

Second Regular Session  
Seventy-first General Assembly  
STATE OF COLORADO

**REVISED**

*This Version Includes All Amendments Adopted  
on Second Reading in the Second House*

LLS NO. 18-0741.01 Jennifer Berman x3286

**SENATE BILL 18-170**

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**SENATE SPONSORSHIP**

**Sonnenberg,**

**HOUSE SPONSORSHIP**

**Hansen and McKean,**

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**Senate Committees**

Agriculture, Natural Resources, & Energy

**House Committees**

Agriculture, Livestock, & Natural Resources

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101

**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.**

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HOUSE  
2nd Reading Unamended  
March 26, 2018

SENATE  
3rd Reading Unamended  
March 8, 2018

SENATE  
Amended 2nd Reading  
March 5, 2018

**Bill Summary**

*(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at*

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.  
*Capital letters or bold & italic numbers indicate new material to be added to existing statute.  
Dashes through the words indicate deletions from existing statute.*

[http://leg.colorado.gov.\)](http://leg.colorado.gov.)

Current law requires an applicant for a water diversion, delivery, or storage facility that requires an application for a permit, license, or other approval from the United States to submit for approval a proposal to the Colorado water conservation board (board), parks and wildlife commission, and the division of parks and wildlife for a fish and wildlife mitigation plan (mitigation plan), which mitigation plan, when approved, is communicated to each federal, state, or other governmental agency from the which the applicant must obtain a permit, license, or other approval.

The bill establishes a water court process by which an owner of a water storage right allowing water to be stored in a newly constructed reservoir or an enlarged existing reservoir may comply with the mitigation measures identified in a mitigation plan by contracting with the board to dedicate to the board, pursuant to a water court decree, an amount of water for release into, and protection from diversion and use through, a qualifying stream reach to avoid, minimize, or mitigate the probable impacts that the newly constructed or expanded reservoir has on fish and wildlife resources.

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

2             **SECTION 1.** In Colorado Revised Statutes, 37-92-102, **add** (8)  
3     as follows:

4             **37-92-102. Legislative declaration - basic tenets of Colorado**  
5     **water law. (8) Reservoir releases for fish and wildlife mitigation -**  
6     **definitions.** (a) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES,  
7     AND DECLARES THAT:

8             (I) ALLOWING THE OWNER OF A WATER STORAGE RIGHT THAT  
9     ALLOWS WATER TO BE STORED IN NEW RESERVOIR CAPACITY TO CONTRACT  
10    WITH THE BOARD TO DEDICATE TO THE BOARD WATER STORED UNDER THE  
11    WATER STORAGE RIGHT FOR RELEASE FROM THE NEW RESERVOIR  
12    CAPACITY TO REASONABLY AVOID, MINIMIZE, OR MITIGATE IMPACTS OF  
13    THE NEW RESERVOIR CAPACITY ON FISH AND WILDLIFE RESOURCES WITHIN  
14    AN IDENTIFIED STREAM REACH MAY ENABLE THE OWNER OF THE WATER

1       STORAGE RIGHT TO COMPLY WITH MITIGATION MEASURES IDENTIFIED IN A  
2       FISH AND WILDLIFE MITIGATION PLAN APPROVED UNDER SECTION  
3       37-60-122.2;

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

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

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

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

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

1 SUBSECTION (3) OF THIS SECTION;

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

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

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

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

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

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

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

3                   (II) "MITIGATION RELEASE" MEANS:

4                   (A) THE RELEASE OF WATER FROM A WATER STORAGE RIGHT  
5   STORED IN NEW RESERVOIR CAPACITY INTO A QUALIFYING STREAM REACH  
6   TO REASONABLY AVOID, MINIMIZE, OR MITIGATE THE IMPACTS OF THE NEW  
7   RESERVOIR CAPACITY ON FISH AND WILDLIFE RESOURCES WITHIN THE  
8   QUALIFYING STREAM REACH IN ACCORDANCE WITH A FISH AND WILDLIFE  
9   MITIGATION PLAN APPROVED UNDER SECTION 37-60-122.2; AND

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

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

22                  (IV) "OWNER" MEANS THE PERSON THAT OWNS THE WATER  
23   STORAGE RIGHT THAT IS TO PROVIDE THE WATER FOR A PROTECTED  
24   MITIGATION RELEASE, AND, IN THE CASE OF A WATER STORAGE RIGHT  
25   OWNED BY A WATER CONSERVANCY DISTRICT, WATER CONSERVATION  
26   DISTRICT, MUNICIPALITY, SPECIAL DISTRICT, OR MUTUAL DITCH COMPANY,  
27   INCLUDES THE RESIDENTS, ALLOTTEES, MEMBERS, CUSTOMERS,

1 SHAREHOLDERS, OR MEMBER DITCH COMPANIES OF THAT ENTITY; AND, IN  
2 THE CASE OF A WATER STORAGE RIGHT OWNED BY AN IRRIGATION  
3 DISTRICT, INCLUDES THE LANDOWNERS WITHIN THE DISTRICT.

