



**TO:** Colorado Water Conservation Board Members

**FROM:** Linda Bassi, Section Chief  
Kaylea White, Senior Water Resource Specialist  
Stream and Lake Protection Section

**DATE:** March 20-21, 2019 Board Meeting

**AGENDA ITEM:** 8. Legislation Amending Section 37-83-105, C.R.S. (Temporary Loans of Water for Instream Flow Use)

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## Introduction

The Nature Conservancy, Conservation Colorado, the Colorado Water Trust, Western Resource Advocates, Audubon Rockies, Trout Unlimited, and American Rivers (“bill proponents”) have been working with Representative Dylan Roberts on a bill to amend section 37-83-105, C.R.S. (2018). That statutory provision authorizes and governs temporary loans and leases of water for instream flow (“ISF”) use. House Bill 19-1218 was introduced on March 4, 2019 and is attached to this memo. This an informational item with no Board action required.

## Discussion

The bill proponents’ impetus for working on this legislation stems in part from a shared interest in renewing temporary ISF loans of water from storage that has benefited the ISF water right on the Yampa River below Stagecoach Reservoir, and the Yampa River through the City of Steamboat Springs. Additionally, there has been increased interest in the ability to: (1) exercise a temporary ISF loan for more than three years in a 10-year period; (2) use temporarily loaned water to improve the natural environment on a decreed ISF reach; and (3) exercise temporary loans of water for ISF use on streams where flows are needed, but do not have an appropriated ISF water right in place, often because of water availability issues. In light of this interest and increasingly common low flow years, this legislation was introduced to expand the CWCB’s ability to work collaboratively with willing water rights owners to protect streams with this tool.

### A. Description of the Bill

House Bill 19-1218 would amend section 37-83-105 to:

1. Expand the number of years a temporary ISF loan may be exercised from 3 years in a 10-year period to 5 years in a 10-year period.
2. Allow a temporary ISF loan to be renewed for up to 2 additional 10-year periods, except that, if a loan has not been exercised during the term of any 10-year period, an applicant may reapply for approval one additional time. Currently, temporary loans may not be renewed.



3. Expand the CWCB's ability to use temporarily loaned water beyond the current ability to only use such water to preserve the natural environment to a reasonable degree on streams where the Board currently holds a decreed ISF water right up to the decreed flow rate to allow the Board to:
  - a. Improve the natural environment to a reasonable degree on a stream where the Board holds a decreed ISF water right; and
  - b. Preserve or improve the natural environment to a reasonable degree on a stream where the Board does not hold a decreed ISF water right.

House Bill 19-1218 requires the Board to base its acceptance and exercise of temporary ISF loans described in 3.a. and b. above on a review of biological and scientific evidence, including a biological analysis performed by Colorado Parks and Wildlife at the Board's request. The bill also requires the CWCB to promulgate rules regarding the Board's process for reviewing proposed temporary ISF loans described in 3.a. and b. above, including the Board's determination, after a hearing, if requested, whether to accept the proposed loan.

#### **B. Potential Impact of Bill on CWCB Procedures**

This legislation would not change the Board's procedures for accepting temporary loans of water to preserve the natural environment on streams where the Board holds a decreed ISF water right. However, it would allow exercise of such loans for two more years in a 10-year period than currently allowed, and would allow such loans to be renewed for up to two 10-year periods, except for loans not exercised during the term of any 10-year period, in which case an applicant would be able to reapply for approval one additional time. For temporary loans of water to improve the natural environment on a decreed ISF reach, or to preserve or improve the natural environment on a reach with no decreed ISF water right, the Board would need to conduct a more rigorous review of such proposed loans under new rules, similar to the ISF Rule 6 process for reviewing and accepting other types of ISF water acquisitions. That review would include reviewing a biological analysis to support the Board's findings that the timing and amount of the loaned water is appropriate to preserve or improve the natural environment to a reasonable degree. The Board would need to amend the ISF Rules to establish the steps it would take to review and accept such loans. Finally, this legislation would not change the process by which the Board requests approval of temporary ISF loans from the State and Division Engineers.

#### **C. Next Steps**

House Bill 19-1218 is scheduled for a hearing before the House Energy and Environment Committee on March 25, 2019. In the meantime, the Colorado Water Congress State Affairs Committee will discuss and determine its position on the bill. Staff will update the Board on any new developments at the March 20-21 CWCB meeting.



First Regular Session  
Seventy-second General Assembly  
STATE OF COLORADO

INTRODUCED

LLS NO. 19-0327.01 Jennifer Berman x3286

HOUSE BILL 19-1218

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HOUSE SPONSORSHIP

Roberts,

SENATE SPONSORSHIP

(None),

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House Committees  
Energy & Environment

Senate Committees

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A BILL FOR AN ACT

101 CONCERNING THE COLORADO WATER CONSERVATION BOARD'S  
102 AUTHORITY TO USE WATER THAT A WATER RIGHT OWNER  
103 VOLUNTARILY LOANS TO THE BOARD FOR INSTREAM FLOW  
104 PURPOSES.

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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://leg.colorado.gov>.)*

Under current law, the Colorado water conservation board (board), subject to procedural requirements established to prevent injury to water rights or decreed conditional water rights, may use loaned water for

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.  
Capital letters or bold & italic numbers indicate new material to be added to existing statute.  
Dashes through the words indicate deletions from existing statute.

instream flows if the loaned water is used for preserving the natural environment of a stream reach that is subject to a decreed instream flow water right held by the board. The bill expands the number of years within a 10-year period that a loan may be exercised from 3 years to 5 years and allows a loan to be renewed for up to 2 additional 10-year periods.

