

CHAPTER 210

WATER AND IRRIGATION

HOUSE BILL 13-1248

BY REPRESENTATIVE(S) Fischer, Conti, Coram, Fields, Gerou, Ginal, Hamner, Hullinghorst, Lebsock, Levy, Mitsch Bush, Rankin, Rosenthal, Salazar, Schafer, Vigil, Young, Duran, Labuda, Pabon, Pettersen;
also SENATOR(S) Schwartz, Todd.

AN ACT**CONCERNING AN AUTHORIZATION OF PILOT PROJECTS FOR THE LEASING OF WATER FOR MUNICIPAL USE.**

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

SECTION 1. Legislative declaration. (1) The general assembly hereby:

(a) Affirms its commitment to develop and implement programs to advance various agricultural transfer methods as alternatives to permanent agricultural dry-up, which it has funded through the "alternative agricultural water transfer sustainability grant program", enacted in the 2007, 2009, and 2012 Colorado water conservation board (board) projects bills;

(b) Recognizes that:

(I) If the status quo development trend continues, Colorado may lose over five hundred thousand irrigated acres statewide and some basins may lose as much as thirty-five percent of their irrigated acreage by 2050, as found by the board's 2010 statewide water supply initiative;

(II) The board believes that it is urgent to implement alternatives, like fallowing irrigated agricultural land for leasing water for temporary municipal use, referred to in this section as "fallowing-leasing", to traditional transfers resulting in permanent agricultural dry-up, and the board is fostering the development of these alternatives through its alternative agricultural water transfer methods competitive grant program;

(III) Both the interbasin compact committee and the basin roundtables, created

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

in section 37-75-104, Colorado Revised Statutes, have expressed a desire to minimize permanent agricultural dry-up;

(IV) Following-leasing poses hydrological issues in addition to those posed by traditional changes of water rights, and an evaluation of the hydrological issues posed may require further analysis to address questions of injury to other water rights; and

(V) The state needs to evaluate whether following-leasing is a practical alternative to permanent agricultural dry-up; and

(c) Determines that:

(I) The board, which was created in section 37-60-102, Colorado Revised Statutes, "[f]or the purpose of aiding in the protection and development of the waters of the state, for the benefit of the present and future inhabitants of the state", is the appropriate agency to test the efficacy of implementing following-leasing as an alternative to permanent agricultural dry-up; and

(II) It is appropriate to authorize the board, after the state engineer determines the issue of injury, to approve up to ten pilot projects to test following-leasing, with each project lasting up to ten years and no more than three pilot projects to be located in any one of the major river basins, namely: The South Platte river basin; the Arkansas river basin; the Rio Grande river basin; and the Colorado river basin, except as further limited by board.

SECTION 2. In Colorado Revised Statutes, 37-60-115, **add** (8) as follows:

37-60-115. Water studies - rules - repeal. (8) Following and leasing pilot projects. (a) AFTER A PERIOD OF NOTICE AND COMMENT, THE BOARD MAY, IN CONSULTATION WITH THE STATE ENGINEER AND UPON CONSIDERATION OF ANY COMMENTS SUBMITTED, SELECT THE SPONSORS OF UP TO TEN PILOT PROJECTS PURSUANT TO THE APPROVAL PROCESS SET FORTH IN PARAGRAPH (f) OF THIS SUBSECTION (8). THE BOARD SHALL NOT ITSELF SPONSOR A PILOT PROJECT, BUT THE BOARD MAY PROVIDE FINANCIAL, TECHNICAL, OR OTHER ASSISTANCE TO A PILOT PROJECT PURSUANT TO THE BOARD'S OTHER ACTIVITIES AND PROGRAMS. NO MORE THAN THREE PILOT PROJECTS MAY BE LOCATED IN ANY ONE OF THE MAJOR RIVER BASINS, NAMELY: THE SOUTH PLATTE RIVER BASIN; THE ARKANSAS RIVER BASIN; THE RIO GRANDE RIVER BASIN; AND THE COLORADO RIVER BASIN. EACH PROJECT MAY LAST UP TO TEN YEARS IN DURATION AND MUST DEMONSTRATE THE PRACTICE OF:

(I) FOLLOWING AGRICULTURAL IRRIGATION LAND; AND

(II) LEASING THE ASSOCIATED WATER RIGHTS FOR TEMPORARY MUNICIPAL USE.

