

CHAPTER 55

WATER AND IRRIGATION

SENATE BILL 13-078

BY SENATOR(S) Giron, Baumgardner, Brophy, Hodge, Roberts, Schwartz, Carroll, Crowder, Jahn, Marble;
also REPRESENTATIVE(S) Sonnenberg, Fischer, Coram, Ginal, Lebsack, Rankin, Rosenthal, Saine, Salazar, Young.

AN ACT**CONCERNING POINTS OF DIVERSION THAT ARE NOT LOCATED AT THE PHYSICAL LOCATION SPECIFIED IN THE DECREES FOR DIVERTED WATER RIGHTS.**

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

SECTION 1. Legislative declaration. It is the purpose of this act to allow the owners and users of water rights to reconcile the actual location of diversion structures with the described locations in the original decrees confirming the water rights when the water rights have continuously diverted at the same location with the intent to divert pursuant to the decreed location. If the erroneous location description in the decrees is due to a clerical error, a difference in locating methods from the time the decrees were established, or a minor inaccuracy, this act will allow the owners and users of the water rights to correct the location description in the decrees without the need to file an application for a change of water right.

SECTION 2. In Colorado Revised Statutes, 37-92-305, **add** (3.6) as follows:

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge. (3.6) Correction to an established but erroneously described point of diversion - definitions. (a) AS USED IN THIS SUBSECTION (3.6):

(I) "DIVERTER" MEANS THE OWNER OR USER OF A DECREED WATER RIGHT.

(II) "ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION" MEANS A POINT OF DIVERSION OF EITHER SURFACE WATER OR GROUNDWATER:

(A) THAT HAS BEEN AT THE SAME PHYSICAL LOCATION SINCE THE APPLICABLE DECREE OR DECREES CONFIRMED THE WATER RIGHT, UNLESS IT WAS RELOCATED PURSUANT TO SECTION 37-86-111 OR, IN THE CASE OF A WELL, RELOCATED

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

ACCORDING TO A VALID WELL PERMIT. A DIVERSION THAT HAS BEEN IN THE SAME PHYSICAL LOCATION SINCE THE ENACTMENT OF THE "ADJUDICATION ACT OF 1943", WHICH WAS REPEALED IN 1969, HAS A REBUTTABLE PRESUMPTION OF HAVING BEEN LOCATED AT THE SAME PHYSICAL LOCATION SINCE ITS INCEPTION.

(B) THAT IS NOT LOCATED AT THE LOCATION SPECIFIED IN THE APPLICABLE DECREE OR DECREES CONFIRMING THE WATER RIGHT; AND

(C) FROM WHICH THE DIVERTER HAS DIVERTED WATER WITH THE INTENT TO DIVERT PURSUANT TO THE DECREE OR DECREES CONFIRMING THE WATER RIGHT.

(b) A WATER RIGHT IS DEEMED TO BE DIVERTED AT ITS DECREED LOCATION AND IS NOT ERRONEOUSLY DESCRIBED IF:

(I) WITH RESPECT TO A SURFACE WATER DIVERSION:

(A) THE PHYSICAL LOCATION OF THE POINT OF DIVERSION IS WITHIN FIVE HUNDRED FEET OF THE DECREED LOCATION; AND

(B) NEITHER A NATURAL SURFACE STREAM THAT IS TRIBUTARY TO THE DIVERTED STREAM NOR ANOTHER SURFACE WATER RIGHT IS LOCATED BETWEEN THE DECREED LOCATION AND ITS PHYSICAL LOCATION;

(II) WITH RESPECT TO A GROUNDWATER DIVERSION, THE PHYSICAL LOCATION OF THE POINT OF DIVERSION IS WITHIN TWO HUNDRED FEET OF THE DECREED LOCATION, UNLESS THE DECREE SPECIFIES A LESSER DISTANCE FOR ACCEPTABLE VARIATION IN LOCATION.

(c) TO PROCEED WITH A CORRECTION IN POINT OF DIVERSION UNDER THIS SUBSECTION (3.6) FOR AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION THAT IS DUE TO A CLERICAL MISTAKE IN THE DECREE, BUT DOES NOT FALL WITHIN THE THREE-YEAR PERIOD SET FORTH IN SECTION 37-92-304 (10) FOR THE WATER CLERK TO CORRECT THE MISTAKE, THE DIVERTER OF THE ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION MAY FILE A PETITION WITH THE WATER CLERK FOR CORRECTION OF THE CLERICAL MISTAKE WITHIN THREE YEARS AFTER THE DIVERTER BECAME AWARE OF THE MISTAKE. THE SAME PROCEDURES SET FORTH IN SECTION 37-92-304 (10) APPLY TO CORRECTIONS IN POINT OF DIVERSION UNDER THIS PARAGRAPH (c).

