted a decree adjudicating a right to water or interests
19 in water for instream flows in a stream channel between specific points,
20 or for natural surface water levels or volumes for natural lakes, for any
21 purpose whatsoever. The board also may acquire, by grant, purchase,
22 donation, bequest, devise, lease, exchange, or other contractual
23 agreement, from or with any person, including any governmental entity,
24 such water, water rights, or interests in water that are not on the division
25 engineer's abandonment list in such amount as the board determines is
26 appropriate for stream flows or for natural surface water levels or
27 volumes for natural lakes to preserve or improve the natural environment

1 to a reasonable degree. At the request of any person, including any
2 governmental entity, the board shall determine in a timely manner, not to
3 exceed one hundred twenty days unless further time is granted by the
4 requesting person or entity, what terms and conditions it will accept in a
5 contract or agreement for such acquisition. Any contract or agreement
6 executed between the board and any person or governmental entity that
7 provides water, water rights, or interests in water to the board shall be
8 enforceable by either party thereto as a water matter under this article,
9 according to the terms of the contract or agreement. The board shall adopt
10 criteria for evaluating proposed contracts or agreements for leases or
11 loans of water, water rights, or interests in water under this subsection (3),
12 including, but not limited to, criteria addressing public notice, the extent
13 to which the leased or loaned water will benefit the natural environment
14 to a reasonable degree, and calculation of the compensation paid to the
15 lessor of the water based upon the use of the water after the term of the
16 lease. As a condition of approval of a proposed contract or agreement for
17 a lease or loan of water, water rights, or interests in water pursuant to this
18 subsection (3), the board shall obtain confirmation from the division
19 engineer that the proposal is administrable and is capable of meeting all
20 applicable statutory requirements. All contracts or agreements entered
21 into by the board for leases or loans of water, water rights, or interests in
22 water pursuant to this subsection (3) shall require the board to maintain
23 records of how much water the board uses under the contract or
24 agreement each year it is in effect and to install any measuring devices
25 deemed necessary by the division engineer to administer the contract or
26 agreement and to measure and record how much water flows out of the
27 reach after use by the board under the contract or agreement, unless a

1 measuring device already exists on the stream that meets the division
2 engineer's requirements. All contracts or agreements for water, water
3 rights, or interests in water under this subsection (3) shall provide that,
4 pursuant to the water court decree implementing the contract or
5 agreement, the board or the lessor, lender, or donor of the water may
6 bring about beneficial use of the historical consumptive use of the leased,
7 loaned, or donated water right downstream of the instream flow reach as
8 fully consumable reusable water. The board shall file a change of water
9 right application or other application with the water court to obtain a
10 decreed right to use water for instream flow purposes under a contract or
11 agreement for a lease or loan of water, water rights, or interests in water
12 pursuant to this subsection (3). The resulting water court decree shall
13 quantify the historical consumptive use of the leased or loaned water right
14 and determine the method by which the historical consumptive use should
15 be quantified and credited during the term of the agreement for the lease
16 or loan of the water right. Said method shall recognize the actual amount
17 of consumptive use available under the leased or loaned water right and
18 shall not result in a reduction of the historical consumptive use of that
19 water right during the term of the lease or loan, except to the extent such
20 reduction is based upon the actual amount of water available under said
21 rights. All water rights under such decrees shall be administered in
22 priority. The board may not accept a donation of water rights that either
23 would require the removal of existing infrastructure without approval of
24 the current owner of such infrastructure or that were acquired by
25 condemnation. The board may use any funds available to it for acquisition
26 of water rights and their conversion to instream flow rights. The board
27 may initiate such applications as it determines are necessary or desirable

1 for utilizing water, water rights, or interests in water appropriated,
2 acquired, or held by the lineboard, including applications for changes of
3 water rights, exchanges, or augmentation plans. Prior to the initiation of
4 any such appropriation or acquisition, the board shall request
5 recommendations from the division of parks and wildlife. The board also
6 shall request recommendations from the United States department of
7 agriculture and the United States department of the interior. Nothing in
8 this article shall be construed as authorizing any state agency to acquire
9 water by eminent domain or to deprive the people of the state of Colorado
10 of the beneficial use of those waters available by law and interstate
11 compact. Nothing in this subsection (3) shall impact section 37-60-121
12 (2.5). Any appropriation made pursuant to this subsection (3) shall be
13 subject to the following principles and limitations:

14 (f) (I) NOTWITHSTANDING ANY REFERENCE TO CONSUMPTIVE USE
15 OR ANY OTHER PROVISION IN THIS SUBSECTION (3) TO THE CONTRARY, THE
16 COLORADO WATER CONSERVATION BOARD MAY ACQUIRE WATER
17 EFFICIENCY SAVINGS FOR INSTREAM FLOW USE PURSUANT TO SECTION
18 37-92-305 (3.3). THIS SUBSECTION (3) APPLIES TO SUCH ACQUISITION
19 EXCEPT TO THE EXTENT THAT THIS SUBSECTION (3) IS INCONSISTENT WITH
20 AN ACQUISITION OF WATER THAT WAS HISTORICALLY NOT CONSUMED.

21 (II) THE BOARD SHALL CONSIDER PRACTICES AND AGREEMENTS,
22 FORMAL AND INFORMAL, AMONG POTENTIALLY AFFECTED WATER USERS
23 WHEN CONSIDERING WHETHER OR NOT TO PLACE A CALL FOR ANY
24 INSTREAM FLOW USE ADJUDICATED FROM WATER EFFICIENCY SAVINGS.

25 (III) THE GENERAL ASSEMBLY HEREBY:

26 (A) FINDS THAT DUE TO THE HYDROLOGICAL AND ADMINISTRATIVE
27 CIRCUMSTANCES IN PORTIONS OF WATER DIVISIONS 4, 5, 6, AND 7 THAT

1 MAY NOT BE PRESENT IN OTHER WATER DIVISIONS, A WATER RIGHT USED
2 SOLELY FOR AGRICULTURAL IRRIGATION OR STOCK WATERING PURPOSES
3 IN THOSE WATER DIVISIONS MAY, THROUGH INCREASED EFFICIENCY
4 MEASURES AND UNDER APPROPRIATE TERMS AND CONDITIONS THAT
5 ENSURE VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER
6 RIGHTS WILL BE PROTECTED, BE ABLE TO PROVIDE NONCONSUMPTIVE
7 WATER TO THE COLORADO WATER CONSERVATION BOARD FOR INSTREAM
8 FLOW PURPOSES; AND

9 (B) DECLARES THAT THE PURPOSE OF THIS PARAGRAPH (f) IS TO
10 PROMOTE AND ENCOURAGE USE OF THESE INCREASED EFFICIENCY
11 MEASURES IN ORDER TO PROVIDE THE COLORADO WATER CONSERVATION
12 BOARD WITH WATER FOR INSTREAM FLOW PURPOSES IN APPROPRIATE
13 AREAS WITHIN WATER DIVISIONS 4, 5, 6, AND 7.

14 **SECTION 4. Applicability.** This act applies to water efficiency
15 savings changed on or after the effective date of this act.

16 **SECTION 5. Safety clause.** The general assembly hereby finds,
17 determines, and declares that this act is necessary for the immediate
18 preservation of the public peace, health, and safety.