

CHAPTER 108

WATER AND IRRIGATION

SENATE BILL 09-147

BY SENATOR(S) Hodge, Brophy, Boyd, Harvey, Isgar, Kopp, Newell, Penry, Renfroe, Romer, Shaffer B., Tapia, Tochtrop;
also REPRESENTATIVE(S) Priola, Gardner C., Curry, Fischer, Labuda, Looper, Massey, McFadyen, Pace, Sonnenberg, Vigil.

AN ACT

CONCERNING THE AUTHORIZATION OF SUBSTITUTE WATER SUPPLY PLANS FOR THE REPLACEMENT OF OUT-OF-PRIORITY DEPLETIONS CAUSED BY HISTORIC DIVERSIONS FROM WELLS INCLUDED IN DECREED AUGMENTATION PLANS ENTERED BY THE WATER COURT FOR WATER DIVISION 1.

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

SECTION 1. 37-92-308, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

37-92-308. Substitute water supply plans - special procedures for review - water adjudication cash fund - legislative declaration - repeal.
(10) (a) BEGINNING JULY 1, 2009, FOR PLANS FOR AUGMENTATION THAT ARE THE SUBJECT OF A FINAL DECREE ENTERED BY THE WATER COURT IN WATER DIVISION 1, THE STATE ENGINEER MAY APPROVE ANNUAL SUBSTITUTE WATER SUPPLY PLANS SOLELY FOR THE PURPOSE OF ALLOWING THE USE OF WATER SUPPLIES NOT IDENTIFIED AS AUGMENTATION SUPPLIES IN THE DECREED AUGMENTATION PLAN, NOT PREVIOUSLY DECREED FOR AUGMENTATION OR REPLACEMENT USES, AND NOT INCLUDED IN A PENDING WATER COURT APPLICATION FOR APPROVAL OF A CHANGE OF WATER RIGHT TO AUGMENTATION AND REPLACEMENT USES TO BE USED IN THE DECREED AUGMENTATION PLAN FOR THE REPLACEMENT OF OUT-OF-PRIORITY DEPLETIONS CAUSED BY PRE-JANUARY 1, 2003, DIVERSIONS FROM WELLS INCLUDED IN THE DECREED AUGMENTATION PLAN, SUBJECT TO AND IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE DECREED AUGMENTATION PLAN. NO WATER SUPPLIES FOR WHICH SUBSTITUTE WATER SUPPLY PLAN APPROVAL IS REQUESTED PURSUANT TO THIS SUBSECTION (10) SHALL BE USED BY AN APPLICANT FOR AUGMENTATION PURPOSES PRIOR TO THE DATE ON WHICH THE STATE ENGINEER APPROVES THE SUBSTITUTE WATER SUPPLY PLAN OR THE DATE ON WHICH ANY APPEAL TO THE WATER COURT OF THE SUBSTITUTE WATER SUPPLY PLAN IS FINALLY DECIDED IN ACCORDANCE WITH PARAGRAPH (d) OF THIS SUBSECTION (10),

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

WHICHEVER OCCURS LATER. THE STATE ENGINEER MAY APPROVE A SUBSTITUTE WATER SUPPLY PLAN UNDER THIS SUBSECTION (10) IF THE FOLLOWING CONDITIONS ARE MET:

(I) THE APPLICANT HAS FILED A REQUEST FOR APPROVAL OF THE SUBSTITUTE WATER SUPPLY PLAN WITH THE STATE ENGINEER, WHICH REQUEST SHALL INCLUDE, AT A MINIMUM, THE FOLLOWING INFORMATION:

(A) THE NAME OF THE WATER RIGHTS TO BE USED FOR AUGMENTATION IN THE DECREED AUGMENTATION PLAN UNDER THE SUBSTITUTE WATER SUPPLY PLAN AND A LIST OF DECREES ASSOCIATED WITH SUCH RIGHTS;

