

# [***ARTICLE: STANDARDIZING TEMPORARY WATER TRANSFER PROCEDURES IN COLORADO***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5XBK-6JB1-F7VM-S42C-00000-00&context=1516831)

Spring, 2019

**Reporter**

22 U. Denv. Water L. Rev. 497 \*

**Length:** 34618 words

**Author:** PETER D. NICHOLS, [[1]](#footnote-2)1ANNE J. CASTLE, [[2]](#footnote-3)2ZACH SMITH, [[3]](#footnote-4)3P. ANDREW JONES [[4]](#footnote-5)4, AND AARON DERWINGSON [[5]](#footnote-6)5 [[6]](#footnote-7)6

**Text**

**[\*498]**

I. Introduction

Increased pressure on water supplies throughout ***Colorado*** and heightened concern about the adverse effects to the agricultural sector and rural economies from large scale dry-up of irrigated lands have focused interest on temporary water transfer options, commonly referred to as Alternative Transfer Methods, or ATMs. [[7]](#footnote-8)7ATMs represent a potential substitute for permanent transfers of ownership of water out of agricultural hands and are viewed as a mechanism that can strengthen the agricultural economy while also providing a relief valve for needy water providers by making possible the voluntary sharing of a portion of the water now dedicated to irrigation use. ***Colorado***'s Water Plan establishes an objective of sharing at least 50,000 acre-feet of agricultural water using ATMs by 2030. [[8]](#footnote-9)8

The water-sharing objective in the ***Colorado*** Water Plan demonstrates a desire for increased flexibility in the state's water distribution system. The need for flexibility has been specifically recognized by the ***Colorado*** Water Conservation Board. [[9]](#footnote-10)9This recognition is also consistent with contemporary academic thought regarding the importance of flexibility in managing complex socio-ecological systems and water systems in particular. [[10]](#footnote-11)10Flexibility can be defined as the capacity to adapt to uncertain or changing conditions in a timely and cost-effective manner. [[11]](#footnote-12)11The legal and regulatory framework applicable to water systems is a commonly cited barrier to flexibility. [[12]](#footnote-13)12Increasing development pressure and consequent demands for water supply, changing public perceptions and priorities, volatile hydrology, and the potential for significant decreases in flows in the future as a result of climate change are examples of changing conditions that are best addressed by flexibility in the system. ***Colorado***'s efforts to provide a means for temporary water transfers are just this kind of adaptive change. Far from undermining the current system, these changes preserve it by institutionalizing mechanisms to respond to rapidly changing social and environmental conditions, while leaving the underlying structure in place.

A variety of temporary transfer mechanisms have been enacted in ***Colorado*** **[\*499]**to address this requirement for increased flexibility and the desire for alternatives to permanent transfers out of agriculture. While each of the various ATM mechanisms was adopted to fulfill a particular need, ***Colorado*** now has a hodge-podge of temporary transfer statutes with inconsistent provisions governing the duration of the transfer, the approval procedure, and the appeal process. This cornucopia of procedures, while seemingly providing flexibility, actually creates confusion and unnecessary compartmentalization. Experienced professional assistance is required to navigate the various mechanisms, determine the best fit, and comply with the unique requirements. Even experienced state officials are sometimes unfamiliar with or confused by the various different procedures and requirements, which can result in mischaracterization of the water rights that have been transferred and the imposition of inappropriate limitations. The experience gained and lessons learned from use of these temporary transfer processes can now support consolidation into a more uniform mechanism that will promote better accessibility and utilization in a manner that responds to the identified need for flexibility.

This article will describe the barriers in existing law to temporary transfers and the various approval mechanisms available under existing ***Colorado*** law. It will provide an assessment of the strengths and limitations of the existing transfer methods and make a recommendation for consolidation and standardization.

A. What Are Temporary Transfers?

"Temporary transfers" may mean different things in different circumstances. This article addresses non-permanent, legally administrable changes to the underlying decree of a water right ( *e.g.* change in point of diversion, change of type of use, change of place of use). For example, a farmer wishes to lease her water to another farmer located downstream for one year. However, the use of her water is restricted to the place of use specified in the water court decree. In order to effectuate the desired lease, the water right owner must obtain approval pursuant to some existing legal mechanism, either from the water court or state engineer allowing the temporary change. The approval will direct state water administration officials to deliver that water to the new downstream location when in priority and when directed by the farmer to do so. The farmer's decree has been changed and her water transferred, but only temporarily. [[13]](#footnote-14)13

**[\*500]**

B. Why Standardize Temporary Transfers?

***Colorado***'s Water Plan describes a future where water demands can be met using a variety of existing and new water supply approaches. Prominent among these are temporary transfers from one use to another to meet growing municipal needs and to address climate change that portends increased risk to water users from more variable hydrology and longer and deeper periods of drought. [[14]](#footnote-15)14Moreover, the state has made it a policy to protect existing agricultural lands. [[15]](#footnote-16)15

Economists have shown that when water is unchained from the water court process, buyers are able to conduct transactions in smaller amounts because the transactional costs per acre-foot are lower. [[16]](#footnote-17)16On the other hand, when buying water that will require a water court change, buyers tend to purchase in large quantities to lower the transaction costs on a per acre-foot basis. [[17]](#footnote-18)17These larger transfers, while economically rational for the buyer, have been criticized for disruptive and problematic changes in agricultural communities. [[18]](#footnote-19)18It is state policy, [[19]](#footnote-20)19and the authors' belief, that facilitating temporary transfers can help eliminate this economic incentive detrimental to agricultural use of water.

In addition to preserving the state's agricultural heritage, there are other motivations for providing a standardized, understandable mechanism for temporary transfers. As noted above, an increasingly volatile hydrology will mean municipal and environmental supplies may be adequate one year but wholly inadequate the next. [[20]](#footnote-21)20The market does and will exist for annual or even partial season water supplies - but the administrative framework is not always responsive enough to the changing annual demand.

There is no question that water law tends to glaze the eyes of the general public, but the number and variety of separate temporary approval mechanisms confuses even the most adept water geeks and officials. This confusion can have real consequences. Many of the existing temporary transfer methods provide for statutory protections for the lessor against diminution of historical consumptive use. [[21]](#footnote-22)21But those protections are only as good as the coding that goes along with annual water use records kept by the state. If a water right's state **[\*501]**record shows reduced use but without reference to a protective statute, it may be difficult to realize those protections in a future water court change case. Simplification through consolidation of the temporary transfer procedures will help ensure that the underlying water right is properly protected.

The body of statutory law authorizing administrative approval of temporary transfers is narrowly drawn, fragmented, and procedurally variable. The authors contend that integrating the permissible uses and standardizing the procedures for temporary transfers would facilitate the use of temporary transfers while protecting other water rights from injury and helping the State meet its interstate obligations.

C. Barriers to Temporary Transfers

Standardization of the multiple existing mechanisms for temporary transfers requires an understanding of the obstacles those mechanisms were intended to address. The major barriers to temporary transfers are discussed below to inform the recommendations in this article for a uniform system.

1. No-Injury Rule

Applicants requesting approval of a change of water right must prove that their proposed change will not injure other users. ***Colorado*** law specifically provides that when applying for a change in water right, an applicant must establish the "absence of any injurious effect." [[22]](#footnote-23)22The no injury concept is critical to the smooth functioning of the ***Colorado*** water rights system and the protection of vested interests in water. The interpretation of what "no injury" means and how it must be proved, however, have created substantial barriers to small and temporary transfers.

Injury, and conditions levied to prevent it, encompass more than just a quantity of water. "A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the *time* and *place* and in the *amount* of demand for beneficial use under the holder's decreed water right operating in priority." [[23]](#footnote-24)23Because injury includes time, place, and amount, water courts impose protective conditions such as foregoing irrigation of historically irrigated land, monitoring and maintaining return flows, and accounting for diversions and deliveries. [[24]](#footnote-25)24

In preventing injury to other water rights, applicants must refrain from altering return flows when changing a water right. [[25]](#footnote-26)25In fact, "it has been fundamental law in this state that junior appropriators have rights to the continuation of historical return flows to the extent that they may not be injured by a change in the place of use of the irrigation water that provides that return flow." [[26]](#footnote-27)26Therefore, water owners must maintain these historical flows after a change-of-use in order to prevent injury to other owners. Calculating historical consumptive use **[\*502]**and return flows can be complicated and may require significant engineering work that considers, among other things, the amount of water diverted, the number of acres historically irrigated over an extended study period, cropping patterns, and groundwater flow patterns. [[27]](#footnote-28)27

The applicant bears the burden of proving no-injury before the burden shifts to the objectors to prove that existing water rights will in fact be injured. [[28]](#footnote-29)28This framework requires the applicant to prove a negative - that their water use will not cause injury - which can be exceedingly difficult. [[29]](#footnote-30)29Furthermore, in some over-appropriated basins such as the Arkansas ***River***, the ***Colorado*** Supreme Court has held that there is a presumption of injury that the applicant must overcome. [[30]](#footnote-31)30For these reasons, applicants often agree to onerous terms and conditions that may significantly reduce the amount of their water right available for the requested changed uses in order to avoid costly, protracted, and uncertain litigation. [[31]](#footnote-32)31In turn, this discourages requests for a temporary change of use for a water sharing arrangement where the costs may not justify the concessions needed to avoid expensive and risky litigation.

2. Anti-Speculation Doctrine

***Colorado*** law prohibits appropriations of water that are based on a speculative sale or transfer of water to a third party. [[32]](#footnote-33)32In the seminal case of ***Colo.******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****.*, the ***Colorado*** Supreme Court held that there was insufficient evidence to grant a conditional water right for future water use by municipalities and stated:

Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for *use*, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of *others* not in privity of contract, or in any agency relationship, with the developer regarding that use. [[33]](#footnote-34)33

This holding was subsequently codified in the ***Colorado*** Revised Statutes. [[34]](#footnote-35)34Notably, the *Vidler*court held that an option agreement did not rise to the level of definite commitment for use required for an appropriation. [[35]](#footnote-36)35

This concern with speculation has been extended to apply to change of water right cases, not merely the initial appropriation of water. [[36]](#footnote-37)36In 2005, the **[\*503] *Colorado*** Supreme Court ruled in *High Plains A & M, LLC v. Southeastern* ***Co****. Water Conservancy Dist*. ("High Plains") that the anti-speculation doctrine and associated statutory requirements apply to applications seeking to change the use of a water right. [[37]](#footnote-38)37In order to satisfy the requirements of the doctrine, applicants for a change in use must demonstrate a vested interest in the land that benefits from the changed water rights and a plan to use the water for specific, actual, beneficial purposes. [[38]](#footnote-39)38In *High Plains*, the court held that the requested change of use would violate the anti-speculation doctrine because the applicant only identified a broad list of uses and a broad list of potential municipal water consumers, but had no firm plans or contracts in place. [[39]](#footnote-40)39The court itself noted that "change proceedings can be extremely expensive to participants and consume many days of trial and appeal time." [[40]](#footnote-41)40

The underlying basis for the anti-speculation doctrine is one of great importance, especially at statehood in an arid state. [[41]](#footnote-42)41There were grave concerns that private out-of-state companies would gobble up rights to all the scarce water in the state. [[42]](#footnote-43)42The anti-speculation doctrine arose as an anti-monopoly policy to prevent such a water grab, and has been successful in doing so. [[43]](#footnote-44)43

At a time when agriculture was the dominant use in the state, such limits were welcome and rational. [[44]](#footnote-45)44But today, water values have expanded. ***Colorado*** is one of the fastest growing states in the nation, and the state and its citizens value healthy, flowing ***rivers***. [[45]](#footnote-46)45Anti-speculation has calcified water users' abilities to enter into transactions to meet the greater spectrum of requirements in the current climate, including for environmental purposes and municipal water sharing as contemplated in ***Colorado***'s Water Plan. Because water owners generally cannot change their water rights to other uses or places of use until a contract is in place, and even then both the end user and place of use will be limited to that contract, they cannot proactively seek to add additional uses to a water right to facilitate future temporary sharing of that water right. Accordingly, this doctrine discourages sharing where an irrigator may be willing to temporarily share her water with another user for a different type of use at a different place.

3. Calculation of Historical Consumptive Use

The assessment of the historical consumptive use ("HCU") of a water right is essential to ensuring that any change in the use of that water right does not **[\*504]**cause injury to the rights of others. As stated above, however, the calculation of HCU and the return flows from a water right can be extremely complex and normally requires the assistance of an experienced professional. There is no universally sanctioned methodology for the HCU calculation. The input data can be extensive and may be quite difficult to obtain. While HCU calculations are given great weight in water court proceedings, they can be significantly influenced by subjectivity. The calculation gives the impression of precision, but in fact may be subject to substantial uncertainty.

The HCU calculation is the source of much of the expense of a water court proceeding. Not only must an applicant engage a water engineer or similar professional to perform the calculation, but it is normally the focal point for objection, revision, and argument. Particularly for small or temporary transfers, the cost associated with the HCU analysis and defense may overwhelm the benefit of the transaction.

In addition to the cost associated with the HCU calculation, it also poses considerable risk for an applicant seeking a change of water right. It is difficult to forecast at the beginning of a change of water right proceeding what the ultimate HCU calculation will be. Whatever it is, the quantification of HCU will become a permanent new limit on the water right. The outcome, after the presentation of alternative HCU calculations by objectors, negotiation, and possibly a water court decision, may be a substantial diminution of the water right being transferred. As a result, water rights owners have become very reluctant to expose their rights to a change proceeding if not absolutely necessary because of the substantial risk of loss of some portion of the right as a result of an HCU calculation. [[46]](#footnote-47)46If a transfer is intended to be only temporary, the risk of an adverse quantification is magnified. [[47]](#footnote-48)47This concern can be mitigated by providing that the effect of a quantification for a temporary transfer expires at the end of the transfer period.

