Legacy Ditch Company Legislation

INTERIM WATER RESOURCES REVIEW COMMITTEE

SEPTEMBER 7, 2012

History

- Initiation of Ditches (1860s)
- Adjudication Acts (1879) (1881)
  - Ditches in various stages of completion
  - Silent on irrigated acreage, contained flow rate and ditch specs
  - "Statements of Claim"

Crossing the River Platte
Worthington Whittredge (1820-1910)

"the amount of land capable of irrigation by said ditch between the headgate and the reservoirs is 12,000 acres, and the amount of lands susceptible to being irrigated by the water of said ditch and said reservoirs lying North and North-west and North-east from said reservoirs is 28,000 acres, in addition thereto, in fact the amount is unlimited as it may continue to the eastern line of Colorado."

History

- **Continuing Development (1880-1930)**
  - Financial Ups and Downs (1893)(1907)
  - Ditch extensions, multiple rights, joining of ditches
  - Increasing settlement (Homestead Act)
  - Build out – stabilized acreage

Jones Ditch And Burlington Ditch

- **Jones Ditch**
  - 1867 Water Right
  - Serves 700-900 acres
  - Development to 900 acres by 1930
  - Court: Intent of Jones 344 acres
  - Result: Reduction of CU and service area

On the Cache La Poudre River, 1876
Worthington Whittredge (1820-1910

- **Burlington Ditch Reservoir and Land Company**
  - 1885 Water Right
  - Burlington Ditch, delivery through Barr Lake 1909
  - Court: Intent of Burlington appropriator limited to above Barr Lake
  - Result: reduction of CU and service area

Impact

- Uncertainty
  - Permissible Irrigated Areas
  - Reliability for change purposes
  - Value: estate planning, business management
- Prevents Ditch Wide Change in Use Cases
  - Hinders flexibility, development of water rights markets, application of alternatives to dry-up
- Creates potential for large scale re-quantification of Senior Rights
  - 19th Century development levels

Proposed Solution

IF water right decreed prior to 1937 **AND** decree is silent on permissible acreage **THEN** all acreage within 50 years of decree is lawful.

- Recognize longstanding use
- Support senior rights holders, agricultural economies by 'grandfathering' usage made within 50 years of entry of decree
- Eliminate ad hoc determinations based on 'intent of appropriator'
- Restore certainty, support water rights markets

MEMORANDUM

TO: Water Resources Review Committee

FROM: Lawrence Jones Custer Grasmick

DATE: September 6, 2012

RE: Proposal for Legislation for a Legacy Ditch Statute

This memo summarizes a legislative concept that would provide protections for senior water rights decreed for irrigation. Under the proposal, if the decree establishing a water right provides no express limit on the amount and/or location of acreage the right may irrigate, acreages irrigated within 50 years following the entry of the original decree would be considered to be within the lawful service area of the ditch as a matter of statute.

The water rights to be protected by this statute are senior irrigation rights, most of which are held by mutual ditch companies that have been in existence for more than 100 years. These mutual ditch companies are critical to the agricultural economy in the regions they serve. The bill title – "Legacy Ditch Statute" – reflects this tradition and the importance of irrigated agriculture in the State's economy.

I. CURRENT STATUS

The most senior rights on Colorado's Front Range are decreed for irrigation, and typically held by mutual ditch companies. Mutual ditch companies hold water rights for water users and deliver water available for diversion under the rights on a pro-rata basis. These senior water rights (in the form of mutual ditch company "shares") are valuable for agriculture and also frequently acquired by municipalities and industrial users seeking stable water supplies. As a result, change in use cases have become commonplace, and are increasing as demand for reliable water supply increases.

Because of the high demand for renewable water supply, senior water rights are very valuable. These assets represent a large proportion of the value in a farming operation, and play a central role in business and estate planning for family farms. The value of the assets for sale to a municipal or industrial user is dependent upon the amount of historical consumptive use associated with the right. As described below, recent Supreme Court rulings have raised significant questions about the stability and value of these rights.

Most of the decrees for senior irrigation rights entered prior to 1969 are silent as to the amount and/or location of acreage the right may lawfully serve. The decrees often refer to the "lands susceptible to irrigation" or the "lands under the ditch," but provide no legal description or acreage amounts. As a practical matter, these ditches were in the early stages of development when decreed, and continued to increase their service areas for

decades following the entry of a decree. It is not uncommon for an agricultural ditch company to have extended its ditch several times in the course of development following the entry of a decree. As a result, questions arise as to whether lands not under irrigation at the time the decree was entered are lawfully irrigated.

