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SENATE BILL 18-170

BY SENATOR(S) Sonnenberg, Baumgardner, Cooke, Coram, Crowder, Gardner, Lambert, Lundberg, Marble, Neville T., Priola, Scott, Smallwood, Tate;
also REPRESENTATIVE(S) Hansen and McKean, Rankin, Rosenthal, Saine, Valdez, Winkler, Young.

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

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:

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

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

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

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

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

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

(IV) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION (8), THE CONTRACTUAL DEDICATION TO THE BOARD MUST COMPLY WITH THE PROCEDURES AND PROTECTIONS FOR OTHER WATER RIGHTS SPECIFIED IN SUBSECTION (3) OF THIS SECTION;

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

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

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

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

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

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

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

(II) "MITIGATION RELEASE" MEANS:

(A) THE RELEASE OF WATER FROM A WATER STORAGE RIGHT STORED IN NEW RESERVOIR CAPACITY INTO A QUALIFYING STREAM REACH TO REASONABLY AVOID, MINIMIZE, OR MITIGATE THE IMPACTS OF THE NEW RESERVOIR CAPACITY ON FISH AND WILDLIFE RESOURCES WITHIN THE

QUALIFYING STREAM REACH IN ACCORDANCE WITH A FISH AND WILDLIFE MITIGATION PLAN APPROVED UNDER SECTION 37-60-122.2; AND

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

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

(IV) "OWNER" MEANS THE PERSON THAT OWNS THE WATER STORAGE RIGHT THAT IS TO PROVIDE THE WATER FOR A PROTECTED MITIGATION RELEASE, AND, IN THE CASE OF A WATER STORAGE RIGHT OWNED BY A WATER CONSERVANCY DISTRICT, WATER CONSERVATION DISTRICT, MUNICIPALITY, SPECIAL DISTRICT, OR MUTUAL DITCH COMPANY, INCLUDES THE RESIDENTS, ALLOTTEES, MEMBERS, CUSTOMERS, SHAREHOLDERS, OR MEMBER DITCH COMPANIES OF THAT ENTITY; AND, IN THE CASE OF A WATER STORAGE RIGHT OWNED BY AN IRRIGATION DISTRICT, INCLUDES THE LANDOWNERS WITHIN THE DISTRICT.

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

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

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

(C) IS PROTECTED FROM DIVERSION, EXCHANGE, OR USE BY HOLDERS OF CONDITIONAL OR VESTED WATER RIGHTS OR OTHER PERSONS THAT CAUSE A REDUCTION IN THE PROTECTED MITIGATION RELEASE AT ANY LOCATION

WITHIN THE QUALIFYING STREAM REACH, OTHER THAN ANY REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER LOSSES.

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

(VII) "SURFACE POINT OF DIVERSION" MEANS A STRUCTURE THAT DIVERTS SURFACE WATER ONLY. "SURFACE POINT OF DIVERSION" DOES NOT INCLUDE:

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

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

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

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

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

MITIGATION RELEASES.

(IV) (A) EXCEPT FOR REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER LOSSES, AND SUBJECT TO SUBSECTIONS (8)(c)(IV)(B) AND (8)(c)(IV)(C) OF THIS SECTION, AN OWNER SHALL: REDIVERT ALL PROTECTED MITIGATION RELEASES AT OR BELOW THE DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH, EITHER DIRECTLY AT A SURFACE POINT OF DIVERSION OR BY A DECREED IN-PRIORITY EXCHANGE TO AN EXCHANGE-TO POINT IDENTIFIED IN THE DECREED IN-PRIORITY EXCHANGE THAT IS OUTSIDE OF THE QUALIFYING STREAM REACH; AND APPLY THE WATER TO THE DECREED BENEFICIAL USES OF THE WATER STORAGE RIGHT THAT PROVIDES THE WATER FOR THE PROTECTED MITIGATION RELEASE.

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

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

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

(VI) THE PROCEDURES SET FORTH IN THIS SUBSECTION (8) APPLY ONLY TO THE ADJUDICATION OF PROPOSED PROTECTED MITIGATION RELEASES FROM NEW RESERVOIR CAPACITY AND DO NOT ALTER THE PROCEDURES OR LEGAL STANDARDS APPLICABLE TO ANY OTHER TYPE OF WATER COURT APPLICATION.

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

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

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

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

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

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

(e) (I) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION (8)(e), A DEDICATION TO THE BOARD PURSUANT TO SUBSECTION (8)(d)(I) OF THIS SECTION OF AN INTEREST IN WATER YIELDED FROM A WATER STORAGE RIGHT THAT WILL BE STORED IN NEW RESERVOIR CAPACITY IS SUBJECT TO SUBSECTION (3) OF THIS SECTION FOR THE DEDICATION OF AN INTEREST IN WATER TO THE BOARD, INCLUDING THE REQUIREMENT IN SUBSECTION (3) OF THIS SECTION THAT THE BOARD MAKE A DETERMINATION THAT THE PROPOSED PROTECTED MITIGATION RELEASES ARE APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH.

