

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

(1) Subject to the limitations of this subsection (1) and pursuant to the procedures set forth in paragraph (b) of subsection (2) 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 division engineer approves such loan in advance and the loan does not cause injury to other decreed water rights.

(2) (a) A water right owner may loan water to the Colorado water conservation board for use as instream flows pursuant to a decreed instream flow water right held by the board for a period not to exceed one hundred twenty days, 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.

(IV) A loan approved pursuant to this paragraph (a) shall not be exercised for more than three years in a ten-year period, for which only a single approval by the state engineer is required. The ten-year period shall begin when the state engineer approves the loan. The state engineer shall not approve a loan pursuant to this paragraph (a) for another ten-year period; except that, if the agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (2).

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

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

(I) The proponent has filed a request for approval of the loan with the division engineer, together with a filing fee in the amount of one hundred dollars. Moneys from the fee shall be transmitted to the state treasurer and deposited in the ground water management cash fund, created in section [37-80-111.5](#). The request for approval shall 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 proponent has provided written notice of the request for approval of the loan by first-class mail or electronic mail to 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 proof of such notice is filed with the division engineer;
- (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 division engineer has given the owners of water rights and decreed conditional water rights fifteen days after the date of mailing of notice under subparagraph (II) of this paragraph (b) to file comments on the proposed loan; except that the division engineer may act on the application immediately after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application. Such comments shall 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 right and any other information the commenting party wishes the division engineer to consider in reviewing the proposed loan.
- (VI) The division 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 and, for loans made pursuant to paragraph (a) of this subsection (2), will not affect Colorado's compact entitlements. The division engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this subparagraph (VI), the division engineer shall not be required to hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the division engineer finds it necessary to address the issues.
- (VII) The division engineer shall approve or deny the proposed loan within twenty days after the date of mailing of notice under subparagraph (II) of this paragraph (b), or within five days after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application, whichever is earlier.
- (VIII) When the division engineer approves or denies a proposed loan, the division engineer

shall serve a copy of the decision on all parties to the application by first-class mail or, if such parties have so elected, by electronic mail. Neither the approval nor the denial by the division engineer shall create any presumptions, shift the burden of proof, or serve as a defense in any legal action that may be initiated concerning the loan. Any appeal of a decision by the division engineer concerning the loan pursuant to this section shall be made to the water judge in the applicable water division within fifteen days after the date on which the decision is served on the parties to the application. The water judge shall hear such appeal on an expedited basis.

(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.

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.

ANNOTATION

C.J.S. See 94 C.J.S., Waters, § 383.

Law reviews. For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 (1981). For article, "Water Banking: A New Tool For Water Management", see 23 Colo. Law. 595 (1994). For article, "Private Means to Enhance Public Streams", see 33 Colo. Law. 69 (April 2004).

The parties who are concerned in the exchange, the lender and the borrower, must each and all be the owners of rights to the use of water for irrigation. Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

If this section had purported to create rights which did not theretofore exist, or if it was to be interpreted as permitting exchanges or loans of water without reference to the rights of other appropriators, it could not be upheld as a valid legislative enactment. Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

The provisions of this section only permit an exchange or loan of water under conditions which do not injuriously affect the vested rights of other appropriators. Bowman v. Virdin, 40 Colo. 247, 90 P. 506 (1907).

Under this section a complaint is fatally defective in an action to restrain defendants from interfering with plaintiff using water loaned to him by other appropriators, which fails to allege that the water so loaned can and will be used by plaintiff without impairing the vested rights of defendants owning later priorities. Bowman v. Virdin, 40 Colo. 247, 90 P. 506 (1907).

This section seems to recognize a temporary exchange or loan of water without first obtaining a decree. Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

Such right is subject to the qualification of impairing vested rights. Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).