

Second Regular Session
Seventy-first General Assembly
STATE OF COLORADO

REENGROSSED

*This Version Includes All Amendments
Adopted in the House of Introduction*

LLS NO. 18-0741.01 Jennifer Berman x3286

SENATE BILL 18-170

SENATE SPONSORSHIP

Sonnenberg,

HOUSE SPONSORSHIP

Hansen and McKean,

Senate Committees

Agriculture, Natural Resources, & Energy

House Committees

A BILL FOR AN ACT

101 **CONCERNING A WATER COURT PROCESS BY WHICH AN OWNER OF A**
102 **STORAGE WATER RIGHT ALLOWING WATER TO BE STORED IN**
103 **NEW RESERVOIR CAPACITY MAY RELEASE WATER INTO AN**
104 **IDENTIFIED STREAM REACH IN A MANNER THAT PROTECTS THE**
105 **WATER RELEASES WHILE COMPLYING WITH MITIGATION**
106 **MEASURES IDENTIFIED IN A FISH AND WILDLIFE MITIGATION**
107 **PLAN APPROVED BY THE COLORADO WATER CONSERVATION**
108 **BOARD.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
*Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.*

SENATE
3rd Reading Unamended
March 8, 2018

SENATE
Amended 2nd Reading
March 5, 2018

<http://leg.colorado.gov>.)

Current law requires an applicant for a water diversion, delivery, or storage facility that requires an application for a permit, license, or other approval from the United States to submit for approval a proposal to the Colorado water conservation board (board), parks and wildlife commission, and the division of parks and wildlife for a fish and wildlife mitigation plan (mitigation plan), which mitigation plan, when approved, is communicated to each federal, state, or other governmental agency from the which the applicant must obtain a permit, license, or other approval.

The bill establishes a water court process by which an owner of a water storage right allowing water to be stored in a newly constructed reservoir or an enlarged existing reservoir may comply with the mitigation measures identified in a mitigation plan by contracting with the board to dedicate to the board, pursuant to a water court decree, an amount of water for release into, and protection from diversion and use through, a qualifying stream reach to avoid, minimize, or mitigate the probable impacts that the newly constructed or expanded reservoir has on fish and wildlife resources.

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

SECTION 1. In Colorado Revised Statutes, 37-92-102, **add** (8) as follows:

37-92-102. Legislative declaration - basic tenets of Colorado water law. (8) Reservoir releases for fish and wildlife mitigation - definitions. (a) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES,

AND DECLARES THAT:

(I) ALLOWING THE OWNER OF A WATER STORAGE RIGHT THAT ALLOWS WATER TO BE STORED IN NEW RESERVOIR CAPACITY TO CONTRACT WITH THE BOARD TO DEDICATE TO THE BOARD WATER STORED UNDER THE WATER STORAGE RIGHT FOR RELEASE FROM THE NEW RESERVOIR CAPACITY TO REASONABLY AVOID, MINIMIZE, OR MITIGATE IMPACTS OF THE NEW RESERVOIR CAPACITY ON FISH AND WILDLIFE RESOURCES WITHIN AN IDENTIFIED STREAM REACH MAY ENABLE THE OWNER OF THE WATER

1 STORAGE RIGHT TO COMPLY WITH MITIGATION MEASURES IDENTIFIED IN A
2 FISH AND WILDLIFE MITIGATION PLAN APPROVED UNDER SECTION
3 37-60-122.2;

4 (II) ACCORDINGLY, FOR THE LIMITED PURPOSE OF PROVIDING
5 ADDITIONAL METHODS TO COMPLY WITH A FISH AND WILDLIFE MITIGATION
6 PLAN APPROVED UNDER SECTION 37-60-122.2, IT IS APPROPRIATE TO
7 CREATE A WATER COURT PROCESS TO ALLOW THE OWNER OF A WATER
8 STORAGE RIGHT THAT ALLOWS WATER TO BE STORED IN NEW RESERVOIR
9 CAPACITY, A PORTION OF WHICH WATER WILL THEN BE DEDICATED TO THE
10 BOARD, TO:

11 (A) OBTAIN PROTECTION FOR WATER TO BE RELEASED FROM THE
12 NEW RESERVOIR CAPACITY, UP TO THE AMOUNT OF WATER THAT IS
13 APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL
14 ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING
15 STREAM REACH; AND