(B) A COPY OF EVERY AGREEMENT OR OTHER DOCUMENT THAT EVIDENCES THE APPLICANT'S RIGHT TO USE THE WATER RIGHTS FOR AUGMENTATION;

(C) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE WATER RIGHTS, AN ANALYSIS OF THE HISTORICAL USE OF THE WATER RIGHTS, WHICH ANALYSIS SHALL INCLUDE, AT A MINIMUM, THE LOCATION AND NUMBER OF ACRES HISTORICALLY IRRIGATED BY THE RIGHTS, IDENTIFICATION OF THE CROPS HISTORICALLY IRRIGATED BY THE RIGHTS, A CALCULATION OF THE HISTORICAL DIVERSIONS AND RETURN FLOWS ASSOCIATED WITH HISTORICAL USE OF THE RIGHTS, A SUMMARY OF AVERAGE ANNUAL DIVERSIONS AND AVERAGE AND MAXIMUM MONTHLY DIVERSIONS AND CONSUMPTIVE USE ASSOCIATED WITH HISTORICAL USE OF THE RIGHTS, THE FIELD IRRIGATION EFFICIENCY USED IN THE HISTORICAL USE ANALYSIS, WHICH SHALL NOT EXCEED FIFTY PERCENT, AND THE IDENTITY OF ALL OTHER WATER RIGHTS USED TO IRRIGATE THE LAND HISTORICALLY IRRIGATED BY THE WATER RIGHTS;

(D) THE AMOUNT OF WATER AVAILABLE FROM THE WATER RIGHTS FOR REPLACEMENT USES UNDER THE SUBSTITUTE WATER SUPPLY PLAN;

(E) THE AMOUNT OF RETURN FLOWS, IF ANY, ASSOCIATED WITH THE HISTORICAL USE OF THE WATER RIGHTS, INCLUDING THE AMOUNT AND TIMING OF SUCH RETURN FLOWS THAT WOULD OCCUR AFTER THE END OF THE ONE-YEAR SUBSTITUTE WATER SUPPLY PLAN APPROVED UNDER THIS SUBSECTION (10);

(F) THE AMOUNT OF DEPLETIONS FROM PRE-JANUARY 1, 2003, DIVERSIONS TO BE REPLACED USING THE WATER RIGHTS;

(G) THE SOURCE OF WATER TO BE USED TO MAKE REQUIRED RETURN FLOW REPLACEMENTS, WHICH SOURCE SHALL NOT INCLUDE WATER PUMPED FROM AUGMENTATION WELLS;

(H) THE MANNER IN WHICH THE APPLICANT WILL INCORPORATE THE ACCOUNTING FOR USE OF THE WATER RIGHTS FOR AUGMENTATION USES INTO THE ACCOUNTING REQUIRED BY THE AUGMENTATION PLAN DECREE AND MAKE ANY REQUIRED RETURN FLOW REPLACEMENTS UNDER THE SUBSTITUTE WATER SUPPLY PLAN; AND

(I) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE WATER RIGHTS, AN AFFIDAVIT SIGNED BY THE RECORD OWNER OF THE WATER RIGHTS STATING THAT, DURING THE TERM OF THE SUBSTITUTE WATER SUPPLY PLAN, THE LAND

HISTORICALLY IRRIGATED BY THE WATER RIGHTS SHALL NOT BE IRRIGATED EXCEPT WITH NONTRIBUTARY GROUND WATER OR POTABLE WATER SUPPLIED BY A MUNICIPALITY OR WATER DISTRICT;

(II) THE APPLICANT HAS PROVIDED WRITTEN NOTICE OF THE REQUEST FOR APPROVAL OF THE SUBSTITUTE WATER SUPPLY PLAN AND HAS MADE AVAILABLE THE INFORMATION REQUIRED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (a), BY FIRST-CLASS MAIL OR ELECTRONIC MAIL, TO ALL PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST FOR WATER DIVISION 1 AND ALL PARTIES TO THE WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS DECREED, AND PROOF OF SUCH NOTICE IS FILED WITH THE STATE ENGINEER;

