

CHAPTER 187

WATER AND IRRIGATION

SENATE BILL 96-064

BY SENATORS Norton, Ament, R. Powers, and Tebedo;
also REPRESENTATIVES Jerke, Martin, Reeser, and Sullivan.

AN ACT**CONCERNING INSTREAM FLOW APPROPRIATIONS OF THE COLORADO WATER CONSERVATION BOARD.**

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

SECTION 1. 37-92-102, Colorado Revised Statutes, 1990 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

37-92-102. Legislative declaration - basic tenets of Colorado water law.

(4) ANY APPROPRIATION MADE PURSUANT TO SUBSECTION (3) OF THIS SECTION SHALL ALSO BE SUBJECT TO THE FOLLOWING PRINCIPLES AND LIMITATIONS:

(a) UTILIZING A PUBLIC NOTICE AND COMMENT PROCEDURE, THE BOARD, IN ITS DISCRETION, MAY DETERMINE WHETHER OR NOT TO APPROPRIATE MINIMUM STREAM FLOWS OR NATURAL LAKE LEVELS, OR DECREASE SUCH AN APPROPRIATION, TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE. THE BOARD MAY ADOPT CONDITIONS ATTACHED TO AN APPROPRIATION OR DECREASED APPROPRIATION, MAY FILE OR WITHDRAW STATEMENTS OF OPPOSITION IN WATER COURT CASES, AND ENTER INTO STIPULATIONS FOR DECREES OR OTHER FORMS OF CONTRACTUAL AGREEMENTS, INCLUDING ENFORCEMENT AGREEMENTS, THAT IT DETERMINES WILL PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE. ALL CONTRACTUAL AGREEMENTS AND STIPULATIONS ENTERED INTO BY THE BOARD PRIOR TO THE EFFECTIVE DATE OF THIS SUBSECTION (4) REGARDING ENFORCEMENT OF ITS APPROPRIATIONS SHALL BE GIVEN FULL FORCE AND EFFECT. ANY INCREASE TO AN EXISTING MINIMUM STREAM FLOW OR NATURAL LAKE LEVEL APPROPRIATION OR DECREE SHALL BE MADE AS A NEW APPROPRIATION.

(b) (I) EXCEPT AS PROVIDED PURSUANT TO PARAGRAPH (d) OF THIS SUBSECTION (4), IF THE BOARD DETERMINES THAT IT IS APPROPRIATE TO CONSIDER DECREASING AN

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

EXISTING DECREED APPROPRIATION, THE BOARD SHALL PROCEED THROUGH AN ADEQUATE PUBLIC NOTICE AND COMMENT PROCESS TO CONSIDER SUCH DECREASE AT A PUBLIC MEETING.

(II) FOR THE PURPOSES OF THIS PARAGRAPH (b), "ADEQUATE PUBLIC NOTICE AND COMMENT PROCESS" SHALL INCLUDE THE FOLLOWING:

(A) NOTICE OF THE PROPOSED DECREASE AND THE DATE OF THE PUBLIC MEETING AT WHICH IT WILL FIRST BE CONSIDERED SHALL BE PRINTED IN THE RESUME IN THE WATER COURT HAVING JURISDICTION OVER THE DECREE THAT IS THE SUBJECT OF THE DECREASE. THE FIRST PUBLIC MEETING OF THE BOARD AT WHICH THE DECREASE IS TO BE CONSIDERED SHALL OCCUR AT LEAST SIXTY DAYS AFTER THE MONTH IN WHICH THE RESUME IS PUBLISHED. NOTICE SHALL ALSO BE PUBLISHED IN A NEWSPAPER OF STATEWIDE DISTRIBUTION WITHIN THIRTY TO FORTY-FIVE DAYS PRIOR TO SUCH FIRST PUBLIC MEETING.

(B) IF THE BOARD DECIDES AT SUCH FIRST PUBLIC MEETING TO CONSIDER THE PROPOSED DECREASE, THE BOARD SHALL ANNOUNCE PUBLICLY THE DATE OF A SUBSEQUENT PUBLIC MEETING FOR SUCH PURPOSE.

(C) ON THE WRITTEN REQUEST OF ANY PERSON MADE WITHIN THIRTY DAYS AFTER THE DATE OF THE FIRST PUBLIC MEETING, THE BOARD SHALL DELAY THE SUBSEQUENT PUBLIC MEETING FOR UP TO ONE YEAR TO ALLOW SUCH PERSON THE OPPORTUNITY FOR THE COLLECTION OF SCIENTIFIC DATA MATERIAL TO THE PROPOSED DECREASE. SUCH REQUEST MAY NOT BE INTERPOSED SOLELY FOR DELAY OF THE PROCEEDINGS.

(D) ON THE WRITTEN REQUEST OF ANY PERSON MADE WITHIN THIRTY DAYS AFTER THE DATE OF THE FIRST PUBLIC MEETING, THE BOARD SHALL, WITHIN SIXTY DAYS AFTER SUCH REQUEST, ESTABLISH FAIR AND FORMAL PROCEDURES FOR THE SUBSEQUENT PUBLIC MEETING, INCLUDING THE OPPORTUNITY FOR REASONABLE DISCLOSURE, DISCOVERY, SUBPOENAS, DIRECT EXAMINATION, AND CROSS EXAMINATION, AND MAY PROMULGATE RULES THAT WILL ASSURE ORDERLY PROCEDURES. SUBJECT TO THESE RIGHTS AND REQUIREMENTS, WHERE A MEETING WILL BE EXPEDITED AND THE INTERESTS OF THE PARTICIPANTS WILL NOT BE SUBSTANTIALLY PREJUDICED THEREBY, THE BOARD MAY RECEIVE ALL OR PART OF THE EVIDENCE IN WRITTEN FORM.

(III) THE BOARD'S FINAL WRITTEN DETERMINATION REGARDING THE DECREASE SHALL STATE ITS EFFECTIVE DATE, BE MAILED PROMPTLY TO THE PERSONS WHO APPEARED BY WRITTEN OR ORAL COMMENT AT THE BOARD'S PROCEEDING, AND BE FILED PROMPTLY WITH THE WATER COURT. WITHIN THIRTY DAYS AFTER SUCH EFFECTIVE DATE, ANY PERSON WHO APPEARED BY WRITTEN OR ORAL COMMENT AT THE BOARD'S PROCEEDING MAY FILE WITH THE WATER COURT AND SERVE THE BOARD A PETITION FOR JUDICIAL REVIEW OF THE BOARD'S DETERMINATION THAT THE DECREED APPROPRIATION AS DECREASED WILL PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE, BASED ON THE ADMINISTRATIVE RECORD AND UTILIZING THE CRITERIA OF SECTION 24-4-106 (6) AND (7), C.R.S. ANY SUCH PERSON MAY REQUEST A STAY IN ACCORDANCE WITH THE CRITERIA OF SECTION 24-4-106 (5), C.R.S., PENDING THE REVIEW PROCEEDING. IF NO PETITION IS FILED, THE COURT SHALL PROMPTLY ENTER AN ORDER DECREASING THE BOARD'S APPROPRIATION DECREE IN ACCORDANCE WITH THE BOARD'S WRITTEN

DETERMINATION. IF A PETITION IS FILED, THE COURT SHALL PROMPTLY ORDER BRIEFING AND ORAL ARGUMENT AND RENDER ITS DECISION TO AFFIRM OR SET ASIDE THE BOARD'S DETERMINATION. IF THE BOARD'S DETERMINATION IS AFFIRMED, THE COURT SHALL PROMPTLY ENTER AN ORDER DECREASING THE BOARD'S APPROPRIATION DECREE IN ACCORDANCE WITH THE BOARD'S WRITTEN DETERMINATION. IF THE BOARD'S DETERMINATION IS SET ASIDE, THE COURT SHALL ENTER ITS ORDER OF RELIEF UNDER THE PROVISIONS OF SECTION 24-4-106 (7), C.R.S. APPELLATE REVIEW OF THE COURT'S ORDER SHALL BE AS ALLOWED IN OTHER WATER MATTERS.

(c) THE BOARD'S DETERMINATIONS REGARDING THE MATTERS TO BE DETERMINED BY THE BOARD UNDER PARAGRAPH (c) OF SUBSECTION (3) OF THIS SECTION AND PARAGRAPH (d) OF THIS SUBSECTION (4) FOR NEW APPROPRIATIONS SHALL BE SUBJECT TO JUDICIAL REVIEW IN THE WATER COURT APPLICATION AND DECREE PROCEEDINGS INITIATED BY THE BOARD, BASED ON THE BOARD'S ADMINISTRATIVE RECORD AND UTILIZING THE CRITERIA OF SECTION 24-4-106 (6) AND (7), C.R.S. THE BOARD MAY FILE APPLICATIONS FOR CHANGES OF WATER RIGHTS AND AUGMENTATION PLANS, AND THE WATER COURT SHALL DETERMINE MATTERS THAT ARE WITHIN THE SCOPE OF SECTION 37-92-305.

(d) THE BOARD MAY PARTICIPATE IN THE RECOVERY IMPLEMENTATION PROGRAM FOR ENDANGERED FISH SPECIES IN THE UPPER COLORADO RIVER BASIN AND APPROPRIATE AND OBTAIN DECREES FOR MINIMUM INSTREAM FLOWS OR NATURAL LAKE LEVELS, INCLUDING DECREE PROVISIONS FOR MODIFICATION AND ENFORCEMENT, THE IMPLEMENTATION OF WHICH SHALL NOT BE SUBJECT TO PARAGRAPH (b) OF THIS SUBSECTION (4), AS IT DETERMINES WILL PRESERVE THE NATURAL ENVIRONMENT OF THE COLORADO RIVER ENDANGERED FISH WITHIN COLORADO TO A REASONABLE DEGREE WHILE PROTECTING EXISTING USES WITHIN COLORADO AND NOT DEPRIVING THE PEOPLE OF THE STATE OF COLORADO OF THE BENEFICIAL USE OF THOSE WATERS AVAILABLE BY LAW AND INTERSTATE COMPACT.

(e) SUB-SUBPARAGRAPHS (A) AND (C) OF SUBPARAGRAPH (II) OF PARAGRAPH (b) OF THIS SUBSECTION (4) SHALL NOT APPLY TO THE BOARD'S CONSIDERATION OF ANY PROPOSED DECREASE WHICH WAS INCLUDED IN A MEETING NOTICE AND AGENDA ISSUED BY THE BOARD PRIOR TO THE EFFECTIVE DATE OF THIS SUBSECTION (4), WHETHER OR NOT THE BOARD HAD SCHEDULED OR TAKEN ANY ACTION ON THE PROPOSAL BY SUCH DATE. SUB-SUBPARAGRAPH (D) OF SUBPARAGRAPH (II) OF PARAGRAPH (b) OF THIS SUBSECTION (4) SHALL NOT APPLY TO SUCH A PROPOSAL SO LONG AS THE BOARD ESTABLISHES FAIR AND FORMAL PROCEDURES PURSUANT TO SUCH SUB-SUBPARAGRAPH (D) AT OR BEFORE THE FIRST PUBLIC MEETING THEREON FOR ANY SUBSEQUENT PUBLIC MEETING, INCLUDING THE OPPORTUNITY FOR REASONABLE DISCLOSURE, DISCOVERY, SUBPOENAS, DIRECT EXAMINATION, AND CROSS EXAMINATION OF WITNESSES. ALL OTHER PROVISIONS IN PARAGRAPH (b) OF THIS SUBSECTION (4) SHALL APPLY TO ANY DECREASE AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (4).

SECTION 2. 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: May 23, 1996