

DEPARTMENT OF NATURAL RESOURCES

Division of Water Resources

RULES GOVERNING THE ARKANSAS RIVER WATER BANK PILOT PROGRAM

2 CCR 402-12

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

AUTHORIZATION

These rules are promulgated pursuant to the authority granted the State Engineer in sections 37-80.5-101 et seq., C.R.S. to implement a water banking program in the Arkansas River Basin.

ORDER OF THE STATE ENGINEER

IT IS ORDERED that the following rules governing the Arkansas River Water Bank Program are adopted by the State Engineer.

Rule 12.1 Title.

The title of these rules is "The Rules Governing the Arkansas River Water Bank Program." The short title for these rules is "Water Bank Rules" and they may be referred to herein collectively as the "rules" or individually as a "rule."

Rule 12.2 Scope and Purpose.

- A. These rules apply to the establishment and operation of a water bank for owners of stored water in the Arkansas River Basin and its tributaries.
- B. The purpose of these rules is to implement a water bank that simplifies and facilitates water leasing, loans and exchanges, including interruptible supply agreements, of stored water within the Arkansas River Basin; and to reduce the costs associated with such transactions. Further, it is also the purpose of these rules to increase the availability of water-related information and assist farmers and ranchers by developing a mechanism to realize the value of their water right assets without forcing the permanent severance of those water rights from the land.
- C. These rules shall not permit any expansion of use of stored water deposited into and leased, loaned, optioned or exchanged through the water bank.
- D. Nothing in these rules is intended to restrict the ability of the holder of a water right to sell, lease, option or exchange that water right in any other manner that is currently permitted under Colorado law. These rules shall not be implemented in a manner that would cause material injury to the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

Rule 12.3 Definitions.

A. As used in these rules:

1. "Bankable water" means any Legally Stored Water that meets the necessary criteria established by these rules. Direct flow water rights are not included in this definition.

2. "Article II water" means Legally Stored Water stored within individual Water District 67 ditch accounts pursuant to Section II of the Resolution Concerning an Operating Plan for John Martin Reservoir adopted by the Arkansas River Compact Administration on April 24, 1980 (as amended) and accounted as "winter stored water" under "Agreement B" dated November 1984.
3. "Beneficial consumptive use" means the amount of water actually consumed in applying the water right to its legal use.
4. "Deposit account" means the amount of Legally Stored Water a person or entity places in the water bank.
5. "Interruptible supply" means the temporary cessation of the historic use of stored water and the temporary use of such water at another location, and/or for a different use, and/or at a different time. Such temporary cessation/use may be during a full or partial season of historic use.
6. "Legally stored water" means water legally stored pursuant to a water court decree, statutory provision, or an existing authorization of the Arkansas River Compact Administration, and that is physically in such storage within 60 days of deposit/enrollment in the Water Bank.
7. "Option agreement" means an agreement by which a buyer pays a seller for the option to use a specified amount of stored water and pays for the right, but is not obligated, to purchase a defined amount of banked water at a specified price within a fixed time period. The buyer of the option may be required to pay a defined premium to the seller for this right. An option agreement may authorize the water bank operator to release deposited water for the seller's use at times when the water is available for use and the buyer is not exercising the option, or allow the seller to use the stored water until the option is exercised.
8. "Return flow(s)" means the amount of the water that is not consumed and returns to the stream following a legal use of a given amount of water.
9. "Transit loss" means the amount of water deducted by the Division Engineer in the delivery of water from one point to another due to stream and environmental conditions.
10. "Water bank" means the Arkansas River Water Bank, which is a program authorized by the Colorado General Assembly to receive and safeguard legally stored water for exchange, lease, options or loans and to facilitate such transactions.
11. "Water banking" means temporarily placing legally stored water into an account within the Water Bank whereby that water is then leased, loaned, optioned or exchanged to another user.
12. "Transaction fee" may include a percentage of water in lieu of monetary compensation.
13. "Water bank operator" means the State Engineer, a delegated public entity or a delegated public-private partnership who administers the water bank and is entitled to charge a transaction fee for deposits, withdrawals, or both, sufficient to cover the bank's administrative costs.
14. "Winter water" means water stored using the Winter Water Storage Program as described in Case No. 84CW179, Water Division 2.