(III) THE STATE ENGINEER HAS GIVEN THE OWNERS OF WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS AND THE PARTIES TO THE WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS DECREED THIRTY DAYS AFTER THE DATE OF MAILING OF SUCH NOTICE TO FILE COMMENTS ON THE SUBSTITUTE WATER SUPPLY PLAN. SUCH COMMENTS SHALL INCLUDE ANY CLAIM OF INJURY OR ANY TERMS AND CONDITIONS THAT SHOULD BE IMPOSED UPON THE PLAN TO PREVENT INJURY TO A PARTY'S WATER RIGHTS OR DECREED CONDITIONAL WATER RIGHTS AND ANY OTHER INFORMATION THE OPPOSER WISHES THE STATE ENGINEER TO CONSIDER IN REVIEWING THE SUBSTITUTE WATER SUPPLY PLAN REQUEST.

(IV) THE STATE ENGINEER, AFTER CONSIDERATION OF THE COMMENTS RECEIVED, HAS DETERMINED THAT THE OPERATION AND ADMINISTRATION OF SUCH PLAN WILL, WHEN COMBINED WITH REPLACEMENTS UNDER THE DECREED AUGMENTATION PLAN, REPLACE ALL OUT-OF-PRIORITY DEPLETIONS CAUSED BY THE PRE-JANUARY 1, 2003, DIVERSIONS FROM WELLS INCLUDED IN THE DECREED AUGMENTATION PLAN IN TIME, LOCATION, AND AMOUNT REQUIRED BY THE DECREE, AND 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 PURSUANT TO SECTION 37-80-120 (3), AND WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACTS. THE STATE ENGINEER SHALL IMPOSE SUCH TERMS AND CONDITIONS AS ARE NECESSARY TO ENSURE THAT THESE STANDARDS ARE MET, INCLUDING, BUT NOT LIMITED TO, THE TERMS AND CONDITIONS REQUIRED BY PARAGRAPH (b) OF THIS SUBSECTION (10). IN MAKING THE DETERMINATIONS SPECIFIED IN THIS SUBPARAGRAPH (IV), THE STATE ENGINEER SHALL NOT BE REQUIRED TO HOLD ANY FORMAL HEARINGS OR CONDUCT ANY OTHER FORMAL PROCEEDINGS, BUT MAY CONDUCT A HEARING OR FORMAL PROCEEDING IF THE STATE ENGINEER FINDS IT NECESSARY TO ADDRESS THE ISSUES.

(b) THE FOLLOWING TERMS AND CONDITIONS SHALL BE INCLUDED IN ANY SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO THIS SUBSECTION (10):

(I) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE WATER RIGHTS, THE LAND HISTORICALLY IRRIGATED BY SUCH WATER RIGHTS SHALL NOT BE IRRIGATED DURING THE TERM OF THE SUBSTITUTE WATER SUPPLY PLAN EXCEPT WITH NONTRIBUTARY GROUND WATER OR POTABLE WATER SUPPLIED BY A MUNICIPALITY OR WATER DISTRICT. WHERE THE HISTORICALLY IRRIGATED CROP IS ALFALFA, AN APPROPRIATE REDUCTION IN THE ALLOWABLE CONSUMPTIVE USE CREDIT SHALL BE IMPOSED IF THE ALFALFA HAS NOT BEEN COMPLETELY REMOVED FROM THE

HISTORICALLY IRRIGATED LAND DURING THE TERM OF THE SUBSTITUTE WATER SUPPLY PLAN.

(II) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE WATER RIGHTS, AN ANNUAL VOLUMETRIC LIMIT ON DIVERSIONS AND A MONTHLY VOLUMETRIC LIMIT ON DIVERSIONS, WHICH SHALL NOT BE GREATER THAN THE AVERAGE ANNUAL AND MAXIMUM MONTHLY HISTORICAL DIVERSIONS OF THE WATER RIGHTS.