Recognizing these problems, the ***Colorado*** General Assembly authorized the exploration of an accounting and administrative tool for evaluating HCU, return flows, and the potential for injury in connection with the fallowing and leasing pilot program. [[48]](#footnote-49)48The resulting Lease Fallow Tool (LFT) is intended to simplify and streamline the evaluation process. The LFT was developed through a collaboration among the ***Colorado*** Division of Water Resources, ***Colorado*** State University, and a technical committee composed of independent experts. [[49]](#footnote-50)49The LFT was intended to provide a conservative analysis, meaning that the HCU is undervalued in most situations to minimize the potential for injury to the water rights of others. [[50]](#footnote-51)50Use of the LFT is mandatory for projects in the Fallowing-Leasing Pilot Program. [[51]](#footnote-52)51

**[\*505]**

4. Time and Cost

While little hard data exists on the average cost of a change of water right proceeding in ***Colorado***'s water courts, it is nearly universally agreed that they take too long and the cost is too high. Complex cases can drag on for years, and appeals are frequent. [[52]](#footnote-53)52The ***Colorado*** water court system, while praised for its due process, fairness of outcomes, and the expertise of the water judges and referees, has been roundly criticized for its burdensome time and expense requirements. [[53]](#footnote-54)53While significant efforts have been made in recent years to improve the efficiency of the water court process and simplified procedures are now available, [[54]](#footnote-55)54the criticisms continue and the cost in many cases remains high. Preliminary analysis from a comprehensive study on water court costs indicates that rule changes over the past decade may have decreased the total time required to reach closure on a change of water rights, but many experienced practitioners believe that total costs for change cases have actually increased. [[55]](#footnote-56)55

Legal and engineering costs in a water court change case can exceed the value of the subject water right, as water rights of any amount must go through the same procedure. [[56]](#footnote-57)56Changes of small amounts of water are disproportionately impacted by transaction costs in that the cost per acre-foot of the change process is much higher than for larger transactions where the cost of the proceeding benefits a greater volume of water. [[57]](#footnote-58)57High costs are particularly a problem for temporary changes as the benefits are not permanent. Thus, small, temporary transfers are effectively priced out of the water court change process.

II. Statutory Temporary Transfer Mechanisms

To address the desire for alternatives to the expensive and risky water court process, the ***Colorado*** General Assembly has enacted multiple mechanisms of temporary transfers of water for various purposes. This section will describe the various methods available to ***Colorado*** water users for a temporary transfer to a new purpose or place of use. Table 1 (attached at the end of the article) provides a summary of these mechanisms, identifying the major characteristics of each. The subsequent sections describe the statutory mechanisms in greater **[\*506]**detail.

A. Substitute Water Supply Plans ([***Colo.*** *Rev. Stat. § 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831))

*Purpose*

The state engineer may approve a Substitute Water Supply Plan ("SWSP") allowing water rights owners to use water for not-yet-decreed purposes, as long as they provide the stream with a substitute water supply. [[58]](#footnote-59)58SWSPs were first used as an interim approval method for augmentation plans, which replaced out-of-priority diversions with existing senior direct flow or storage rights of the same amount, quality, location, and time. [[59]](#footnote-60)59Initially, the state engineer approved SWSPs without requiring water rights owners to apply for a formal augmentation plan in water court. [[60]](#footnote-61)60Subsequently, the ***Colorado*** General Assembly formalized the state engineer's authority to approve SWSPs under various specific circumstances and subject to certain limitations. [[61]](#footnote-62)61

*Substantive Requirements*

Under current ***Colorado*** law, the state engineer may approve SWSPs in four circumstances: (1) during water court proceedings; (2) without a water court proceeding if the plan is for a limited (five-year) duration; (3) during emergency health and welfare situations; and (4) for a third-party's use of water available as a result of their action to address a storage restriction, e.g., dam safety issue. [[62]](#footnote-63)62Agricultural Water Protection Water Rights must also obtain SWSP approval, as further described in the section on these water rights below.

*Temporal limitations*

The state engineer may only approve an SWSP for one year (ninety-one days for a health or welfare emergency). [[63]](#footnote-64)63For SWSPs associated with pending water court applications, annual renewals can be obtained for two more years. [[64]](#footnote-65)64To obtain approval for a fourth and fifth year an applicant must demonstrate to the state engineer that the delay in obtaining a water court decree is justifiable and that not being able to continue operating under an SWSP until a decree is entered will cause undue hardship to the applicant. [[65]](#footnote-66)65Upon a showing of good cause, the water judge can allow additional annual SWSP approvals beyond five years while an application is pending in water court. [[66]](#footnote-67)66

For SWSPs not associated with a pending water court application, annual **[\*507]**renewals may be obtained by refiling the application. [[67]](#footnote-68)67Renewals are limited to a total of five years. [[68]](#footnote-69)68

*Standard of review*

Applicants must meet specific statutory conditions in each circumstance, and in all cases the SWSP must not cause injury to other water owners. [[69]](#footnote-70)69Specifically for SWSPs in the first two categories above, applicants must show that the operation and administration of the SWSP will (1) replace all out-of-priority depletions in time, location, and amount and (2) will otherwise prevent injury to other water rights and decreed conditional water rights - including water quality and continuity to meet the requirements of use to which the senior appropriation has normally been put and will not impair compliance with any interstate compacts. [[70]](#footnote-71)70

*Procedural mechanics*

A written request for approval of an SWSP to the state engineer initiates the process. [[71]](#footnote-72)71The applicant must provide notice to subscribers to the SWSP list maintained by the water clerk, who have thirty-five days to submit comments concerning claims of injury and propose terms and conditions to prevent injury. [[72]](#footnote-73)72

The state engineer may approve an application following a determination that the application will replace all out-of-priority depletions in time, location, and amount and otherwise prevent injury to other water rights and not impair compliance with any interstate compacts. [[73]](#footnote-74)73SWSPs provide only an annual approval for an interim use and must be renewed by application each year. [[74]](#footnote-75)74

*Appeals*

Appeals are to water court, except that no appeals are allowed for SWSPs granted for health and welfare emergencies, which are limited to ninety-one days. [[75]](#footnote-76)75

*Strengths and Limitations*

SWSPs have seen widespread use and are proven to be quite handy, particularly when applications are pending in water court. The principal limitation is that annual approval is required.

**[\*508]**

B. Interruptible Water Supply Agreements ([***Colo.*** *Rev. Stat. § 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831))

In 2003, the ***Colorado*** General Assembly granted the state engineer authority to approve the use of Interruptible Water Supply Agreements ("IWSAs"). [[76]](#footnote-77)76

*Purpose*

IWSAs are intended for use in circumstances under which administrative approvals can maximize the beneficial use of ***Colorado*** water resources without the need for an adjudication and without injury to vested water rights or decreed conditional water rights. [[77]](#footnote-78)77They are intended to enable water users to transfer the HCU of an absolute water right for application to another type or place of use on a temporary basis, without permanently changing the water right. [[78]](#footnote-79)78

*Substantive Requirements*

An IWSA is basically a loan between water users that allows the borrower to exercise an option to use the loaned water in accordance with the agreement while the owner of the water right stops using the water. [[79]](#footnote-80)79The amount of water available to loan is the HCU. [[80]](#footnote-81)80

*Temporal Limitations*

The state engineer may approve IWSAs for up to ten years, but the option may only be exercised in three of those ten years. [[81]](#footnote-82)81IWSAs may apparently be renewed for two additional ten-year terms, although there is some confusion in the statute as to whether a renewal can occur if the IWSA has been exercised during the original term. [[82]](#footnote-83)82

*Standard of Review*

The state engineer, after consideration of any comments, shall make a determination of the operation and administration of the IWSA to assure that such operation and administration will effect only a temporary change in the HCU of the water right in a manner that will not cause injury to other water rights and decreed conditional water rights, if such conditional rights will be exercised during operation of the IWSA, and will not impair compliance with any interstate compact. [[83]](#footnote-84)83

*Procedural Mechanics*

An application is filed with the state engineer. [[84]](#footnote-85)84The application must be **[\*509]**accompanied by a detailed written report, prepared by a professional engineer or other professional acceptable to the state engineer, that (1) evaluates the HCU, return flows, and the potential for material injury to other water rights relating to the IWSA and (2) proposes conditions to prevent such injury. [[85]](#footnote-86)85The applicant must give notice to all subscribers to the water division's SWSP list and provide proof of notice to the state engineer. [[86]](#footnote-87)86 Owners of water rights have thirty-five days to file comments, which must include any claim of injury or any terms and conditions proposed to prevent injury to a party's water rights or decreed conditional water rights, if such conditional rights will be exercised during operation of the IWSA, and any other information the party wishes the state engineer to consider in reviewing the application. [[87]](#footnote-88)87A party to the original application may also file comments following the initial year of operation of the IWSA. [[88]](#footnote-89)88

*Appeals*

Appeals of an initial decision made by the state engineer concerning the operation of an IWSA are to the water court, and are expedited and limited to the issue of injury. [[89]](#footnote-90)89Appeals of a renewal decision by the state engineer are also to the water court and are expedited only upon a request by a party to the appeal. [[90]](#footnote-91)90

*Strengths and Limitations*

IWSAs allow water users to transfer the HCU of an absolute water right for application to another type or place of use on a temporary basis without permanently changing the water right. [[91]](#footnote-92)91An IWSA, however, only allows the new use in three of ten years. [[92]](#footnote-93)92An IWSA is well suited to address drought or post-drought storage recovery, but not well suited to meet annual water supply needs. Despite its seeming utility, however, the IWSA mechanism has never been successfully used.

C. Fallowing-Leasing Pilot Program ([***Colo.*** *Rev. Stat. § 37-60-115(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831))

The ***Colorado*** General Assembly encouraged fallowing-leasing agreements by authorizing a pilot program in 2013 through House Bill 13-1248 for agreements between irrigators and municipalities, in which irrigators forego irrigating parcels of land and lease the water temporarily to cities. [[93]](#footnote-94)93This program was extended in 2015 to include environmental, industrial, and recreational uses, **[\*510]**along with municipal uses and was authorized through 2035. [[94]](#footnote-95)94

*Purpose*

The purpose of the pilot program is to develop and implement non-permanent leasing of agricultural water rights for different uses, hoping to stem permanent agricultural dry up. [[95]](#footnote-96)95Furthermore, the pilot program is designed to demonstrate cooperation among water owners such as irrigators, ditch companies, and cities. [[96]](#footnote-97)96Another goal of the pilot program is to evaluate the feasibility of delivering temporary water to municipalities through a streamlined approach for determining HCU and injury. [[97]](#footnote-98)97

*Substantive Requirements*

The pilot program is operated pursuant to criteria and guidelines developed by the CWCB. [[98]](#footnote-99)98The criteria and guidelines set forth the process and requirements for fallowing-leasing pilot project selection, application, and approval. [[99]](#footnote-100)99Project proposals must also contain sufficient information for the CWCB to evaluate the specific water rights involved, the land ownership and parcels to be fallowed, the water source used to meet return flow obligations, the process for delivering replacement and transferred water, and all necessary infrastructure. [[100]](#footnote-101)100The full proposal must provide evidence demonstrating the historical irrigation and include a HCU analysis. [[101]](#footnote-102)101

*Temporal Limitations*

Through the Fallowing-Leasing Pilot Program, the CWCB may approve up to fifteen pilot projects lasting up to ten years each. [[102]](#footnote-103)102

*Standard of Review*

The state engineer must make a written determination that the temporary change in the HCU will not cause injury to other water rights or impair compliance with any interstate compact. [[103]](#footnote-104)103The CWCB may approve the application adopting the terms and conditions recommended by the state engineer. [[104]](#footnote-105)104

**[\*511]**

*Procedural Mechanics*

The enabling statute and the criteria and guidelines require that applicants use the Lease Fallow Tool ("LFT") to evaluate HCU and return flows for fallowing-leasing projects. [[105]](#footnote-106)105Additionally, projects must meet local land use regulations, prevent erosion, and comply with noxious weed requirements, which help mitigate the potential negative effects of fallowing land. [[106]](#footnote-107)106

The applicant must provide notice to subscribers to the SWSP notification list, and provide proof of notice to the CWCB. [[107]](#footnote-108)107Interested or affected parties have sixty days to submit comments on the proposal. [[108]](#footnote-109)108A conference is held within thirty days of final comments involving the applicant, commenters, the state engineer, and the CWCB. [[109]](#footnote-110)109The conferees submit a joint report to the state engineer of agreed upon terms and conditions, and the reasons for failing to agree on any other terms and conditions. [[110]](#footnote-111)110If the state engineer makes a determination that the pilot project will effect only a temporary change that will not cause injury or impair compliance with any interstate compact, the CWCB may approve the project with such terms and conditions as recommended by the state engineer. [[111]](#footnote-112)111

*Appeals*

The CWCB's approval or denial of an application, and the state engineer's determination are final agency action that may be appealed to the water court within thirty-five days. [[112]](#footnote-113)112The court expedites the appeal, which is reviewed *de novo*. [[113]](#footnote-114)113

*Strengths and Limitations*

The Pilot Program established a new mechanism to approve fallowing-leasing, using a spreadsheet-based model (the LFT) developed from the Irrigation Systems Analysis Model (ISAM) by the ***Colorado*** Division of Water Resources in collaboration with the CWCB and private consulting water engineers representing a broad range of water rights owners through an open public process. [[114]](#footnote-115)114The LFT is a transparent, simple, and streamlined approach for calculating HCU and return flow obligations. [[115]](#footnote-116)115Moreover, the LFT adopted conservative assumptions for factors such as irrigation efficiency that underestimate HCU **[\*512]**and correspondingly overestimate historical return flows, which virtually eliminates the risk that fallowing-leasing projects will injure other water users or violate ***Colorado***'s intestate obligations. [[116]](#footnote-117)116

While the Pilot Program's extensive procedures ensure a high degree of transparency, the many steps are more cumbersome and costly for an applicant than an interruptible water supply agreement, for example, which somewhat similarly allows for the temporary transfer of water rights in three of ten years. [[117]](#footnote-118)117

Pilot projects may not involve the fallowing of land more than three in ten years, or the fallowing of more than 30 percent of a farm for more than ten consecutive years. [[118]](#footnote-119)118In addition, the Pilot Program is limited to fifteen pilot projects, with no more than five in any major ***river*** basin (Arkansas, ***Colorado***, Rio Grande and South Platte). [[119]](#footnote-120)119Pilot projects cannot involve the transfer of water across the Continental Divide, or out of the Rio Grande basin. [[120]](#footnote-121)120In selecting pilot projects, the CWCB must give preference to projects that would use existing infrastructure. [[121]](#footnote-122)121There have been only two applications to date, so none of these statutory limits has restricted pilot projects to date.