The Supreme Court has addressed this issue by instructing water courts to determine the intent of the original appropriator as to the scope of the right. In *Central Colorado Water Conservancy Dist. V. City of Greeley*, 147 P.3d 9 (Colo. 2006) (the "Jones Ditch Case") and *Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645 (Colo. 2011) (the "Burlington Ditch Case") the Supreme Court applied the law of prior appropriation very strictly and limited "lawful historical use" to the amounts that the original appropriator made or intended to make at the time of the appropriation over 100 years ago. In both the Jones Ditch and Burlington Ditch cases, the Supreme Court upheld water court rulings that severely limited the lawful service area of senior irrigation rights based upon the court's interpretation of the original appropriator's intent. As a result, farms that have received irrigation water from these ditches for over 100 years have been left without water supplies and the owners of shares that irrigated these farms have suffered a dramatic reduction in the value of their shares.

Because of these rulings, owners of senior irrigation rights face a substantial risk if they file a water court case to change the use their water rights. If their lands were within the 'lawfully irrigated area' of the particular right, as determined by the court based on the intent of the appropriator, there is consumptive use associated with the rights and therefore value. If the lands served by the shares are outside the 'lawfully irrigated area,' they have no lawful historical consumptive use and therefore little or no value. Furthermore, following a determination that the lands are outside the lawful area, the State Engineer is likely to prevent further deliveries, thereby eliminating the farm's water supply. If there are other farms outside the lawfully irrigated area, the State Engineer will prohibit deliveries to these farms as well, even if they did not request a change in use. In sum, a senior water rights holder seeking a change in use faces the risk of devaluing his or her water right and being the cause of the cessation of all irrigation deliveries to his neighbors. Under these circumstances, it is not surprising that the owners of large senior irrigation rights are reticent to initiate change in use cases.

The risk is not limited to senior water rights holders who seek to change the use of their water right, however. Colorado law permits interested parties to file suit against senior ditch companies if the party filing the suit believes that the use of the water right has been 'expanded' beyond the original intent of the appropriator. While all agree that water rights owners should not unlawfully expand the use of decreed rights, the water court process could be abused by junior appropriators seeking to curtail the use of senior rights by limiting them to 19th century development areas. Under the current state of the law, nothing prevents an aggressive water user from filing suit against a legacy ditch company with a request that the court examine the intent of the 19th century appropriator and curtail uses that have been in place for over 100 years. If one major legacy ditch company is sued, it could touch off a firestorm of litigation as water users seek to

'requantify' the oldest rights on the stream in the hope curtailing these rights it will improve the status of those more junior.

While the "intent of the appropriator" concept has merit in the abstract world of prior appropriation law, in the real world it is very difficult to establish the intent of an appropriator that has been deceased for over 100 years. Evidence is lost and witnesses with personal knowledge are long gone. Even if the intent can be established, the practical application is that ditch companies that have been irrigating an established acreage for more than 100 years are told that some of their historical use is not lawful, and, therefore, not recognizable by the court for the purpose of quantifying historical consumptive use. In addition, these rulings create the possibility that service area of the ditches will have to be reduced to be commensurate with 19th century development, leaving farms that have been irrigated for several generations without a water supply. Strict application of the principle does not account for the reality that nearly every agricultural ditch of any significant size continued to develop following its initial pre-1900 decree.

II. IMPORTANCE OF DITCH WIDE CHANGE IN USE CASES

In the context of a change of type of use of ditch company shares, there are two methods used most often to quantify historical consumptive use. The "Parcel Specific" method focuses solely on pro rata deliveries of water to the shares for which a change is sought, and the specific acreage those shares irrigated. Consumptive use is calculated solely based upon the historical use made on the parcels the shares served. The method is not concerned about what irrigation may have occurred under the farms served by the ditch. Consumptive use results vary from farm to farm under the ditch depending upon the amount of acreage historically irrigated, the number of shares applied, and other parcel-specific variables. No shareholder can know how much consumptive use he or she may have under their specific shares until they go to court and have it quantified.

In contrast, the "Ditch Wide" method considers the irrigation under the entire mutual ditch. Rather than quantifying bits and pieces of the ditch company water right as individuals come forward, the entire right is quantified. In most cases, the results are normalized across shareholders such that each shareholder receives the same amount of consumptive use per share. Likewise, return flows are analyzed on a ditch wide basis. Because the entire right has been quantified, all shareholders know how much consumptive use they have.