- B. Any term used in these Water Bank Rules that is defined in sections 37-90-103 or 37-92-103, C.R.S. shall have the same meaning given therein.
- C. The terms “buyer” and “seller” are used generally in these rules and are intended to encompass lessors and lessees and any other type of party entering into a transaction through the water bank.
- D. Any term used in these Water Bank Rules not defined herein that is defined in other Rules and Regulations of the State Engineer shall have the same meaning given therein.

Rule 12.4 Delegation of Administration of Water Bank.

- A. Pursuant to section 37-80.5-104.5(1)(d), the State Engineer delegates administration and operation of the Water Bank to the Upper Arkansas Water Conservancy District. Said District has full authority to administer the Water Bank’s operations pursuant to section 37-80.5-104.5, including any power to act outside the geographic boundaries of the District when necessary to administer the Water Bank.
- B. As administrator and operator of the water bank, the District is authorized to charge a transaction fee for deposits, withdrawals, or both, sufficient to cover the Water Bank’s administration costs.

Rule 12.5 Limitations on the Water Bank.

- A. Leases, exchanges and loans of water through the Water Bank may only occur within Water Division 2 and cannot operate in a manner so as to increase water diverted from another water division as set forth in section 37-92-201, C.R.S.
- B. Nothing in these rules shall be construed to authorize any lease, exchange, option, or loan of water below John Martin Reservoir to points of diversion or storage above John Martin Reservoir without the approval of the Arkansas River Compact Administration.
- C. No transfer of water from the bank to instream flow uses as provided in section 37-92-102(3), C.R.S. is allowed except where such transfer, lease, loan, option, exchange or sale is to the Colorado Water Conservation Board.
- D. The water bank shall not be used to export water out of state.
- E. “Winter water” stored in Pueblo Reservoir shall only be bankable if deposited before August 1 following the winter storage program period during which such water was stored.
- F. Article II “winter stored water” can be used in the water bank. No Article II “summer stored water” can be used in the bank.
- G. Any deposit of water into the water bank and any leases, loans, options or exchanges through the water bank must comply with all state and/or federal:
 - 1. statutory and regulatory requirements;
 - 2. operating principles; and
 - 3. contractual requirements governing the use of federally authorized projects in the Arkansas River basin to the extent such project facilities are utilized in banking operations.

Operations of the water bank shall not in any way harm or compromise the Fryingpan-Arkansas Project purposes as defined in the Fryingpan-Arkansas Project Act.

- H. The bank shall operate within the existing requirements of Colorado water law, including the Arkansas River Compact, the Colorado Ground Water Management Act, (see sections 37-90-101, et seq. C.R.S.), and the Water Rights Determination and Administration Act (see sections 37-92-101, et seq. , C.R.S.). However, upon approval by the State Engineer, adjudication of the temporary use of the water right is not required pursuant to sections 37-80.5-104(1)(a)(IV) and 104.5(1)(a)(III), C.R.S.
- I. Ground water shall not be deemed bankable water for the Water Bank.
- J. Leases, loans, options or exchanges of water may be for more than one year, subject to (1) appropriate terms and conditions to facilitate annual operation and administration by the State Engineer, and (2) available storage space and water supply, which may vary from year to year. No lease, loan, option or exchange can extend beyond date limitations set forth in any enabling legislation for the Water Bank.

Rule 12.6 Procedures for Placing Water into the Water Bank.

- A. To apply to deposit water into the water bank, a prospective depositor must pay any transaction fees required by the water bank and must provide the following information to the water bank operator:
 - 1. Written agreement that the owner or operator of any non-federal reservoirs from which the water will be released for use in the Water Bank has approved such use of the water and will properly account for the water in the reservoir, and cooperate in regulating its delivery.
 - 2. When the transaction of water in the water bank requires the use of federal facilities other than John Martin Reservoir, the water bank operator or one or both of the parties will be required to have a storage and/or exchange contract with the United States.
 - 3. Proof of ownership, lease or contract that includes the right to use and control the disposition of the water.
 - 4. The amount of legally stored water that will be deposited into the water bank.
 - 5. A description of the point of diversion, place of storage and historic place of use of the water. Sufficient descriptions may include maps, legal descriptions, and/or aerial photographs.
 - 6. If the subject water historically has been used for irrigation, a description of the proposed use of the historically irrigated land, including proposed sources of irrigation water and methods of irrigating the land, if any. Such description must establish that no expansion of water use shall result from the deposit of the subject water into the bank.
 - 7. Unless utilizing the factors provided in Rule 10 herein, an estimate of the available historic consumptive use and return flows, and documentation of how that estimate was derived, prepared by a registered professional engineer with a minimum of five years of experience in the field of water resources engineering.
 - 8. Anticipated terms that may apply to the lease, loan, option or exchange of the water, including, but not limited to:
 - a. Applicable time frames, parameters and/or limitations for and on use of the water.
 - b. The minimum price the depositor will accept for the water.
 - c. The amount of stored water the depositor is willing to lease, loan, option or exchange.

9. Contact information, including name, address, phone number and email address (if available).
 10. The information set forth in 6(A)1 through 9 above is also required to proceed under the expedited procedures set forth in Rule 9.
 11. Any other relevant information requested by the water bank.
- B. Based upon its review of the above information, the water bank, in consultation with the Division Engineer, shall determine whether the stored water is eligible for deposit in the bank. If the water bank determines that the water is not eligible, it shall notify the prospective depositor to address any impediments to the water's eligibility.
- C. A "suggested minimum asking price" shall be determined by the Water Bank Operator based on relevant sales or leases of water within the basin. The "suggested minimum asking price" shall be included by the water bank operator as a term and condition of eligibility.
- D. Upon determination that a prospective depositor's stored water is eligible for deposit into the water bank, the water bank and the depositor shall negotiate and enter into a deposit agreement. The terms of the deposit agreement shall include, but not be limited to:
1. Authorization of the water bank by the depositor to advertise and market the water placed into the deposit account.
 2. The depositor's agreement that the water bank shall have the exclusive right to market, lease, loan, option or exchange the deposited water on behalf of the depositor for the term of the deposit agreement, and that the depositor shall not independently market, lease, loan, option or exchange the deposited water during the time that the deposit agreement is in effect.
 3. A provision that the depositor may remove the deposited water from the water bank for the depositor's own use or for permanent sale by the depositor at any time prior to an actual water bank transaction in which control of all or a portion of the deposited water is transferred pursuant to terms of the deposit agreement. Such removal may be subject to early withdrawal penalties.
 4. A provision addressing procedures to be followed upon a breach of the deposit agreement by either party. The terms of the deposit agreement may include early withdrawal penalties.
 5. Any other terms not listed herein deemed necessary by the water bank operator and the depositor to facilitate water bank transactions pursuant to Article 80.5, Title 37, C.R.S. and these rules.

Rule 12.7 Listing and Bidding Process.

- A. Upon finalization of the deposit agreement, the water bank shall list the availability of the water on the water bank's web site. Listings of availability shall also be available at any State or Division Engineer field office locations.
- B. The listing shall include, at a minimum, the amount of water available, the stored location of the water, the source of water, the minimum acceptable price and the historic type of use.
- C. If the minimum acceptable price is not offered, the seller may withdraw the water from the bank or leave the water in the bank for the bank to market.

- D. The water bank operator shall establish a process for registration of qualified bidders who may participate in the bidding process.
- E. The water bank operator shall establish and maintain a Water Bank Notification List. Within thirty (30) days after the effective date of these rules and annually thereafter, the water bank operator shall publish in the Division 2 water court resume and in a newspaper or newspapers as necessary to obtain general circulation once in every county affected, an invitation to be included on the Water Bank Notification List. Persons on the List shall receive notice of all proposed water bank transactions as set forth in Rules 12.8 and 12.99 herein, and may elect to receive such notice by first class mail or by electronic mail. Persons may be required to pay a fee, not to exceed twelve dollars per year, to be placed on the Water Bank Notification List to cover administrative costs.

Rule 12.8 Transactional Procedures.