D. Temporary Ag-to-Ag Loans ([***Colo.*** *Rev. Stat. § 37-83-105(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831))

The ***Colorado*** General Assembly recognized the need for flexibility in transferring water quickly between users not long after statehood. In 1899, the legislature allowed "owners of ditches and water rights" [[122]](#footnote-123)122on the same stream "to loan to, each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner." [[123]](#footnote-124)123All that was required of the owner wishing to make the loan was written notice "stating such loan ... has been made, and for what length of time the same shall continue." [[124]](#footnote-125)124The statute on its face required no further analysis: the "water commissioner shall recognize the same in his distribution of water." [[125]](#footnote-126)125

Amazingly, this law remained substantially unchanged for 105 years. In 2004, two years after one of ***Colorado***'s worst droughts and one year after the addition of the ability to loan for in-stream flow use (see next section), Senate **[\*513]**Bill 04-32 brought the Ag-to-Ag Loan in line with the standards and procedures created by the 1969 Water Rights Determination and Administration Act, bringing it close to its current form. [[126]](#footnote-127)126

*Purpose*

Temporary loans of water between owners of water rights decreed and used solely for agricultural irrigation purposes on the same stream system. [[127]](#footnote-128)127

*Substantive Requirements*

Provides for loans of all or a portion of a water right decreed solely for agricultural irrigation to the owner of a similarly decreed water right on the same stream system. [[128]](#footnote-129)128

*Temporal Limitations*

Loans are limited to 180 days during any one calendar year. [[129]](#footnote-130)129

*Standard of Review*

The proponent must prove that the loan will not be injurious. [[130]](#footnote-131)130However, the no-injury standard is relaxed under this statute, as the proponent is only required to provide a "reasonable estimate of historic consumptive use." [[131]](#footnote-132)131

*Procedural Mechanics*

The proponent must file a request for approval with the division engineer and remit a $ 100 filing fee. [[132]](#footnote-133)132The request must contain:

Evidence of the proponent's legal right to use the loaned water right;

A statement of the duration of the proposed loan;

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;

A description of the new proposed points of diversion, the return flow pattern, the stream reach, and the place, and types of use of the loaned water right; and

A reasonable estimate of the historical consumptive use of the loaned water right. [[133]](#footnote-134)133

The proponent must then provide notice to all parties on the SWSP notification list in the water division of the loan. [[134]](#footnote-135)134Owners of water rights and decreed conditional water rights have fifteen days to comment after notice is given, but the division engineer may render a decision earlier if all parties entitled to **[\*514]**comment have consented to the loan. [[135]](#footnote-136)135The division engineer must make a determination within twenty days of the noticing of the loan to approve or deny the loan. [[136]](#footnote-137)136The division engineer shall impose any terms and conditions necessary to prevent injury, and may, but is not required to, hold a hearing or formal proceeding. [[137]](#footnote-138)137

*Appeals*

Appeals are to the water court and are heard on an expedited basis. [[138]](#footnote-139)138

*Strengths and Limitations*

This statute provides a fast, relatively simple way for nearby farms and ranches to share water between ditches. There are no apparent restrictions on the number of times the loan may be exercised. Its greatest strength is a relaxed injury standard, allowing the division engineer to move quickly to approve or deny the loan. This reduces transaction costs and allows for irrigators to make decisions closer to real-time. However, the statute is limited to agricultural irrigation water rights and to water rights on the "same stream system." It is believed that very little use of this mechanism has taken place in recent years.

E. Temporary Loans for Instream Flow ([***Colo.*** *Rev. Stat. § 37-83-105(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831))

During the 2002 drought, many ***rivers*** in ***Colorado*** ran so low that volunteer bucket brigades scooped fish out of shrinking pools to transport them to ***rivers*** with more water. [[139]](#footnote-140)139Several water users approached the CWCB, the entity with the exclusive authority to hold in-stream flow water rights, [[140]](#footnote-141)140proposing to temporarily provide their water to the CWCB so that local ***rivers*** would not run completely dry. At the time, such a transfer would have required water court approval, and any water made available to the CWCB would not have been legally available for the CWCB's use prior to the end of that hot summer. ***Colorado*** water law was not equipped to move quickly enough. Admirably, the legislature acted in 2003, providing for expedited loans of water to the CWCB to be approved by the state engineer during times of declared drought or other emergency. [[141]](#footnote-142)141Eventually, the ***Colorado*** General Assembly eliminated the emergency requirement [[142]](#footnote-143)142and further provided water users protections against abandonment and reduced consumptive use during the use of the loan. [[143]](#footnote-144)143This statute was used during the 2012 drought by the CWCB and the ***Colorado*** Water **[\*515]**Trust to bolster flows in sections of the Fraser ***River***, [[144]](#footnote-145)144Yampa ***River***, [[145]](#footnote-146)145Deep Creek, [[146]](#footnote-147)146and the upper ***Colorado*** ***River***. [[147]](#footnote-148)147Since then, the loan has been used in several other basins. [[148]](#footnote-149)148

*Purpose*

Allows a water right owner to temporarily loan water to the CWCB for an existing CWCB decreed in-stream flow. [[149]](#footnote-150)149

*Substantive Requirements*

The CWCB must have an in-stream flow water right for the stream reach the loaned water will benefit. [[150]](#footnote-151)150

*Temporal Limitations*

A water right owner may loan water no more than 120 days in a calendar year, [[151]](#footnote-152)151no more than three years in a ten-year period, and may not renew if ever exercised. [[152]](#footnote-153)152

*Standard of Review*

Proponent must prove that the loan will not be injurious. [[153]](#footnote-154)153However, the no-injury standard is relaxed under this statute as the proponent is only required to provide a "reasonable estimate of historic consumptive use." [[154]](#footnote-155)154

*Procedural Mechanics*

The approval of loans to the CWCB is nearly identical to Ag-to-Ag loans discussed above. One exception is that a party may file comments concerning potential injury in the year following the use of the loan, [[155]](#footnote-156)155and there are added CWCB acceptance requirements found in statute and regulations. [[156]](#footnote-157)156The CWCB has five working days to evaluate whether a proposed loan has value for **[\*516]**temporary in-stream flow use, and the director of the CWCB has the delegated authority to accept the loan after the state engineer approves the loan. [[157]](#footnote-158)157The CWCB must ratify the director's decision at the next regular or special CWCB board meeting. [[158]](#footnote-159)158

*Appeals*

Appeals are to the water court and are heard on an expedited basis. [[159]](#footnote-160)159

*Strengths and Limitations*

Like the Ag-to-Ag loan, this statute provides a fast, low risk and low-cost response to dry year conditions. In years predicted to have reduced runoff, it is possible to identify willing lessors of water in the spring and receive the above approvals in time to boost streamflows by the summer. [[160]](#footnote-161)160However, the three-in-ten year limitation, no renewals, and the requirement to loan to an existing instream flow all reduce this statute's ultimate utility. [[161]](#footnote-162)161

F. Agricultural Water Protection Water Rights ([***Colo.*** *Rev. Stat.§§37-92-305(19)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) and [*37-92-308(12)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)

*Purpose*

The Agricultural Water Protection Water Right Act (the "AWPWRA") enacted by the ***Colorado*** General Assembly in 2016 provides a mechanism for water users to quantify the HCU of a senior irrigation right and to enter into annual leases of up to 50 perecen of the identified consumptive uses. [[162]](#footnote-163)162Under the Act, Agricultural Water Protection Water Rights are limited to Water Divisions 1 and 2. [[163]](#footnote-164)163

*Substantive Requirements*

This statute takes a hybrid approach combining water court and temporary approvals, essentially establishing a quid pro quo. [[164]](#footnote-165)164An applicant willing to apply to water court for a traditional determination of HCU and return flow obligations [[165]](#footnote-166)165is rewarded with a relaxation of ***Colorado***'s strict anti-speculation doctrine, [[166]](#footnote-167)166and the applicant is not required to identify specific end uses at the time **[\*517]**of the change in use application. [[167]](#footnote-168)167Instead, all end uses are effectively decreed, permitting the applicant to negotiate with potential end users year by year and provide annual notice of end uses for the 50 percent of consumptive use permitted to leave the farm. [[168]](#footnote-169)168In addition to committing to leaving 50 percent of the consumptive use on the farm for irrigation, the applicant must also agree to participate in a federal, state, or local conservation program [[169]](#footnote-170)169or an approved agricultural water protection program that is established pursuant to the procedures described in the statute. [[170]](#footnote-171)170

*Temporal Limitations*

Once decreed, the arrangement has no temporal limitation but may continue indefinitely under the terms of the decree, provided the applicant remains enrolled in an approved conservation program. [[171]](#footnote-172)171

*Procedural Mechanisms*

Both the CWCB and the state engineer play a role in implementing the AWPWRA. The CWCB is called upon to enact minimum criteria and guidelines for the establishment of agricultural water protection programs. [[172]](#footnote-173)172The CWCB has completed this process and the criteria have been adopted and published. [[173]](#footnote-174)173

The state engineer, in turn, is required to enact rules governing the review of the SWSPs used as the legal vehicle for approving the annual leases. [[174]](#footnote-175)174These rules were approved by the Division One Water Court in consolidated Case No. 17CW3152 effective April 22, 2019. [[175]](#footnote-176)175

*Standard of Review*

The water court application for approval of an Agricultural Water Protection Water Right is reviewed pursuant to water court change in use standards. [[176]](#footnote-177)176The decree must quantify historical diversions, consumptive use and return flows in time, place, and amount sufficient to prevent material injury to other vested water rights and decreed conditional water rights. [[177]](#footnote-178)177The annual SWSPs identifying the place of use may be approved by the state engineer pursuant to rules developed for that purpose. [[178]](#footnote-179)178

**[\*518]**

*Appeals*

The water court decree is appealable to the ***Colorado*** Supreme Court in the same manner as any other water court adjudication. The annual SWSP approval in which the place of use is identified is appealable to the water court within thirty-five days of its issuance and is heard using the same standards and procedures applicable to water court applications without deference to the state engineer. [[179]](#footnote-180)179Appeals are heard on an expedited basis. [[180]](#footnote-181)180

*Strengths and Limitations*

The strength of the Agricultural Water Protection Water Right Act is that it uses the established water court process, thereby providing a high level of scrutiny and providing assurance that other water users will not be injured by the temporary transfers. Implementation of the annual leases is accomplished via SWSPs - also a familiar process, trusted by many water users. [[181]](#footnote-182)181Once the foundation is laid in the underlying decree, there are no temporal limitations on the transfers or limitations on types of temporary uses. Allowing monetization of a portion of a senior water right provides the potential for a revenue stream supporting ongoing farming activities and increases the value of the water right, while providing much needed supplies to lessees. Simultaneously, the Act encourages continued irrigation and land conservation.

Despite its ATM component, the procedure established under the AWPWRA remains highly cumbersome. The requirement of water court adjudication exposes water users to the perils that have chilled widespread adoption of temporary transfers - the risk of re-quantification, high transaction cost, and uncertainty. [[182]](#footnote-183)182In addition, the geographical limitations in the Act render it useless to water users in Water Divisions 3 through 7, where interstate compact and supply pressures could make its application most useful. It remains to be seen whether the targeted waiver of the anti-speculation doctrine and the promised potential for annual leases is enough to overcome water users' reluctance to adjudicate changes in use in water court.

G. Water Bank ([***Colo.*** *Rev. Stat. § 37-80.5-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36C-00000-00&context=1516831))

*Purpose*

In 2001 the ***Colorado*** General Assembly authorized the formation of a pilot water bank in the Arkansas ***River*** basin and extended that authorization to other water divisions in 2003. [[183]](#footnote-184)183The legislatively declared purposes of these banks are:

to simplify and improve the approval of water leases, loans, and exchanges, **[\*519]**including interruptible supply agreements, of stored water within each ***river*** basin, reduce the costs associated with such transactions, and increase the availability of water-related information. It is also the purpose of the water banks to assist farmers and ranchers by developing a mechanism to realize the value of their water rights assets without forcing the permanent severance of those water rights from the land. [[184]](#footnote-185)184

*Substantive Requirements*

Upon request by a water conservation or conservancy district, the state engineer is directed to establish rules for water bank operation that would enable the lease, exchange, or loan of stored water within the relevant water division. [[185]](#footnote-186)185The rules must establish criteria governing the deposit of water into the bank and for its withdrawal. [[186]](#footnote-187)186The state engineer was charged with delivering water withdrawn from the bank, subject to ensuring no harm to other water uses. [[187]](#footnote-188)187Only the CWCB can use banked water for in-stream flow purposes. [[188]](#footnote-189)188Banked water is subject to the 1969 Water Right Determination and Administration Act (or the ***Colorado*** Ground Water Management Act if applicable), specifically the requirement that water be put to a beneficial use. [[189]](#footnote-190)189Leases, loans, and exchanges through the bank do not require adjudication. [[190]](#footnote-191)190The day-to-day administration of the bank must be delegated to the water conservation or conservancy district that submitted the request. [[191]](#footnote-192)191

*Temporal Limitations*

There is no stated limitation on the amount of time water may remain in the bank or any provisions addressing how frequently water can be banked. [[192]](#footnote-193)192

*Standard of Review*

The state engineer's rules must ensure that the operation of the water bank will not cause material injury to the owner of or persons entitled to use water under a vested water right or decreed conditional water right. [[193]](#footnote-194)193Because the banks must operate consistently with the requirements of the 1969 Act or the Ground Water Management Act, [[194]](#footnote-195)194it is likely that the assessment of injury would be done in like manner as is the case in water court proceedings.