The ditch wide approach is favored by the Supreme Court, principally because it is more efficient and comprehensive. *Central Colorado Water Conservancy Dist. V. City of Greeley*, 147 P.3d 9 (Colo. 2006). The ditch wide approach is better from a consistency, efficiency and fairness standpoint. This approach is also favorable for encouraging multiple uses of the water rights because it opens up markets and provides a framework and basis for rotational fallowing, reduced consumptive use cropping, leasing or other methods that permit municipal and industrial uses while continuing to provide water for farming.

Though the Supreme Court encouraged the use of ditch wide analyses in the Jones Ditch Case, the rulings in the Jones Ditch and Burlington Ditch cases have created a climate of uncertainty regarding the practical viability of ditch wide change in use cases. In a ditch-wide change case, the entire irrigated acreage of the mutual ditch company is considered, opening the door for a "Jones Ditch" analysis that could result in findings that some of the areas historically irrigated by the ditch are outside the intent of the original appropriator and therefor 'unlawful.'

Few companies are willing to risk this analysis for fear that an aggressive opposer will devote time and attention to finding the company's appropriative 'skeletons in the closet,' and force a reduction in the ditch's service area and a catastrophic devaluation of share value. While these issues may be real or imagined, the threat of expensive and protracted litigation is real enough to deter attempts at ditch wide adjudication. At the time of the ruling in the Burlington Ditch Case, four major ditch wide cases were pending in Division 1. Every one of these applicants converted to a parcel specific analysis following the decision in the Burlington Ditch Case in attempt to seek shelter from the "Jones Ditch" analysis.

One of the principle benefits of our prior appropriation system is certainty. Ironically, strict application of the principle announced in by the Court in the Jones Ditch and Burlington Ditch Cases has created widespread uncertainty. This uncertainty is not limited to ditch companies. The issue affects all sectors—anyone using, buying or leasing senior agricultural rights.

The Statewide Water Supply Initiative Study has identified significant gaps between water supply available from planned projects and demand in the coming decades. Quantifying the most senior rights in the system is critical as the state moves into an era of increasing municipal and industrial demand and essential to developing workable water rights markets. If Colorado is to respond to increasing pressures for water in the front range South Platte and Arkansas basins, it is unwise to maintain a legal environment that chills the development of markets essential to future growth. Without a ready means to quantify consumptive use on a ditch wide basis, traditional and alternative agricultural transfers become more difficult.

Legislative action could reverse this trend. Rather than discouraging ditch wide analyses, the State should be encouraging them. It is appropriate for the General Assembly to resolve this tension between the Supreme Court's endorsement of the ditch wide approach, on the one hand, and the uncertainty arising out of the Jones Ditch and Burlington Ditch cases on the other.

III. LEGISLATIVE OBJECTIVE

To protect existing agricultural uses and to facilitate water markets by providing water users a measure of certainty with regard to the lawful extent of irrigated acreage served by senior irrigation rights, when the decree establishing the rights is silent on this issue.

IV. PROPOSED LEGISLATION

The bill calls for the addition of a new §37-92-305(4)(a)(I)(a):

> a. Provided no court of competent jurisdiction has previously entered an order to the contrary, if a decree entered prior to January 1, 1937 establishing an irrigation right has no express limit on the number of acres the right may irrigate, an amount of acreage commensurate with the amount of acreage actually irrigated by the right at any time within 50 years following the entry of the original decree shall be considered to be within the lawful scope of the right for the purposes of administration and determination of historical consumptive use.

This new provision is inserted into the section of §37-92-305(4) that discusses the court's authority to impose limitations on the use of water right based upon historical use. It is intended to apply both to change in use cases and enforcement actions when a water user challenges the senior irrigation right owner regarding expanded use.

V. LEGAL/STATUTORY PRECEDENT

The proposed statutory amendment effectively bars allegations of unlawful expansion of irrigation right service area if the deliveries to the alleged 'expanded' acreage first occurred within 50 years of the original decree. It is a statute of limitations. If the original decree on the water right is silent as to permissible irrigated acreage, the owner of an irrigation right delivered water to an acreage within 50 years of the entry of the decree, and neither the State Engineer nor any other water user objected to the deliveries, the statute provides recognition that the irrigation is lawful. Application of the statute is limited to decrees entered prior to January 1, 1937.