16 (B) MAINTAIN DOMINION AND CONTROL OVER THE RELEASED
17 WATER THROUGH A QUALIFYING STREAM REACH;

18 (III) THE RELEASED WATER SUBJECT TO A PROTECTED MITIGATION
19 RELEASE AUTHORIZED UNDER THIS SUBSECTION (8) MUST BE REDIVERTED
20 AT OR BELOW THE DOWNSTREAM TERMINATION POINT OF THE QUALIFYING
21 STREAM REACH, EITHER DIRECTLY AT A SURFACE POINT OF DIVERSION OR
22 BY A DECREED EXCHANGE AS PERMITTED IN THIS SUBSECTION (8) FOR USE
23 BY AN OWNER FOR THE DECREED BENEFICIAL USES OF THAT WATER
24 STORAGE RIGHT;

25 (IV) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION (8),
26 THE CONTRACTUAL DEDICATION TO THE BOARD MUST COMPLY WITH THE
27 PROCEDURES AND PROTECTIONS FOR OTHER WATER RIGHTS SPECIFIED IN

1 SUBSECTION (3) OF THIS SECTION;

2 (V) THE WATER COURT PROCESS AND RESULTING DECREE MUST
3 ENSURE THAT:

4 (A) PROTECTED MITIGATION RELEASES DO NOT EXPAND THE
5 WATER STORAGE RIGHT THAT IS TO PROVIDE THE WATER FOR THE
6 PROTECTED MITIGATION RELEASES OR INJURE OTHER WATER RIGHTS;

7 (B) THE PROTECTED MITIGATION RELEASES WILL BE PROTECTED
8 THROUGH THE QUALIFYING STREAM REACH UP TO THE AMOUNT OF WATER
9 THAT IS APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE
10 NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE
11 QUALIFYING STREAM REACH; AND

12 (C) DIVERSIONS OF THE PROTECTED MITIGATION RELEASES WITHIN
13 THE QUALIFYING STREAM REACH BY EXCHANGES, SUBSTITUTION PLANS,
14 AUGMENTATION PLANS, OR OTHER MEANS THAT CAUSE A REDUCTION IN
15 THE PROTECTED MITIGATION RELEASES WITHIN THE QUALIFYING STREAM
16 REACH, OTHER THAN REDUCTIONS CAUSED BY EVAPORATION,
17 TRANSPORTATION, AND OTHER LOSSES, WILL BE PREVENTED; AND

18 (VI) THROUGH THE DEDICATION OF THE PROTECTED MITIGATION
19 RELEASES TO THE BOARD UNDER THE PROCEDURES SET FORTH IN
20 SUBSECTION (3) OF THIS SECTION, EXCEPT AS OTHERWISE PROVIDED IN
21 THIS SUBSECTION (8), AND THROUGH THE WATER COURT DECREE
22 APPROVING THE PROTECTED MITIGATION RELEASES, THE PROTECTED
23 MITIGATION RELEASES WILL SERVE A SECONDARY INSTREAM BENEFICIAL
24 USE, SPECIFICALLY THE PRESERVATION OR IMPROVEMENT OF THE NATURAL
25 ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING
26 STREAM REACH.

27 (b) AS USED IN THIS SUBSECTION (8):

1 (I) "BOARD" MEANS THE COLORADO WATER CONSERVATION
2 BOARD CREATED IN SECTION 37-60-102.

3 (II) "MITIGATION RELEASE" MEANS:

4 (A) THE RELEASE OF WATER FROM A WATER STORAGE RIGHT
5 STORED IN NEW RESERVOIR CAPACITY INTO A QUALIFYING STREAM REACH
6 TO REASONABLY AVOID, MINIMIZE, OR MITIGATE THE IMPACTS OF THE NEW
7 RESERVOIR CAPACITY ON FISH AND WILDLIFE RESOURCES WITHIN THE
8 QUALIFYING STREAM REACH IN ACCORDANCE WITH A FISH AND WILDLIFE
9 MITIGATION PLAN APPROVED UNDER SECTION 37-60-122.2; AND

10 (B) THE REDIVERSION OF THE RELEASED WATER AT OR BELOW THE
11 DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH,
12 EITHER DIRECTLY AT A SURFACE POINT OF DIVERSION OR BY A DECREED
13 IN-PRIORITY EXCHANGE TO AN EXCHANGE-TO POINT IDENTIFIED IN THE
14 DECREED IN-PRIORITY EXCHANGE THAT IS OUTSIDE OF THE QUALIFYING
15 STREAM REACH, FOR USE BY AN OWNER FOR THE DECREED BENEFICIAL
16 USES OF THAT WATER STORAGE RIGHT.

