

CHAPTER 54

WATER AND IRRIGATION

SENATE BILL 12-097

BY SENATOR(S) Hodge, Carroll, Guzman, Newell, Schwartz;
also REPRESENTATIVE(S) Sonnenberg, Brown, Casso, Coram, Fischer, Nikkel, Pace, Schafer S., Scott.

AN ACT

CONCERNING A SIMPLIFIED PROCEDURE FOR THE ADJUDICATION OF CERTAIN CHANGES OF THE POINTS OF DIVERSION OF WATER RIGHTS.

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

SECTION 1. In Colorado Revised Statutes, 37-92-305, **add** (3.5) as follows:

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge. (3.5) Applications for a simple change in a surface point of diversion. (a) FOR PURPOSES OF THIS SUBSECTION (3.5):

(I) "INTERVENING SURFACE DIVERSION POINT OR INFLOW" MEANS ANY DITCH DIVERSION OR OTHER POINT OF DIVERSION FOR A DECREED SURFACE WATER RIGHT, POINT OF REPLACEMENT OR POINT OF DIVERSION BY EXCHANGE THAT IS PART OF AN EXISTING DECREED EXCHANGE, WELL OR WELL FIELD THAT IS DECREED TO OPERATE AS A SURFACE DIVERSION, OR POINT OF INFLOW FROM A TRIBUTARY SURFACE STREAM.

(II) "SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION" MEANS A CHANGE IN THE POINT OF DIVERSION FROM A DECREED SURFACE DIVERSION POINT TO A NEW SURFACE DIVERSION POINT THAT IS NOT COMBINED WITH AND DOES NOT INCLUDE ANY OTHER TYPE OF CHANGE OF WATER RIGHT AND FOR WHICH THERE IS NO INTERVENING SURFACE DIVERSION POINT OR INFLOW BETWEEN THE NEW POINT OF DIVERSION AND THE DIVERSION POINT FROM WHICH A CHANGE IS BEING MADE. "SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION" DOES NOT INCLUDE A CHANGE OF POINT OF DIVERSION FROM BELOW OR WITHIN A STREAM REACH FOR WHICH THERE IS AN INTERVENING SURFACE DIVERSION POINT OR INFLOW OR DECREED IN-STREAM FLOW RIGHT TO AN UPSTREAM LOCATION WITHIN OR ABOVE THAT REACH.

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

(b) (I) AN APPLICATION FOR A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION IS SUBJECT TO ALL PROVISIONS OF THIS ARTICLE, INCLUDING SECTIONS 37-92-302 TO 37-92-305, EXCEPT AS SPECIFICALLY MODIFIED BY THIS SUBSECTION (3.5).

(II) THE PROCEDURES IN THIS SUBSECTION (3.5) APPLY ONLY TO A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION AND DO NOT CHANGE THE PROCEDURES OR LEGAL STANDARDS APPLICABLE TO ANY OTHER CHANGE OF WATER RIGHT.

(III) AN APPLICATION FOR A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION MAY:

(A) BE MADE WITH RESPECT TO A CHANGE OF POINT OF DIVERSION THAT HAS ALREADY BEEN PHYSICALLY ACCOMPLISHED OR WITH RESPECT TO A REQUESTED FUTURE CHANGE OF POINT OF DIVERSION;

(B) BE MADE WITH RESPECT TO AN ABSOLUTE WATER RIGHT OR A CONDITIONAL WATER RIGHT; AND

(C) INCLUDE ONE OR MORE WATER RIGHTS THAT ARE TO BE DIVERTED AT THE NEW POINT OF DIVERSION. THE APPLICATION MUST NOT INCLUDE OR BE CONSOLIDATED OR JOINED WITH AN ACTION BY THE APPLICANT SEEKING ANY OTHER TYPE OF CHANGE OF WATER RIGHT OR DILIGENCE PROCEEDING OR APPLICATION TO MAKE ABSOLUTE WITH RESPECT TO THE WATER RIGHT OR RIGHTS INCLUDED IN THE APPLICATION.