*Procedural Mechanics*

The state engineer promulgated rules for the Arkansas Basin bank in **[\*520]**2002. [[195]](#footnote-196)195The rules include detailed procedures for placing stored water in the bank and determining the amount of water that can be banked, including presumptive consumptive use factors for nineteen major ditches and two reservoirs in the Arkansas ***River*** Basin and expedited procedures for water rights that have already been decreed as fully consumable or reusable. [[196]](#footnote-197)196The availability of banked water (and its minimum acceptable price) is to be posted on a special bank website. [[197]](#footnote-198)197The rules envision a bidding system in which the bank operator negotiates a lease or option between the depositor and proposed withdrawer. [[198]](#footnote-199)198

Mailed notice of the proposed agreement is sent to the state and division engineers and to any persons who have signed up to receive water bank notifications, and the notice is posted on the Division of Water Resources website. [[199]](#footnote-200)199Interested parties have thirty days to file written comments, including claims of potential injury to their water uses or proposed terms and conditions for implementing the agreement. [[200]](#footnote-201)200Within five business days after the close of the comment period, the state and division Engineers develop any terms and conditions determined to be necessary. [[201]](#footnote-202)201Upon acceptance of these terms and conditions by both depositor and withdrawer, the transaction is complete, and the division engineer will administer delivery of the water. [[202]](#footnote-203)202The water bank is authorized to charge fees necessary to recover its administrative costs. [[203]](#footnote-204)203Protection against loss of HCU is available for a maximum of five years in any consecutive ten-year period for participation in "a water banking program as provided by law." [[204]](#footnote-205)204This protection is now available for water rights in Water Divisions 1 through 6, but not Division 7. [[205]](#footnote-206)205Any period of participation in a water bank is excluded from any determination of abandonment. [[206]](#footnote-207)206

*Appeals*

Review of water bank rules promulgated by the state engineer is done in accordance with the state Administrative Procedure Act. [[207]](#footnote-208)207Venue for the review is in the water court in the appropriate water division. [[208]](#footnote-209)208

The rules for the Arkansas ***River*** water bank pilot program allow for, but do not require, a hearing to be conducted by the state or division engineers if they find it necessary to address issues raised in comments to a proposed water **[\*521]**bank transaction. [[209]](#footnote-210)209Appeal from the decision of the state or division engineer is not addressed.

*Strengths and Limitations*

The concept of water banking has been promoted as a means of facilitating temporary transfers while providing the type of long-term stability of supply that municipal providers prefer. A well-subscribed water bank can offer security that supplies will always be available if needed, even if the individual depositors change from year to year. ***Colorado***'s water bank also recognizes the value provided by having a means for farmers and ranchers to monetize their water rights assets without forcing a permanent severance from the land. Water bank transactions are protected from loss of HCU [[210]](#footnote-211)210and abandonment. [[211]](#footnote-212)211

Despite its intention to encourage temporary changes of water uses, the water bank authority has only been implemented in the Arkansas, and even there, no transactions have ever occurred. [[212]](#footnote-213)212While a few storage rights were deposited in the Arkansas ***River*** bank, none were leased. [[213]](#footnote-214)213This outcome has been explained by high asking prices ($ 500-$ 1,000/acre-foot/year) and the absence of a storage facility to hold the water. [[214]](#footnote-215)214Another concern was the length of time for the review process, expected to be a minimum of two to three months, making the transaction too lengthy for an annual agreement. [[215]](#footnote-216)215

More generally, the limitation of these banks to transactions involving stored water seems to be an important inhibiting factor, because it does not allow for immediate exchanges of direct flow water rights to allow the highest value use, such as might occur during a dry year. Also critical to the establishment of a viable market was the lack of a credible institution that would proactively facilitate these transactions and promote interest in use of the bank. Finally, water bank transactions are not permitted to cross water division lines, [[216]](#footnote-217)216perhaps diminishing the utility for ***Colorado*** ***River*** Compact security purposes.

III. Analysis of Common Elements of Statutory Temporary Transfer Mechanisms and Recommendations

While the specific details may vary, there are many common elements in the existing statutory mechanisms for temporary transfers. In order to distill the various factors that should go into a standardized temporary transfer law, these elements are discussed in detail below, with recommendations for a uniform provision addressing each one.

**[\*522]**

A. No-Injury rule

All of the existing temporary transfer mechanisms require a determination that the transfer will not cause injury to other water rights. Responsibility for making that determination varies, however. In most instances the state engineer must determine that the transfer will not cause injury to other water rights, although in one instance it is the division dngineer (loans to the CWCB for instream flows). In one other instance - Agricultural Water Protection Water Rights - the water court must first determine that transfers authorized by the court's decree will not cause injury, plus the state engineer must determine on an annual basis through the SWSP process that the transfer will not result in injury to other water rights.

The various transfer mechanisms describe the water rights to be protected from injury in several different ways. Most refer to injury to "other water rights," [[217]](#footnote-218)217one refers to injury to "other water rights, decreed conditional water rights and contract rights to water," [[218]](#footnote-219)218and others refer to "vested water rights." [[219]](#footnote-220)219Another difference among the temporary transfer mechanisms is that some explicitly require a determination that the transfer will not impair compliance with or negatively affect any interstate compact. [[220]](#footnote-221)220

*Recommendation*

The authors assert that inclusive and uniform language is appropriate in stating the non-injury standard for temporary transfers. Such transfers should not result in injury to "other vested water rights or decreed conditional water rights" and should not impair compliance with any interstate obligations.

B. Anti-Speculation doctrine

Although the statutes on temporary transfers do not specifically address the anti-speculation doctrine, they almost universally require identification of the type, place, and time of use of the water to be transferred. [[221]](#footnote-222)221Owners of water rights cannot temporarily transfer their water rights to other types or places of use until a contract is in place with a new user to deliver a specific quantity of water, and the temporary use will be limited to the terms of that contract. Thus, growing municipalities and junior water rights cannot option water supplies they may need to cope with future population growth, drought, and climate change.

*Recommendation*

***Colorado*** law should provide a limited exception to the anti-speculation doctrine to implement the ATM policies set forth in ***Colorado***'s Water Plan. **[\*523]**Specifically, option contracts should be authorized for temporary transfers to meet the anticipated needs of users that identify the specific type and place of their future use. This would complement Agricultural Water Protection Water Rights discussed above by allowing water rights owners who do not have the resources to adjudicate a change to make their water rights available to others to meet future needs.

C. Administrative Approval

All of the temporary transfer mechanisms require administrative approval to transfer water. The state engineer has sole authority to approve most temporary transfers, although the division engineer, acting alone, may approve Ag-to-Ag loans. [[222]](#footnote-223)222

A few of the temporary transfer mechanisms require the CWCB's approval in addition to the state engineer, e.g., for in-stream flow loans and fallowing-leasing pilot projects. [[223]](#footnote-224)223Ag-to-Ag loans and loans for in-stream flows require the division engineer's approval. [[224]](#footnote-225)224

*Recommendations*

The authors believe the state engineer is best able to determine injury to other water rights and impairment of interstate compacts for transfers that are limited in duration. And since existing statutes nearly universally task the state engineer with these determinations, there is not any compelling reason to change that responsibility. [[225]](#footnote-226)225The state engineer can delegate this responsibility to the division engineer if desired and in appropriate circumstances.

D. Appeals of Administrative Approvals

Several temporary transfer mechanisms allow for a party to appeal a claim of injury to water court, which considers the issues on a *de novo* basis. Exceptions are emergency SWSPs and water bank transactions, which do not provide a right of appeal. [[226]](#footnote-227)226Appeals of SWSPs and interruptible water supply agreements to water court may be expedited. [[227]](#footnote-228)227Given the length of water court dockets, particularly in Water Divisions 1, 2, and 5, the right to an expedited appeal may be meaningless pursuant to the existing procedures. A *de novo* proceeding in the water court undermines any cost or time savings associated with the temporary transfer.

*Recommendation*

The state engineer now has substantial experience with the various types **[\*524]**of temporary transfers and is in the best position to evaluate and guard against injury to other water rights. Owners of water rights, of course, should receive notice and have an opportunity to provide comments concerning injury to their rights. The state engineer would consider comments in crafting the terms of approval, as occurs now. With those safeguards in place, an appeal to the water court based on the standards of the Administrative Procedure Act seems an appropriate mechanism that provides due process while acknowledging the expertise of the state engineer together with the goal of reducing cost and delay. Emergency SWSPs are so short lived - ninety-one days maximum - that an appeal process would be meaningless.

E. Notice

Many of the temporary transfer mechanisms provide for notice to persons who have subscribed to the SWSP notification list for the water division in which the subject water right is located. [[228]](#footnote-229)228The procedures for establishing and using the SWSP notification list are specified by statute, [[229]](#footnote-230)229and water users are accustomed to utilizing this procedure for notification.

*Recommendation*

The SWSP notification list should be used to provide notice for any temporary transfer requiring notice to interested parties. Short-term transfers for emergency purposes should not require notification.

F. Standardized HCU and return flow analysis

The fallowing-leasing pilot program and the CWCB's associated Criteria and Guidelines require that applicants use the Lease Fallow Tool ("LFT") to evaluate HCU and return flows for leasing-fallowing projects. [[230]](#footnote-231)230The LFT is a spreadsheet-based model derived from the Irrigation Systems Analysis Model developed by the ***Colorado*** Division of Water Resources ("DWR") to assess changes in irrigation practices in the Lower Arkansas Valley. [[231]](#footnote-232)231The DWR worked in collaboration private consulting water engineers representing a broad range of water rights owners through an open public process to develop the LFT. The LFT is a transparent, simple, and streamlined approach for calculating HCU and return flow obligations. [[232]](#footnote-233)232Moreover, the LFT adopted conservative assumptions for factors such as irrigation efficiency that underestimate HCU and correspondingly overestimate historical return flows, which virtually eliminates the risk that fallowing-leasing projects will injure other water users or **[\*525]**violate ***Colorado***'s interstate obligations. [[233]](#footnote-234)233

HB 17-1289 proposed to build on the positive experience with the LFT. As introduced, it would have directed the state engineer to develop a streamlined approach incorporating local factors similar to the LFT that applicants could use to calculate the HCU of their water right. [[234]](#footnote-235)234Applicants could use the calculated HCU in any water court proceeding or temporary transfer (SWSPs, IWSAs). [[235]](#footnote-236)235HB 17-1289 did not direct the state engineer take on this task, and the ***Colorado*** General Assembly referred the notion to the Interim Water Resources Review Committee, which did not make any recommendations regarding the LFT or another streamlined methodology for calculating HCU. [[236]](#footnote-237)236

The use of the working group of professional engineers for development of the LFT has been successfully used in other, similar cases, such as: (1) the Rio Grande Decision Support System with the help of a "Peer Review Team" composed of professional engineers; [[237]](#footnote-238)237(2) the Rules Governing the Withdrawal of Groundwater in Water Division 3 (Rio Grande Basin) with the help of advisory committees; [[238]](#footnote-239)238and (3) the Compact Rules Governing Improvements to Surface Water Irrigation Systems in the Arkansas ***River*** Basin in ***Colorado*** with the help of an advisory committee. [[239]](#footnote-240)239This type of inclusive involvement ensures that the state engineer has the benefit of multiple perspectives and professional expertise familiar with the particular basin.

*Recommendation*

A 2008 report prepared by the Water Court Committee of the ***Colorado*** Supreme Court identified "a lack of uniformity in computational models and other predictive tools, as well as the underlying data sets as a source of inefficiency in water court adjudications" and recommended the development of presumptively valid basin models. [[240]](#footnote-241)240The authors' experience with water court proceedings and administrative temporary transfers confirms the need for and value of a streamlined approach to the determination of HCU and return flow **[\*526]**requirements as a means to address criticisms of the ***Colorado*** water court system for its burdensome time and expense. [[241]](#footnote-242)241Development of tools akin to the LFT by the state engineer and adoption by rulemaking would give interested parties an opportunity to participate in their development and approval by the water court before they could be used. State engineer rulemaking would also ensure due process and fairness in developing a streamlined approach to determine HCU and return flow.

The rules should provide for methodologies that incorporate specific local factors, at no higher level than the water districts in Water Divisions 1, 2, and 5 that receive the overwhelming majority of water court applications. The standardized methodologies should be developed in concert with a technical advisory committee.

The state engineer's HCU methodology and determinations would be given a rebuttable presumption of preventing injury to other water rights, switching the burden of proof from the applicant to any objector claiming injury. The methodology and determination and associated presumption would be available to applicants, but not required, so that an applicant hoping to prove a higher level of HCU would have the option of independently preparing and relying on individualized data and engineering.

G. Temporal Limits on Transfers

There is more variation in the temporal limits associated with the different types of temporary transfer mechanisms than any other element. The limits reflect the specific needs that sparked explicit statutory authorities, as well as concerns about open-ended transfers that could pose questions of long-term injury to other water rights without the procedural protections of the water court process.

Limits range from just ninety-one days to ten years, with two ten-year renewals. Three factors appear to account for the variation. First, limits of less than half of a year apply to short-term water supply needs, i.e., public health and safety emergencies [[242]](#footnote-243)242and agricultural loans within the same stream system. [[243]](#footnote-244)243Second, limits of three to five years accommodate transfers while applications are pending in water court and intermediate water supply needs. [[244]](#footnote-245)244Third, three-in-ten year limits exist for several transfer mechanisms designed to meet periodic longer-term needs. [[245]](#footnote-246)245The three-in-ten limit is founded in the desire to **[\*527]**ensure that agricultural production will continue, even if not every year, and that rural economies will not suffer as a result of dry-up of land. Similar protection but greater flexibility can be provided by an alternative limit of 30 percent of the HCU over a ten-year period.

*Recommendation*

The authors do not believe there are principled legal reasons to differentiate the approval periods between temporary transfers for different purposes. Thus, the authors recommend that ***Colorado*** authorize approval of temporary transfers for any purpose for three-in-ten years or 30 percent of the HCU on a rolling ten-year average, with the option to renew for two ten-year terms. Any increase in the amount or change in the type or place of use after the initial ten-year approval would require an additional approval, which would be subject to appeal. Water rights approved for temporary transfers should be used in accordance with their decrees in any years in which they are not temporarily transferred to the other approved use.

H. Special Note on Water Banks

The water bank statute establishes a unique procedure for a market system, with deposits and withdrawals facilitated by a water conservation or conservancy district. [[246]](#footnote-247)246It includes a temporary transfer procedure, but embodies a larger concept, that of flexible banking of rights. The authors do not recommend that the water bank mechanism be entirely subsumed by a new standardized temporary transfer procedure. Rather, the water bank framework should remain and be expanded to allow banking of direct flow water rights as well as storage rights, [[247]](#footnote-248)247but the actual transfer of water into the bank can follow the standardized procedure recommended here.

IV. Proposed Uniform Temporary Transfer Procedure

A unified statute covering all forms of temporary transfers should include the following elements. These recommended uniform requirements are for the most part derived from those that are most common in the existing transfer mechanisms, but also include the authors' recommendations based on lessons learned over the past decades through implementation of the various procedures:

Application filed with the state engineer.

Notice to all subscribers to the SWSP list for the appropriate water division.

A comment period of thirty-five days, except for loans to in-stream flows and Ag-to-Ag loans, for which the authors suggest keeping the existing timeframes for comment by water rights owners (fifteen days from mailing of notice) and decision by the state engineer (twenty days from mailing of notice). [[248]](#footnote-249)248

A determination by the state engineer that the transfer would not injure **[\*528]**other vested water rights or decreed conditional water rights, or impair interstate obligations.

Administrative approval by the state engineer. [[249]](#footnote-250)249

Appeal to water court pursuant to the Administrative Procedure Act, not a *de novo* proceeding. The appeal may be heard on an expedited basis when the appealing party(s) agree to pay a fee to cover the direct costs associated with an expedited appeal.

Availability of an optional, standardized, and streamlined approach to determine HCU and return flow. The state engineer would phase in the approach for water districts where it would be most useful. While the approach would be uniform, it would use local factors for ditch loss, transit losses, and farm irrigation efficiency. The state engineer would develop the local factors through an informal process with input from a technical advisory committee(s) of water professionals. Use of the approach would create a rebuttable presumption that no injury would result, switching the burden of proof to the objectors. It would not, however, create any presumptions in any subsequent legal proceeding.

Authorization of the use of option contracts between water rights owners and new users for temporary transfers that identify the maximum amount of HCU that could be transferred, and the specific type and place of use.

Authorization of approval for any purpose for three-in-ten years or 30 percent of HCU on a rolling ten-year average, with the option to renew for two ten-year terms. Any increase in the amount, or change in the type or place of use after the initial ten-year approval would require an additional approval, which would be subject to appeal. Water rights approved for temporary transfers should be used in accordance with their decrees in any years not temporarily transferred to another use.

All periods of time during which a water right is used for another approved temporary purpose shall be excluded from any historic consumptive use analysis of the water right required under any water court proceeding.

V. Conclusion

Standardization and consolidation of the numerous temporary transfer methods currently part of ***Colorado*** water law will provide greater access to the flexibility intended by the original legislation that created them, while maintaining the protection of other water rights as intended. Gleaning the best components of the various existing mechanisms and tempering those provisions with lessons learned through experience can construct a standardized system that reduces cost and confusion while facilitating the types of temporary transfers that benefit farmers, rural economies, municipalities, and the environment. The authors submit that the carefully constructed uniform temporary transfer procedure described above combines the best features of those currently in existence and appropriately balances the benefits of a flexible system and the risks associated with temporary changes of water rights.

**[\*529]**

**TABLE 1**

MECHANISMS FOR TEMPORARY CHANGES OF WATER RIGHTS

(PP. 530-533)

**[\*530]**

**TABLE 1 - MECHANISMS FOR TEMPORARY CHANGES OF WATER RIGHTS**

|  |  |  |  |
| --- | --- | --- | --- |
| Temporary | Statute, ***Colo.*** | Purpose | Approval Entity |
| Transfer Mechanism | Rev. Stat. |  |  |
| Substitute Water | 37-92-308(4) | Allow use of | State Engineer |
| Supply Plan (For |  | water while |  |
| pending water |  | application for |  |
| court Cases) |  | augmentation |  |
|  |  | plan, rotational |  |
|  |  | crop management |  |
|  |  | contract or |  |
|  |  | change of water |  |
|  |  | right pending in |  |
|  |  | water court |  |
| Substitute Water | 37-92-308(5) | For out-of- | State Engineer |
| Supply Plan (for |  | priority use for |  |
| up to 5 years |  | no more than 5 |  |
| without filing |  | years |  |
| water court |  |  |  |
| application) |  |  |  |
| Substitute Water | 37-92-308(7) | To address public | State Engineer |
| Supply Plan |  | health and safety |  |
| (public health |  | emergencies |  |
| and safety |  |  |  |
| emergencies) |  |  |  |
| Substitute Water | 37-92-308(9) | To incentivize | State Engineer |
| Supply Plan |  | third parties to |  |
| (removal of |  | pay for |  |
| storage |  | improvements to |  |
| restrictions |  | remove storage |  |
| imposed by State |  | restrictions |  |
| Engineer) |  |  |  |
| Interruptible | 37-92-309 | Temporary | State Engineer |
| Water Supply |  | transfer of HCU |  |
| Agreement |  | for another type |  |
|  |  | or place of use |  |
| Fallowing-Leasing | 37-60-115(8) | Pilot program to | CWCB and State |
| Pilot Projects |  | demonstrate | Engineer |
|  |  | cooperation among |  |
|  |  | water owners, |  |
|  |  | ditches and |  |
|  |  | cities, and use |  |
|  |  | of streamlined |  |
|  |  | approach to |  |
|  |  | determine HCU and |  |
|  |  | injury. |  |
| Ag-to-Ag Lease | 37-83-105(1) | Provide water to | Division Engineer |
|  |  | another |  |
|  |  | agricultural |  |
|  |  | irrigator |  |
| Instream Flow Loan | 37-83-105(2) | Provide water to | CWCB and State |
|  |  | existing decreed | and Division |
|  |  | instream flow | Engineer |
|  |  | water right |  |
| Water Bank | 37-80.5-101 et | Simplify leases, | State Engineer |
|  | seq. | reduce costs, | Rules |
|  |  | assist water |  |
|  |  | owners in |  |
|  |  | realizing value |  |
|  |  | of water without |  |
|  |  | forcing permanent |  |
|  |  | severance |  |
| Agricultural | 37-60-133; 37-80- | Water court | Water court; |
| Water Protection | 123; 37-92- | decree permits | CWCB; State |
| Water Rights | 305(4)(c), (19); | annual leasing of | Engineer; State, |
|  | 37-92-308(12) | up to 50% of | Local and Federal |
|  |  | consumptive use | Conservation |
|  |  | amount | Entities |

**[\*531]**

**TABLE 1 - MECHANISMS FOR TEMPORARY CHANGES OF WATER RIGHTS**

|  |  |  |
| --- | --- | --- |
| Temporary Transfer | Temporal Limits | Strengths |
| Mechanism |  |  |
| Substitute Water Supply | 1 year approval; | Allows applicant to use |
| Plan (For pending water | renewable for 2 years by | water while application |
| court Cases) | DWR; additional 3 years | pending in water court |
|  | with showing of |  |
|  | justified delay and |  |
|  | hardship; renewal after |  |
|  | 5 years requires |  |
|  | approval by water judge |  |
| Substitute Water Supply | 1 year approvals, up to | Does not require filing |
| Plan (for up to 5 years | 5 years max renewable | application in water |
| without filing water |  | court |
| court application) |  |  |
| Substitute Water Supply | 91 days max use | Does not require filing |
| Plan (public health and |  | application in water |
| safety emergencies) |  | court |
| Substitute Water Supply | 1 year approvals, up to | Allows party that pays |
| Plan (removal of storage | 5 years max renewable | for removing storage |
| restrictions imposed by |  | restrictions to use some |
| State Engineer) |  | or all of newly |
|  |  | unrestricted storage |
| Interruptible Water | 3 years in 10, renewable | Allows for the temporary |
| Supply Agreement | twice | transfer of a water |
|  |  | right to another type or |
|  |  | place of use without |
|  |  | water court approval |
| Fallowing-Leasing Pilot | 3 years in 10, not | Authorizes pilot |
| Projects | renewable | projects to demonstrate |
|  |  | fallowing-leasing as |
|  |  | alternative to permanent |
|  |  | ag dry-up |
| Ag-to-Ag Lease | 180 days per calendar | Simple way to provide |
|  | year | irrigation water when |
|  |  | needed for a single year |
| Instream Flow Loan | 3 years in 10, not | Simple and expedient way |
|  | renewable | to provide water to a |
|  |  | water-short instream flow |
| Water Bank | None | Flexible; protection |
|  |  | from loss of HCU (except |
|  |  | Div. 7) and abandonment |
| Agricultural Water | None | Provides stable platform |
| Protection Water Rights |  | for leasing, consistent |
|  |  | with current water court |
|  |  | and SWSP processes, |
|  |  | allows change in use |
|  |  | without identified end |
|  |  | use, encourages |
|  |  | continuing ag use with |
|  |  | 50% irrigation |
|  |  | requirement, revenue |
|  |  | source to ag users |

**[\*532]**

**TABLE 1 - MECHANISMS FOR TEMPORARY CHANGES OF WATER RIGHTS**

|  |  |  |
| --- | --- | --- |
| Temporary Transfer | Limitations | Injury Protection |
| Mechanism |  |  |
| Substitute Water Supply | Application to water | Appeal to water court |
| Plan (For pending water | court required; annual | within 35 days of State |
| court Cases) | application and approval | Engineer's approval |
|  | of state engineer | consolidated with |
|  | required while case | pending application |
|  | pending; not for |  |
|  | residential supplies |  |
| Substitute Water Supply | Annual application and | Yes, terms and |
| Plan (for up to 5 years | approval required; not | conditions imposed by |
| without filing water | for residential supplies | State Engineer |
| court application) |  |  |
| Substitute Water Supply | Limited to emergency | Yes, terms and |
| Plan (public health and | situations that do not | conditions imposed by |
| safety emergencies) | allow time for normal | State Engineer |
|  | SWSP process |  |
| Substitute Water Supply | Third party must have | Yes, terms and |
| Plan (removal of storage | agreement of storage | conditions imposed by |
| restrictions imposed by | owner | State Engineer |
| State Engineer) |  |  |
| Interruptible Water |  | Yes, terms and |
| Supply Agreement |  | conditions imposed by |
|  |  | State Engineer |
| Fallowing-Leasing Pilot | Up to 15 pilot projects, | Yes, terms and |
| Projects | with no more than 3 in | conditions imposed by |
|  | any basins. No | State Engineer |
|  | transfers from Rio |  |
|  | Grande or ***Colorado*** |  |
|  | basins to other basins. |  |
| Ag-to-Ag Lease | Must involve water | Yes, conditions imposed |
|  | rights decreed "solely | by State Engineer |
|  | for agricultural |  |
|  | irrigation purposes" |  |
| Instream Flow Loan | Limited to the decreed | Yes, terms and |
|  | reach and flow levels of | conditions imposed by |
|  | an existing instream | Division Engineer |
|  | flow - may not |  |
|  | "improve" |  |
| Water Bank | Limited to "stored" | Yes. Provided by rules |
|  | water; relatively | promulgated by the State |
|  | lengthy approval process | Engineer and approved by |
|  |  | water court. |
| Agricultural Water | High transactional cost | Yes. Provided by water |
| Protection Water Rights | and risk due to water | court decree and SWSP |
|  | court Adjudication, | review process. |
|  | ongoing costs for annual |  |
|  | SWSP approvals, leases |  |
|  | limited to 50% of CU |  |

**[\*533]**

**TABLE 1 - MECHANISMS FOR TEMPORARY CHANGES OF WATER RIGHTS**

|  |  |  |
| --- | --- | --- |
| Temporary Transfer | Appeals Process | Utilization |
| Mechanism |  |  |
| Substitute Water Supply | Appeal to water court | Often for augmentation |
| Plan (For pending water | within 35 days of State | plans and changes of |
| court Cases) | Engineer's approval | water rights; never for |
|  | consolidated with | rotational crop |
|  | pending application | management contract |
| Substitute Water Supply | Expedited appeal to | Common to meet temporary |
| Plan (for up to 5 years | water court within 35 | demands |
| without filing water | days of State Engineer's |  |
| court application) | approval |  |
| Substitute Water Supply | None | Example: well |
| Plan (public health and |  | augmentation on South |
| safety emergencies) |  | Platte 2002-2003 |
| Substitute Water Supply | Water available from dam | ??? |
| Plan (removal of storage | repairs may be used |  |
| restrictions imposed by | under a SWSP, 37-92- |  |
| State Engineer) | 308(5) [see above] |  |
| Interruptible Water | Expedited appeal to | Some |
| Supply Agreement | water court on question |  |
|  | of injury |  |
| Fallowing-Leasing Pilot | Appeal to water court | Catlin Pilot Project |
| Projects |  | (2015 - present) |
| Ag-to-Ag Lease | Appeal to water court | Some |
| Instream Flow Loan | Appeal to water court | Seven approvals to date |
| Water Bank | The State Engineer's | No |
|  | rules are appealable in |  |
|  | accordance with the |  |
|  | Administrative Procedure |  |
|  | Act. |  |
| Agricultural Water | Yes. Water court decree, | None. Awaiting approval |
| Protection Water Rights | to Supreme Court. SWSP | of enabling rules. |
|  | approvals, to water |  |
|  | court. |  |