17 (III) "NEW RESERVOIR CAPACITY" MEANS ADDITIONAL WATER
18 STORAGE CAPACITY RESULTING FROM THE CONSTRUCTION OF A NEW
19 RESERVOIR OR A PHYSICAL ENLARGEMENT OF AN EXISTING RESERVOIR IF
20 THE CONSTRUCTION OR PHYSICAL ENLARGEMENT IS COMPLETED ON OR
21 AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (8).

22 (IV) "OWNER" MEANS THE PERSON THAT OWNS THE WATER
23 STORAGE RIGHT THAT IS TO PROVIDE THE WATER FOR A PROTECTED
24 MITIGATION RELEASE, AND, IN THE CASE OF A WATER STORAGE RIGHT
25 OWNED BY A WATER CONSERVANCY DISTRICT, WATER CONSERVATION
26 DISTRICT, MUNICIPALITY, SPECIAL DISTRICT, OR MUTUAL DITCH COMPANY,
27 INCLUDES THE RESIDENTS, ALLOTTEES, MEMBERS, CUSTOMERS,

1 SHAREHOLDERS, OR MEMBER DITCH COMPANIES OF THAT ENTITY; AND, IN
2 THE CASE OF A WATER STORAGE RIGHT OWNED BY AN IRRIGATION
3 DISTRICT, INCLUDES THE LANDOWNERS WITHIN THE DISTRICT.

4 (V) "PROTECTED MITIGATION RELEASE" MEANS THE AMOUNT OF
5 WATER TO BE RELEASED FOR A MITIGATION RELEASE THAT:

6 (A) THE BOARD DETERMINES IS APPROPRIATE FOR STREAM FLOWS
7 TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE
8 DEGREE WITHIN AN IDENTIFIED QUALIFYING STREAM REACH;

9 (B) IS APPROVED BY A WATER COURT DECREE PURSUANT TO THIS
10 SUBSECTION (8); AND

11 (C) IS PROTECTED FROM DIVERSION, EXCHANGE, OR USE BY
12 HOLDERS OF CONDITIONAL OR VESTED WATER RIGHTS OR OTHER PERSONS
13 THAT CAUSE A REDUCTION IN THE PROTECTED MITIGATION RELEASE AT
14 ANY LOCATION WITHIN THE QUALIFYING STREAM REACH, OTHER THAN ANY
15 REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER
16 LOSSES.

17 (VI) "QUALIFYING STREAM REACH" MEANS ALL OR A PORTION OF
18 A NATURAL STREAM OF THE STATE THAT IS IDENTIFIED IN A FISH AND
19 WILDLIFE MITIGATION PLAN APPROVED UNDER SECTION 37-60-122.2 AND
20 WITHIN WHICH THE BOARD DETERMINES, AND THE WATER COURT DECREE
21 APPROVES IN ACCORDANCE WITH THIS SUBSECTION (8), THAT WATER FROM
22 A PROTECTED MITIGATION RELEASE IS APPROPRIATE FOR STREAM FLOWS
23 TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE
24 DEGREE. A QUALIFYING STREAM REACH MUST BE IDENTIFIED BY AN
25 UPSTREAM POINT AT WHICH THE PROTECTED MITIGATION RELEASE ENTERS
26 THE NATURAL STREAM AND A DOWNSTREAM TERMINATION POINT.

27 (VII) "SURFACE POINT OF DIVERSION" MEANS A STRUCTURE THAT

1 DIVERTS SURFACE WATER ONLY. "SURFACE POINT OF DIVERSION" DOES
2 NOT INCLUDE:

3 (A) A STRUCTURE THAT DIVERTS GROUNDWATER, WHETHER
4 THROUGH A WELL, INFILTRATION GALLERY, OR OTHER TYPE OF
5 GROUNDWATER DIVERSION STRUCTURE; OR

6 (B) DELIVERY INTO A FACILITY USED TO RECHARGE AN ALLUVIAL
7 AQUIFER.

