

CHAPTER 390

WATER AND IRRIGATION

HOUSE BILL 09-1303

BY REPRESENTATIVE(S) Curry, Fischer, Looper, McNulty, Nikkel, Pace, Priola, Roberts, Solano, Stephens, Tipton, Vigil, Baumgardner, Hullinghorst, Labuda;
also SENATOR(S) Isgar, Boyd, Gibbs, Groff, Hodge, Kester, Kopp, Penry, Schwartz, Veiga.

AN ACT

CONCERNING THE APPLICATION OF ENGINEERING CRITERIA TO INCREASE EFFICIENCY IN THE ADMINISTRATION OF WELLS THAT WITHDRAW GROUND WATER IN CONJUNCTION WITH THE MINING OF MINERALS, AND, IN CONNECTION THEREWITH, INTEGRATING WELLS THAT WITHDRAW GROUND WATER IN CONJUNCTION WITH THE MINING OF MINERALS INTO THE PRIOR APPROPRIATION SYSTEM AND EXTENDING THE TIME SCHEDULE FOR WELL OWNERS TO CORRECT DEFICIENCIES IN PERMITTING AND OPERATION.

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

SECTION 1. 37-90-103 (10.5), Colorado Revised Statutes, is amended, and the said 37-90-103 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

37-90-103. Definitions - repeal. As used in this article, unless the context otherwise requires:

(10.5) "Nontributary ground water" means that ground water, located outside the boundaries of any designated ground water basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years OF CONTINUOUS WITHDRAWAL, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101 (2) and 37-92-102 (1) (b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal. The determination of whether ground water is nontributary shall be based on aquifer conditions existing at the time of permit application; except that, in recognition of the de minimis amount of water discharging from the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers into surface streams due to artesian pressure, when compared with the great economic importance of the ground water in those aquifers, and the feasibility and requirement of full augmentation by wells located in the

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

tributary portions of those aquifers, it is specifically found and declared that, in determining whether ground water of the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers is nontributary, it shall be assumed that the hydrostatic pressure level in each such aquifer has been lowered at least to the top of that aquifer throughout that aquifer; except that not nontributary ground water, as defined in subsection (10.7) of this section, in the Denver basin shall not become nontributary ground water as a result of the aquifer's hydrostatic pressure level dropping below the alluvium of an adjacent stream due to Denver basin well pumping activity. Nothing in this subsection (10.5) shall preclude the designation of any aquifer or basin, or any portion thereof, which is otherwise eligible for designation under the standard set forth in subsection (6) of this section relating to ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of a basin.

(10.9) "OIL AND GAS WELL" MEANS A WELL PERMITTED BY THE COLORADO OIL AND GAS CONSERVATION COMMISSION OR A WELL AUTHORIZED BY A FEDERAL OR TRIBAL ENTITY FOR THE PRIMARY PURPOSE OF MINING, INCLUDING EXPLORATION OR PRODUCTION, OF PETROLEUM PRODUCTS.

SECTION 2. 37-90-137 (2) (b), Colorado Revised Statutes, is amended to read:

37-90-137. Permits to construct wells outside designated basins - fees - permit no ground water right - evidence - time limitation - well permits - repeal. (2) (b) (I) ~~If the state engineer finds that there is unappropriated water available for withdrawal by the proposed well and that the vested water rights of others will not be materially injured, and can be substantiated by hydrological and geological facts,~~ The state engineer shall issue a permit to construct a well ~~but not otherwise~~ ONLY IF:

(A) THE STATE ENGINEER FINDS, AS SUBSTANTIATED BY HYDROLOGICAL AND GEOLOGICAL FACTS, THAT THERE IS UNAPPROPRIATED WATER AVAILABLE FOR WITHDRAWAL BY THE PROPOSED WELL AND THAT THE VESTED WATER RIGHTS OF OTHERS WILL NOT BE MATERIALLY INJURED; AND

(B) Except ~~that no permit shall be issued unless~~ AS SPECIFIED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (b), the location of the proposed well will be ~~at a distance of~~ more than six hundred feet from an existing well.

