

Colorado Revised Statutes 2021

ARTICLE 83

Exchange of Water

Cross references: For the appointments and functions of water division engineers, see § 37-92-202.

37-83-101. Transfer from one stream to another. Whenever any person or company diverts water from one public stream and turns it into another public stream, such person or company may take out the same amount of water again, less a reasonable deduction for seepage and evaporation, to be determined by the state engineer.

Source: L. 1897: p. 176, § 1. R.S. 08: § 3222. C.L. § 1702. CSA: C. 90, § 100. CRS 53: § 147-6-1. C.R.S. 1963: § 148-6-1.

37-83-102. Maintenance of measuring devices. Any person or company transferring water from one public stream to another is required to construct and maintain, under the direction of the state engineer, measuring flumes or weirs and self-registering devices at the point where the water leaves its natural watershed and is turned into another and also at the point where it is finally diverted for use from the public stream.

Source: L. 1897: p. 176, § 2. R.S. 08: § 3223. C.L. § 1703. CSA: C. 90, § 101. CRS 53: § 147-6-2. C.R.S. 1963: § 148-6-2.

37-83-103. Division engineer to keep record. It is the duty of the division engineer of the division in which the water is used to keep a record of the amount of water so turned into his division from any other division.

Source: L. 1897: p. 176, § 3. R.S. 08: § 3224. C.L. § 1704. CSA: C. 90, § 102. CRS 53: § 147-6-3. C.R.S. 1963: § 148-6-3.

37-83-104. Reservoirs and ditches may exchange. When the rights of others are not injured thereby, it is lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations from said stream and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the state engineer. The person or company desiring such exchange shall be required to construct and maintain, under the direction of the state engineer, measuring flumes or weirs and self-registering devices at the point where the water is turned into the stream or ditch taking the same or as near such point as is practicable so that the division engineer may readily determine and secure the just and equitable exchange of water.

Source: L. 1897: p. 177, § 4. R.S. 08: § 3225. C.L. § 1705. CSA: C. 90, § 103. CRS 53: § 147-6-4. C.R.S. 1963: § 148-6-4.

37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules. (1) (a) Subject to the limitations of this subsection (1) and pursuant to the procedures set forth in subsection (2)(b) of this section that apply to an expedited loan described in subsection (2)(a)(III.7) of this section, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the state engineer approves the loan in advance and the loan does not cause injury to other decreed water rights.

(b) The owner of any decreed water right may loan water to the Colorado water conservation board for use as instream flows:

(I) To preserve the natural environment to a reasonable degree pursuant to a decreed instream flow water right held by the board; or

(II) To improve the natural environment to a reasonable degree for a stream reach for which the board holds a decreed instream flow water right.

(2) (a) Water may be used for instream flows pursuant to a loan authorized under this section for a period not to exceed one hundred twenty days in a single calendar year, 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 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.

(III.5) Water rights loaned pursuant to this section are not precluded from concurrent or subsequent inclusion in a water conservation, demand management, compact compliance, or water banking program or plan, as is or may be subsequently defined or described in statute.

(III.7) An expedited loan approved to preserve the natural environment to a reasonable degree pursuant to this subsection (2)(a) has a term of up to one year. The loan period begins when the state engineer approves the expedited loan. If an expedited loan is approved, the applicant shall not reapply for an additional expedited loan of the water right.

(IV) (A) A renewable loan approved to preserve or improve the natural environment to a reasonable degree pursuant to this subsection (2)(a) must not be exercised for more than five years in a ten-year period and for no more than three consecutive years, for which only a single approval by the state engineer is required. The ten-year period begins when the state engineer approves the loan. An applicant may reapply for and the state engineer may approve a renewable loan pursuant to this subsection (2)(a) for up to two additional ten-year periods.

(B) If an applicant had previously been approved for and had exercised an expedited loan pursuant to subsection (2)(a)(III.7) of this section and subsequently applies and is approved for a renewable loan, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan.

(C) In each year that a renewable loan is exercised, the applicant shall provide the written notice described in subsection (2)(b)(II) of this section.

(V) A party may file comments concerning potential injury to the party's water rights or decreed conditional water rights due to the operations of the loan of the water right with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of subsection (2)(b) of this section regarding notice, opportunity to comment, the state engineer's decision, and an appeal of the decision shall again be followed with regard to the party's comments. In an appeal to the water judge in the applicable water division of the determination made by the state engineer pursuant to this section, the applicant has the burden of proof that the loaned water right does not cause injury to other vested or conditionally decreed water rights. Any appeal of a decision by the state engineer concerning the loan pursuant to this section shall be made in accordance with the procedures set forth in subsection (2)(b)(VIII) of this section.

(VI) Rules promulgated by the Colorado water conservation board pursuant to subsection (3) of this section.

(b) In determining whether injury will occur, the state engineer shall ensure that the following conditions are met:

(I) The applicant has filed a request for approval of the loan with the state engineer, together with a filing fee in the amount of three hundred dollars. The state engineer shall transmit the fee to the state treasurer, who shall deposit the fee in the water resources cash fund created in section 37-80-111.7 (1). The request for approval must 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 applicant has submitted proof to the state engineer, in a form and manner determined by the state engineer, demonstrating that the applicant provided written notice of the request for approval of the loan by first-class mail or electronic mail to:

(A) 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

(B) A registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall.

(II.5) The applicant has proven that the loan will not injure decreed water rights, decreed exchanges of water, or other water users' undecreed existing exchanges of water to the extent that the undecreed existing exchanges have been administratively approved before the date of the filing of the request for approval of the loan.