American legislatures, including the Colorado General Assembly, have invoked the principle of limitation to bar the enforcement of claims after the lapse of a specified period of time in a wide spectrum of actions, including actions concerning real property rights. Legislation to render stale claims unenforceable protects against the risk of error about the merits of such claims which may result from the difficulty to obtain evidence of events which transpired, and the circumstances which prevailed, in the remote past because evidence has been lost, memories have faded, and witnesses have disappeared or are deceased. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49, 64 S.Ct. 582, 586 (1944).

The legislation proposed herein is consistent with Colorado's law of statute of limitations on real property claims. *See* § 38-41-101, C.R.S. An adjudicated water right is a property right in Colorado, and as such should be afforded the same protections against stale claims to promote certainty and stability in water rights. As the Colorado Supreme Court noted in *Coffin v. Left Hand Ditch Company*, 6 Colo. 443 (1882),

> [i]t has always been the policy of the national, as well as the territorial and state

> governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected.

The proposed Legacy Ditch Statute would promote justice and certainty in water rights by preventing the surprises arising from ad hoc determinations of lawful irrigated area based upon the intent of appropriators no longer living or capable of testifying.

West's Colorado Revised Statutes Annotated Currentness
Title 37. Water and Irrigation
Water Rights and Irrigation
Water Right Determination and Administration
Article 92. Water Right Determination and Administration (Refs & Annos)
Part 3. Determination and Administration of Water Rights (Refs & Annos)
→→ **§ 37-92-305. Standards with respect to rulings of the referee and decisions of the water judge**

(1) In the determination of a water right the priority date awarded shall be that date on which the appropriation was initiated if the appropriation was completed with reasonable diligence. If the appropriation was not completed with reasonable diligence following the initiation thereof, then the priority date thereof shall be that date from which the appropriation was completed with reasonable diligence.

(2) Subject to the provisions of this article, a particular means or point of diversion of a water right may also serve as a point or means of diversion for another water right.

(3)(a) A change of water right, implementation of a rotational crop management contract, or plan for augmentation, including water exchange project, shall be approved if such change, contract, or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change, contract, or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions that would prevent such injurious effect.

(b) Decrees for changes of water rights that implement a contract or agreement for a lease, loan, or donation of water, water rights, or interests in water to the Colorado water conservation board for instream flow use under section 37-92-102(3)(b) shall provide that the board or the lessor, lender, or donor of the water may bring about beneficial use of the historical consumptive use of the changed water right downstream of the instream flow reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights or decreed conditional water rights.

(3.5) **Applications for a simple change in a surface point of diversion.** (a) For purposes of this subsection (3.5):

(I) "Intervening surface diversion point or inflow" means any ditch diversion or other point of diversion for a decreed surface water right, point of replacement or point of diversion by exchange that is part of an existing decreed exchange, well or well field that is decreed to operate as a surface diversion, or point of inflow from a tributary surface stream.

(II) "Simple change in a surface point of diversion" means a change in the point of diversion from a decreed surface diversion point to a new surface diversion point that is not combined with and does not include any other type of

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change of water right and for which there is no intervening surface diversion point or inflow between the new point of diversion and the diversion point from which a change is being made. "Simple change in a surface point of diversion" does not include a change of point of diversion from below or within a stream reach for which there is an intervening surface diversion point or inflow or decreed in-stream flow right to an upstream location within or above that reach.

(b)(I) An application for a simple change in a surface point of diversion is subject to all provisions of this article, including sections 37-92-302 to 37-92-305, except as specifically modified by this subsection (3.5).

(II) The procedures in this subsection (3.5) apply only to a simple change in a surface point of diversion and do not change the procedures or legal standards applicable to any other change of water right.

(III) An application for a simple change in a surface point of diversion may:

(A) Be made with respect to a change of point of diversion that has already been physically accomplished or with respect to a requested future change of point of diversion;

(B) Be made with respect to an absolute water right or a conditional water right; and

(C) Include one or more water rights that are to be diverted at the new point of diversion. The application must not include or be consolidated or joined with an action by the applicant seeking any other type of change of water right or diligence proceeding or application to make absolute with respect to the water right or rights included in the application.