- A. After the water bank operator negotiates a lease or option agreement between the seller and buyer of the deposited water, the water bank operator will provide the State and Division Engineer with a signed agreement describing the transaction, including but not limited to the amount of water, the place of use, and the proposed time of use. (If needed, the bank will provide a standard agreement form). If the proposed lease/option shall require delivery of water into a different distribution system, the seller or buyer shall provide written consent of the owner or operator of the receiving facility or system, including any terms or conditions related to the use of such facility or system. The lease or option agreement also shall include a provision addressing procedures to be followed upon a breach of the agreement by either party.
- B. Within two (2) business days of sending the lease or option agreement to the State and Division Engineers, the water bank operator shall provide written notice of the proposed transaction by first class mail or electronic mail to all persons who have subscribed to the Water Bank Notification List, and shall provide proof of such notice to the State and Division Engineers. The notice shall include the names and addresses of the parties to the transaction, a description of the water right involved, and a description of the proposed transaction, including but not limited to the amount of water, the historic place of use, the proposed new place of use, the proposed time of use, and the proposed type of use. The water bank also shall post the notice on its website.
- C. The State and Division Engineers shall allow persons or entities thirty (30) days after the date of mailing of the notice in Rule 12.8.B to file written comments on the transaction. Such comments shall include any claim of injury or any terms and conditions that should be imposed upon the transaction to prevent injury to a party's water rights, and any other information the person or entity wishes the State and Division Engineers to consider in reviewing the proposed transaction.
- D. Within five (5) business days after the close of the comment period described in Rule 12.8.C, the State and Division Engineers, after consideration of the comments received on the transaction, will provide the seller and buyer, and any person or entity who has submitted written comments, with terms and conditions necessary for implementing the agreement. The terms and conditions shall include any necessary and/or desirable limitations upon the time, place or type of use of the water made available through the water bank, or other terms and conditions as deemed necessary to prevent injury to vested water rights, including dry-up provisions where applicable. In making the determinations necessary to developing such terms and conditions, the State and Division Engineers shall not be required to hold or conduct any formal hearings or proceedings, but may hold or conduct a hearing or formal proceeding if the State and Division Engineers find it necessary to address the issues. Any such hearing shall be held pursuant to the Division of Water Resources Procedural Regulations, 2 CCR-402-5.
- E. Upon acceptance by the buyer and seller of the State and Division Engineers' terms and conditions, the water bank operator may finalize the agreement between the seller and buyer. Once the agreement is finalized and all parties, including the water bank, have been properly

compensated, the water bank will notify the Division Engineer of the completion of the transaction.

- F. A seller of deposited water shall comply with all state and local laws and regulations regarding land use and vegetation (i.e. weed control).

Rule 12.9 Expedited Transaction Procedures for Certain Water Rights.

- A. The expedited transaction procedures set forth in this rule shall apply to water rights that have been decreed by a court of competent jurisdiction that the water available under such water rights, or portions thereof, are fully consumable or reusable. Prior to utilizing these expedited transaction procedures, proof of such determination by the courts must be provided to the State and Division Engineers and the water bank operator. Upon the State and Division Engineers acceptance of such proof, the transaction may proceed under the process set forth under Rule 12.9, B-E below, subject to compliance with the information requirement provisions set forth in Rule 12.6(A).
- B. After the water bank operator negotiates a lease or option agreement between the seller and buyer of the deposited water, the water bank operator will provide the State and Division Engineer with a signed agreement describing the transaction, including but not limited to the amount of water, the place of use, and the proposed time of use. (If needed, the bank will provide a standard agreement form). If the proposed lease/option shall require delivery of water into a different distribution system, the seller or buyer shall provide written consent of the owner or operator of the receiving facility or system, including any terms or conditions related to the use of such facility or system. The lease or option agreement also shall include a provision addressing procedures to be followed upon a breach of the agreement by either party.
- C. Within two (2) business days of sending the lease or option agreement to the State and Division Engineers, the water bank operator shall provide written notice of the proposed transaction by first class mail or electronic mail to all persons who have subscribed to the Water Bank Notification List, and shall provide proof of such notice to the State and Division Engineers. The notice shall include the names and addresses of the parties to the transaction, a description of the water right involved, and a description of the proposed transaction, including but not limited to the amount of water, the historic place of use, the proposed new place of use, the proposed time of use, and the proposed type of use. The water bank also shall post the notice on its website.
- D. Within seven (7) business days after providing notice as described in Rule 12.9.C, the State and Division Engineers will provide the seller and buyer with terms and conditions necessary for implementing the agreement. The terms and conditions shall include any necessary and/or desirable limitations upon the time, place or type of use of the water made available through the water bank, or other terms and conditions as deemed necessary to prevent injury to vested water rights.
- E. Upon acceptance by the buyer and seller of the State and Division Engineers' terms and conditions, the water bank operator may finalize the agreement between the seller and buyer. Once the agreement is finalized and all parties, including the water bank, have been properly compensated, the water bank operator will notify the Division Engineer of the completion of the transaction.