(III) The proposed use of the loaned water right is for agricultural irrigation purposes or for instream flow purposes by the Colorado water conservation board;

(IV) None of the water rights involved in the loan are adjudicated to or diverted at a well located more than one hundred feet from the bank of the nearest flowing stream;

(V) The state engineer has given the owners of water rights and decreed conditional water rights the opportunity to file comments on the proposed loan within the relevant time frame indicated in this subsection (2)(b)(V). The comments must 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 rights and any other information the commenting party wishes the state engineer to consider in reviewing the proposed loan. The state engineer shall provide the parties entitled to notice under subsection (2)(b)(II) of this section:

(A) Fifteen days after the date of mailing of notice for expedited loans authorized under subsection (2)(a)(III.7) of this section to provide comments on the proposed loan; and

(B) Sixty days after the date of mailing of notice for renewable loans authorized under subsection (2)(a)(IV) of this section to provide comments on the proposed loan.

(VI) The state engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, decreed exchanges, or undecreed exchanges as described in subsection (2)(b)(II.5) of this section and, for loans made pursuant to subsection (2)(a) of this section, will not affect Colorado's compact entitlements. The state engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this subsection (2)(b)(VI), the state engineer need not hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

(VII) The state engineer shall approve or deny the proposed loan within ten days after the period for comments on the proposed loan specified in subsection (2)(b)(V) of this section has expired.

(VIII) When the state engineer approves or denies a proposed loan, the state engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if the parties have so elected, by electronic mail. Neither the approval nor the denial by the state engineer creates any presumptions or serves as a defense in any legal action that may be initiated concerning the loan. A party may file an appeal of a decision by the state engineer concerning the loan pursuant to this section to the water judge in the applicable water division within fifteen days after the date that the state engineer, following the state engineer's consideration of any comments submitted pursuant to subsection (2)(a)(V) of this section, serves the decision on the parties to the application. The applicant has the burden of proof to demonstrate that the loaned water right does not cause injury to other vested or conditionally decreed water rights, decreed exchanges, or undecreed exchanges as described in subsection (2)(b)(II.5) of this section. The water judge shall hear and determine the appeal on an expedited basis using the procedures and standards set forth in section 37-92-304 (3) concerning matters rereferred to the water judge by the water referee.

(c) All periods of time during which a loaned water right is used by the board for instream flow purposes shall be excluded from any historic consumptive use analysis of the loaned water right required under any water court proceeding.

(3) The Colorado water conservation board shall promulgate rules regarding the following necessary steps for its review and acceptance of loans for instream flow use pursuant to subsection (1)(b)(II) of this section:

(a) The board's review of the proposed loan, including a requirement that the board request and review a biological analysis from the division of parks and wildlife concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree;

(b) A requirement that when considering a proposed loan, the board shall give preference to loans of stored water, when available, over loans of direct flow water; and

(c) The board's determination, after a hearing on the matter, if requested, whether to accept the proposed loan.

Source: **L. 1899:** p. 236, § 3. **R.S. 08:** § 3232. **C.L.** § 1712. **CSA:** C. 90, § 110. **CRS 53:** § 147-6-5. **C.R.S. 1963:** § 148-6-5. **L. 2003:** Entire section amended, p. 2396, § 1, effective June 5. **L. 2004:** (1), IP(2)(b), (2)(b)(III), (2)(b)(VI), and (2)(b)(VII) amended, p. 1014, § 1, effective May 21. **L. 2005:** IP(2)(a) amended and (2)(a)(IV) and (2)(a)(V) added, p. 82, § 1, effective August 8. **L. 2007:** (2)(c) added, p. 48, § 1, effective August 3. **L. 2012:** IP(2)(b)(I) amended, (SB 12-009), ch. 197, p. 792, § 6, effective July 1. **L. 2020:** (1), IP(2)(a), (2)(a)(IV), (2)(a)(V), IP(2)(b), IP(2)(b)(I), (2)(b)(II), (2)(b)(V), (2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII) amended and (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)(II.5), and (3) added, (HB 20-1157), ch. 52, p. 179, § 1, effective September 14.

37-83-106. Authority of political subdivisions to lease or exchange water. Water conservancy districts and water conservation districts which own or hold rights to water may enter into cooperative agreements with other political subdivisions of the state for the lease or exchange of water produced in the exercise of such district's water rights and the construction or use of waterworks within or outside of district boundaries, according to such terms as such district and political subdivision agree upon. Conservation districts, conservancy districts, and other political subdivisions of the state may enter into agreements with each other to provide funds or undertake measures to carry out section 37-45-118 (1)(b)(II), including agreements for the exchange or lease of such water outside the boundaries of the conservation or conservancy district. Such leases and exchanges may cover the time period necessary to amortize, or repay bonds issued for, the cost of constructing the waterworks involved, and may be renewable according to such terms as such district and political subdivision may agree upon. Any water rights leased or exchanged under this section shall be only for the time certain contained in each such agreement or extension thereof. Any water rights or changes of water rights which are necessary to implement such agreements shall be adjudicated as provided by law. If mutually agreeable, districts and other political subdivisions may submit any contractual disputes arising under this section between them to nonbinding arbitration, as they may determine.

Source: **L. 89:** Entire section added, p. 1420, § 1, effective April 12. **L. 2001:** Entire section amended, p. 1278, § 50, effective June 5.