

CHAPTER 73

WATER AND IRRIGATION

HOUSE BILL 20-1037

BY REPRESENTATIVE(S) Arndt, Bird, Buentello, Cutter, Esgar, Exum, Holtorf, Jackson, Kennedy, Kipp, McCluskie, McLachlan, Melton, Michaelson Jenet, Roberts, Snyder, Soper, Titone, Valdez D., Will, Wilson, Young, Becker; also SENATOR(S) Coram, Bridges, Hansen, Moreno, Rodriguez, Scott, Tate, Zenzinger, Garcia.

AN ACT

CONCERNING THE COLORADO WATER CONSERVATION BOARD'S AUTHORITY TO AUGMENT STREAM FLOWS WITH ACQUIRED WATER RIGHTS THAT HAVE BEEN PREVIOUSLY DECREED FOR AUGMENTATION USE.

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

SECTION 1. In Colorado Revised Statutes, 37-92-102, **add** (4.5) as follows:

37-92-102. Legislative declaration - basic tenets of Colorado water law. (4.5) **Plan for augmentation to augment stream flows.** (a) **Legislative declaration.** THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT THE COLORADO WATER CONSERVATION BOARD WOULD BENEFIT FROM DIRECTION WITH REGARD TO WATER COURT APPLICATIONS FOR PLANS FOR AUGMENTATION TO AUGMENT STREAM FLOWS, AS IDENTIFIED IN SUBSECTION (3) OF THIS SECTION.

(b) **Plan approval.** TO OBTAIN A DECREED PLAN FOR AUGMENTATION, THE BOARD, EITHER AS SOLE APPLICANT OR TOGETHER WITH AN OWNER OF A DECREED WATER RIGHT FOR WHICH A CHANGE OF WATER RIGHTS TO INCLUDE ANY AUGMENTATION USE HAS BEEN JUDICIALLY APPROVED, MUST FILE AN APPLICATION WITH THE WATER COURT FOR APPROVAL OF A PLAN FOR AUGMENTATION TO AUGMENT STREAM FLOWS AND PROTECT AUGMENTATION DELIVERIES MADE PURSUANT TO THE PLAN FOR AUGMENTATION WITHIN A SPECIFIC STREAM REACH OR REACHES, AT RATES THE BOARD DETERMINES ARE APPROPRIATE TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE. THE APPLICATION AND APPROVAL PROCESS FOR A PLAN FOR AUGMENTATION TO AUGMENT STREAM FLOWS ARE SUBJECT TO THE FOLLOWING PRINCIPLES AND LIMITATIONS:

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

(I) THE BOARD MAY FILE AN APPLICATION ONLY IF THE OWNER OF THE WATER RIGHT THAT IS DECREED FOR AUGMENTATION USE IS IDENTIFIED IN THE APPLICATION AND CONSENTS TO THE APPLICATION.

(II) THE PROCEDURES, STANDARDS, AND REQUIREMENTS OF THIS ARTICLE 92 FOR PLANS FOR AUGMENTATION APPLY TO APPLICATIONS FILED UNDER THIS SUBSECTION (4.5).

(III) A PLAN FILED UNDER THIS SUBSECTION (4.5) MUST USE, FOR AUGMENTATION ONLY, WATER RIGHTS:

(A) FOR WHICH THE HISTORICAL CONSUMPTIVE USE HAS BEEN QUANTIFIED; AND

(B) FOR WHICH A CHANGE OF WATER RIGHTS TO INCLUDE ANY AUGMENTATION USE HAS BEEN JUDICIALLY APPROVED.

(IV) IF THE AUGMENTATION WATER RIGHT MEETS THE REQUIREMENTS OF SUBSECTION (4.5)(b)(III) OF THIS SECTION, NO FURTHER CHANGE OF THAT AUGMENTATION WATER RIGHT IS REQUIRED.

(V) THE USE OF WATER AS PART OF A PLAN FOR AUGMENTATION TO AUGMENT STREAM FLOWS IS SUBJECT TO THE TERMS AND CONDITIONS OF ANY APPLICABLE DECREE TO WHICH THAT WATER IS SUBJECT.

(VI) ADDITIONAL TERMS AND CONDITIONS MUST BE IMPOSED ON THE USE OF WATER AS PART OF A PLAN FOR AUGMENTATION TO AUGMENT STREAM FLOWS AS NECESSARY TO PREVENT INJURY TO THE OWNERS OF VESTED WATER RIGHTS OR DECREED CONDITIONAL WATER RIGHTS. THE TERMS AND CONDITIONS MUST INCLUDE TERMS AND CONDITIONS TO PREVENT INJURY TO OTHER WATER RIGHTS THAT RESULT FROM ANY CHANGE IN THE TIME, PLACE, OR AMOUNT OF WATER AVAILABLE FOR DIVERSION OR EXCHANGE TO THE EXTENT THAT OTHER APPROPRIATORS HAVE RELIED UPON THE STREAM CONDITIONS THAT RESULTED FROM THE HISTORICAL USE OF THE AUGMENTATION WATER RIGHTS DESCRIBED IN SUBSECTION (4.5)(b)(III) OF THIS SECTION OR ADDED PURSUANT TO SECTION 37-92-305 (8)(c) BEFORE THEIR USE IN THE PLAN FOR AUGMENTATION OF STREAM FLOWS. A JUNIOR APPROPRIATOR IS ENTITLED TO THE CONTINUATION OF STREAM CONDITIONS AS THE CONDITIONS EXISTED AT THE TIME OF THE JUNIOR APPROPRIATOR'S APPROPRIATION.