(b) THE PURPOSE OF THE PILOT PROGRAM IS TO:

(I) IN FOLLOWING IRRIGATED AGRICULTURAL LAND FOR LEASING WATER FOR TEMPORARY MUNICIPAL USE, DEMONSTRATE COOPERATION AMONG DIFFERENT TYPES OF WATER USERS, INCLUDING COOPERATION AMONG SHAREHOLDERS, DITCH

COMPANIES, WATER USER ASSOCIATIONS, IRRIGATION DISTRICTS, WATER CONSERVANCY DISTRICTS, WATER CONSERVATION DISTRICTS, AND MUNICIPALITIES;

(II) EVALUATE THE FEASIBILITY OF DELIVERING LEASED WATER TO THE TEMPORARY MUNICIPAL USERS;

(III) PROVIDE SUFFICIENT DATA FROM WHICH THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, CAN EVALUATE THE EFFICACY OF USING A STREAMLINED APPROACH, SUCH AS AN ACCOUNTING AND ADMINISTRATIVE TOOL, FOR DETERMINING:

(A) HISTORICAL CONSUMPTIVE USE;

(B) RETURN FLOWS;

(C) THE POTENTIAL FOR MATERIAL INJURY TO OTHER WATER RIGHTS; AND

(D) CONDITIONS TO PREVENT MATERIAL INJURY; AND

(IV) DEMONSTRATE HOW TO OPERATE, ADMINISTER, AND ACCOUNT FOR THE PRACTICE OF FALLOWING IRRIGATED AGRICULTURAL LAND FOR LEASING WATER FOR TEMPORARY MUNICIPAL USE WITHOUT CAUSING MATERIAL INJURY TO OTHER VESTED WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER.

(c) THE BOARD SHALL NOT SELECT A PILOT PROJECT THAT INVOLVES:

(I) THE FALLOWING OF THE SAME LAND FOR MORE THAN THREE YEARS IN A TEN-YEAR PERIOD;

(II) THE FALLOWING OF MORE THAN THIRTY PERCENT OF A SINGLE IRRIGATED FARM FOR MORE THAN TEN CONSECUTIVE YEARS;

(III) THE TRANSFER OR FACILITATION OF THE TRANSFER OF WATER ACROSS THE CONTINENTAL DIVIDE BY DIRECT DIVERSION, EXCHANGE, OR OTHERWISE; OR

(IV) THE TRANSFER OR FACILITATION OF THE TRANSFER OF WATER OUT OF THE RIO GRANDE BASIN BY DIRECT DIVERSION, EXCHANGE, OR OTHERWISE.

(d) AFTER PROVIDING A REASONABLE OPPORTUNITY FOR PUBLIC COMMENT AND CONSIDERATION OF ANY COMMENTS RECEIVED, THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL ESTABLISH CRITERIA AND GUIDELINES INCLUDING AT LEAST THE FOLLOWING:

(I) AN APPLICATION FEE AND, FOR SELECTED PILOT PROJECTS, AN ANNUAL REVIEW FEE;

(II) THE INFORMATION TO BE INCLUDED IN THE APPLICATION, INCLUDING A DESCRIPTION OF THE PROPOSED PILOT PROJECT;

(III) THE MAXIMUM QUANTITY OF TRANSFERABLE CONSUMPTIVE WATER USE PER

YEAR FOR ANY SINGLE PILOT PROJECT;

(IV) NOTWITHSTANDING PARAGRAPH (a) OF THIS SUBSECTION (8), ANY GEOGRAPHIC AREAS THAT ARE NOT ELIGIBLE FOR PILOT PROJECTS;

(V) A TIME PERIOD OF AT LEAST SEVENTY-FIVE DAYS WITHIN WHICH THE BOARD SHALL RECEIVE COMMENTS ON THE APPLICATION AFTER PROVIDING NOTICE PURSUANT TO THE PROCESS SET FORTH IN PARAGRAPHS (e) AND (f) OF THIS SUBSECTION (8). THE COMMENTS MAY INCLUDE:

(A) ANY CLAIM OF INJURY;

(B) ANY TERMS AND CONDITIONS THAT THE PERSON FILING A COMMENT BELIEVES SHOULD BE IMPOSED ON THE PILOT PROJECT IN ORDER TO PREVENT INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER; AND

(C) OTHER INFORMATION THAT THE PERSON FILING THE COMMENT BELIEVES THE BOARD SHOULD CONSIDER IN REVIEWING THE APPLICATION;