(II) ~~but~~ If the state engineer, after a hearing, finds that circumstances in a particular instance so warrant, or if a court decree is entered for the proposed well location after notice has been given in accordance with SUB-SUBPARAGRAPH (B) OF THIS subparagraph (II), ~~of this paragraph (b),~~ the state engineer may issue a permit without regard to the limitation specified in SUB-SUBPARAGRAPH (B) OF SUBPARAGRAPH (I) OF this ~~subsection (2)~~ PARAGRAPH (b); EXCEPT THAT NO HEARING SHALL BE REQUIRED AND THE STATE ENGINEER MAY ISSUE A WELL PERMIT WITHOUT REGARD TO THE LIMITATION SPECIFIED IN SUB-SUBPARAGRAPH (B) OF SUBPARAGRAPH (I) OF THIS PARAGRAPH (b):

~~(H)~~ (A) If the state engineer notifies the owners of all wells within six hundred

feet of the proposed well by certified mail and receives no response within the time set forth in the notice; ~~no hearing shall be required.~~

(B) If the proposed well is part of a water court proceeding adjudicating the water right for the well, or if the proposed well is part of an adjudication of a plan for augmentation or change of water right ~~no hearing by the state engineer shall be required~~ AND if evidence is provided to the water court that the applicant has given notice of the water court application, at least ten days before making the application, by registered or certified mail, return receipt requested, to the owners of record of all wells within six hundred feet of the proposed well;

~~(H) (C) The hearing requirement shall not apply to wells located less than six hundred feet from existing wells~~ If the proposed well will serve an individual residential site and the proposed pumping rate will not exceed fifteen gallons per minute; EXCEPT THAT, IF THERE IS AN OIL AND GAS WELL WITHIN SIX HUNDRED FEET OF THE SURFACE LOCATION OF THE PROPOSED WELL, THE STATE ENGINEER SHALL NOTIFY THE OWNER OF SUCH WELL BY CERTIFIED MAIL OF THE PROPOSED WELL AND MAY ISSUE THE WELL PERMIT SUBJECT TO THE LIMITATIONS SPECIFIED IN SUB-SUBPARAGRAPH (A) OF SUBPARAGRAPH (I) OF THIS PARAGRAPH (b);

(D) IF THE PROPOSED WELL IS AN OIL AND GAS WELL AND THE ONLY WELLS WITHIN SIX HUNDRED FEET OF THE SURFACE LOCATION OF THE PROPOSED WELL ARE OIL AND GAS WELLS; OR

(E) IF THE PROPOSED WELL IS AN OIL AND GAS WELL, THERE IS AN EXISTING PRODUCTION WATER WELL THAT IS NOT AN OIL AND GAS WELL WITHIN SIX HUNDRED FEET OF THE SURFACE LOCATION OF THE PROPOSED OIL AND GAS WELL, THE STATE ENGINEER HAS PROVIDED WRITTEN NOTICE OF THE APPLICATION BY CERTIFIED MAIL TO THE OWNERS OF SUCH WELLS THAT ARE NOT OIL AND GAS WELLS WITHIN THIRTY DAYS AFTER RECEIPT OF A COMPLETE APPLICATION FOR THE PROPOSED WELL, AND THE STATE ENGINEER HAS GIVEN THOSE TO WHOM NOTICE WAS PROVIDED THIRTY DAYS AFTER THE DATE OF MAILING OF SUCH NOTICE TO FILE COMMENTS ON THE PROPOSED WELL'S APPLICATION.

SECTION 3. The introductory portion to 37-90-137 (7), Colorado Revised Statutes, is amended, and the said 37-90-137 (7) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

37-90-137. Permits to construct wells outside designated basins - fees - permit no ground water right - evidence - time limitation - well permits - rules - repeal. (7) In the case of dewatering of geologic formations by ~~removing~~ WITHDRAWING nontributary ground water to facilitate or permit mining of minerals:

(c) THE STATE ENGINEER MAY, PURSUANT TO THE "STATE ADMINISTRATIVE PROCEDURE ACT", ADOPT RULES TO ASSIST WITH THE ADMINISTRATION OF THIS SUBSECTION (7). IN ALL RULE-MAKING PROCEEDINGS AUTHORIZED BY THIS SUBSECTION (7), THE STATE ENGINEER SHALL AFFORD INTERESTED PERSONS THE RIGHT OF CROSS-EXAMINATION. JUDICIAL REVIEW OF ALL RULES PROMULGATED PURSUANT TO THIS SUBSECTION (7) SHALL BE IN ACCORDANCE WITH THE "STATE ADMINISTRATIVE PROCEDURE ACT"; EXCEPT THAT VENUE FOR SUCH REVIEW SHALL LIE EXCLUSIVELY WITH THE WATER JUDGE OR JUDGES FOR THE WATER DIVISION OR

DIVISIONS WITHIN WHICH THE GROUND WATER THAT IS THE SUBJECT OF SUCH RULES IS LOCATED. ANY RULES PROMULGATED PURSUANT TO THIS SUBSECTION (7) SHALL NOT CONFLICT WITH EXISTING LAWS AND SHALL NOT AFFECT THE VALIDITY OF GROUND WATER WELL PERMITS EXISTING PRIOR TO THE ADOPTION OF SUCH RULES.

SECTION 4. 37-90-138 (2), Colorado Revised Statutes, is amended to read:

37-90-138. Waste - violations - permits. (2) If the state engineer finds any well to have been drilled or maintained in a manner or condition OR TO BE WITHDRAWING GROUND WATER contrary to any of the provisions of this article or the ~~regulations~~ RULES issued under this article, ~~he~~ THE STATE ENGINEER shall immediately notify the user in writing of such violation and give ~~him~~ THE USER such time as may reasonably be necessary, not to exceed sixty days, to correct deficiencies. If the user fails or refuses to ~~make the changes~~ CORRECT THE DEFICIENCIES within the allowed time, the state engineer is authorized to enter upon ~~his~~ THE USER'S land and do whatever is necessary in order that the user comply with ~~the provisions of this article~~ or ~~regulations~~ RULES issued under this article. PRIOR TO MARCH 31, 2010, THIS SUBSECTION (2) SHALL NOT APPLY TO OIL AND GAS WELLS.

SECTION 5. 37-92-103, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

37-92-103. Definitions. As used in this article, unless the context otherwise requires:

(5.5) "COAL BED METHANE WELL" MEANS A WELL PERMITTED BY THE COLORADO OIL AND GAS CONSERVATION COMMISSION OR A WELL AUTHORIZED BY A FEDERAL OR TRIBAL ENTITY AND CONSTRUCTED FOR THE PRIMARY PURPOSE OF PRODUCING METHANE GAS FROM A COAL BED.

SECTION 6. 37-92-308, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

37-92-308. Substitute water supply plans - special procedures for review - water adjudication cash fund - legislative declaration. (11) (a) (I) TO PROVIDE SUFFICIENT TIME TO INTEGRATE COAL BED METHANE WELLS INTO THE WATER COURT ADJUDICATION PROCESS FOR AUGMENTATION PLANS, DURING 2010, 2011, AND 2012 THE STATE ENGINEER MAY APPROVE ANNUAL SUBSTITUTE WATER SUPPLY PLANS FOR SUCH WELLS USING THE PROCEDURES AND STANDARDS SET FORTH IN THIS SUBSECTION (11). BEGINNING MARCH 31, 2010, AND ENDING DECEMBER 31, 2012, NO COAL BED METHANE WELL THAT WITHDRAWS TRIBUTARY GROUND WATER AND IMPACTS AN OVER-APPROPRIATED STREAM SHALL OPERATE UNLESS:

(A) OPERATION OF THE WELL IS AUTHORIZED PURSUANT TO THIS SECTION;

(B) THE WELL IS INCLUDED IN A PLAN FOR AUGMENTATION APPROVED BY A WATER JUDGE; OR

(C) THE WELL IS INCLUDED IN A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO SUBSECTION (4) OF THIS SECTION.