8 (c) (I) AN OWNER MAY, IN ACCORDANCE WITH AND AFTER
9 COMPLYING WITH THE REQUIREMENTS OF THIS SUBSECTION (8), MAKE A
10 PROTECTED MITIGATION RELEASE.

11 (II) HOLDERS OF CONDITIONAL OR VESTED WATER RIGHTS OR
12 OTHER PERSONS SHALL NOT DIVERT, EXCHANGE UPON, OR USE A
13 PROTECTED MITIGATION RELEASE WITHIN THE QUALIFYING STREAM REACH
14 UNLESS THE DIVERSION, EXCHANGE, OR USE IS FULLY AUGMENTED SO
15 THAT THERE IS NO REDUCTION IN THE PROTECTED MITIGATION RELEASE AT
16 ANY LOCATION WITHIN THE QUALIFYING STREAM REACH, OTHER THAN
17 REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER
18 LOSSES.

19 (III) THE STATE ENGINEER SHALL ADMINISTER PROTECTED
20 MITIGATION RELEASES MADE IN ACCORDANCE WITH THIS SUBSECTION (8)
21 AND THE TERMS AND CONDITIONS OF DECREES APPROVING PROTECTED
22 MITIGATION RELEASES.

23 (IV) (A) EXCEPT FOR REDUCTIONS CAUSED BY EVAPORATION,
24 TRANSPORTATION, AND OTHER LOSSES, AND SUBJECT TO SUBSECTIONS
25 (8)(c)(IV)(B) AND (8)(c)(IV)(C) OF THIS SECTION, AN OWNER SHALL:
26 REDIVERT ALL PROTECTED MITIGATION RELEASES AT OR BELOW THE
27 DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH,

1 EITHER DIRECTLY AT A SURFACE POINT OF DIVERSION OR BY A DECREED
2 IN-PRIORITY EXCHANGE TO AN EXCHANGE-TO POINT IDENTIFIED IN THE
3 DECREED IN-PRIORITY EXCHANGE THAT IS OUTSIDE OF THE QUALIFYING
4 STREAM REACH; AND APPLY THE WATER TO THE DECREED BENEFICIAL USES
5 OF THE WATER STORAGE RIGHT THAT PROVIDES THE WATER FOR THE
6 PROTECTED MITIGATION RELEASE.

7 (B) EXCEPT AS PROVIDED IN SUBSECTION (8)(c)(IV)(C) OF THIS
8 SECTION, AN OWNER MAY REDIVERT WATER ASSOCIATED WITH PROTECTED
9 MITIGATION RELEASES IN ACCORDANCE WITH SUBSECTION (8)(c)(IV)(A)
10 OF THIS SECTION BY EXCHANGE INTO STORAGE, WHICH EXCHANGE SHALL
11 BE ADMINISTERED WITH A PRIORITY DATE NO EARLIER THAN THE DATE OF
12 APPROVAL OF THE FISH AND WILDLIFE MITIGATION AND ENHANCEMENT
13 PLAN PURSUANT TO SECTION 37-60-122.2, AND SUBSEQUENTLY APPLY THE
14 WATER TO THE DECREED BENEFICIAL USES OF THE WATER STORAGE RIGHT
15 THAT PROVIDES THE WATER FOR THE PROTECTED MITIGATION RELEASE.

16 (C) AN OWNER SHALL NOT REDIVERT WATER ASSOCIATED WITH
17 PROTECTED MITIGATION RELEASES BY EXCHANGE THROUGH ALL OR A
18 PORTION OF THE QUALIFYING STREAM REACH OR TO THE RESERVOIR OF
19 ORIGIN.

20 (V) WATER PRESENT IN THE QUALIFYING STREAM REACH, OTHER
21 THAN THE PROTECTED MITIGATION RELEASES, REMAINS AVAILABLE TO
22 OTHER WATER USERS FOR BENEFICIAL USES AND MAY BE DIVERTED AND
23 BENEFICIALLY USED BY OTHER WATER USERS IN ACCORDANCE WITH THE
24 PRIORITY SYSTEM AND ANY RELEVANT DECREE.