(VII) AN APPLICANT MUST PROVE THAT THE PLAN FOR AUGMENTATION TO AUGMENT STREAM FLOWS WILL NOT INJURE OTHER WATER USERS' UNDECREED EXISTING EXCHANGES OF WATER TO THE EXTENT THE UNDECREED EXISTING EXCHANGES OF WATER HAVE BEEN ADMINISTRATIVELY APPROVED BEFORE THE DATE OF THE FILING OF THE APPLICATION FOR APPROVAL OF THE PLAN FOR AUGMENTATION TO AUGMENT STREAM FLOWS.

(VIII) THE AUGMENTATION WATER USED TO AUGMENT STREAM FLOWS IN A PLAN FOR AUGMENTATION TO AUGMENT STREAM FLOWS SHALL NOT BE DIVERTED WITHIN THE SPECIFIC STREAM REACH BY AN EXCHANGE, PLAN FOR SUBSTITUTION, PLAN FOR AUGMENTATION, OR OTHER MEANS THAT CAUSE A REDUCTION OF THE AUGMENTATION WATER ADDED TO THAT STREAM REACH. THE AUGMENTATION

WATER IS SUBJECT TO SUCH REASONABLE TRANSIT LOSSES AS MAY BE IMPOSED BY THE WATER COURT OR THE STATE AND DIVISION ENGINEERS.

(IX) IF OPERATION OF A PLAN FOR AUGMENTATION REQUIRES THE USE OF, OR MAKING OF PHYSICAL MODIFICATIONS TO, AN EXISTING DIVERSION STRUCTURE WITHIN A STREAM REACH TO ALLOW THE AUGMENTATION WATER TO BYPASS THE STRUCTURE, THE OPERATOR OF THE PLAN MUST HAVE CONSENT FROM THE OWNER OF THE EXISTING STRUCTURE AND BEAR ALL REASONABLE CONSTRUCTION COSTS ASSOCIATED WITH ANY PHYSICAL MODIFICATIONS AND ALL REASONABLE OPERATIONAL AND MAINTENANCE COSTS INCURRED BY THE OWNER OF THE STRUCTURE THAT WOULD NOT HAVE BEEN INCURRED IN THE ABSENCE OF THE PHYSICAL MODIFICATIONS TO THE STRUCTURE.

(c) **Saving clause.** THIS SUBSECTION (4.5):

(I) DOES NOT IMPAIR OR IN ANY WAY AFFECT ANY WATER COURT DECREE, ADMINISTRATIVE AUTHORIZATION, OR AGREEMENT THAT ALLOWS WATER DECREED FOR ENVIRONMENTAL, PISCATORIAL, WATER QUALITY, RECREATIONAL, OR OTHER IN-CHANNEL PURPOSES TO BE USED IN THE NATURAL STREAM CHANNEL FOR THE DECREED PURPOSES;

(II) IS NOT INTENDED TO BE THE EXCLUSIVE MEANS OF AUTHORIZING WATER DECREED FOR AUGMENTATION PURPOSES TO BE USED FOR ENVIRONMENTAL, PISCATORIAL, WATER QUALITY, RECREATIONAL, OR OTHER IN-CHANNEL PURPOSES, INCLUDING THE MAINTENANCE OF DOMINION AND CONTROL OVER THE WATER RELEASED FROM A SPECIFIC RESERVOIR;

(III) DOES NOT AUTHORIZE, RESTRICT, OR PRECLUDE FUTURE WATER RIGHTS APPROPRIATIONS, ADMINISTRATIVE AUTHORIZATIONS, OR OTHER AGREEMENTS FOR THE PURPOSES LISTED IN THIS SUBSECTION (4.5); AND

(IV) DOES NOT AFFECT APPLICATIONS BY THE COLORADO WATER CONSERVATION BOARD FOR PLANS FOR AUGMENTATION NOT DESCRIBED IN THIS SUBSECTION (4.5).

SECTION 2. In Colorado Revised Statutes, 37-92-305, **amend** (8)(c) as follows:

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge - definitions. (8) (c) A plan for augmentation ~~shall~~ MUST be sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior DIVERTER would be deprived of ~~his or her~~ THE SENIOR DIVERTER'S lawful entitlement by the applicant's diversion. A proposed plan for augmentation that relies upon a supply of augmentation water that, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation water is limited in duration, if the terms and conditions of the plan prevent injury to vested water rights. ~~Said~~ THE terms and conditions ~~shall~~ MUST require replacement of out-of-priority depletions that occur after any groundwater diversions cease. Decrees approving plans for augmentation ~~shall~~ MUST require that the state engineer curtail all out-of-priority diversions, the depletions from which are not so replaced as to

prevent injury to vested water rights. A plan for augmentation, INCLUDING A COLORADO WATER CONSERVATION BOARD PLAN TO AUGMENT STREAM FLOWS PURSUANT TO SECTION 37-92-102, may provide procedures to allow additional or alternative sources of AUGMENTATION OR replacement water, including water leased on a yearly or less frequent basis, to be used in the plan after the initial decree is entered if the use of ~~said~~ THE additional or alternative sources is part of a substitute water supply plan approved pursuant to section 37-92-308 or if such sources are decreed for such use.

SECTION 3. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2020, if adjournment sine die is on May 6, 2020); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

Approved: March 24, 2020