Rule 12.10 Quantification Procedures for Water to be Released from the Bank.

- A. Acceptable Factors. Table A of these rules sets forth acceptable values for stored water deposited in the water bank that was historically applied to lands within a ditch service area as "winter water," Article II water, and/or releases of water pursuant to appropriative storage rights from vessels outside of the ditch service area. These factors are applicable to gross quantities of stored water.

To claim values differing from those listed below, parties must submit to the State and/or the Division Engineer(s) a historic consumptive use analysis for consideration.

Table A

Ditch	Transit Loss	Canal and Lateral Loss	+	Tail Water	+	DeepPerc.*	=	Total Return Flows	C.U. Factor**
Bessemer	0.0000	0.1348		0.0523		0.2212		0.4083	0.5916
Colorado	0.0280	0.1618		0.0477		0.1267		0.3363	0.6356
Highline	0.0300	0.2244		0.0414		0.1490		0.4148	0.5553
Oxford	0.0300	0.0889		0.0549		0.3535		0.4972	0.4728
Catlin	0.0560	0.1051		0.0516		0.3239		0.4806	0.4634
Holbrook	0.0620	0.1133		0.0504		0.1972		0.3608	0.5771
Fort Lyon (P***)	0.0790	0.2563		0.0350		0.1204		0.4117	0.5094
Consolidated (P)	0.0960	0.0874		0.0507		0.2305		0.3687	0.5353
Fort Lyon (J****)	0.0000	0.2783		0.0380		0.1307		0.4470	0.5530
Consolidated (J)	0.0000	0.0967		0.0561		0.2555		0.4079	0.5921
Keesee	0.0040	0.0659		0.0590		0.2214		0.3463	0.6497
Fort Bent	0.0040	0.1203		0.0535		0.2094		0.3832	0.6127
Amity	0.0110	0.2363		0.0414		0.1426		0.4203	0.5687
Lamar	0.0200	0.1047		0.0540		0.3390		0.4976	0.4823
Hyde	0.0220	0.0647		0.0579		0.1991		0.3218	0.6562
Manvel	0.0200	0.1047		0.0540		0.3390		0.4976	0.4823
X-Y Grm	0.0350	0.0884		0.0546		0.1881		0.3311	0.6339
Buffalo	0.0410	0.0976		0.0533		0.2088		0.3597	0.5993
Sisn-Stbs	0.0480	0.0582		0.0568		0.1955		0.3105	0.6415

*Deep Perc. = Deep Percolation **C.U. Factor = Consumptive Use Factor

Pueblo Reservoir *John Martin Reservoir

B. The factors for waters stored within the Holbrook Reservoirs (Holbrook and Dye Reservoirs) pertain to units of banked water resident within those reservoirs. To claim values differing from those listed in Table B, users must submit to the State and Division Engineers a historic consumptive use analysis for consideration.

Table B

Reservoir	Canal and Lateral Loss	+	Tail Water	+	Deep Perc.*	=	Total Return Flows	C.U. Factor**
Holbrook Reservoirs	0.1208		0.0537		0.2102		0.3848	0.6152