(c) The applicant bears the initial burden in an application for a simple change in a surface point of diversion to prove, through the imposition of terms and conditions if necessary, that the simple change in a surface point of diversion will not:

(I) Result in diversion of a greater flow rate or amount of water than has been decreed to the water right and, without requantifying the water right, is physically and legally available at the diversion point from which a change is being made; or

(II) Injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(d) If the applicant makes a prima facie showing with respect to the matters in paragraph (c) of this subsection (3.5), the case proceeds as a simple change in a surface point of diversion, the applicant has the burden of persuasion with respect to the elements of its case, including the matters in paragraph (c) of this subsection (3.5), and the standards of paragraph (e) of this subsection (3.5) apply. If the applicant does not make such a prima facie showing, the referee or water judge shall dismiss the application without prejudice to the applicant's filing an application for a change of water right that is not a simple change in a surface point of diversion.

(e) The following standards apply to a simple change in a surface point of diversion:

(I) There is a rebuttable presumption that a simple change in a surface point of diversion will not cause an enlargement of the historical use associated with the water rights being changed.

(II) The decree must not requantify the water rights for which the point of diversion is being changed.

(III) The applicant, in prosecuting the simple change in a surface point of diversion, is not required to:

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(A) Prove that the water diverted at the new point of diversion can and will be diverted and put to use within a reasonable period of time;

(B) Prove compliance with the anti-speculation doctrine; or

(C) Provide or make a showing of future need imposed by the cases of *Pagosa Area Water and Sanitation District v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009) or *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996); except that nothing in this subsection (3.5) relieves the applicant or its successors in any pending or future diligence application from any of the requirements for demonstrating diligence in the development of a conditional water right changed pursuant to this subsection (3.5).

(4)(a) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(I) ~~(I)~~ A limitation on the use of the water that is subject to the change, taking into consideration the historical use and the flexibility required by annual climatic differences;

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a. Provided no court of competent jurisdiction has previously entered an order to the contrary, if a decree entered prior to January 1, 1937 establishing an irrigation right has no express limit on the number of acres the right may irrigate, an amount of acreage commensurate with the amount of acreage actually irrigated by the right at any time within 50 years following the entry of the original decree shall be considered to be within the lawful scope of the right for the purposes of administration and determination of historical consumptive use.

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(II) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant that are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historical use or diminution of return flow to the detriment of other appropriators;

(III) A time limitation on the diversion of water for which the change is sought in terms of months per year;

(IV) If the application is for the implementation of a rotational crop management contract, separate annual historical consumptive use limits for the parcels to be rotated according to the historical consumptive use of such lands. To the extent that some or all of the water that is the subject of the contract is not utilized at a new place of use in a given year, such water may be utilized on the originally irrigated lands if so provided in the decree and contract and if the election to irrigate is made prior to the beginning of the irrigation season and applies to the entire irrigation season. A failure of a party to a rotational crop management contract who is not the owner of the irrigation water rights that are subject to the contract to put to beneficial use the full amount of water that was decreed pursuant to the application for approval of the contract shall not be deemed to reduce the amount of historical consumptive use that the owner of the water rights has made of the rights.

(V) A term or condition that addresses decreases in water quality caused by a change in the type of use and permanent removal from irrigation of more than one thousand acre-feet of consumptive use per year that includes a change in the point of diversion, if the change would cause an exceedance or contribute to an existing exceedance of water quality standards established by the water quality control commission pursuant to section 25-8-204, C.R.S., in effect at the

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time of the application, or, if ordered by the court, subsequently adopted by the commission prior to the entry of the decree, for the stream segment at the original point of diversion. Under any such term or condition, the applicant shall be responsible for only that portion of the exceedance attributable to the proposed change. Any such term or condition and any activity to be taken in fulfillment thereof shall not be inconsistent with the "Colorado Water Quality Control Act", [FN1] article 8 of title 25, C.R.S., and rules promulgated pursuant to said act, and implementation of section 303(d) of the "Federal Water Pollution Control Act" [FN2] by the water quality control division. This subparagraph (V) shall not be interpreted to confer standing on any person to assert injury who would not otherwise have such standing.

(VI) Such other conditions as may be necessary to protect the vested rights of others.

(b) If the water judge approves the implementation of a rotational crop management contract, the rotational crop management contract shall be recorded with the clerk and recorder of the county in which the historically irrigated lands are located, and the water judge shall make affirmative findings that the implementation of the rotational crop management contract:

(I) Is capable of administration by the state and division engineers. In order to satisfy the requirement of this subparagraph (I), the water judge may require the applicant to provide signage and mapping of the lands not irrigated on an annual basis.

