

**First Regular Session  
Seventieth General Assembly  
STATE OF COLORADO**

**PREAMENDED**

*This Unofficial Version Includes Committee  
Amendments Not Yet Adopted on Second Reading*

LLS NO. 15-0589.01 Jennifer Berman x3286

**HOUSE BILL 15-1038**

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**HOUSE SPONSORSHIP**

**Arndt,**

**SENATE SPONSORSHIP**

**Hodge,**

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**House Committees**

Agriculture, Livestock, & Natural Resources

**Senate Committees**

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**A BILL FOR AN ACT**

101 **CONCERNING FLEXIBLE WATER MARKETS.**

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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://www.leg.state.co.us/billsummaries>.)*

Currently, water court proceedings governing an application to change the beneficial use of an irrigation water right require the applicant to designate a specific alternative beneficial use identified at the time of the application. The bill creates a more flexible change-in-use system by allowing an applicant who seeks to implement fallowing, regulated deficit irrigation, reduced consumptive use cropping, or other alternatives to the permanent dry-up of irrigated lands to apply for a change in use to any beneficial use, without designating the specific beneficial use to which

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.

the water will be applied.

**Section 1** of the bill defines "flex use" to mean an application of the fully consumptive portion of water that has been subject to a water right change-in-use proceeding to any beneficial use. It also redefines "appropriation" to exclude flex use from the anti-speculation doctrine.

**Section 2** describes the procedures for obtaining a flex use change-in-use decree, and **section 3** describes the procedures for obtaining a flex use substitute water supply plan.

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

2 **SECTION 1.** In Colorado Revised Statutes, 37-92-103, **amend**  
3 (3) (b), (4) (b), and (4) (c); and **add** (4) (d), (7.3), and (7.5) as follows:

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

6 (3) (b) Nothing in this subsection (3) ~~shall affect~~ AFFECTS  
7 appropriations by the state of Colorado for minimum streamflows as  
8 described in subsection (4) of this section OR APPROVAL OF FLEX USE.

9 (4) "Beneficial use" means the use of that amount of water that is  
10 reasonable and appropriate under reasonably efficient practices to  
11 accomplish without waste the purpose for which the appropriation is  
12 lawfully made. Without limiting the generality of the previous sentence,  
13 "beneficial use" includes:

14 (b) FOR RECREATIONAL IN-CHANNEL DIVERSION PURPOSES, the  
15 diversion of water by a county, municipality, city and county, water  
16 district, water and sanitation district, water conservation district, or water  
17 conservancy district; ~~for recreational in-channel diversion purposes; and~~

18 (c) For the benefit and enjoyment of present and future  
19 generations, the appropriation by the state of Colorado in the manner  
20 prescribed by law of such minimum flows between specific points or  
21 levels for and on natural streams and lakes as are required to preserve the

1 natural environment to a reasonable degree; AND

2 (d) A FLEX USE.

3 (7.3) "FLEX CONSUMPTIVE USE" MEANS:

4 (a) THE FULLY CONSUMPTIVE PORTION OF A WATER RIGHT  
5 DECREED FOR IRRIGATION PURPOSES THAT HAS BEEN QUANTIFIED FOR THE  
6 FIRST TIME BY A WATER COURT CHANGE-IN-USE DECREE OR QUANTIFIED  
7 BY A SUBSTITUTE WATER SUPPLY PLAN APPROVAL, ENTERED OR APPROVED  
8 ON OR AFTER JUNE 1, 2015; AND

9 (b) THE RETURN FLOWS ASSOCIATED WITH THE HISTORICAL USE OF  
10 THE WATER RIGHT IF APPROPRIATED IN ACCORDANCE WITH THE LAW  
11 UNDER A NEW PRIORITY DATE AND CONFIRMED BY THE WATER COURT  
12 CHANGE-IN-USE DECREE IN WHICH THE FULLY CONSUMPTIVE USE PORTION  
13 OF THE WATER RIGHT IS QUANTIFIED.