25 (VI) THE PROCEDURES SET FORTH IN THIS SUBSECTION (8) APPLY
26 ONLY TO THE ADJUDICATION OF PROPOSED PROTECTED MITIGATION
27 RELEASES FROM NEW RESERVOIR CAPACITY AND DO NOT ALTER THE

1 PROCEDURES OR LEGAL STANDARDS APPLICABLE TO ANY OTHER TYPE OF
2 WATER COURT APPLICATION.

3 (VII) AN APPLICATION FOR APPROVAL OF A PROPOSED PROTECTED
4 MITIGATION RELEASE FILED IN ACCORDANCE WITH THIS SUBSECTION (8)
5 MUST NOT INCLUDE, AND SHALL NOT BE CONSOLIDATED OR JOINED WITH,
6 ANY OTHER WATER COURT APPLICATION.

7 (d) AN OWNER THAT INTENDS TO MAKE PROTECTED MITIGATION
8 RELEASES IN ACCORDANCE WITH THIS SUBSECTION (8) SHALL, BEFORE ANY
9 SUCH RELEASES MAY BE ADMINISTERED AS PROTECTED MITIGATION
10 RELEASES:

11 (I) DEDICATE THE PROPOSED PROTECTED MITIGATION RELEASES TO
12 THE BOARD BY GRANT, DONATION, OR OTHER CONTRACTUAL AGREEMENT
13 IN ACCORDANCE WITH SUBSECTIONS (3) AND (8)(e) OF THIS SECTION;

14 (II) AGREE TO MAKE THE PROPOSED PROTECTED MITIGATION
15 RELEASES AVAILABLE TO THE BOARD WITHIN THE QUALIFYING STREAM
16 REACH;

17 (III) WITH THE BOARD AS A CO-APPLICANT, FILE AN APPLICATION
18 IN WATER COURT IN THE WATER DIVISION IN WHICH THE NEW RESERVOIR
19 CAPACITY IS LOCATED, SEEKING APPROVAL OF THE PROPOSED PROTECTED
20 MITIGATION RELEASES, BY THE LAST DAY OF THE TWELFTH MONTH
21 FOLLOWING THE MONTH IN WHICH THE NEW RESERVOIR CAPACITY IS
22 CERTIFIED FOR STORAGE BY THE STATE ENGINEER; EXCEPT THAT AN
23 APPLICATION MUST NOT INCLUDE ANY OTHER CLAIM FOR RELIEF; AND

24 (IV) OBTAIN A FINAL WATER COURT DECREE APPROVING THE
25 PROTECTED MITIGATION RELEASES.

26 (e) (I) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION
27 (8)(e), A DEDICATION TO THE BOARD PURSUANT TO SUBSECTION (8)(d)(I)

1 OF THIS SECTION OF AN INTEREST IN WATER YIELDED FROM A WATER
2 STORAGE RIGHT THAT WILL BE STORED IN NEW RESERVOIR CAPACITY IS
3 SUBJECT TO SUBSECTION (3) OF THIS SECTION FOR THE DEDICATION OF AN
4 INTEREST IN WATER TO THE BOARD, INCLUDING THE REQUIREMENT IN
5 SUBSECTION (3) OF THIS SECTION THAT THE BOARD MAKE A
6 DETERMINATION THAT THE PROPOSED PROTECTED MITIGATION RELEASES
7 ARE APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE
8 NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE
9 QUALIFYING STREAM REACH.

10 (II) THE BOARD'S CONTRACTUAL INTEREST IN WATER ACQUIRED IN
11 ACCORDANCE WITH THIS SUBSECTION (8) MAY BE YIELDED FROM A WATER
12 RIGHT THAT IS EITHER ABSOLUTE OR CONDITIONAL AT THE TIME OF
13 ACQUISITION.

14 (III) TO OBTAIN A DECREED RIGHT TO USE PROPOSED PROTECTED
15 MITIGATION RELEASES FOR INSTREAM FLOW PURPOSES, THE OWNER AND
16 THE BOARD NEED NOT FILE AN APPLICATION WITH THE WATER COURT TO
17 CHANGE THE WATER STORAGE RIGHT FROM WHICH THE PROPOSED
18 PROTECTED MITIGATION RELEASES ARE TO BE MADE.

19 (IV) THE BOARD NEED NOT HOLD A DECREED APPROPRIATION FOR
20 INSTREAM FLOWS WITHIN THE QUALIFYING STREAM REACH AS A
21 PREREQUISITE FOR AN OWNER TO DEDICATE PROPOSED PROTECTED
22 MITIGATION RELEASES TO THE BOARD IN ACCORDANCE WITH THIS
23 SUBSECTION (8).