*Deep Perc. = Deep Percolation **C.U. Factor = Consumptive Use Factor

- C. No factors are proposed for use in connection with waters associated with the Colorado Canal Reservoirs (Lake Henry or Lake Meredith), for which quantification procedures have been established by decrees of the Water Court. Banked water derived from any of these Reservoirs shall be quantified in terms of “net loss water” as that term is used in Case Nos. 84CW62-64, Water Division 2.
- D. For water other than those systems listed in paragraphs A, B, or C above, a historic consumptive use analysis must be submitted to the State and/or Division Engineer(s) for consideration. The State and/or Division Engineer shall review and apply the following criteria in considering the historic consumptive use analysis: (1) historic diversion/storage records (1970-present) analysis; (2) applicable decrees; (3) crop evapotranspiration and irrigation water requirements; (4) descriptive maps and diagrams; and (5) additional information and/or analysis deemed necessary by the Division Engineer.
- E. The State and Division Engineers shall apply the factors/procedures described in paragraphs A, B, C, or D above in approving and developing terms and conditions for proposed leases, loans, options and exchanges of water as set forth in Rule 12.8 in the following manner:
1. Only that portion of each unit of deposited water determined to be consumable shall be deliverable less any amounts deducted by the Division Engineer for evaporation and transit loss.
 2. That portion of each unit of deposited water determined as transit loss that historically would have occurred in the delivery of water to the ditch headgate, shall be released from the reservoir at the time that other waters of the same type (i.e. winter water stored by a particular ditch company, for a particular year) as that deposited in the water bank are released, except as provided for in Rule 12.10.E.4 and 12.10.E.5.
 3. That portion identifiable as canal and lateral loss is to be dedicated to use of other water users within the ditch service area and shall be released from the reservoir at the time that other waters of the same type as that deposited in the water bank are released, except as provided for in Rule 12.10.E.4 and 12.10.E.5.
 4. In the event that all of the waters of a given type have been deposited in the water bank, then the timing of release of the transit loss and canal/lateral loss components of the deposited water shall be the same as that determined for the tail-water and deep percolation components in Rule 12.10.E.5.
 5. The remaining tail-water and deep percolation components shall be released to the river by the Division Engineer to maintain historic return flow patterns. These releases shall reflect the return flow response resulting from historic patterns of use and shall be implemented starting at the time of completion of the transaction and continuing for a twelve (12) month period.

Rule 12.11 Procedures for Delivering Water from Storage Facilities.

- A. The user of banked water must notify the Division Engineer at least 24 hours prior to a request for delivery of water from the bank. Such notification must include the account number, date, time and location of release. The Division Engineer will administer the delivery of water per the terms and conditions of approval for the account and the agreement being implemented.
- B. In cooperation with the State and Division Engineers, the water bank shall develop credit and debit accounting for each reservoir used to store banked water.

- C. The State Engineer will determine all transit losses pursuant to sections 37-87-102(4) and 37-83-104, C.R.S.
- D. The State Engineer shall determine all evaporative losses pursuant to section 37-87-102(4), C.R.S.
- E. Exchange operations necessary for the delivery of water made available through the water bank shall be evaluated and approved in accordance with 37-83-104, C.R.S.

Rule 12.12 Reporting Requirements.

The bank, in cooperation with the State and/or Division Engineers, will publish monthly summaries of the bank's transactions on the water bank's and Colorado Division of Water Resource's web sites. Paper copies of such summaries will also be made available to the public at the State Engineer's Office main office in Denver as well as the Water Division 2 Field Office in Pueblo.

Rule 12.13 Water Bank Time Limitation.

- A. These rules effectuate the laws set forth in Article 80.5 of Title 37, C.R.S. Pursuant to section 37-80.5-107, these rules are repealed automatically on July 1, 2007. Any water left in the bank at that time shall immediately revert back to the owner of record.
- B. If, after reviewing the State Engineer's report on the effectiveness of the Arkansas River Water Bank, the legislature extends the water banking program for three (3) years or more, or authorizes a permanent water bank, the State Engineer shall review and revise these Rules to address issues related to the continued operation of the water bank. If the legislature extends the water banking program for less than three (3) years, the State Engineer may review and revise these Rules as necessary to address issues related to the continued operation of the water bank.

Rule 12.14 If any part of these rules is found to be invalid by a court of law, the remaining rules shall remain in full force and effect.

Rule 12.15 Effective Dates.

These rules shall take effect on November 17, 2006 and shall remain in effect until the latter of either June 30, 2007 or the date specified for repeal of rules promulgated pursuant to article 80.5, title 37 of the Colorado Revised Statutes.

IT IS FURTHER ORDERED that any person wishing to protest these rules may do so in the manner provided in sections 24-4-101 et seq., C.R.S., (the State Administrative Procedure Act); however, any protest of these Rules must be filed with the Water Court for Water Division No. 2 in Pueblo, Colorado.

Editor's Notes

History