University of Denver Water Law Review

Copyright (c) 2019 University of Denver Sturm College of Law

University of Denver Water Law Review

**End of Document**

1. 1 Partner, Berg Hill Greenleaf Ruscitti LLP, Boulder, ***Colorado***. [↑](#footnote-ref-2)
2. 2 Senior Fellow, Getches-Wilkinson Center for Natural Resources, Energy, and the Environment, University of ***Colorado***. [↑](#footnote-ref-3)
3. 3 Founder, WSmith, Denver, ***Colorado***. Zach was the ***Colorado*** Water Trust's staff attorney from 2010 to 2018. [↑](#footnote-ref-4)
4. 4 Partner, Lawrence Jones Custer Grasmick LLP. [↑](#footnote-ref-5)
5. 5 Water Projects Manager, The Nature Conservancy, ***Colorado*** ***River*** Program. [↑](#footnote-ref-6)
6. 6 The views expressed herein are those of the authors in their personal capacities and do not represent the position of the organizations with which they are affiliated. [↑](#footnote-ref-7)
7. 7 ***Colorado***'s Water Plan, Ch. 6.4. [↑](#footnote-ref-8)
8. 8 *Id.,* Ch. 10, Measurable Objective D. [↑](#footnote-ref-9)
9. 9 ***Colo.*** Water Cons. Bd., Criteria and Guidelines for Fallowing-Leasing Pilot Projects 1. [↑](#footnote-ref-10)
10. 10 *See* Asokan, *et al.*, Introducing Flexibility to Complex, Resilient Socio-Ecological Systems: A Comparative Analysis of Economics, Flexible Manufacturing Systems, Evolutionary Biology, and Supply Chain Management, Sustainability, 2017, 9, 1091; DeFrancesco and Tullos, *Flexibility in Water Resources Management: Review of Concepts and Development of Assessment Measures for Flood Management Systems*, J. Am. Water Resources Ass'n, Paper No. JAWRA 13-0094-P. For a good discussion of the general definitions and literature regarding Complex Systems theory, *see* Robinson, A Complex Systems Approach to Pastoral Commons, Human Ecology 2009, 37:441-451. [↑](#footnote-ref-11)
11. 11 De Francesco and Tullos, *supra* n. 10, at 1-2. [↑](#footnote-ref-12)
12. 12 *Id.,* at 8-9. [↑](#footnote-ref-13)
13. 13 The authors' definition purposely excludes water conservation plans and forbearance agreements. Water conservation plans under [***Colo.*** *Rev. Stat.§§37-92-103(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) and [*37-92-305(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) provide water users a safe harbor from the risks of voluntarily using less water: abandonment threats and historical consumptive use reductions in future change cases, respectively. To be eligible for these safe harbor provisions, a governmental entity from an enumerated list must approve the water right owner's water conservation plan. Forbearance agreements are private agreements between at least one water right owner and another party through which the water right owner agrees to reduce water use pursuant to the terms of the agreement. A forbearance agreement may be coupled with a water conservation plan. Entities desiring to make more water available to a stream system have used one or both of these tools - including the recent ***Colorado*** ***River*** System Conservation Pilot Program projects. Depending on geography, such agreements can restore flows to ***rivers*** or provide a more secure water supply to a junior water right. However, water made available through a water conservation plan or agreement is not directly administrable to a different use. Instead, this water becomes water of the natural stream, subject to appropriation and diversion by others. The distinction is key. The temporary transfers discussed herein allow water to be transferred under its priority from one use or place to another. [↑](#footnote-ref-14)
14. 14 ***Colorado***'s Water Plan, Ch. 6.4. [↑](#footnote-ref-15)
15. 15 *Id.* at Ch. 1 (***Colorado***'s water values include "A productive economy that supports vibrant and sustainable cities, *viable and productive agriculture*, and a robust skiing, recreation, and tourism industry." Emphasis added.) [↑](#footnote-ref-16)
16. 16 Charles W. Howe, Christopher Goemans, *Water Transfers and Their Impacts: Lessons from Three* ***Colorado*** *Water Markets,*June 2007, available at [*https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1752-1688.2003.tb03692.x*](https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1752-1688.2003.tb03692.x). [↑](#footnote-ref-17)
17. 17 *Id.*at p. 1059 [↑](#footnote-ref-18)
18. 18 *Id*. [↑](#footnote-ref-19)
19. 19 ***Colorado***'s Water Plan, Ch. 6.4. [↑](#footnote-ref-20)
20. 20 For example, the ***Colorado*** Water Trust's annual leases from Stagecoach Reservoir to improve flows on the Yampa ***River*** have varied from zero acre-feet to 4,000 acre-feet in a seven-year period. [*http://coloradowatertrust.org/project/stagecoach-reservoir-yampa-****river***](http://coloradowatertrust.org/project/stagecoach-reservoir-yampa-river). [↑](#footnote-ref-21)
21. 21 And likely all of them through case law. *See* ISG, LLC v. Arkansas Valley Ditch Ass'n [*., 120 P.3d 724, 734 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-T3J0-0039-4284-00000-00&context=1516831) ("By enacting these statutes, the ***Colorado*** General Assembly has authorized short-term changes that do not penalize the appropriator in any subsequent change of water right proceeding.") [↑](#footnote-ref-22)
22. 22 [***Colo.*** *Rev. Stat. § 37-92-304(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G2-00000-00&context=1516831) (2019). [↑](#footnote-ref-23)
23. 23 [*Farmers Reservoir & Irrigation* ***Co****. v. Consol. Mut. Water* ***Co****., 33 P.3d 799, 807 (****Colo.*** *2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831). [↑](#footnote-ref-24)
24. 24 *Id*. [↑](#footnote-ref-25)
25. 25 *S*ee [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 80 (****Colo.*** *1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831). [↑](#footnote-ref-26)
26. 26 *Id.* [↑](#footnote-ref-27)
27. 27 Trout, Raley, Montano, Witwer & Freeman, P.C., Acquiring, Using, and Protecting Water in ***Colorado*** § 11.2.1 (2011). [↑](#footnote-ref-28)
28. 28 [*City of Thornton, 926 P.2d at 88*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831). [↑](#footnote-ref-29)
29. 29 Britt Banks & Peter Nichols, A Roundtable Discussion on the No-Injury Rule of ***Colorado*** Water Law, 44 ***Colo.*** Law. 87, 90 (2015). [↑](#footnote-ref-30)
30. 30 *See, e.g*., [*Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1158 (****Colo.*** *2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44PW-3160-0039-4363-00000-00&context=1516831) (holding that opposers did not need to prove injury where water rights applicant made out-of-priority diversions in the Arkansas Basin without adjudicating an augmentation plan). [↑](#footnote-ref-31)
31. 31 Banks & Nichols, *supra*note 29, at 90. [↑](#footnote-ref-32)
32. 32 [***Colo.*** *Rev. Stat. § 37-92-103(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2019). [↑](#footnote-ref-33)
33. 33 [***Colo.******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****., 594 P.2d 566, 568 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831). [↑](#footnote-ref-34)
34. 34 [***Colo.*** *Rev. Stat. § 37-92-103(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2019). [↑](#footnote-ref-35)
35. 35 [*Vidler, 594 P.2d at 568*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831). [↑](#footnote-ref-36)
36. 36 *See* [*High Plains A & M, LLC v. Southeastern* ***Co****. Water Conservancy Dist., 120 P.3d 710(****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831). [↑](#footnote-ref-37)
37. 37 *See* [*id., 716-17*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831). [↑](#footnote-ref-38)
38. 38 [*Id. at 720*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831). [↑](#footnote-ref-39)
39. 39 [*Id. at 721*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831). [↑](#footnote-ref-40)
40. 40 [*Id. at 722*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-07R0-0039-427V-00000-00&context=1516831). [↑](#footnote-ref-41)
41. 41 *See*, e.g., David Schorr, The ***Colorado*** Doctrine: Water Rights, Corporations, and Distributive Justice on the American Frontier, 2012. [↑](#footnote-ref-42)
42. 42 *See*[*City and County of Denver v. Sheriff, 96 P.2d 836, 841 (****Colo.*** *1939)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831); [***Colorado******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****., 594 P.2d 566, 568 (1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831). [↑](#footnote-ref-43)
43. 43 *Id*. [↑](#footnote-ref-44)
44. 44 *See, e.g.,*Schorr, *supra*note 41. [↑](#footnote-ref-45)
45. 45 ***Colorado*** College, State of the Rockies, Conservation in the West Poll, 2019, available at [*https://www.coloradocollege.edu/other/stateoftherockies/documents/SotR%20Fact%20Sheets\_****CO****.pdf*](https://www.coloradocollege.edu/other/stateoftherockies/documents/SotR%20Fact%20Sheets_CO.pdf). [↑](#footnote-ref-46)
46. 46 *See*, e.g., [*Grand Valley Water Users Ass'n. v. Busk-Ivanhoe, Inc., 386 P.3d 452, 462 - 63 (****Colo.*** *2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MB2-RH51-F04C-3025-00000-00&context=1516831); Farmers Reservoir & Irrigation ***Co***. v. Consolidated Mutual Water ***Co***., 33 p.3d 799, 815 (***Colo.*** 2001). [↑](#footnote-ref-47)
47. 47 Ryan McLane and John Dingess, The Role of Temporary Changes of Water Rights in ***Colorado***, Univ. of Denver Water Law Review, Vol. 17, Iss. 2, Spring 2014, at 314. [↑](#footnote-ref-48)
48. 48 [***Colo.*** *Rev. Stat. § 37-60-115(8)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-49)
49. 49 ***Colo.*** Div. of Water Resources, Lease Fallow Tool, http://water.state.***co***.us./DataMaps/ModelingCDSS/Pages/LeaseFallowTool.aspx. [↑](#footnote-ref-50)
50. 50 Banks & Nichols, *supra* note 29, at 91 n.10. [↑](#footnote-ref-51)
51. 51 ***Colo.*** Water Cons. Bd., Criteria and Guidelines for Fallowing-Leasing Pilot Projects pp. 9-11, [*http://cwcb.state.****co****.us/water-management/water-projects\_programs/documents/fallowlease/fallowingleasingcriteria%2020131119.pdf*](http://cwcb.state.co.us/water-management/water-projects_programs/documents/fallowlease/fallowingleasingcriteria%2020131119.pdf). [↑](#footnote-ref-52)
52. 52 Peter D. Nichols & Douglas S. Kenney, Watering Growth in ***Colorado***: Swept Along by the Current or Choosing a Better Line?, 6 Univ. Den. Water L. Rev. 411, 420 (2003). [↑](#footnote-ref-53)
53. 53 Greg Hobbs, Timely, Fair and Effective Water Courts: Report of the Water Court Committee to Chief Justice Mary J. Mullarkey, (2008) at 7; Yichuan Wang, Courting ***Colorado***'s Water Courts in California to Improve Water Rights Adjudication? Letting Go and Improving Existing Institutions, Vermont Journal of Environmental Law, 2014, at 546-52; Britt Banks and Peter Nichols, *supra* note 29; Leon Szeptycki and David Pilz, ***Colorado*** ***River*** Basin Environmental Water Transfers Scorecard, p. 9 March 2017. [↑](#footnote-ref-54)
54. 54 Report to ***Colorado*** Water Resources Review Committee on Impact of 2009 Water Court Rule Changes, Aug. 7, 2014, available at [*http://www.leg.state.****co****.us/CLICS/CLICS2014A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/166ba98334d2b1cb87257d2d004d6c8b*](http://www.leg.state.co.us/CLICS/CLICS2014A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/166ba98334d2b1cb87257d2d004d6c8b). [↑](#footnote-ref-55)
55. 55 Phone conference, Mar. 12, 2019, with Philip Womble, PhD Candidate, Emmett Interdisciplinary Program in Environment and Resources, School of Earth, Energy and Environmental Sciences, Stanford University. [↑](#footnote-ref-56)
56. 56 Nichols and Kenney, *supra* n. 51. [↑](#footnote-ref-57)
57. 57 Phone conference with Philip Womble, *supra* n. 54. [↑](#footnote-ref-58)
58. 58 [***Colo.*** *Rev. Stat. § 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019); Michael F. Browning, Substitute Supply Plans: Recent Water Law Developments, 31 ***Colo.*** Law. 67, 67 (Aug. 2002). [↑](#footnote-ref-59)
59. 59 Browning, Substitute Supply Plans at 68, *supra* n. 57. [↑](#footnote-ref-60)
60. 60 Lain Strawn, Comment: The Last Gasp: The Conflict Over Management of Replacement Water in the South Platte ***River*** Basin, [*75 U.* ***Colo.*** *L. Rev. 597, 619 (2004)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4CHH-MK40-00CV-N01W-00000-00&context=1516831). [↑](#footnote-ref-61)
61. 61 [***Colo.*** *Rev. Stat. § 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-62)
62. 62 [***Colo.*** *Rev. Stat. § 37-92-308 (4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831), (5), (7), and (9) (2019). [↑](#footnote-ref-63)
63. 63 [***Colo.*** *Rev. Stat. § 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-64)
64. 64 [***Colo.*** *Rev. Stat. § 37-92-308(4)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-65)
65. 65 *Id.* [↑](#footnote-ref-66)
66. 66 [***Colo.*** *Rev. Stat. § 37-92-308(4)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-67)
67. 67 [***Colo.*** *Rev. Stat. § 37-92-308(5)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-68)
68. 68 *Id.* [↑](#footnote-ref-69)
69. 69 [***Colo.*** *Rev. Stat. § 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-70)
70. 70 [***Colo.*** *Rev. Stat. § 37-92-308(4)(a)(IV)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) and (5)(a)(IV)(A) (2019). [↑](#footnote-ref-71)
71. 71 [***Colo.*** *Rev. Stat. § 37-92-308(3)(b)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-72)
72. 72 *See, e.g.,*[***Colo.*** *Rev. Stat. § 37-92-308(4)(a)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) and (III) (2019). [↑](#footnote-ref-73)
73. 73 *See*[***Colo.*** *Rev. Stat. § 37-92-308(4)(a)(IV)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) and (5)(a)(IV)(A) (2019). [↑](#footnote-ref-74)