(III) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE WATER RIGHTS, ALL RETURN FLOWS THAT WOULD HAVE ACCRUED TO THE STREAM FROM THE HISTORICAL USE OF THE WATER RIGHTS SHALL BE REPLACED, INCLUDING THE RETURN FLOWS THAT WOULD HAVE OCCURRED AFTER THE END OF THE ONE-YEAR SUBSTITUTE WATER SUPPLY PLAN. ALL SUCH RETURN FLOWS SHALL BE DEEMED TO BE AN OBLIGATION OF THE APPLICANT FOR THE SUBSTITUTE WATER SUPPLY PLAN AND SHALL BE INCLUDED AS A REPLACEMENT OBLIGATION IN ANY PROJECTION REQUIRED BY THE AUGMENTATION PLAN DECREE IN WHICH SUCH WATER IS PROPOSED TO BE USED, AND AFTER THE END OF ANY APPROVED SUBSTITUTE WATER SUPPLY PLAN, ALL CONTINUING RETURN FLOW OBLIGATIONS SHALL BE ENFORCEABLE IN THE SAME MANNER AS ALL OTHER TERMS AND CONDITIONS OF THE AUGMENTATION PLAN DECREE UNDER WHICH THE WATER RIGHTS IN THE SUBSTITUTE WATER SUPPLY PLAN WERE USED.

(IV) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE WATER RIGHTS, NO WATER PUMPED FROM AUGMENTATION WELLS, AS SUCH WELLS ARE DEFINED IN SECTION 37-90-103 (21) (a), SHALL BE USED TO REPLACE RETURN FLOWS THAT WOULD HAVE ACCRUED TO THE STREAM FROM THE HISTORICAL USE OF THE WATER RIGHTS.

(V) THE AMOUNT OF WATER MADE AVAILABLE UNDER THE APPROVED SUBSTITUTE WATER SUPPLY PLAN SHALL NOT BE INCLUDED AS A SOURCE OF WATER FOR REPLACEMENT OF DEPLETIONS IN ANY PROJECTION REQUIRED BY THE AUGMENTATION PLAN DECREE IN WHICH SUCH WATER IS PROPOSED TO BE USED UNTIL THE SUBSTITUTE WATER SUPPLY PLAN IS APPROVED, AND THEN ONLY FOR THE TERM OF THE APPROVED SUBSTITUTE WATER SUPPLY PLAN OR THE TERM OF THE AGREEMENT OR OTHER DOCUMENT WHICH EVIDENCES THE APPLICANT'S RIGHT TO USE THE WATER RIGHTS FOR AUGMENTATION, WHICHEVER IS SHORTER.

(VI) THE ACCOUNTING FOR THE APPROVED SUBSTITUTE WATER SUPPLY PLAN SHALL BE INCORPORATED INTO THE ACCOUNTING FOR THE AUGMENTATION PLAN DECREE IN WHICH SUCH WATER IS PROPOSED TO BE USED AND SHALL BE SHOWN IN THE ACCOUNTING IN SEPARATE LINE ITEMS. SUCH ACCOUNTING AND ALL SUPPORTING DOCUMENTS FOR SUCH ACCOUNTING SHALL BE PROVIDED BY THE APPLICANT TO ANY PARTY REQUESTING SUCH ACCOUNTING AND SUPPORTING DOCUMENTS IN WRITING AND UPON PAYMENT OF REASONABLE REPRODUCTION COSTS.

(VII) IF ANY TERM OR CONDITION OF THE APPROVED SUBSTITUTE WATER SUPPLY PLAN CONFLICTS WITH ANY OF THE TERMS AND CONDITIONS OF THE AUGMENTATION PLAN DECREE, THE TERMS AND CONDITIONS OF THE AUGMENTATION PLAN DECREE SHALL CONTROL.