(c) THE APPLICANT BEARS THE INITIAL BURDEN IN AN APPLICATION FOR A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION TO PROVE, THROUGH THE IMPOSITION OF TERMS AND CONDITIONS IF NECESSARY, THAT THE SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION WILL NOT:

(I) RESULT IN DIVERSION OF A GREATER FLOW RATE OR AMOUNT OF WATER THAN HAS BEEN DECREED TO THE WATER RIGHT AND, WITHOUT REQUANTIFYING THE WATER RIGHT, IS PHYSICALLY AND LEGALLY AVAILABLE AT THE DIVERSION POINT FROM WHICH A CHANGE IS BEING MADE; OR

(II) INJURIOUSLY AFFECT THE OWNER OF OR PERSONS ENTITLED TO USE WATER UNDER A VESTED WATER RIGHT OR A DECREED CONDITIONAL WATER RIGHT.

(d) IF THE APPLICANT MAKES A PRIMA FACIE SHOWING WITH RESPECT TO THE MATTERS IN PARAGRAPH (c) OF THIS SUBSECTION (3.5), THE CASE PROCEEDS AS A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION, THE APPLICANT HAS THE BURDEN OF PERSUASION WITH RESPECT TO THE ELEMENTS OF ITS CASE, INCLUDING THE MATTERS IN PARAGRAPH (c) OF THIS SUBSECTION (3.5), AND THE STANDARDS OF PARAGRAPH (e) OF THIS SUBSECTION (3.5) APPLY. IF THE APPLICANT DOES NOT MAKE SUCH A PRIMA FACIE SHOWING, THE REFEREE OR WATER JUDGE SHALL DISMISS THE APPLICATION WITHOUT PREJUDICE TO THE APPLICANT'S FILING AN APPLICATION FOR A CHANGE OF WATER RIGHT THAT IS NOT A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION.

(e) THE FOLLOWING STANDARDS APPLY TO A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION:

(I) THERE IS A REBUTTABLE PRESUMPTION THAT A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION WILL NOT CAUSE AN ENLARGEMENT OF THE HISTORICAL USE ASSOCIATED WITH THE WATER RIGHTS BEING CHANGED.

(II) THE DECREE MUST NOT REQUANTIFY THE WATER RIGHTS FOR WHICH THE POINT OF DIVERSION IS BEING CHANGED.

(III) THE APPLICANT, IN PROSECUTING THE SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION, IS NOT REQUIRED TO:

(A) PROVE THAT THE WATER DIVERTED AT THE NEW POINT OF DIVERSION CAN AND WILL BE DIVERTED AND PUT TO USE WITHIN A REASONABLE PERIOD OF TIME;

(B) PROVE COMPLIANCE WITH THE ANTI-SPECULATION DOCTRINE; OR

(C) PROVIDE OR MAKE A SHOWING OF FUTURE NEED IMPOSED BY THE CASES OF *PAGOSA AREA WATER AND SANITATION DISTRICT V. TROUT UNLIMITED*, 219 P.3d 774 (COLO. 2009) OR *CITY OF THORNTON V. BIJOU IRRIGATION CO.*, 926 P.2d 1 (COLO. 1996); EXCEPT THAT NOTHING IN THIS SUBSECTION (3.5) RELIEVES THE APPLICANT OR ITS SUCCESSORS IN ANY PENDING OR FUTURE DILIGENCE APPLICATION FROM ANY OF THE REQUIREMENTS FOR DEMONSTRATING DILIGENCE IN THE DEVELOPMENT OF A CONDITIONAL WATER RIGHT CHANGED PURSUANT TO THIS SUBSECTION (3.5).

SECTION 2. Applicability. The provisions of this act apply to applications for simple changes in a surface point of diversion filed 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: March 22, 2012