74. 74 *See, e.g.,*[***Colo.*** *Rev. Stat. § 37-92-308(4)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-75)
75. 75 [***Colo.*** *Rev. Stat. § 37-92-308(4)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831), (5)(c), (7) (2019). [↑](#footnote-ref-76)
76. 76 [***Colo.*** *Rev. Stat. § 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-77)
77. 77 [***Colo.*** *Rev. Stat. § 37-92-309(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-78)
78. 78 *Id.* [↑](#footnote-ref-79)
79. 79 *See*[***Colo.*** *Rev. Stat. § 37-92-309(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-80)
80. 80 [***Colo.*** *Rev. Stat. § 37-92-309(3)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-81)
81. 81 [***Colo.*** *Rev. Stat. § 37-92-309(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-82)
82. 82 [***Colo.*** *Rev. Stat. § 37-92-309(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) and (6) (2019). [↑](#footnote-ref-83)
83. 83 [***Colo.*** *Rev. Stat. § 37-92-309(3)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-84)
84. 84 [***Colo.*** *Rev. Stat. § 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-85)
85. 85 [***Colo.*** *Rev. Stat. § 37-92-309(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-86)
86. 86 *Id*. [↑](#footnote-ref-87)
87. 87 *Id.* [↑](#footnote-ref-88)
88. 88 [***Colo.*** *Rev. Stat. § 37-92-309(4)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-89)
89. 89 [***Colo.*** *Rev. Stat. § 37-92-309(4)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-90)
90. 90 [***Colo.*** *Rev. Stat. § 37-92-309(6)(g)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) and (h) (2019). [↑](#footnote-ref-91)
91. 91 *See*[***Colo.*** *Rev. Stat. § 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-92)
92. 92 [***Colo.*** *Rev. Stat. § 37-92-309(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019). [↑](#footnote-ref-93)
93. 93 [***Colo.*** *Rev. Stat. § 37-60-115(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019); H.B. 13-1248, 69th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 2013). H.B. 13-1248 was built on the ashes of H.B. 11-1068, a similar idea that ignited a firestorm of opposition. [↑](#footnote-ref-94)
94. 94 [***Colo.*** *Rev. Stat. § 37-60-115(8)(a)(ii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831), (j) (2019); S.B. 15-198; H.B. 17-1219, 72nd Gen. Assemb., 1st Reg. Sess. (***Colo.*** 2017). [↑](#footnote-ref-95)
95. 95 H.B. 13-1248. [↑](#footnote-ref-96)
96. 96 [***Colo.*** *Rev. Stat. § 37-60-115(8)(a)(i)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-97)
97. 97 ***Colo.*** Water Conservation Bd., Criteria and Guidelines for Fallowing-Leasing Pilot Projects 2 p. 2 (2013), [*http://cwcb.state.****co****.us/water-management/water-projects-programs/Documents/FallowLease/FallowingLeasingCriteria%2020131119.pdf*](http://cwcb.state.co.us/water-management/water-projects-programs/Documents/FallowLease/FallowingLeasingCriteria%2020131119.pdf) [hereinafter Criteria and Guidelines for Fallowing-Leasing Pilot Projects]. [↑](#footnote-ref-98)
98. 98 [*Id. at 1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831). [↑](#footnote-ref-99)
99. 99 *See generally*Criteria and Guidelines for Fallowing-Leasing Pilot Projects. [↑](#footnote-ref-100)
100. 100 [*Id. at 7-8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831). [↑](#footnote-ref-101)
101. 101 [*Id. at 9*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831). [↑](#footnote-ref-102)
102. 102 [***Colo.*** *Rev. Stat. § 37-60-115(8)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-103)
103. 103 [***Colo.*** *Rev. Stat. § 37-60-115(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-104)
104. 104 [***Colo.*** *Rev. Stat. § 37-60-115(8)(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-105)
105. 105 The ***Colorado*** Water Conservation Board, *Lease Fallow Tool*, http://cwcb. state.***co***.us/water-management/water-projects-programs/Pages/LeaseFallowTool.aspx (last visited Mar 8, 2016) [hereinafter Lease Fallow Tool]. [↑](#footnote-ref-106)
106. 106 Criteria and Guidelines for Fallowing-Leasing Pilot Projects, *supra*note 96, at 13. [↑](#footnote-ref-107)
107. 107 Criteria and Guidelines for Fallowing-Leasing Pilot Projects, *supra* note 96, at 8. [↑](#footnote-ref-108)
108. 108 [***Colo.*** *Rev. Stat. § 37-60-115(8)(d)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-109)
109. 109 Criteria and Guidelines for Fallowing-Leasing Pilot Projects at 12. [↑](#footnote-ref-110)
110. 110 Criteria and Guidelines for Fallowing-Leasing Pilot Projects at 12; [***Colo.*** *Rev. Stat. § 37-60-115(8)(VI)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-111)
111. 111 Criteria and Guidelines for Fallowing-Leasing Pilot Projects at 12; [***Colo.*** *Rev. Stat. § 37-60-115(8)(VII)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-112)
112. 112 [***Colo.*** *Rev. Stat. § 37-60-115(8)(h)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-113)
113. 113 [***Colo.*** *Rev. Stat. § 37-60-115(8)(h)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-114)
114. 114 Lease Fallow Tool, *supra* note 104. [↑](#footnote-ref-115)
115. 115 Lease Fallow Tool, *supra* note 104. [↑](#footnote-ref-116)
116. 116 Banks & Nichols, *supra*note 29, at 91 n.10. [↑](#footnote-ref-117)
117. 117 [***Colo.*** *Rev. Stat.§§37-60-115(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-118)
118. 118 [***Colo.*** *Rev. Stat. § 37-60-115(8)(c)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-119)
119. 119 [***Colo.*** *Rev. Stat. § 37-60-115(8)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-120)
120. 120 [***Colo.*** *Rev. Stat. § 37-60-115(8)(c)(III)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831)-(IV) (2019). [↑](#footnote-ref-121)
121. 121 [***Colo.*** *Rev. Stat. § 37-60-115(8)(d)(XIII)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-122)
122. 122 Although not stated in statute, courts found the injury standard applied to these loans and that the water right owners must both be irrigation water right owners. In [*Ft. Lyon Canal* ***Co****. v. Chew, 81 P. 37 (****Colo.*** *1905)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-25K0-0040-004R-00000-00&context=1516831), the senior Arkansas Valley Company loaned water to the junior Twin Lakes Company, and the senior Caitlin Company loaned water to the junior Laguna Canal Company. A fifth ditch, senior to the two juniors receiving loaned water, filed and received a writ of injunction, claiming injury by diminishment of supply in the Arkansas ***River***. Considering burgeoning case law regarding some of ***Colorado***'s first permanent transfers of water rights, the court reasoned "when such exchanges or loans are made, or attempted to be made, they ought not be permitted, if at all, until the parties seeking their benefits have clearly established that the alleged qualified right has been exercised in such a way, and at such times, and in such circumstances that the vested rights of others are not injured." [↑](#footnote-ref-123)
123. 123 1899 ***Colo.*** Sess. Laws 105-236; Rev. Stat. ***Colo.*** 3232 Sec. 68 (1908). [↑](#footnote-ref-124)
124. 124 *Id.* [↑](#footnote-ref-125)
125. 125 *Id*. [↑](#footnote-ref-126)
126. 126 S.B. 032 64th Gen. Assemb., 2nd Reg. Sess. (***Colo.*** 2004), now codified at [***Colo.*** *Rev. Stat. § 37-83-105(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-127)
127. 127 *Id.* [↑](#footnote-ref-128)
128. 128 *Id*. [↑](#footnote-ref-129)
129. 129 *Id.* [↑](#footnote-ref-130)
130. 130 *Id.* [↑](#footnote-ref-131)
131. 131 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(I)(E)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-132)
132. 132 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-133)
133. 133 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(I)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)-(E) (2019). [↑](#footnote-ref-134)
134. 134 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-135)
135. 135 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). Because the SWSP list subscribers number in the hundreds, it is unlikely a proponent would ever be able to take advantage of this shortcut. [↑](#footnote-ref-136)
136. 136 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(VII)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-137)
137. 137 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(VI)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-138)
138. 138 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(VIII)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831). [↑](#footnote-ref-139)
139. 139 [*https://www.fondriest.com/news/facing-drought-colorados-farmers-could-get-cash-to-leave-water-in-streams.htm*](https://www.fondriest.com/news/facing-drought-colorados-farmers-could-get-cash-to-leave-water-in-streams.htm). [↑](#footnote-ref-140)
140. 140 [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2019). [↑](#footnote-ref-141)
141. 141 H.B. 1320 64th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 2003). [↑](#footnote-ref-142)
142. 142 H.B. 1039 65th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 2005). [↑](#footnote-ref-143)
143. 143 H.B. 1012 66th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 2007). [↑](#footnote-ref-144)
144. 144 *See* [*http://coloradowatertrust.org/project/winter-park-ranch-ws-fraser-****river***](http://coloradowatertrust.org/project/winter-park-ranch-ws-fraser-river). [↑](#footnote-ref-145)
145. 145 *See*[*http://coloradowatertrust.org/project/stagecoach-reservoir-yampa-****river***](http://coloradowatertrust.org/project/stagecoach-reservoir-yampa-river). [↑](#footnote-ref-146)
146. 146 *See*[*http://coloradowatertrust.org/project/yost-ditch-deep-creek*](http://coloradowatertrust.org/project/yost-ditch-deep-creek). [↑](#footnote-ref-147)
147. 147 *See*[*http://coloradowatertrust.org/project/bunte-highline-ditch-willow-creek*](http://coloradowatertrust.org/project/bunte-highline-ditch-willow-creek). [↑](#footnote-ref-148)
148. 148 *See*[*http://coloradowatertrust.org/projects-map*](http://coloradowatertrust.org/projects-map). [↑](#footnote-ref-149)
149. 149 [***Colo.*** *Rev. Stat. § 37-83-105(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-150)
150. 150 *Id.*Legislation was introduced on March 4, 2019 that would allow a loaned water right to be used to preserve or improve the natural environment for a stream reach not subject to a CWCB-held instream flow water right based on a biological analysis provided by the ***Colorado*** Division of Parks and Wildlife. House Bill 19-1218, available at [*http://leg.****colorado****.gov/sites*](http://leg.colorado.gov/sites) /default/files/documents/2019A/bills/2019a\_1218\_01.pdf. [↑](#footnote-ref-151)
151. 151 *Id.* [↑](#footnote-ref-152)
152. 152 [***Colo.*** *Rev. Stat. § 37-83-105(2)(a)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). HB 19-1218, *supra* n. 149, would allow exercise of a loaned right for five years in a ten-year period and would allow renewal for two additional ten-year periods. [↑](#footnote-ref-153)
153. 153 *Id.* [↑](#footnote-ref-154)
154. 154 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(I)(E)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-155)
155. 155 [***Colo.*** *Rev. Stat. § 37-83-105(2)(a)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-156)
156. 156 [***Colo.*** *Rev. Stat. § 37-83-105(2)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). HB 19-1218, *supra* n. 149, would direct the CWCB to promulgate rules regarding the review and acceptance of loans based on a biological analysis by the ***Colorado*** Division of Parks and Wildlife. [↑](#footnote-ref-157)
157. 157 [*2* ***Colo.*** *Code Regs. § 408-2(6)(k)(1)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:621K-TFK1-DY89-M3F7-00009-00&context=1516831)-(2) (2019). [↑](#footnote-ref-158)
158. 158 [*2* ***Colo.*** *Code Regs. § 408-2(6)(k)(4)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:621K-TFK1-DY89-M3F7-00009-00&context=1516831) (2019). [↑](#footnote-ref-159)
159. 159 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(VIII)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-160)
160. 160 [*http://coloradowatertrust.org/request-for-water*](http://coloradowatertrust.org/request-for-water). [↑](#footnote-ref-161)
161. 161 Each of these limitations would be mitigated by the provisions of HB 19-1218, *supra*n. 149, as originally introduced. [↑](#footnote-ref-162)
162. 162 House Bill 16-1228, codified at [***Colo.*** *Rev. Stat. §§37-60-133*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33K-00000-00&context=1516831); 37-80-123 (2019); 37-92-305(4)(c), (19); 37-92-308(12) (2019). [↑](#footnote-ref-163)
163. 163 *See* [***Colo.*** *Rev. Stat. § 37-92-305(19)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-164)
164. 164 This statute resulted in large part from the CWCB FLEX studies, which developed the idea of a permanent, decree-based ATM. The Flex Market Model Completion Report, June 30, 2013, available at [*https://www.****colorado****.gov/pacific/sites/default/files*](https://www.colorado.gov/pacific/sites/default/files) /13WaterResourcesFLEXMarketModelFinalCompletionReport.pdf provides an entry point into these CWCB funded studies. [↑](#footnote-ref-165)
165. 165 See [***Colo.*** *Rev. Stat. § 37-92-305(4)(c)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), (II) (2019). [↑](#footnote-ref-166)
166. 166 See [***Colo.*** *Rev. Stat. § 37-92-305(19)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-167)
167. 167 See [***Colo.*** *Rev. Stat. § 37-92-305(19)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-168)
168. 168 See [***Colo.*** *Rev. Stat. § 37-92-305(19)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-169)
169. 169 *See* [***Colo.*** *Rev. Stat. § 37-92-305(19)(b)(IV)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-170)