(c) A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO THIS SUBSECTION (10) SHALL NOT BE APPROVED FOR A PERIOD OF MORE THAN ONE YEAR; EXCEPT THAT AN APPLICANT MAY REQUEST THE RENEWAL OF A PLAN BY REPEATING THE APPLICATION PROCESS DESCRIBED IN THIS SUBSECTION (10). HOWEVER, IN NO EVENT SHALL AN INDIVIDUAL WATER RIGHT OR SOURCE OF WATER NATIVE TO THE SOUTH PLATTE RIVER BASIN, INCLUDING THE PRO RATA PORTION OF A WATER RIGHT REPRESENTED BY SHARES IN A MUTUAL DITCH COMPANY, BE APPROVED FOR USE IN A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO THIS SUBSECTION (10) FOR A TOTAL OF MORE THAN FIVE YEARS.

(d) WHEN THE STATE ENGINEER APPROVES OR DENIES A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO THIS SUBSECTION (10), THE STATE ENGINEER SHALL SERVE A COPY OF THE DECISION ON ALL PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST FOR WATER DIVISION 1 AND ALL PARTIES TO THE WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS DECREED BY FIRST-CLASS MAIL OR, IF SUCH PARTIES HAVE SO ELECTED, BY ELECTRONIC MAIL. NEITHER THE APPROVAL NOR THE DENIAL BY THE STATE ENGINEER SHALL CREATE ANY PRESUMPTIONS, SHIFT THE BURDEN OF PROOF, OR SERVE AS A DEFENSE IN ANY LEGAL ACTION INVOLVING THE SUBSTITUTE WATER SUPPLY PLAN. ANY APPEAL OF A DECISION MADE BY THE STATE ENGINEER CONCERNING A SUBSTITUTE WATER SUPPLY PLAN APPROVED OR DENIED PURSUANT TO THIS SUBSECTION (10) SHALL BE MADE WITHIN THIRTY DAYS AFTER THE DATE OF SERVICE OF THE DECISION. ANY SUCH APPEAL SHALL BE FILED UNDER THE SAME CASE NUMBER AS THE DECREED PLAN FOR AUGMENTATION AND SHALL BE HEARD UNDER THE RETAINED JURISDICTION OF THE WATER JUDGE, USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTIONS 37-92-304 AND 37-92-305, FOR DETERMINATION OF MATTERS REFERRED TO THE WATER JUDGE BY THE REFEREE. THE WATER JUDGE SHALL HEAR AND DETERMINE ANY SUCH APPEAL ON AN EXPEDITED BASIS. THE APPLICANT FOR THE SUBSTITUTE WATER SUPPLY PLAN SHALL NOT USE THE PROPOSED SUBSTITUTE WATER SUPPLY IN THE DECREED PLAN FOR AUGMENTATION UNTIL ANY APPEAL UNDER THIS PARAGRAPH (d) IS DECIDED BY THE WATER COURT. FOLLOWING THE DETERMINATION ON APPEAL BY THE WATER COURT, THE APPLICANT'S USE OF WATER UNDER THE SUBSTITUTE WATER SUPPLY PLAN SHALL BE GOVERNED BY SUCH WATER COURT DETERMINATION, UNLESS THE TERMS OF THE AUGMENTATION PLAN DECREE PROVIDE OTHERWISE.

(e) NOTHING IN THIS SUBSECTION (10) SHALL AUTHORIZE OR FACILITATE ADDITIONAL TRANSBASIN DIVERSION OF WATER FROM THE COLORADO RIVER.

(f) (I) THIS SUBSECTION (10) IS REPEALED, EFFECTIVE JULY 1, 2018.

(II) ALL APPROVALS OF SUBSTITUTE WATER SUPPLY PLANS UNDER THIS SUBSECTION (10) SHALL EXPIRE ON OR BEFORE JULY 1, 2018.

SECTION 2. Applicability. This act shall apply to substitute water supply plans applied for on or after the effective date of this act.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: April 9, 2009