14 (7.5) (a) (I) "FLEX USE" MEANS DIVERSION AND USE OF FLEX  
15 CONSUMPTIVE USE AT ANY POINT OF DIVERSION WITHIN THE WATER  
16 DIVISION OF HISTORICAL USE IDENTIFIED IN AN EXISTING WATER COURT  
17 DECREE OR STATE ENGINEER-APPROVED SUBSTITUTE WATER SUPPLY PLAN,  
18 FOR ANY BENEFICIAL USES IDENTIFIED IN THE DECREE OR SUBSTITUTE  
19 WATER SUPPLY PLAN. "FLEX USE" INCLUDES WATER DELIVERY TO SATISFY  
20 COMPACT OBLIGATIONS.

21 (II) "FLEX USE" DOES NOT INCLUDE THE APPLICATION OF FLEX  
22 CONSUMPTIVE USE TO FACILITATE THE DIVERSION OF WATER BETWEEN  
23 WATER DIVISIONS BY DIRECT DIVERSION, EXCHANGE, REPLACEMENT, OR  
24 OTHER MEANS.

25 (b) FOLLOWING DELIVERY OF FLEX CONSUMPTIVE USE TO THE  
26 RIVER AT THE POINT OR POINTS OF DELIVERY IDENTIFIED IN THE FLEX  
27 CHANGE-IN-USE DECREE OR SUBSTITUTE WATER SUPPLY PLAN APPROVAL,

1 THE WATER USER MAY ACCOMPLISH FLEX USE BY DIRECT DELIVERY;  
2 STORAGE; RECHARGE; AUGMENTATION; EXCHANGE; WATER BANKING;  
3 WHERE APPROPRIATE, NONCONSUMPTIVE USE; OR ANY OTHER LAWFUL  
4 MEANS THAT COMPLY WITH APPLICABLE DECREES, STATUTORY AND OTHER  
5 LEGAL REQUIREMENTS, AND ADMINISTRATION BY THE STATE ENGINEER  
6 AND DIVISION ENGINEERS.

7 **SECTION 2.** In Colorado Revised Statutes, 37-92-305, **add** (3.7)  
8 as follows:

9 **37-92-305. Standards with respect to rulings of the referee and**  
10 **decisions of the water judge. (3.7) Flex use. (a) IF A CHANGE-IN-USE**  
11 **APPLICATION SEEKS APPROVAL OF FLEX USE, THE DECREE MUST:**

12 (I) COMPLY WITH SECTION 37-92-103 (7.3) AND (7.5);

13 (II) IDENTIFY THE WATER RIGHT AS A FLEX USE WATER RIGHT;

14 (III) QUANTIFY THE HISTORICAL DIVERSIONS AND HISTORICAL  
15 CONSUMPTIVE USE OF THE WATER RIGHT;

16 (IV) QUANTIFY THE RETURN FLOWS ASSOCIATED WITH THE  
17 HISTORICAL USE OF THE WATER RIGHT IN TIME, PLACE, AND AMOUNT;

18 (V) PROVIDE TERMS AND CONDITIONS FOR A CHANGE IN THE TYPE  
19 OF USE OF THE WATER RIGHT, INCLUDING THE RETURN FLOW OBLIGATIONS  
20 IN TIME, PLACE, AND AMOUNT, THAT PREVENT MATERIAL INJURY TO OTHER  
21 VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS;

22 (VI) IF RETURN FLOWS ASSOCIATED WITH THE HISTORICAL USE OF  
23 THE WATER RIGHT ARE APPROPRIATED IN ACCORDANCE WITH THE LAW  
24 UNDER A NEW PRIORITY DATE, PROVIDE TERMS AND CONDITIONS  
25 GOVERNING THE USE OF THE APPROPRIATED RETURN FLOWS;