24 (f) (I) TO SATISFY THE REQUIREMENTS OF SUBSECTIONS (8)(d)(III)
25 AND (8)(d)(IV) OF THIS SECTION, THE BOARD AND THE OWNER MUST FILE
26 A WATER COURT APPLICATION AS CO-APPLICANTS PURSUANT TO
27 SUBSECTION (8)(d)(III). THE WATER COURT SHALL ENTER A DECREE

1 APPROVING THE PROPOSED PROTECTED MITIGATION RELEASES IF:

2 (A) THE BOARD DEMONSTRATES THAT IT HAS DULY DETERMINED
3 IN ACCORDANCE WITH THIS SUBSECTION (8) AND WITH SUBSECTION (3) OF
4 THIS SECTION THAT THE PROPOSED PROTECTED MITIGATION RELEASES ARE
5 APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL
6 ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING
7 STREAM REACH. IF A PARTY CHALLENGES THE BOARD'S DETERMINATION
8 IN THE WATER COURT PROCEEDING, THE BOARD SHALL ASSEMBLE AND
9 SUBMIT TO THE COURT THE COMPLETE ADMINISTRATIVE RECORD UPON
10 WHICH THE BOARD MADE THE DETERMINATION. THE COURT SHALL BASE
11 ITS REVIEW OF THE BOARD'S DETERMINATION ON THE ADMINISTRATIVE
12 RECORD, USING THE CRITERIA SET FORTH IN SECTION 24-4-106 (6) AND (7).

13 (B) THE OWNER PROVES THAT THE PROPOSED PROTECTED
14 MITIGATION RELEASES: WILL NOT CAUSE AN EXPANSION OF USE BEYOND
15 THE LIMITS OF USE OF THE DECREED WATER STORAGE RIGHT FROM WHICH
16 THE MITIGATION RELEASES ARE TO BE MADE; WILL NOT CAUSE INJURY TO
17 VESTED WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS,
18 SUBSEQUENTLY ADJUDICATED WATER RIGHTS THAT ARE THE SUBJECT OF
19 A PENDING WATER COURT APPLICATION FILED BEFORE THE EFFECTIVE
20 DATE OF THIS SUBSECTION (8), OR OTHER WATER USERS' USES OR
21 EXCHANGES OF WATER BEING MADE PURSUANT TO APPROPRIATION OR
22 PRACTICES IN EXISTENCE ON THE DATE OF THE FILING OF THE APPLICATION
23 FOR APPROVAL OF THE PROPOSED PROTECTED MITIGATION RELEASES; ARE
24 ADMINISTRABLE BY THE DIVISION ENGINEER; AND HAVE BEEN DEDICATED
25 TO AND APPROVED BY THE BOARD IN COMPLIANCE WITH THE
26 REQUIREMENTS AND PROCEDURES OF SUBSECTION (8)(e) OF THIS SECTION.

27 (II) FOR PURPOSES OF DETERMINING INJURY PURSUANT TO

1 SUBSECTION (8)(f)(I)(B) OF THIS SECTION, THE INABILITY OF OTHER
2 WATER USERS TO DIVERT, EXCHANGE UPON, OR USE THE PROPOSED
3 PROTECTED MITIGATION RELEASES WITHIN THE QUALIFYING STREAM
4 REACH SHALL NOT BE CONSIDERED INJURY.

5 (III) THE WATER COURT SHALL NOT REQUANTIFY THE WATER
6 STORAGE RIGHT FROM WHICH THE PROTECTED MITIGATION RELEASES ARE
7 PROPOSED TO BE MADE.