(d) (I) TO PROCEED WITH A CORRECTION IN POINT OF DIVERSION UNDER THIS SUBSECTION (3.6) FOR AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION THAT IS NOT DUE TO A CLERICAL MISTAKE IN THE DECREE, A DIVERTER HAS THE BURDEN TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT A POINT OF DIVERSION IS AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION.

(II) EXCEPT AS SPECIFICALLY MODIFIED BY THIS SUBSECTION (3.6), AN APPLICATION FOR A CORRECTION IN AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION IS SUBJECT TO ALL PROVISIONS OF THIS ARTICLE, INCLUDING SECTIONS 37-92-302 TO 37-92-305.

(III) THE PROCEDURES IN THIS SUBSECTION (3.6) APPLY ONLY TO A CORRECTION IN AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION AND DO NOT ALTER THE PROCEDURES OR LEGAL STANDARDS APPLICABLE TO A CHANGE OF WATER RIGHT.

(IV) A DIVERTER MAY APPLY FOR A CORRECTION IN AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION ONLY:

(A) FOR A POINT OF DIVERSION THAT IS ALREADY IN PLACE; AND

(B) IF ONE OR MORE WATER RIGHTS ARE DIVERTED AT THE CORRECTED POINT OF DIVERSION.

(V) THE APPLICATION MUST NOT INCLUDE OR BE CONSOLIDATED OR JOINED WITH AN ACTION BY THE APPLICANT SEEKING ANY 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.

(e) IF AN APPLICANT PROVES THE MATTERS IN PARAGRAPH (a) OF THIS SUBSECTION (3.6) BY A PREPONDERANCE OF THE EVIDENCE, THEN THERE IS A REBUTTABLE PRESUMPTION THAT A CORRECTION IN AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION:

(I) WILL NOT CAUSE AN ENLARGEMENT OF THE HISTORICAL USE ASSOCIATED WITH A WATER RIGHT DIVERTED AT THE POINT OF DIVERSION; AND

(II) DOES NOT INJURIOUSLY AFFECT THE OWNER OF OR PERSONS ENTITLED TO USE WATER UNDER A VESTED WATER RIGHT OR A DECREED CONDITIONAL WATER RIGHT.

(f) IF THE APPLICANT DOES NOT PROVE THE MATTERS IN PARAGRAPH (a) OF THIS SUBSECTION (3.6) OR IF THE PRESUMPTIONS STATED IN THIS SUBSECTION (3.6) ARE SUCCESSFULLY REBUTTED, THE REFEREE OR WATER JUDGE SHALL DISMISS THE APPLICATION WITHOUT PREJUDICE TO THE APPLICANT'S FILING AN APPLICATION FOR A CHANGE OF WATER RIGHT.

(g) THE FOLLOWING STANDARDS APPLY TO A CORRECTION IN AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION:

(I) THE DECREE MUST NOT REQUANTIFY THE WATER RIGHTS FOR WHICH THE ERRONEOUSLY DESCRIBED POINT OF DIVERSION IS BEING CORRECTED;

(II) THE APPLICANT, IN PROSECUTING THE CORRECTION IN THE ERRONEOUSLY DESCRIBED POINT OF DIVERSION, IS NOT REQUIRED TO:

(A) PROVE THAT THE WATER DIVERTED AT THE CORRECTED 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).

(III) THE STATE ENGINEER SHALL NOT CURTAIL A DIVERSION BASED SOLELY ON THE FACT THAT THE POINT OF DIVERSION IS ERRONEOUSLY DESCRIBED; AND

(IV) NOTHING IN THIS SUBSECTION (3.6) MODIFIES THE STATE ENGINEER'S AUTHORITY TO MAKE DETERMINATIONS REGARDING THE ADMINISTRATION OF WATER RIGHTS AND THE DISTRIBUTION OF WATER.

(h) DURING A CHANGE OF WATER RIGHT CASE OR AN ABANDONMENT PROCEEDING, IF A POINT OF DIVERSION QUALIFIES AS AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION PURSUANT TO THIS SUBSECTION (3.6), FULL CONSIDERATION OF THE HISTORICAL CONSUMPTIVE USE OF THE WATER RIGHT AT ITS PHYSICAL LOCATION SHALL NOT BE DENIED DUE SOLELY TO THE FACT THAT THE POINT OF DIVERSION IS NOT AT ITS DECREED LOCATION.

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 7, 2013, if adjournment sine die is on May 8, 2013); 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 2014 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

Approved: March 22, 2013