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

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

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

(f) (I) TO SATISFY THE REQUIREMENTS OF SUBSECTIONS (8)(d)(III) AND (8)(d)(IV) OF THIS SECTION, THE BOARD AND THE OWNER MUST FILE A WATER COURT APPLICATION AS CO-APPLICANTS PURSUANT TO SUBSECTION (8)(d)(III). THE WATER COURT SHALL ENTER A DECREE APPROVING THE PROPOSED PROTECTED MITIGATION RELEASES IF:

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

(B) THE OWNER PROVES THAT THE PROPOSED PROTECTED MITIGATION RELEASES: WILL NOT CAUSE AN EXPANSION OF USE BEYOND THE LIMITS OF USE OF THE DECREED WATER STORAGE RIGHT FROM WHICH THE MITIGATION RELEASES ARE TO BE MADE; WILL NOT CAUSE INJURY TO VESTED WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, SUBSEQUENTLY

ADJUDICATED WATER RIGHTS THAT ARE THE SUBJECT OF A PENDING WATER COURT APPLICATION FILED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION (8), OR OTHER WATER USERS' USES OR EXCHANGES OF WATER BEING MADE PURSUANT TO APPROPRIATION OR PRACTICES IN EXISTENCE ON THE DATE OF THE FILING OF THE APPLICATION FOR APPROVAL OF THE PROPOSED PROTECTED MITIGATION RELEASES; ARE ADMINISTRABLE BY THE DIVISION ENGINEER; AND HAVE BEEN DEDICATED TO AND APPROVED BY THE BOARD IN COMPLIANCE WITH THE REQUIREMENTS AND PROCEDURES OF SUBSECTION (8)(e) OF THIS SECTION.

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

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

(IV) A DECREE APPROVING A PROTECTED MITIGATION RELEASE MUST CONTAIN THE TERMS AND CONDITIONS NECESSARY TO PREVENT INJURY TO OTHER WATER RIGHTS, PREVENT THE EXPANSION OF USE OF THE DECREED WATER STORAGE RIGHT FROM WHICH THE PROTECTED MITIGATION RELEASE IS TO BE MADE, AND ENSURE THAT THE PROTECTED MITIGATION RELEASES ARE ADMINISTRABLE BY THE DIVISION ENGINEER, INCLUDING, IF NECESSARY, TO PREVENT INJURY OR EXPANSION OF USE OF THE DECREED WATER STORAGE RIGHT FROM WHICH THE PROTECTED MITIGATION RELEASE IS TO BE MADE, TERMS REJECTING OR DECREASING THE PROPOSED FLOW RATE OF THE PROTECTED MITIGATION RELEASES OR THE QUALIFYING STREAM REACH. ALL SUCH DECREES MUST ALSO SPECIFICALLY IDENTIFY THE TIMING AND RATE OF THE PROTECTED MITIGATION RELEASES, THE QUALIFYING STREAM REACH, AND THE FLOW RATE THAT IS APPROPRIATE TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH. FOR PROTECTED MITIGATION RELEASES THAT ARE TO BE EXCHANGED INTO STORAGE IN ACCORDANCE WITH SUBSECTION (8)(c)(IV)(B) OF THIS SECTION, THE DECREE MUST SPECIFY THAT THE EXCHANGE TO STORAGE BE ADMINISTERED WITH A PRIORITY DATE THAT IS NO EARLIER THAN THE DATE OF THE APPROVAL OF THE FISH AND WILDLIFE MITIGATION AND ENHANCEMENT PLAN PURSUANT TO SECTION 37-60-122.2.

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

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

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

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

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

(II) UNLESS THE OWNER IS IN COMPLIANCE WITH:

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

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

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

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

(IV) WHEN THE RELEASED WATER IS WITHIN THE NATURAL STREAM AT A LOCATION OUTSIDE OF THE QUALIFYING STREAM REACH, INCLUDING WHEN THE RELEASED WATER IS BETWEEN THE DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH AND THE POINT OF REDIVERSION; OR

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

(j) THIS SUBSECTION (8):

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

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

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

SECTION.

SECTION 2. Act subject to petition - effective date - applicability. (1) 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 8, 2018, if adjournment sine die is on May 9, 2018); 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 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

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

Kevin J. Grantham
PRESIDENT OF
THE SENATE

Crisanta Duran
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Effie Ameen
SECRETARY OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
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APPROVED

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO