

## CHAPTER 151

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**WATER AND IRRIGATION**

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**HOUSE BILL 02-1414**

BY REPRESENTATIVE(S) Hoppe, Alexander, Kester, Borodkin, Coleman, Daniel, Fritz, Harvey, Hodge, Johnson, Mitchell, Rippy, Smith, Snook, Webster, Weddig, White, Williams T., Young, Boyd, Crane, Groff, Hefley, Jahn, Lawrence, Mace, Madden, Marshall, Sinclair, Spradley, Stafford, Vigil, and Williams S.;  
also SENATOR(S) Entz, Isgar, Andrews, Chlouber, Dyer, Hanna, Hernandez, Hillman, Matsunaka, Musgrave, Pascoe, Perlmutter, Taylor, and Teck.

**AN ACT**

**CONCERNING THE CONTINUED AUTHORITY OF THE STATE ENGINEER TO APPROVE LIMITED SUBSTITUTE WATER SUPPLY PLANS, AND MAKING AN APPROPRIATION IN CONNECTION THEREWITH.**

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

**SECTION 1.** Part 3 of article 92 of title 37, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

**37-92-308. Substitute water supply plans - special procedures for review.**

(1) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

(a) THERE ARE CERTAIN CIRCUMSTANCES UNDER WHICH THE TIME REQUIRED TO GO THROUGH THE WATER COURT ADJUDICATION PROCESS CAN BE PROBLEMATIC FOR SOME WATER USERS. PRIOR TO JANUARY 1, 2002, SUBSTITUTE WATER SUPPLY PLANS HAD COME INTO COMMON USAGE FOR A NUMBER OF WATER USERS, AND BASED ON THIS PRECEDENT, IT APPEARS DESIRABLE TO ESTABLISH SOME ADDITIONAL AUTHORITY FOR THE STATE ENGINEER TO APPROVE SUBSTITUTE WATER SUPPLY PLANS.

(b) PRIOR TO JANUARY 1, 2002, THE GENERAL ASSEMBLY GAVE THE STATE ENGINEER CERTAIN AUTHORITY TO APPROVE EXCHANGES AND SUBSTITUTE WATER SUPPLY PLANS, INCLUDING SUBSTITUTE WATER SUPPLY PLANS INVOLVING SAND AND GRAVEL MINES APPROVED PURSUANT TO SECTIONS 37-90-137 (11) AND 37-80-120 (5); EXCHANGES PURSUANT TO SECTIONS 37-80-120, 37-83-104, 37-80-106, AND OTHER STATUTES AUTHORIZING EXCHANGES; AND WATER USES THAT ARE PART OF THE ARKANSAS RIVER WATER BANK PILOT PROGRAM APPROVED PURSUANT TO ARTICLE

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

80.5 OF THIS TITLE; AND THIS SECTION SHALL NOT APPLY TO SUCH PLANS AND EXCHANGES.

(c) PRIOR TO JANUARY 1, 2002, THE GENERAL ASSEMBLY GAVE THE STATE ENGINEER ADMINISTRATIVE AUTHORITY TO REGULATE WELLS UPON PROMULGATION OF RULES FOR A RIVER BASIN OR AQUIFER, SUBJECT TO THE REVIEW OF THE WATER JUDGE AS PROVIDED IN SECTION 37-92-501 (3); AND NOTHING IN THIS SECTION SHALL BE CONSTRUED TO MODIFY SUCH AUTHORITY.

(2) IN ADDITION TO THE AUTHORITY PREVIOUSLY GRANTED TO THE STATE ENGINEER, LISTED IN SUBSECTION (1) OF THIS SECTION, THE STATE ENGINEER IS AUTHORIZED TO REVIEW AND APPROVE SUBSTITUTE WATER SUPPLY PLANS THAT ALLOW OUT-OF-PRIORITY DIVERSIONS ONLY UNDER THE CIRCUMSTANCES AND PURSUANT TO THE PROCEDURES SET FORTH IN THIS SECTION.

(3) FOR SUBSTITUTE WATER SUPPLY PLANS APPROVED BY THE STATE ENGINEER IN WRITING PRIOR TO JANUARY 1, 2002, THE STATE ENGINEER MAY APPROVE ONE RENEWAL OF SUCH PLAN ON THE SAME OR SIMILAR TERMS AS THOSE CONTAINED IN THE PREVIOUS APPROVAL OF SUCH PLAN. THE RENEWAL PLAN REQUEST MAY INCLUDE AMENDMENTS TO THE PREVIOUSLY APPROVED PLAN SO LONG AS THE AMENDMENTS ADDRESS THE SAME WATER USES OR PROJECTS AS WERE INCLUDED IN THE PREVIOUSLY APPROVED PLAN. SUCH RENEWAL MAY NOT EXTEND PAST DECEMBER 31, 2002. AFTER SUCH DATE, THE PLAN SHALL COMPLY WITH THE PROVISIONS OF SUBSECTION (4) OR (5) OF THIS SECTION IN ORDER TO CONTINUE OPERATION AS A SUBSTITUTE WATER SUPPLY PLAN. RENEWAL OF A PREVIOUSLY APPROVED SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO THIS SUBSECTION (3) SHALL NOT REQUIRE NOTICE TO OTHER WATER USERS. NEITHER THE APPROVAL NOR THE DENIAL OF A SUBSTITUTE WATER SUPPLY PLAN BY THE STATE ENGINEER SHALL CREATE ANY PRESUMPTIONS, SHIFT THE BURDEN OF PROOF, OR BE A DEFENSE IN ANY LEGAL ACTION THAT MAY BE INITIATED CONCERNING A RENEWED SUBSTITUTE WATER SUPPLY PLAN.

(4) (a) BEGINNING JANUARY 1, 2002, IF AN APPLICATION FOR APPROVAL OF A PLAN FOR AUGMENTATION HAS BEEN FILED WITH A WATER COURT AND THE COURT HAS NOT ISSUED A DECREE, THE STATE ENGINEER MAY APPROVE THE TEMPORARY OPERATION OF SUCH PLAN AS A SUBSTITUTE WATER SUPPLY PLAN IF THE FOLLOWING CONDITIONS ARE MET:

(I) THE WATER COURT APPLICANT HAS FILED A REQUEST FOR APPROVAL OF THE SUBSTITUTE WATER SUPPLY PLAN WITH THE STATE ENGINEER;

(II) THE APPLICANT HAS PROVIDED WRITTEN NOTICE OF THE REQUEST FOR APPROVAL OF THE SUBSTITUTE WATER SUPPLY PLAN BY FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES WHO HAVE FILED A STATEMENT OF OPPOSITION TO THE PLAN IN WATER COURT AND PROOF OF SUCH NOTICE IS FILED WITH THE STATE ENGINEER;

(III) THE STATE ENGINEER HAS GIVEN THE OPPOSERS IN THE WATER COURT CASE THIRTY DAYS AFTER THE DATE OF MAILING OF SUCH NOTICE TO FILE COMMENTS ON THE SUBSTITUTE WATER SUPPLY PLAN. SUCH COMMENTS SHALL INCLUDE ANY CLAIM OF INJURY OR ANY TERMS AND CONDITIONS THAT SHOULD BE IMPOSED UPON THE PLAN TO PREVENT INJURY TO AN OPPOSER'S WATER RIGHTS OR DECREED CONDITIONAL

WATER RIGHTS AND ANY OTHER INFORMATION AN OPPOSER WISHES THE STATE ENGINEER TO CONSIDER IN REVIEWING THE SUBSTITUTE WATER SUPPLY PLAN REQUEST.

(IV) THE STATE ENGINEER, AFTER CONSIDERATION OF THE COMMENTS FROM ANY WATER COURT OPPOSER, HAS DETERMINED THAT THE OPERATION AND ADMINISTRATION OF SUCH PLAN WILL REPLACE ALL OUT-OF-PRIORITY DEPLETIONS IN TIME, LOCATION, AND AMOUNT IN A MANNER THAT WILL PREVENT INJURY TO OTHER WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS, INCLUDING WATER QUALITY AND CONTINUITY TO MEET THE REQUIREMENTS OF USE TO WHICH THE SENIOR APPROPRIATION HAS NORMALLY BEEN PUT, PURSUANT TO SECTION 37-80-120(3), AND WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACTS. THE STATE ENGINEER SHALL IMPOSE SUCH TERMS AND CONDITIONS AS ARE NECESSARY TO ENSURE THAT THESE STANDARDS ARE MET. IN MAKING SUCH DETERMINATIONS, THE STATE ENGINEER SHALL NOT BE REQUIRED TO HOLD ANY FORMAL HEARINGS OR CONDUCT ANY OTHER FORMAL PROCEEDINGS, BUT MAY CONDUCT A HEARING OR FORMAL PROCEEDING IF THE STATE ENGINEER FINDS IT NECESSARY TO ADDRESS THE ISSUES.

(b) A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO THIS SUBSECTION (4) SHALL NOT BE APPROVED FOR A PERIOD OF MORE THAN ONE YEAR; EXCEPT THAT AN APPLICANT MAY REQUEST THE RENEWAL OF A PLAN BY REPEATING THE APPLICATION PROCESS DESCRIBED IN THIS SUBSECTION (4). IF AN APPLICANT REQUESTS A RENEWAL OF A PLAN THAT WOULD EXTEND THE PLAN PAST THREE YEARS FROM THE INITIAL DATE OF APPROVAL, THE APPLICANT SHALL DEMONSTRATE TO THE STATE ENGINEER THAT THE DELAY IN OBTAINING A WATER COURT DECREE IS JUSTIFIABLE AND THAT NOT BEING ABLE TO CONTINUE OPERATING UNDER A SUBSTITUTE WATER SUPPLY PLAN UNTIL A DECREE IS ENTERED WILL CAUSE UNDUE HARDSHIP TO THE APPLICANT. IF AN APPLICANT REQUESTS RENEWAL OF A PLAN THAT WOULD EXTEND THE PLAN PAST FIVE YEARS FROM THE INITIAL DATE OF APPROVAL, THE APPLICANT SHALL DEMONSTRATE TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION THAT THE DELAY IN OBTAINING A DECREE HAS BEEN JUSTIFIABLE AND THAT NOT BEING ABLE TO CONTINUE OPERATING UNDER A SUBSTITUTE WATER SUPPLY PLAN UNTIL A DECREE IS ENTERED WILL CAUSE UNDUE HARDSHIP TO THE APPLICANT.

(c) WHEN THE STATE ENGINEER APPROVES OR DENIES A SUBSTITUTE WATER SUPPLY PLAN, THE STATE ENGINEER SHALL SERVE A COPY OF THE DECISION ON ALL PARTIES TO THE PENDING WATER COURT APPLICATION BY FIRST-CLASS MAIL. NEITHER THE APPROVAL NOR THE DENIAL BY THE STATE ENGINEER SHALL CREATE ANY PRESUMPTIONS, SHIFT THE BURDEN OF PROOF, OR SERVE AS A DEFENSE IN THE PENDING WATER COURT CASE OR ANY OTHER LEGAL ACTION THAT MAY BE INITIATED CONCERNING THE SUBSTITUTE WATER SUPPLY PLAN. ANY APPEAL OF A DECISION MADE BY THE STATE ENGINEER CONCERNING A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO THIS SUBSECTION (4) SHALL BE TO THE WATER JUDGE OF THE APPLICABLE WATER DIVISION WITHIN THIRTY DAYS AND SHALL BE CONSOLIDATED WITH THE APPLICATION FOR APPROVAL OF THE PLAN FOR AUGMENTATION.

(5) (a) BEGINNING JANUARY 1, 2002, FOR NEW WATER USE PLANS INVOLVING OUT-OF-PRIORITY DIVERSIONS, IF NO APPLICATION FOR APPROVAL OF A PLAN FOR AUGMENTATION HAS BEEN FILED WITH A WATER COURT AND THE WATER USE PROPOSED AND THE DEPLETIONS ASSOCIATED WITH SUCH WATER USE WILL BE FOR A

LIMITED DURATION NOT TO EXCEED FIVE YEARS, THE STATE ENGINEER MAY APPROVE SUCH PLAN AS A SUBSTITUTE WATER SUPPLY PLAN IF THE FOLLOWING CONDITIONS ARE MET:

(I) THE APPLICANT HAS FILED A REQUEST FOR APPROVAL OF THE SUBSTITUTE WATER SUPPLY PLAN WITH THE STATE ENGINEER;

(II) THE APPLICANT HAS PROVIDED WRITTEN NOTICE OF THE REQUEST FOR APPROVAL OF THE SUBSTITUTE WATER SUPPLY PLAN BY FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST FOR THE WATER DIVISION IN WHICH THE PROPOSED PLAN IS LOCATED AND PROOF OF SUCH NOTICE IS FILED WITH THE STATE ENGINEER;

(III) THE STATE ENGINEER HAS GIVEN THE OWNERS OF WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS THIRTY DAYS AFTER THE DATE OF MAILING OF SUCH NOTICE TO FILE COMMENTS ON THE SUBSTITUTE WATER SUPPLY PLAN. SUCH COMMENTS SHALL INCLUDE ANY CLAIM OF INJURY OR ANY TERMS AND CONDITIONS THAT SHOULD BE IMPOSED UPON THE PLAN TO PREVENT INJURY TO A PARTY'S WATER RIGHTS OR DECREED CONDITIONAL WATER RIGHTS AND ANY OTHER INFORMATION THE OPPOSER WISHES THE STATE ENGINEER TO CONSIDER IN REVIEWING THE SUBSTITUTE WATER SUPPLY PLAN REQUEST.

(IV) THE STATE ENGINEER, AFTER CONSIDERATION OF THE COMMENTS FROM ANY OPPOSER, HAS DETERMINED THAT THE OPERATION AND ADMINISTRATION OF SUCH PLAN WILL REPLACE ALL OUT-OF-PRIORITY DEPLETIONS IN TIME, LOCATION, AND AMOUNT IN A MANNER THAT WILL PREVENT INJURY TO OTHER WATER RIGHTS AND DECREED CONDITIONAL WATER RIGHTS, INCLUDING WATER QUALITY AND CONTINUITY TO MEET THE REQUIREMENTS OF USE TO WHICH THE SENIOR APPROPRIATION HAS NORMALLY BEEN PUT, PURSUANT TO SECTION 37-80-120 (3) AND WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACTS. THE STATE ENGINEER SHALL IMPOSE SUCH TERMS AND CONDITIONS AS ARE NECESSARY TO ENSURE THAT THESE STANDARDS ARE MET. IN MAKING THE DETERMINATIONS SPECIFIED IN THIS SUBPARAGRAPH (IV), THE STATE ENGINEER SHALL NOT BE REQUIRED TO HOLD ANY FORMAL HEARINGS OR CONDUCT ANY OTHER FORMAL PROCEEDINGS, BUT MAY CONDUCT A HEARING OR FORMAL PROCEEDING IF THE STATE ENGINEER FINDS IT NECESSARY TO ADDRESS THE ISSUES.

(b) A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO THIS SUBSECTION (5) SHALL NOT BE APPROVED FOR A PERIOD OF MORE THAN ONE YEAR; EXCEPT THAT AN APPLICANT MAY REQUEST THE RENEWAL OF A PLAN BY REPEATING THE APPLICATION PROCESS DESCRIBED IN THIS SUBSECTION (5). HOWEVER, IN NO EVENT SHALL ANY PLAN APPROVED PURSUANT TO THIS SUBSECTION (5) BE RENEWED BEYOND FIVE YEARS AFTER THE INITIAL DATE OF APPROVAL.

(c) WHEN THE STATE ENGINEER APPROVES OR DENIES A SUBSTITUTE WATER SUPPLY PLAN, THE STATE ENGINEER SHALL SERVE A COPY OF THE DECISION ON ALL PARTIES TO THE APPLICATION BY FIRST-CLASS MAIL OR, IF SUCH PARTIES HAVE SO ELECTED, BY ELECTRONIC MAIL. NEITHER THE APPROVAL NOR THE DENIAL BY THE STATE ENGINEER SHALL CREATE ANY PRESUMPTIONS, SHIFT THE BURDEN OF PROOF, OR SERVE AS A DEFENSE IN ANY LEGAL ACTION THAT MAY BE INITIATED CONCERNING THE SUBSTITUTE WATER SUPPLY PLAN. ANY APPEAL OF A DECISION MADE BY THE STATE ENGINEER

CONCERNING A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO THIS SUBSECTION (5) SHALL BE MADE TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION WITHIN THIRTY DAYS, WHO SHALL HEAR SUCH APPEAL ON AN EXPEDITED BASIS.

(6) THE STATE ENGINEER SHALL ESTABLISH A SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST FOR EACH WATER DIVISION FOR THE PURPOSES OF NOTIFYING INTERESTED PARTIES PURSUANT TO SUBPARAGRAPH (II) OF PARAGRAPH (a) OF SUBSECTION (5) OF THIS SECTION. BEGINNING IN JULY 2002, AND IN JANUARY OF EACH YEAR THEREAFTER, IN ORDER TO ESTABLISH SUCH NOTIFICATION LIST, THE WATER CLERKS IN EACH DIVISION SHALL INCLUDE IN THE WATER COURT RESUME AN INVITATION TO BE INCLUDED ON SUCH NOTIFICATION LIST FOR THE APPLICABLE WATER DIVISION. PERSONS ON THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST SHALL RECEIVE NOTICE OF ALL SUBSTITUTE WATER SUPPLY PLANS FILED IN THAT WATER DIVISION PURSUANT TO SUBSECTION (5) OF THIS SECTION BY EITHER FIRST-CLASS MAIL OR, IF A PERSON SO REQUESTS, BY ELECTRONIC MAIL. PERSONS MAY BE REQUIRED TO PAY A FEE, NOT TO EXCEED TWELVE DOLLARS PER YEAR, TO BE PLACED ON THE NOTIFICATION LIST.

(7) BEGINNING JANUARY 1, 2002, THE STATE ENGINEER MAY APPROVE A SUBSTITUTE WATER SUPPLY PLAN IF THE STATE ENGINEER DETERMINES SUCH PLAN IS NEEDED TO ADDRESS AN EMERGENCY SITUATION AND THAT THE PLAN WILL NOT CAUSE INJURY TO THE VESTED WATER RIGHTS OR DECREED CONDITIONAL WATER RIGHTS OF OTHERS OR IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACT. SUCH PLAN SHALL NOT BE IMPLEMENTED FOR MORE THAN NINETY DAYS. FOR PURPOSES OF THIS SECTION, "EMERGENCY SITUATION" MEANS A SITUATION AFFECTING PUBLIC HEALTH OR SAFETY WHERE A SUBSTITUTE WATER SUPPLY PLAN NEEDS TO BE IMPLEMENTED MORE QUICKLY THAN THE OTHER PROCEDURES SET FORTH IN THIS SECTION ALLOW. IN SUCH SITUATION, NOTICE TO OTHER WATER USERS SHALL NOT BE REQUIRED. NEITHER THE APPROVAL NOR THE DENIAL BY THE STATE ENGINEER SHALL CREATE ANY PRESUMPTIONS, SHIFT THE BURDEN OF PROOF, OR BE A DEFENSE IN ANY LEGAL ACTION THAT MAY BE INITIATED CONCERNING AN EMERGENCY SUBSTITUTE WATER SUPPLY PLAN.

(8) AFTER JULY 1, 2002, WATER USERS REQUESTING APPROVAL OF A NEW PLAN OR A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO THIS SECTION SHALL PAY A FEE OF THREE HUNDRED DOLLARS. THE FEES SHALL BE USED BY THE STATE ENGINEER FOR THE PUBLISHING AND ADMINISTRATIVE COSTS FOR PROCESSING APPLICATIONS AND RENEWALS AND ADMINISTERING PLANS. SUCH FEES SHALL BE DEPOSITED IN THE GROUND WATER MANAGEMENT CASH FUND PURSUANT TO SECTION 37-80-111.5.

**SECTION 2.** 37-80-111.5 (1) (d), Colorado Revised Statutes, is amended to read:

**37-80-111.5. Fees - water data bank cash fund - division of water resources publication cash fund - satellite monitoring system cash fund - ground water management cash fund - created.** (1) (d) The state engineer shall collect fees pursuant to sections 37-90-105 (3) (a) and (4), 37-90-107 (7) (c) (I) and (7) (d) (I), 37-90-108 (4) and (6), 37-90-116 (1) (a), (1) (c), (1) (h), and (1) (i), 37-90-137 (2), (3) (a), and (3) (c), ~~and~~ 37-92-602 (3) (a) and (5), AND 37-92-308. All such fees shall be transmitted to the state treasurer, who shall credit the same to the division of water resources ground water management cash fund, which is hereby created; except that, of each fee collected pursuant to section 37-90-107 (7) (c) (I) and (7) (d) (I) and

section 37-90-116 (1) (a), (1) (h), and (1) (i), thirty dollars shall be credited to the general fund; of each fee collected pursuant to section 37-90-137 (2), (3) (a) (I), and (3) (a) (II) and section 37-92-602 (3) (a) for wells applied for pursuant to section 37-92-602 (3) (b), twenty-five dollars shall be credited to the general fund; of each fee collected pursuant to section 37-90-116 (1) (c), ten dollars shall be credited to the general fund; and, of each fee collected pursuant to section 37-90-105 (3) (a) and (4) (a) and section 37-92-602 (3) (a) for wells applied for pursuant to section 37-92-602 (3) (c) and (5), five dollars shall be credited to the general fund. Moneys in the ground water management cash fund shall be expended by the state engineer for the purposes of developing an automated well permit processing system that will expedite the issuance of well permits, creating and maintaining a ground water information management system, establishing a ground water data network, establishing ground water recharge programs, conducting ground water investigations, and for other ground water related activities that are deemed necessary by the state engineer in performing statutory duties, subject to appropriation by the general assembly. Data in the ground water data network shall be made available to the public by the office of the state engineer as expeditiously as possible.

**SECTION 3. Appropriation.** In addition to any other appropriation, there is hereby appropriated, out of any moneys in the ground water management cash fund, created in section 37-80-111.5 (1) (d), Colorado Revised Statutes, not otherwise appropriated, to the department of natural resources, division of water resources, for the fiscal year beginning July 1, 2002, the sum of forty-eight thousand dollars (\$48,000), or so much thereof as may be necessary, for the implementation of this act.

**SECTION 4. 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, 2002