(VI) CRITERIA FOR A CONFERENCE BETWEEN A PILOT PROJECT APPLICANT, THE STATE ENGINEER, AND OWNERS OF WATER RIGHTS OR A CONTRACT RIGHTS TO WATER THAT FILE COMMENTS ON THE APPLICATION, INCLUDING THE FOLLOWING REQUIREMENTS:

(A) THE CONFERENCE PARTICIPANTS MUST MEET WITHIN THIRTY DAYS AFTER FINAL COMMENTS ON THE APPLICATION HAVE BEEN SUBMITTED;

(B) AT THE CONFERENCE, THE CONFERENCE PARTICIPANTS MUST DISCUSS HOW THE PILOT PROJECT COULD BE STRUCTURED TO PREVENT MATERIAL INJURY TO OTHER WATER RIGHTS AND CONTRACT RIGHTS TO WATER; AND

(C) WITHIN FIFTEEN DAYS AFTER THE CONFERENCE, THE PILOT PROJECT APPLICANT AND THE OWNERS OF WATER RIGHTS OR CONTRACT RIGHTS TO WATER MUST FILE A JOINT REPORT WITH THE BOARD AND WITH THE STATE ENGINEER OUTLINING ANY AGREED-UPON TERMS AND CONDITIONS FOR THE PROPOSED PILOT PROJECT AND EXPLAINING THE REASONS FOR FAILING TO AGREE ON ANY TERMS AND CONDITIONS FOR THE PROPOSED PILOT PROJECT IF THE APPLICANT AND THE OWNERS FAIL TO REACH A FULL AGREEMENT AT THE CONFERENCE;

(VII) GUIDELINES FOR THE OPERATION AND ADMINISTRATION OF THE PILOT PROJECTS TO ASSURE THAT A PILOT PROJECT:

(A) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER; AND

(B) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACT;

(VIII) CRITERIA FOR SELECTING PILOT PROJECTS THAT RANGE IN SIZE AND

COMPLEXITY;

(IX) CRITERIA FOR SELECTING PILOT PROJECTS OVER A FIVE-YEAR PERIOD ENDING ON DECEMBER 31, 2018, TO PROVIDE A WINDOW FOR POTENTIAL PILOT PROJECT SPONSORS TO APPLY;

(X) A REQUIREMENT THAT A PROPOSED PILOT PROJECT:

(A) MEET APPLICABLE LOCAL GOVERNMENT LAND USE REQUIREMENTS;

(B) PREVENT EROSION AND BLOWING SOILS; AND

(C) COMPLY WITH LOCAL COUNTY NOXIOUS WEED REGULATIONS;

(XI) A REQUIREMENT THAT, DURING THE TERM OF THE PILOT PROJECT, LAND AND WATER INCLUDED IN A PILOT PROJECT IS NOT ALSO INCLUDED IN A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO SECTION 37-92-308 (5) OR (7), AN INTERRUPTIBLE WATER SUPPLY AGREEMENT PURSUANT TO SECTION 37-92-309, OR ANOTHER PILOT PROJECT;

(XII) A REQUIREMENT FOR PERIODIC REPORTS TO THE BOARD ON THE OPERATION OF THE PILOT PROJECT; AND

(XIII) A REQUIREMENT THAT PRIORITY IS GIVEN TO PILOT PROJECTS THAT CAN BE IMPLEMENTED USING EXISTING INFRASTRUCTURE.

(e) (I) FOR APPROVAL OF A PILOT PROJECT, THE APPLICANT MUST PROVIDE WRITTEN NOTICE OF THE APPLICATION, INCLUDING, AT A MINIMUM:

(A) A DESCRIPTION OF THE PROPOSED PILOT PROJECT;

(B) AN ANALYSIS OF THE HISTORICAL USE, THE HISTORICAL CONSUMPTIVE USE, AND THE HISTORICAL RETURN FLOWS OF THE WATER RIGHTS OR CONTRACT RIGHTS TO WATER PROPOSED TO BE USED FOR TEMPORARY MUNICIPAL USE; AND

(C) A DESCRIPTION OF THE SOURCE OF WATER TO BE USED TO REPLACE HISTORICAL RETURN FLOWS DURING THE PILOT PROJECT AND AFTER COMPLETION OF THE PILOT PROJECT; AND

(II) THE APPLICANT MUST PROVIDE THE WRITTEN NOTICE BY FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES THAT HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST, AS DESCRIBED IN SECTION 37-92-308 (6) FOR THE DIVISION OR DIVISIONS IN WHICH THE WATER RIGHT IS LOCATED AND IN WHICH IT WILL BE USED. THE APPLICANT MUST FILE PROOF OF THE WRITTEN NOTICE WITH THE BOARD.