(II) BEGINNING JANUARY 1, 2013, ANY COAL BED METHANE WELL THAT WITHDRAWS TRIBUTARY GROUND WATER FROM A GEOLOGIC FORMATION IN CONJUNCTION WITH THE MINING OF MINERALS SHALL BE CONTINUOUSLY CURTAILED UNLESS THE WELL:

(A) IS INCLUDED IN A PLAN FOR AUGMENTATION APPROVED BY A WATER JUDGE;

(B) IS INCLUDED IN A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO SUBSECTION (4) OF THIS SECTION; OR

(C) CAN BE OPERATED IN PRIORITY WITHOUT AUGMENTATION.

(III) THE GENERAL ASSEMBLY FINDS THAT THE TIME PERIOD ESTABLISHED IN SUBPARAGRAPH (II) OF PARAGRAPH (b) OF THIS SUBSECTION (11) IS SUFFICIENT TO DEVELOP AUGMENTATION PLAN APPLICATIONS FOR THESE WELLS, AND THERE SHALL BE NO SUBSEQUENT EXTENSIONS OF THIS DEADLINE.

(b) FOR A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO THIS SUBSECTION (11), THE STATE ENGINEER MAY APPROVE THE TEMPORARY OPERATION OF A COAL BED METHANE WELL THAT WITHDRAWS TRIBUTARY GROUND WATER ONLY IF THE FOLLOWING CONDITIONS ARE MET:

(I) 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;

(II) ALL PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST FOR THE WATER DIVISION IN WHICH THE PROPOSED PLAN IS LOCATED HAVE 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, 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 A PARTY WISHES THE STATE ENGINEER TO CONSIDER IN REVIEWING THE SUBSTITUTE WATER SUPPLY PLAN REQUEST; AND

(III) THE STATE ENGINEER, AFTER CONSIDERATION OF THE COMMENTS RECEIVED, HAS DETERMINED THAT THE OPERATION AND ADMINISTRATION OF SUCH PLAN WILL: REPLACE ALL OUT-OF-PRIORITY DEPLETIONS OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (11) IN TIME, LOCATION, AND AMOUNT, INCLUDING DELAYED OUT-OF-PRIORITY DEPLETIONS THAT AFFECT THE STREAM SYSTEM AFTER EXPIRATION OF THE PLAN; OTHERWISE PREVENT INJURY OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (11) 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 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, WHICH MAY INCLUDE TERMS AND CONDITIONS THAT REMAIN IN EFFECT AFTER EXPIRATION OF THE PLAN SO AS TO REQUIRE THE PROPONENT OF THE PLAN TO REPLACE DELAYED OUT-OF-PRIORITY DEPLETIONS OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (11). 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.

(c) A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO THIS SUBSECTION (11) 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 (11). IN NO CASE SHALL A PLAN APPROVED PURSUANT TO THIS SUBSECTION (11) BE RENEWED BEYOND DECEMBER 31, 2012.

(d) 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 SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST FOR THE WATER DIVISION IN WHICH THE PROPOSED PLAN IS LOCATED BY FIRST-CLASS MAIL OR BY ELECTRONIC MAIL. EVERY DECISION OF THE STATE ENGINEER SHALL PROVIDE A DETAILED STATEMENT OF HOW ALL STREAM DEPLETIONS WERE CALCULATED, THE LOCATION WHERE THEY OCCUR, HOW ALL REPLACEMENT WATER SOURCES WERE QUANTIFIED, AND WHAT TERMS AND CONDITIONS WERE IMPOSED TO PREVENT INJURY TO OTHER WATER RIGHTS AND WHY THEY WERE IMPOSED.

(e) 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 (11) SHALL BE TO THE WATER JUDGE OF THE APPLICABLE WATER DIVISION WITHIN THIRTY DAYS AFTER THE DATE OF SERVICE OF THE DECISION. THE WATER JUDGE SHALL HEAR AND DETERMINE SUCH APPEAL ON AN EXPEDITED BASIS USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTIONS 37-92-304 AND 37-92-305 FOR DETERMINATION OF MATTERS REFERRED TO THE WATER JUDGE BY THE REFEREE.

SECTION 7. Applicability. This act shall apply to acts occurring on or after the effective date of this act.

SECTION 8. 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: June 2, 2009