170. 170 *See* [***Colo.*** *Rev. Stat.§§37-92-305(19)(b)(IV)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019); 37-60-133(1)(a). [↑](#footnote-ref-171)
171. 171 *See* [***Colo.*** *Rev. Stat. § 37-92-305(19)(b)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-172)
172. 172 *See* [***Colo.*** *Rev. Stat. § 37-60-133*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33K-00000-00&context=1516831) (2019). [↑](#footnote-ref-173)
173. 173 *See* Criteria and Guidelines for Establishment of an Agricultural Water Protection Program in Water Division 1 or 2 for the Implementation of an *Agricultural Water Protection Right* as allowed by House Bill 16-1228, available at [*https://dnrweblink.state.****co****.us/dwr/0/edoc/*](https://dnrweblink.state.co.us/dwr/0/edoc/) 3144184/DWR\_3144184.pdf?searchid=45a53099-18c4-4f0f-adaa-51ce6eb607f0 [↑](#footnote-ref-174)
174. 174 *See* [***Colo.*** *Rev. Stat. § 37-80-123(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J368-00000-00&context=1516831) (2019). [↑](#footnote-ref-175)
175. 175 [*http://water.state.****co****.us/SurfaceWater/RulemakingAndAdvising/AgWaterProtection/Pag*](http://water.state.co.us/SurfaceWater/RulemakingAndAdvising/AgWaterProtection/Pag) es/DWRSite1.aspx. [↑](#footnote-ref-176)
176. 176 *See* [***Colo.*** *Rev. Stat. § 37-92-305(4)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-177)
177. 177 *Id.* [↑](#footnote-ref-178)
178. 178 *See* [***Colo.*** *Rev. Stat.§§37-92-305(4)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), 308(12) (2019); [***Colo.*** *Rev. Stat. § 37-80-123*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J368-00000-00&context=1516831) (2019). [↑](#footnote-ref-179)
179. 179 *See* [***Colo.*** *Rev. Stat. § 37-92-308(12)(h)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-180)
180. 180 *Id.* [↑](#footnote-ref-181)
181. 181 *See* [***Colo.*** *Rev. Stat. § 37-92-308(12)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-182)
182. 182 *See* generally Flex Market Model Completion Report, June 30, 2013 (discussing barriers to ATM implementation). [↑](#footnote-ref-183)
183. 183 [***Colo.*** *Rev. Stat.§§37-80.5-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36C-00000-00&context=1516831) et seq. (2019) ; [***Colo.*** *Rev. Stat. § 37-80.5-104.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-184)
184. 184 [***Colo.*** *Rev. Stat. § 37-80.5-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36D-00000-00&context=1516831) (2019). [↑](#footnote-ref-185)
185. 185 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-186)
186. 186 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-187)
187. 187 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-188)
188. 188 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(a)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-189)
189. 189 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(a)(III)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-190)
190. 190 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(a)(III)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-191)
191. 191 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-192)
192. 192 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(a)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-193)
193. 193 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-194)
194. 194 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(a)(III)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-195)
195. 195 Rules Governing the Arkansas ***River*** Water Bank Pilot Program, ***Colo.*** Div. of Water Resources, [*2 CCR 402-12*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5XSH-9F01-DXHD-G225-00009-00&context=1516831) (ARWB Rules); Ralph "Terry" Scanga, Update of Water Banking in the Arkansas presented to the Interim Water Resources Review Committee, Aug. 21, 2013. [↑](#footnote-ref-196)
196. 196 [*2 CCR 402-12*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5XSH-9F01-DXHD-G225-00009-00&context=1516831) et seq. [↑](#footnote-ref-197)
197. 197 Rule 12.7 [↑](#footnote-ref-198)
198. 198 Rule 12.6-12.9. [↑](#footnote-ref-199)
199. 199 Rule 12.8. [↑](#footnote-ref-200)
200. 200 Rule 12.8(c). [↑](#footnote-ref-201)
201. 201 Rule 12.8(D). [↑](#footnote-ref-202)
202. 202 Rule 12.8(E); 12.11. [↑](#footnote-ref-203)
203. 203 Id at 12.3(A)(13) *.* [↑](#footnote-ref-204)
204. 204 [***Colo.*** *Rev. Stat. § 37-92-305(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-205)
205. 205 [***Colo.*** *Rev. Stat. § 37-92-305(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-206)
206. 206 [***Colo.*** *Rev. Stat. § 37-92-103(2)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2019). [↑](#footnote-ref-207)
207. 207 ***Colo.*** Rev. Stat. § 37-80.5.105 (2019); Rule 12.15. [↑](#footnote-ref-208)
208. 208 ***Colo.*** Rev. Stat. § 37-80.5.105 (2019). [↑](#footnote-ref-209)
209. 209 ARWB Rule 12.8.D. [↑](#footnote-ref-210)
210. 210 [***Colo.*** *Rev. Stat. § 37-92-305(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019) (except in Water Division 7). [↑](#footnote-ref-211)
211. 211 [***Colo.*** *Rev. Stat. § 37-92-103(2)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2019). [↑](#footnote-ref-212)
212. 212 Ralph "Terry" Scanga, Update of Water Banking in the Arkansas presented to the Interim Water Resources Review Committee, Aug. 21, 2013. [↑](#footnote-ref-213)
213. 213 *Id.* [↑](#footnote-ref-214)
214. 214 *Id.*; *see also*CWCB, Brief History of Arkansas Basin Water Bank (Feb. 2012). [↑](#footnote-ref-215)
215. 215 CWCB, Brief History of Arkansas Basin Water Bank (Feb. 2012). [↑](#footnote-ref-216)
216. 216 [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019). [↑](#footnote-ref-217)
217. 217 [***Colo.*** *Rev. Stat. § 37-60-115(8)(b)(III)(C)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-218)
218. 218 [***Colo.*** *Rev. Stat. § 37-60-115(8)(d)(VII)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019). [↑](#footnote-ref-219)
219. 219 *See, e.g.,*[***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (2019); [***Colo.*** *Rev. Stat. 37-92-308(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-220)
220. 220 [***Colo.*** *Rev. Stat. § 37-60-115(8)(d)(VII)(B)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019) (fallowing-leasing pilot projects); [***Colo.*** *Rev. Stat. § 37-80.5-104.5(1)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831) (water banks). [↑](#footnote-ref-221)
221. 221 An exception is the agricultural water protection water right. *See*[***Colo.*** *Rev. Stat.§§37-92-305(19)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831), 308(12). The water bank statute does not mandate specification of the proposed use of a banked water right, but the Arkansas ***River*** pilot program rules do so. ARWB Rule 12.8. [↑](#footnote-ref-222)
222. 222 [***Colo.*** *Rev. Stat. § 37-83-105(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-223)
223. 223 [***Colo.*** *Rev. Stat. § 37-60-115(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019); [***Colo.*** *Rev. Stat. § 37-83-105(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-224)
224. 224 [***Colo.*** *Rev. Stat. § 37-83-105(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-225)
225. 225 The unique situation involving loans for instream flows necessarily require the CWCB to accept the loan as one of the two parties to the transfer. In that capacity, however, the CWCB is a party to the transfer and not acting in an administrative approval capacity. [↑](#footnote-ref-226)
226. 226 [***Colo.*** *Rev. Stat. § 37-92-308(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019); ARWB Rule 12.8; [***Colo.*** *Rev. Stat. § 37-92-305(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2019). [↑](#footnote-ref-227)
227. 227 [***Colo.*** *Rev. Stat.§§37-92-308(5)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831), 309 (2019). [↑](#footnote-ref-228)
228. 228 *See, e.g.,*[***Colo.*** *Rev. Stat. § 37-92-308(5)(a)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019); [***Colo.*** *Rev. Stat. § 37-60-115(8)(e)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019); [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-229)
229. 229 [***Colo.*** *Rev. Stat. § 37-92-308(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-230)
230. 230 ***Colorado*** Water Conservation Board, Lease Fallow Tool, [*http://cwcb.state.****co****.us/water-management/water-projects-programs/Pages/LeaseFallowTool.aspx*](http://cwcb.state.co.us/water-management/water-projects-programs/Pages/LeaseFallowTool.aspx) (last visited Feb. 21, 2019) [hereinafter Lease Fallow Tool]. [↑](#footnote-ref-231)
231. 231 Lease Fallow Tool, *supra* note 104. [↑](#footnote-ref-232)
232. 232 Lease-Fallowing Water Accounting Tool, a.k.a. Lease-Fallow Tool (LFT) (updated 1/26/16), available at [*http://cwcb.state.****co****.us/water-management/water-projects-programs/Pages/*](http://cwcb.state.co.us/water-management/water-projects-programs/Pages/) LeaseFallowTool.aspx. [↑](#footnote-ref-233)
233. 233 Banks & Nichols, *supra* note 29, at 91 n.10. [↑](#footnote-ref-234)
234. 234 HB 17 - 1289 [*https://leg.****colorado****.gov/sites/default/files/2017a\_1289\_signed.pdf*](https://leg.colorado.gov/sites/default/files/2017a_1289_signed.pdf) [↑](#footnote-ref-235)
235. 235 HB 17 - 1289 [*https://leg.****colorado****.gov/sites/default/files/2017a\_1289\_signed.pdf*](https://leg.colorado.gov/sites/default/files/2017a_1289_signed.pdf) [↑](#footnote-ref-236)
236. 236 Final Report of the Water Resources Review Committee p. 7 (Dec. 2017); [*https://leg.****colorado****.gov/sites/default/files/final\_report\_for\_the\_water\_resources\_review\_committee\_12122017\_1.pdf*](https://leg.colorado.gov/sites/default/files/final_report_for_the_water_resources_review_committee_12122017_1.pdf). [↑](#footnote-ref-237)
237. 237 In the Matter of the Rules Governing the Withdrawal of Groundwater in Water Division 3 (the Rio Grande Basin) and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division No. 3 for All Irrigation Water Rights, Case No. 15CW3024 (Water Div. 3, , Mar. 15, 2019). Available at: [*http://water.state.****co****.us/DWRIPub/Documents/*](http://water.state.co.us/DWRIPub/Documents/) FINAL%20Groundwater%20Rules%20for%20Division%203%20September %2023%202015%202.pdf. [↑](#footnote-ref-238)
238. 238 *Id*. [↑](#footnote-ref-239)
239. 239 In the Matter of the Proposed Compact Rules Governing Improvements to Surface Irrigation Systems in the Arkansas ***River*** Basin in ***Colorado***, Case No. 09CW110 (Water Div. 2, Oct. 28, 2011). Available at: [*http://water.state.****co****.us/DWRIPub/Documents/ArkRBIrrigationImprovementFinalRulesAndAttachmts.pdf*](http://water.state.co.us/DWRIPub/Documents/ArkRBIrrigationImprovementFinalRulesAndAttachmts.pdf). [↑](#footnote-ref-240)
240. 240 Greg Hobbs, Timely, Fair and Effective Water Courts: Report of the Water Court Committee to Chief Justice Mary J. Mullarkey, (2008) at 43, 45 ("The subcommittee believes that repetitive litigation over acceptable computational techniques and the reliability of data sets is an inefficient use of the resources of litigants and the courts."). [↑](#footnote-ref-241)
241. 241 Greg Hobbs, Timely, Fair and Effective Water Courts: Report of the Water Court Committee to Chief Justice Mary J. Mullarkey, (2008) at 7; Yichuan Wang, Courting ***Colorado***'s Water Courts in California to Improve Water Rights Adjudication? Letting Go and Improving Existing Institutions, Vermont Journal of Environmental Law, 2014, at 546-52; Britt Banks and Peter Nichols, A Roundtable Discussion on the No-Injury Rule of ***Colorado*** Water Law, 44 The ***Colo.*** Lawyer 87 (2015); Leon Szeptycki and David Pilz, ***Colorado*** ***River*** Basin Environmental Water Transfers Scorecard, March 2017; Ryan McLane and John Dingess, The Role of Temporary Changes of Water Rights in ***Colorado***, Univ. of Denver Water Law Review, Vol. 17, Iss. 2, Spring 2014, at 108-14. [↑](#footnote-ref-242)
242. 242 [***Colo.*** *Rev. Stat. § 37-92-308(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2019). [↑](#footnote-ref-243)
243. 243 [***Colo.*** *Rev. Stat. § 37-83-105(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-244)
244. 244 [***Colo.*** *Rev. Stat. § 37-92-308(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831), (5), and (9). [↑](#footnote-ref-245)
245. 245 [*Colo Rev. Stat. § 37-92-309(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2019); [*Colo Rev. Stat. § 37-60-115(8)(c)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2019); [*Colo Rev. Stat. § 37-83-105(2)(a)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2019). [↑](#footnote-ref-246)
246. 246 [***Colo.*** *Rev. Stat.§§37-80.5-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36C-00000-00&context=1516831) et seq (2019). [↑](#footnote-ref-247)
247. 247 *See*Castle and MacDonnell, An Enhanced Water Bank for ***Colorado***, p. 5, March 2016, available at [*https://www.****colorado****.edu/law/sites/default/files/An%20Enhanced%20Water%20Bank%20for*](https://www.colorado.edu/law/sites/default/files/An%20Enhanced%20Water%20Bank%20for) %20***Colorado***.pdf [↑](#footnote-ref-248)
248. 248 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831), (VII) (2019). [↑](#footnote-ref-249)
249. 249 Although the CWCB is involved in approving various transfers for instream flows, their role is more as a party to the transfer than administrative approval. If the State Engineer approves a transfer with terms and conditions to prevent injury to other water rights, maintain return flows, and meet interstate obligations, another approval is merely redundant and inefficient. [↑](#footnote-ref-250)