26 (VII) PERMIT DELIVERY AND USE OF ALL OR A PORTION OF THE  
27 CONSUMPTIVE USE ASSOCIATED WITH THE WATER RIGHT AND ANY

1 APPROPRIATED RETURN FLOWS TO A FLEX USE THROUGH THE  
2 IMPLEMENTATION OF FALLOWING, REGULATED DEFICIT IRRIGATION,  
3 REDUCED CONSUMPTIVE USE CROPPING, OR OTHER ALTERNATIVE TO  
4 PERMANENT CESSATION OF AGRICULTURAL IRRIGATION ON THE PROPERTY  
5 THAT IS SERVED BY THE WATER RIGHT; AND

6 (VIII) ESTABLISH A FIXED POINT OR POINTS OF DELIVERY FOR THE  
7 FULLY CONSUMPTIVE PORTION OF THE WATER RIGHT AND ANY  
8 APPROPRIATED RETURN FLOWS TO THE RIVER.

9 (b) A DECREED FLEX USE IS SUBJECT TO RECONSIDERATION BY THE  
10 WATER JUDGE ON THE QUESTION OF INJURY TO THE VESTED WATER RIGHTS  
11 OF OTHERS FOR SUCH PERIOD AFTER THE ENTRY OF THE DECREE AS IS  
12 NECESSARY OR DESIRABLE TO REMEDY OR PRECLUDE INJURY.

13 (c) (I) THE GENERAL ASSEMBLY INTENDS THAT ANY DECREED FLEX  
14 USE BE IMPLEMENTED IN A MANNER DESIGNED TO PROMOTE THE USE OF  
15 ALTERNATIVE TRANSFER METHODS THAT ENCOURAGE AND SUPPORT  
16 CONTINUATION OF IRRIGATED AGRICULTURE, WHILE APPLYING THE  
17 DECREED FLEX USE TO ADDITIONAL USES. AS SUCH, A DECREED FLEX USE  
18 MUST BE CONDITIONED UPON THE CONTINUATION OF IRRIGATION OF A  
19 PORTION OF THE PROPERTY SERVED BY THE WATER RIGHT DECREED FOR  
20 FLEX USE, SUBJECT TO FALLOWING FOR FLEX USE. THE WATER JUDGE MAY  
21 ESTABLISH TERMS AND CONDITIONS COMMENSURATE WITH THE INTENT OF  
22 THE GENERAL ASSEMBLY EXPRESSED IN THIS SUBPARAGRAPH (I).

23 (II) AT A MINIMUM, A CHANGE-IN-USE DECREE APPROVING A FLEX  
24 USE MUST PROVIDE THAT DELIVERY OF MORE THAN FIFTY PERCENT OF THE  
25 FLEX CONSUMPTIVE USE OVER ANY TEN-YEAR PERIOD FOR USES OTHER  
26 THAN IRRIGATION OF THE PROPERTY SERVED BY THE WATER RIGHT OR  
27 ANOTHER PROPERTY SERVED BY THE SAME DITCH SYSTEM NULLIFIES THE

1 DECEED FLEX USE WITHOUT ANY FURTHER ACTION OF THE WATER JUDGE.  
2 IF SUCH NULLIFICATION OCCURS, THE WATER RIGHT MAY ONLY BE USED  
3 FOR THE DECEED IRRIGATION USE UNLESS THE OWNER OF THE WATER  
4 RIGHT OBTAINS A SUBSEQUENT WATER COURT CHANGE-IN-USE DECREE OR  
5 SUBSEQUENT SUBSTITUTE WATER SUPPLY PLAN IDENTIFYING THE  
6 SPECIFIED END USES OF THE WATER RIGHT AND ESTABLISHING ANY  
7 ADDITIONAL TERMS AND CONDITIONS NECESSARY TO PREVENT INJURY.