(f) AFTER CONSIDERATION OF THE COMMENTS AND ANY CONFERENCE REPORTS SUBMITTED PURSUANT TO SUBPARAGRAPH (IV) OF PARAGRAPH (d) OF THIS SUBSECTION (8), THE BOARD MAY APPROVE THE PILOT PROJECT APPLICATION IF THE STATE ENGINEER HAS MADE A WRITTEN DETERMINATION THAT THE OPERATION AND ADMINISTRATION OF THE PILOT PROJECT:

(I) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER;

(II) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACT; AND

(III) THE BOARD ADOPTS ALL TERMS AND CONDITIONS RECOMMENDED BY THE STATE ENGINEER.

(g) WHEN THE BOARD APPROVES OR DENIES A PILOT PROJECT APPLICATION, IT SHALL SERVE A COPY OF THE DECISION, ALONG WITH A COPY OF THE STATE ENGINEER'S WRITTEN DETERMINATION AND ANY CONFERENCE REPORTS SUBMITTED PURSUANT TO SUBPARAGRAPH (IV) OF PARAGRAPH (d) OF THIS SUBSECTION (8), UPON ALL PARTIES TO THE APPLICATION BY FIRST-CLASS MAIL OR, IF ELECTED BY THE PARTIES, BY ELECTRONIC MAIL. THE BOARD SHALL MAIL A COPY OF THE DECISION, THE STATE ENGINEER'S WRITTEN DETERMINATION, AND ANY CONFERENCE REPORTS TO THE APPROPRIATE WATER CLERK.

(h) (I) NEITHER THE BOARD'S APPROVAL NOR THE DENIAL OF A PILOT PROJECT CREATES ANY PRESUMPTIONS, SHIFTS THE BURDEN OF PROOF, OR SERVES AS A DEFENSE IN ANY LEGAL ACTION THAT MAY ARISE CONCERNING THE PILOT PROJECT. THE BOARD'S APPROVAL OR DENIAL OF A PILOT PROJECT APPLICATION AND THE STATE ENGINEER'S WRITTEN DETERMINATION ON THE APPLICATION ARE FINAL AGENCY ACTIONS THAT MAY BE APPEALED. AN APPEAL PURSUANT TO THIS SUBSECTION (8) MUST BE FILED WITH THE APPROPRIATE WATER JUDGE AND BE MADE WITHIN THIRTY-FIVE DAYS AFTER THE BOARD'S DECISION HAS BEEN MAILED TO THE APPROPRIATE WATER CLERK.

(II) THE WATER JUDGE SHALL EXPEDITE THE APPEAL, WHICH SHALL BE DE NOVO AND USE THE PROCEDURES AND STANDARDS SET FORTH IN SECTIONS 37-92-304 AND 37-92-305 FOR DETERMINATION OF MATTERS REREFERRED TO THE WATER JUDGE BY THE REFEREE; EXCEPT THAT THE WATER JUDGE SHALL NOT DEEM A PARTY'S FAILURE EITHER TO APPEAL ALL OR ANY PART OF THE BOARD'S DECISION OR THE STATE ENGINEER'S WRITTEN DETERMINATION OR TO STATE ANY GROUNDS FOR THE APPEAL TO PRECLUDE THE PARTY FROM RAISING A CLAIM OF INJURY IN A FUTURE PROCEEDING BEFORE THE WATER JUDGE. THE PILOT PROJECT APPLICANT IS DEEMED TO BE THE APPLICANT FOR PURPOSES OF THE PROCEDURES AND STANDARDS THAT THE WATER JUDGE APPLIES TO THE APPEAL.

(i) THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL ANNUALLY REPORT TO THE WATER RESOURCES REVIEW COMMITTEE, CREATED IN SECTION 37-98-102, OR ITS SUCCESSOR COMMITTEE, ON THE REPORTED RESULTS OF THE PILOT PROJECTS. THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL PROVIDE A FINAL REPORT TO THE WATER RESOURCES REVIEW COMMITTEE, OR ITS SUCCESSOR COMMITTEE, BY JULY 1, 2029, OR THE YEAR IN WHICH THE FINAL PILOT PROJECT IS COMPLETED, IF BEFORE 2029.

(j) THIS SUBSECTION (8) IS REPEALED, EFFECTIVE JULY 1, 2030.

SECTION 3. 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 13, 2013