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

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

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

11 (C) IS PROTECTED FROM DIVERSION, EXCHANGE, OR USE BY  
12 HOLDERS OF CONDITIONAL OR VESTED WATER RIGHTS OR OTHER PERSONS  
13 THAT CAUSE A REDUCTION IN THE PROTECTED MITIGATION RELEASE AT  
14 ANY LOCATION WITHIN THE QUALIFYING STREAM REACH, OTHER THAN ANY  
15 REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER  
16 LOSSES.

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

27 (VII) "SURFACE POINT OF DIVERSION" MEANS A STRUCTURE THAT

1 DIVERTS SURFACE WATER ONLY. "SURFACE POINT OF DIVERSION" DOES  
2 NOT INCLUDE:

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

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

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

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

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

23 (IV) (A) EXCEPT FOR REDUCTIONS CAUSED BY EVAPORATION,  
24 TRANSPORTATION, AND OTHER LOSSES, AND SUBJECT TO SUBSECTIONS  
25 (8)(c)(IV)(B) AND (8)(c)(IV)(C) OF THIS SECTION, AN OWNER SHALL:  
26 REDIVERT ALL PROTECTED MITIGATION RELEASES AT OR BELOW THE  
27 DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH,

1       EITHER DIRECTLY AT A SURFACE POINT OF DIVERSION OR BY A DECREED  
2       IN-PRIORITY EXCHANGE TO AN EXCHANGE-TO POINT IDENTIFIED IN THE  
3       DECREED IN-PRIORITY EXCHANGE THAT IS OUTSIDE OF THE QUALIFYING  
4       STREAM REACH; AND APPLY THE WATER TO THE DECREED BENEFICIAL USES  
5       OF THE WATER STORAGE RIGHT THAT PROVIDES THE WATER FOR THE  
6       PROTECTED MITIGATION RELEASE.

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

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

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

25               (VI) THE PROCEDURES SET FORTH IN THIS SUBSECTION (8) APPLY  
26       ONLY TO THE ADJUDICATION OF PROPOSED PROTECTED MITIGATION  
27       RELEASES FROM NEW RESERVOIR CAPACITY AND DO NOT ALTER THE

1 PROCEDURES OR LEGAL STANDARDS APPLICABLE TO ANY OTHER TYPE OF  
2 WATER COURT APPLICATION.

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

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

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

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

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

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

26 (e) (I) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION  
27 (8)(e), A DEDICATION TO THE BOARD PURSUANT TO SUBSECTION (8)(d)(I)

1       OF THIS SECTION OF AN INTEREST IN WATER YIELDED FROM A WATER  
2       STORAGE RIGHT THAT WILL BE STORED IN NEW RESERVOIR CAPACITY IS  
3       SUBJECT TO SUBSECTION (3) OF THIS SECTION FOR THE DEDICATION OF AN  
4       INTEREST IN WATER TO THE BOARD, INCLUDING THE REQUIREMENT IN  
5       SUBSECTION (3) OF THIS SECTION THAT THE BOARD MAKE A  
6       DETERMINATION THAT THE PROPOSED PROTECTED MITIGATION RELEASES  
7       ARE APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE  
8       NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE  
9       QUALIFYING STREAM REACH.

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

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

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

24                   (f) (I) TO SATISFY THE REQUIREMENTS OF SUBSECTIONS (8)(d)(III)  
25       AND (8)(d)(IV) OF THIS SECTION, THE BOARD AND THE OWNER MUST FILE  
26       A WATER COURT APPLICATION AS CO-APPLICANTS PURSUANT TO  
27       SUBSECTION (8)(d)(III). THE WATER COURT SHALL ENTER A DECREE