8 (IV) A DECREE APPROVING A PROTECTED MITIGATION RELEASE
9 MUST CONTAIN THE TERMS AND CONDITIONS NECESSARY TO PREVENT
10 INJURY TO OTHER WATER RIGHTS, PREVENT THE EXPANSION OF USE OF THE
11 DECREED WATER STORAGE RIGHT FROM WHICH THE PROTECTED
12 MITIGATION RELEASE IS TO BE MADE, AND ENSURE THAT THE PROTECTED
13 MITIGATION RELEASES ARE ADMINISTRABLE BY THE DIVISION ENGINEER,
14 INCLUDING, IF NECESSARY, TO PREVENT INJURY OR EXPANSION OF USE OF
15 THE DECREED WATER STORAGE RIGHT FROM WHICH THE PROTECTED
16 MITIGATION RELEASE IS TO BE MADE, TERMS REJECTING OR DECREASING
17 THE PROPOSED FLOW RATE OF THE PROTECTED MITIGATION RELEASES OR
18 THE QUALIFYING STREAM REACH. ALL SUCH DECREES MUST ALSO
19 SPECIFICALLY IDENTIFY THE TIMING AND RATE OF THE PROTECTED
20 MITIGATION RELEASES, THE QUALIFYING STREAM REACH, AND THE FLOW
21 RATE THAT IS APPROPRIATE TO PRESERVE OR IMPROVE THE NATURAL
22 ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING
23 STREAM REACH. FOR PROTECTED MITIGATION RELEASES THAT ARE TO BE
24 EXCHANGED INTO STORAGE IN ACCORDANCE WITH SUBSECTION
25 (8)(c)(IV)(B) OF THIS SECTION, THE DECREE MUST SPECIFY THAT THE
26 EXCHANGE TO STORAGE BE ADMINISTERED WITH A PRIORITY DATE THAT
27 IS NO EARLIER THAN THE DATE OF THE APPROVAL OF THE FISH AND

1 WILDLIFE MITIGATION AND ENHANCEMENT PLAN PURSUANT TO SECTION
2 37-60-122.2.

3 (V) AN OWNER SHALL ERECT, MAINTAIN, AND REPAIR SUITABLE
4 AND PROPER MEASURING DEVICES AS REQUIRED BY SECTION 37-84-113
5 AND BY THE DECREE APPROVING THE PROTECTED MITIGATION RELEASES
6 AND AS ORDERED BY THE STATE OR DIVISION ENGINEER. ADDITIONALLY,
7 THE OWNER SHALL MAINTAIN RECORDS OF THE QUANTITY AND RATE OF
8 RELEASE OF THE PROTECTED MITIGATION RELEASES AND THE QUANTITY
9 AND RATE OF DIVERSION OF THE PROTECTED MITIGATION RELEASES THAT
10 ARE REDIVERTED FOR SUBSEQUENT APPLICATION TO BENEFICIAL USE.

11 (g) IF OPERATION OF A PROTECTED MITIGATION RELEASE UNDER
12 THIS SUBSECTION (8) REQUIRES THE MAKING OF PHYSICAL MODIFICATIONS
13 TO AN EXISTING WATER DIVERSION STRUCTURE WITHIN THE QUALIFYING
14 STREAM REACH TO ALLOW THE PROTECTED MITIGATION RELEASE TO
15 BYPASS THE EXISTING WATER DIVERSION STRUCTURE, THE OWNER OF THE
16 WATER STORAGE RIGHT USED TO MAKE THE PROTECTED MITIGATION
17 RELEASE SHALL BEAR ALL REASONABLE CONSTRUCTION COSTS
18 ASSOCIATED WITH THE PHYSICAL MODIFICATIONS AND ALL REASONABLE
19 OPERATIONAL AND MAINTENANCE COSTS INCURRED BY THE OWNER OF THE
20 EXISTING WATER DIVERSION STRUCTURE THAT WOULD NOT HAVE BEEN
21 INCURRED IN THE ABSENCE OF THE PHYSICAL MODIFICATIONS TO THE
22 STRUCTURE.

23 (h) A DETERMINATION UNDER SECTION 37-60-122.2 THAT
24 RELEASES OF WATER FROM NEW RESERVOIR CAPACITY WILL HELP TO
25 REASONABLY AVOID, MINIMIZE, OR MITIGATE THE IMPACTS OF THE NEW
26 RESERVOIR CAPACITY ON FISH AND WILDLIFE RESOURCES WITHIN THE
27 QUALIFYING STREAM REACH IS EVIDENCE OF THE APPROPRIATENESS OF A

1 PROTECTED MITIGATION RELEASE WITHIN THE QUALIFYING STREAM
2 REACH.

3 (i) A MITIGATION RELEASE SHALL NOT BE PROTECTED OR
4 ADMINISTERED AS A PROTECTED MITIGATION RELEASE:

5 (I) WHEN THE AMOUNT OF THE EXISTING FLOW IN THE QUALIFYING
6 STREAM REACH IS SUCH THAT ADDITION OF THE PROTECTED MITIGATION
7 RELEASE WOULD EXCEED THE STREAM FLOW RATE SET FORTH IN THE
8 DECREE TO BE APPROPRIATE TO PRESERVE OR IMPROVE THE NATURAL
9 ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING
10 STREAM REACH;

11 (II) UNLESS THE OWNER IS IN COMPLIANCE WITH:

12 (A) THE MEASURING REQUIREMENTS OF SECTION 37-84-113;

13 (B) THE TERMS AND CONDITIONS IN THE DECREE APPROVING THE
14 PROTECTED MITIGATION RELEASE REGARDING THE OPERATION,
15 MAINTENANCE, OR REPAIR OF PROPER MEASURING DEVICES; AND

16 (C) AN ORDER BY THE STATE OR DIVISION ENGINEER REGARDING
17 THE OPERATION, MAINTENANCE, OR REPAIR OF PROPER MEASURING
18 DEVICES;

19 (III) WHEN THE OWNER IS INCAPABLE OF REDIVERTING THE
20 PROTECTED MITIGATION RELEASE AT OR BELOW THE DOWNSTREAM
21 TERMINATION POINT OF THE QUALIFYING STREAM REACH FOR APPLICATION
22 TO A DECREED BENEFICIAL USE OF THE WATER STORAGE RIGHT THAT IS TO
23 PROVIDE THE WATER FOR THE PROTECTED MITIGATION RELEASE;

24 (IV) WHEN THE RELEASED WATER IS WITHIN THE NATURAL
25 STREAM AT A LOCATION OUTSIDE OF THE QUALIFYING STREAM REACH,
26 INCLUDING WHEN THE RELEASED WATER IS BETWEEN THE DOWNSTREAM
27 TERMINATION POINT OF THE QUALIFYING STREAM REACH AND THE POINT

1 OF REDIVERSION; OR

2 (V) WHEN THE OWNER IS NOT OTHERWISE IN COMPLIANCE WITH
3 THE TERMS OF THE DECREE APPROVING THE PROTECTED MITIGATION
4 RELEASE.

5 (j) THIS SUBSECTION (8):

6 (I) DOES NOT IMPAIR OR IN ANY WAY AFFECT ANY WATER COURT
7 DECREE, ADMINISTRATIVE AUTHORIZATION, OR AGREEMENT THAT ALLOWS
8 WATER TO BE STORED, RELEASED, AND ADMINISTERED FOR
9 ENVIRONMENTAL, PISCATORIAL, WATER QUALITY, RECREATIONAL,
10 MUNICIPAL, OR OTHER IN-CHANNEL PURPOSES, INCLUDING THE
11 MAINTENANCE OF DOMINION AND CONTROL OVER THE WATER RELEASES
12 FROM A SPECIFIED RESERVOIR;

13 (II) IS NOT INTENDED TO BE THE EXCLUSIVE MEANS OF
14 AUTHORIZING WATER TO BE STORED, RELEASED, AND ADMINISTERED FOR
15 ENVIRONMENTAL, PISCATORIAL, WATER QUALITY, RECREATIONAL,
16 MUNICIPAL, OR OTHER IN-CHANNEL PURPOSES, INCLUDING THE
17 MAINTENANCE OF DOMINION AND CONTROL OVER THE WATER RELEASED
18 FROM A SPECIFIC RESERVOIR; AND

19 (III) DOES NOT AUTHORIZE, RESTRICT, OR PRECLUDE FUTURE
20 WATER RIGHTS, APPROPRIATIONS, ADMINISTRATIVE AUTHORIZATIONS, OR
21 OTHER AGREEMENTS FOR THE PURPOSES LISTED IN SUBSECTION (8)(j)(I) OF
22 THIS SECTION.

23 **SECTION 2. Act subject to petition - effective date -**
24 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
25 the expiration of the ninety-day period after final adjournment of the
26 general assembly (August 8, 2018, if adjournment sine die is on May 9,
27 2018); except that, if a referendum petition is filed pursuant to section 1

1 (3) of article V of the state constitution against this act or an item, section,
2 or part of this act within such period, then the act, item, section, or part
3 will not take effect unless approved by the people at the general election
4 to be held in November 2018 and, in such case, will take effect on the
5 date of the official declaration of the vote thereon by the governor.

6 (2) This act applies to reservoir release dedication applications
7 filed in the water court on or after the applicable effective date of this act.