8 **SECTION 3.** In Colorado Revised Statutes, 37-92-308, **add** (12)  
9 as follows:

10 **37-92-308. Substitute water supply plans - special procedures**  
11 **for review - water adjudication cash fund - legislative declaration -**  
12 **repeal.** (12) (a) **Flex use.** IF THE STATE ENGINEER APPROVES A  
13 SUBSTITUTE WATER SUPPLY PLAN APPLICATION IN WHICH THE PLAN  
14 SOUGHT IS FOR A FLEX USE, THE APPROVAL MUST:

- 15 (I) COMPLY WITH SECTION 37-92-103 (7.3) AND (7.5);
- 16 (II) IDENTIFY THE WATER RIGHT AS A FLEX USE WATER RIGHT;
- 17 (III) QUANTIFY THE HISTORICAL DIVERSIONS AND HISTORICAL  
18 CONSUMPTIVE USE OF THE WATER RIGHT;
- 19 (IV) QUANTIFY THE RETURN FLOWS ASSOCIATED WITH THE  
20 HISTORICAL USE OF THE WATER RIGHT IN TIME, PLACE, AND AMOUNT;
- 21 (V) PROVIDE TERMS AND CONDITIONS FOR A CHANGE IN THE TYPE  
22 OF USE OF THE WATER RIGHT THAT PREVENT MATERIAL INJURY TO OTHER  
23 VESTED WATER RIGHTS AND DECEED CONDITIONAL WATER RIGHTS,  
24 INCLUDING THE RETURN FLOW OBLIGATIONS IN TIME, PLACE, AND  
25 AMOUNT;
- 26 (VI) IF RETURN FLOWS ASSOCIATED WITH THE HISTORICAL USE OF  
27 THE WATER RIGHT ARE APPROPRIATED IN ACCORDANCE WITH THE LAW

1 UNDER A NEW PRIORITY DATE, PROVIDE TERMS AND CONDITIONS  
2 GOVERNING THE USE OF THE APPROPRIATED RETURN FLOWS;

3 (VII) PERMIT DELIVERY AND USE OF ALL OR A PORTION OF THE  
4 CONSUMPTIVE USE ASSOCIATED WITH THE WATER RIGHT AND ANY  
5 APPROPRIATED RETURN FLOWS TO A FLEX USE THROUGH THE  
6 IMPLEMENTATION OF FALLOWING, REGULATED DEFICIT IRRIGATION,  
7 REDUCED CONSUMPTIVE USE CROPPING, OR OTHER ALTERNATIVE TO  
8 PERMANENT CESSATION OF AGRICULTURAL IRRIGATION ON THE PROPERTY  
9 THAT IS SERVED BY THE WATER RIGHT; AND

10 (VIII) ESTABLISH A FIXED POINT OR POINTS OF DELIVERY FOR THE  
11 FULLY CONSUMPTIVE PORTION OF THE WATER RIGHT AND ANY  
12 APPROPRIATED RETURN FLOWS.

13 (b) A SUBSTITUTE WATER SUPPLY PLAN APPROVING FLEX USE MUST  
14 BE CONDITIONED UPON THE CONTINUATION OF IRRIGATION OF A PORTION  
15 OF THE PROPERTY SERVED BY THE WATER RIGHT, SUBJECT TO FALLOWING  
16 FOR FLEX USE. AT A MINIMUM, A SUBSTITUTE WATER SUPPLY PLAN  
17 APPROVING FLEX USE IS CONDITIONED ON A SHOWING THAT NO MORE THAN  
18 FIFTY PERCENT OF THE FLEX CONSUMPTIVE USE WILL BE DELIVERED  
19 DURING THE PERIOD OF THE SUBSTITUTE WATER SUPPLY PLAN APPROVAL  
20 FOR USES OTHER THAN IRRIGATION OF THE PROPERTY SERVED BY THE  
21 WATER RIGHT OR ANOTHER PROPERTY SERVED BY THE SAME DITCH  
22 SYSTEM. IF THIS CONDITION IS VIOLATED DURING THE PERIOD OF THE  
23 SUBSTITUTE WATER SUPPLY PLAN APPROVAL, THE APPROVAL WILL  
24 TERMINATE WITHOUT FURTHER ACTION OF THE STATE ENGINEER.

25 **SECTION 4. Effective date.** This act takes effect June 1, 2015.

26 **SECTION 5. Safety clause.** The general assembly hereby finds,

- 1 determines, and declares that this act is necessary for the immediate
- 2 preservation of the public peace, health, and safety.