The bill also expands the board's ability to use loaned water for instream flows to allow loans to:

- ! Improve the natural environment to a reasonable degree pursuant to a decreed instream flow water right held by the board; or
- ! Preserve or improve the natural environment to a reasonable degree for a stream reach for which the board does not hold a decreed instream flow water right.

In considering whether to accept one of the new types of loans authorized by the bill, the board must evaluate the proposed loan based on a biological analysis performed by the division of parks and wildlife. The board is required to promulgate rules regarding the necessary steps for reviewing and accepting such a loan.

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

2           **SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend**  
3 (1), (2)(a) introductory portion, (2)(a)(IV), and (2)(a)(V); and **add**  
4 (2)(a)(VI) as follows:

5           **37-83-105. Owner may loan agricultural water right - loans**  
6 **to Colorado water conservation board for instream flows - rules.**

7 (1) (a) Subject to the limitations of this subsection (1) and pursuant to the  
8 procedures set forth in ~~paragraph (b) of subsection (2)~~ SUBSECTION (2)(b)  
9 of this section, the owner of a water right decreed and used solely for  
10 agricultural irrigation purposes may loan all or a portion of the water right  
11 to another owner of a decreed water right on the same stream system and  
12 that is used solely for agricultural irrigation purposes for no more than  
13 one hundred eighty days during any one calendar year if the division  
14 engineer approves ~~such~~ THE loan in advance and the loan does not cause  
15 injury to other decreed water rights.

1 (b) A WATER RIGHT OWNER MAY LOAN WATER TO THE COLORADO  
2 WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOW:

3 (I) TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE  
4 DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY  
5 THE BOARD; OR

6 (II) BASED ON THE BOARD'S REVIEW OF BIOLOGICAL AND  
7 SCIENTIFIC EVIDENCE PRESENTED TO IT INCLUDING A BIOLOGICAL  
8 ANALYSIS THAT THE BOARD REQUESTS THAT THE DIVISION OF PARKS AND  
9 WILDLIFE CREATED IN SECTION 33-9-104 PERFORM:

10 (A) TO IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE  
11 DEGREE FOR A STREAM REACH FOR WHICH THE BOARD HOLDS A DECREED  
12 INSTREAM FLOW WATER RIGHT; OR

13 (B) TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A  
14 REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD DOES  
15 NOT HOLD A DECREED INSTREAM FLOW WATER RIGHT.

16 (2) (a) ~~A Water right owner may loan water to the Colorado water~~  
17 ~~conservation board for use as~~ BE USED FOR instream flows pursuant to a  
18 ~~decreed instream flow water right held by the board~~ LOAN AUTHORIZED  
19 UNDER THIS SECTION for a period not to exceed one hundred twenty days,  
20 subject to the following:

21 (IV) A loan approved pursuant to this ~~paragraph (a)~~ shall  
22 SUBSECTION (2)(a) MUST not be exercised for more than ~~three~~ FIVE years  
23 in a ten-year period, for which only a single approval by the state engineer  
24 is required. The ten-year period ~~shall begin~~ BEGINS when the state  
25 engineer approves the loan. The state engineer ~~shall not~~ MAY approve a  
26 loan pursuant to this ~~paragraph (a)~~ SUBSECTION (2)(a) for ~~another~~ UP TO  
27 TWO ADDITIONAL ten-year ~~period~~ PERIODS; except that, if the agreement

1 has not been exercised during the term of ANY TEN-YEAR PERIOD OF the  
2 agreement, an applicant may reapply one ADDITIONAL time by repeating  
3 the application process pursuant to this subsection (2).

4 (V) A party may file comments concerning potential injury to ~~such~~  
5 THE party's water rights or decreed conditional water rights due to the  
6 operations of the loan of a THE water right to a ~~decreed instream flow~~  
7 ~~right~~ with the state engineer by January 1 of the year following each year  
8 that the loan is exercised. The procedures of ~~paragraph (b) of this~~  
9 ~~subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice,  
10 opportunity to comment, the state engineer's decision, and an appeal of  
11 ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's  
12 comments.

13 (VI) THE BOARD SHALL PROMULGATE RULES REGARDING THE  
14 FOLLOWING NECESSARY STEPS FOR REVIEWING AND ACCEPTING LOANS FOR  
15 INSTREAM FLOW USE TO PRESERVE OR IMPROVE THE NATURAL  
16 ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO SUBSECTION  
17 (1)(b)(II) OF THIS SECTION:

18 (A) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A  
19 REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL  
20 ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE  
21 EXTENT TO WHICH THE PROPOSED LOAN WILL PRESERVE OR IMPROVE THE  
22 NATURAL ENVIRONMENT TO A REASONABLE DEGREE; AND

23 (B) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE  
24 MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

25 **SECTION 2. Act subject to petition - effective date -**  
26 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following  
27 the expiration of the ninety-day period after final adjournment of the

1 general assembly (August 2, 2019, if adjournment sine die is on May 3,  
2 2019); except that, if a referendum petition is filed pursuant to section 1  
3 (3) of article V of the state constitution against this act or an item, section,  
4 or part of this act within such period, then the act, item, section, or part  
5 will not take effect unless approved by the people at the general election  
6 to be held in November 2020 and, in such case, will take effect on the  
7 date of the official declaration of the vote thereon by the governor.

8 (2) This act applies to conduct occurring on or after the applicable  
9 effective date of this act.