1 APPROVING THE PROPOSED PROTECTED MITIGATION RELEASES IF:

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

13 (B) THE OWNER PROVES THAT THE PROPOSED PROTECTED  
14 MITIGATION RELEASES: WILL NOT CAUSE AN EXPANSION OF USE BEYOND  
15 THE LIMITS OF USE OF THE DECREED WATER STORAGE RIGHT FROM WHICH  
16 THE MITIGATION RELEASES ARE TO BE MADE; WILL NOT CAUSE INJURY TO  
17 VESTED WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS,  
18 SUBSEQUENTLY ADJUDICATED WATER RIGHTS THAT ARE THE SUBJECT OF  
19 A PENDING WATER COURT APPLICATION FILED BEFORE THE EFFECTIVE  
20 DATE OF THIS SUBSECTION (8), OR OTHER WATER USERS' USES OR  
21 EXCHANGES OF WATER BEING MADE PURSUANT TO APPROPRIATION OR  
22 PRACTICES IN EXISTENCE ON THE DATE OF THE FILING OF THE APPLICATION  
23 FOR APPROVAL OF THE PROPOSED PROTECTED MITIGATION RELEASES; ARE  
24 ADMINISTRABLE BY THE DIVISION ENGINEER; AND HAVE BEEN DEDICATED  
25 TO AND APPROVED BY THE BOARD IN COMPLIANCE WITH THE  
26 REQUIREMENTS AND PROCEDURES OF SUBSECTION (8)(e) OF THIS SECTION.

27 (II) FOR PURPOSES OF DETERMINING INJURY PURSUANT TO

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

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

8 (IV) A DECREE APPROVING A PROTECTED MITIGATION RELEASE  
9 MUST CONTAIN THE TERMS AND CONDITIONS NECESSARY TO PREVENT  
10 INJURY TO OTHER WATER RIGHTS, PREVENT THE EXPANSION OF USE OF THE  
11 DECREED WATER STORAGE RIGHT FROM WHICH THE PROTECTED  
12 MITIGATION RELEASE IS TO BE MADE, AND ENSURE THAT THE PROTECTED  
13 MITIGATION RELEASES ARE ADMINISTRABLE BY THE DIVISION ENGINEER,  
14 INCLUDING, IF NECESSARY, TO PREVENT INJURY OR EXPANSION OF USE OF  
15 THE DECREED WATER STORAGE RIGHT FROM WHICH THE PROTECTED  
16 MITIGATION RELEASE IS TO BE MADE, TERMS REJECTING OR DECREASING  
17 THE PROPOSED FLOW RATE OF THE PROTECTED MITIGATION RELEASES OR  
18 THE QUALIFYING STREAM REACH. ALL SUCH DECREES MUST ALSO  
19 SPECIFICALLY IDENTIFY THE TIMING AND RATE OF THE PROTECTED  
20 MITIGATION RELEASES, THE QUALIFYING STREAM REACH, AND THE FLOW  
21 RATE THAT IS APPROPRIATE TO PRESERVE OR IMPROVE THE NATURAL  
22 ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING  
23 STREAM REACH. FOR PROTECTED MITIGATION RELEASES THAT ARE TO BE  
24 EXCHANGED INTO STORAGE IN ACCORDANCE WITH SUBSECTION  
25 (8)(c)(IV)(B) OF THIS SECTION, THE DECREE MUST SPECIFY THAT THE  
26 EXCHANGE TO STORAGE BE ADMINISTERED WITH A PRIORITY DATE THAT  
27 IS NO EARLIER THAN THE DATE OF THE APPROVAL OF THE FISH AND

1 WILDLIFE MITIGATION AND ENHANCEMENT PLAN PURSUANT TO SECTION  
2 37-60-122.2.

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

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

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

1 PROTECTED MITIGATION RELEASE WITHIN THE QUALIFYING STREAM  
2 REACH.

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

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

11 (II) UNLESS THE OWNER IS IN COMPLIANCE WITH:

12 (A) THE MEASURING REQUIREMENTS OF SECTION 37-84-113;  
13 (B) THE TERMS AND CONDITIONS IN THE DECREE APPROVING THE  
14 PROTECTED MITIGATION RELEASE REGARDING THE OPERATION,  
15 MAINTENANCE, OR REPAIR OF PROPER MEASURING DEVICES; AND

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

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

24 (IV) WHEN THE RELEASED WATER IS WITHIN THE NATURAL  
25 STREAM AT A LOCATION OUTSIDE OF THE QUALIFYING STREAM REACH,  
26 INCLUDING WHEN THE RELEASED WATER IS BETWEEN THE DOWNSTREAM  
27 TERMINATION POINT OF THE QUALIFYING STREAM REACH AND THE POINT

1       OF REDIVERSION; OR

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

5           (j) THIS SUBSECTION (8):

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

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

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

23           **SECTION 2. Act subject to petition - effective date -**  
24       **applicability.** (1) This act takes effect at 12:01 a.m. on the day following  
25       the expiration of the ninety-day period after final adjournment of the  
26       general assembly (August 8, 2018, if adjournment sine die is on May 9,  
27       2018); except that, if a referendum petition is filed pursuant to section 1

1       (3) of article V of the state constitution against this act or an item, section,  
2       or part of this act within such period, then the act, item, section, or part  
3       will not take effect unless approved by the people at the general election  
4       to be held in November 2018 and, in such case, will take effect on the  
5       date of the official declaration of the vote thereon by the governor.

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