(II) Will neither expand the historical use of the original water rights nor change the return flow pattern from the historically irrigated land in a manner that will result in an injurious effect as specified in subsection (3) of this section; and

(III) Will comply with paragraph (a) of subsection (4.5) of this section with regard to potential soil erosion, revegetation, and weed management.

(4.5)(a) The terms and conditions applicable to changes of use of water rights from agricultural irrigation purposes to other beneficial uses shall include reasonable provisions designed to accomplish the revegetation and noxious weed management of lands from which irrigation water is removed. The applicant may, at any time, request a final determination under the court's retained jurisdiction that no further application of water will be necessary in order to satisfy the revegetation provisions. Dry land agriculture may not be subject to revegetation order of the court.

(b)(I) If article 65.1 of title 24, C.R.S., is not applicable to a significant water development activity, the court may utilize the methods specified in this section to mitigate certain potential effects of such activity. Subject to the provisions of this article, a court may impose the following mitigation payments upon any person who files an application for removal of water as part of a significant water development activity:

(A) **Transition mitigation payment.** A transition mitigation payment shall equal the amount of the reduction in property tax revenues for property that is subject to taxation by an entity listed in section 37-92-302(3.5) that is attributable to a significant water development activity. Such payment shall be made on an annual basis in accordance with the repayment schedule established by the court unless the applicant and the taxing entities mutually agree on an alternate payment schedule. The county shall certify, as appropriate, to the change applicant each year the amount of mitigation payment due under this subparagraph (I). Any moneys collected pursuant to this sub-subparagraph (A) shall be distributed by the board of county commissioners of the county from which water is removed among the entities in the county in proportion to the percentage of their share of the total of property taxes for nonbonded indebtedness purposes.

(B) **Bonded indebtedness payment.** A bonded indebtedness payment shall be made on an annual basis in the same manner as mitigation payments and shall be based on the bonded indebtedness on the property that is to be removed

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from irrigation at the time the decree is entered. The bonded indebtedness payment shall be equal to the reduction in bond repayment revenues that is attributable to the removal of water as part of a significant water development activity. The court may identify such mitigation payment as part of the decree. Whenever an application for determination with respect to a change of water rights requires a payment pursuant to this sub-subparagraph (B), the board of county commissioners of the county from which water is removed shall distribute any moneys collected among the entities in the county having bonded indebtedness in proportion to the percentage of their share of the total of such indebtedness.

(II) Unless the court determines that a greater or lesser period of time would be appropriate based upon the evidence of record, the amount of the transition mitigation and bonded indebtedness payments shall be equal to the total reduction in revenues for a period of thirty years commencing upon the date of initial reductions in such revenues as a consequence of the removal of water associated with the significant water development activity.

(III) To the extent that there is an increase in the property tax or bonded indebtedness revenues after the date of the commencement of the payment obligations identified under sub-subparagraphs (A) and (B) of subparagraph (I) of this paragraph (b) as a consequence of a change in land use and accompanying modification of the assessed valuation of the land, such payment obligations shall be correspondingly reduced.

(IV) When determining the amount to be paid pursuant to this paragraph (b), if any, the court shall take into consideration any evidence of a beneficial impact to the county from which the water is to be diverted and shall adjust the amount of the payment accordingly.

(c) Paragraph (b) of this subsection (4.5) shall not apply to:

(I) Any removal of water involving water rights owned by the applicant prior to August 6, 2003; any removal of water that was accomplished prior to August 6, 2003; any removal of water for which an application for a change of water rights was pending in the water court on such date; or any removal of water for which a decree has been entered that continues to be subject to the water court's retained jurisdiction;

(II) Any removal of water when:

(A) Such change is undertaken by a water conservancy district, water conservation district, special district, ditch company, other ditch organization, or municipality;

(B) The water was beneficially used within the boundaries or service area of such entity before the removal; and

(C) The water will continue to be beneficially used within such entity's boundaries or service area after the removal; or

(III) Any removal of water where the new place of use is within a twenty-mile radius of the historic place of use, even though such new place is located within a different county. For purposes of this subparagraph (III), the distance between the historic place of use and the proposed new place of use shall be measured between the most proximate points in the respective areas.

(5) In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others. Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights.

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(6)(a) In the case of an application for determination of a water right or a conditional water right, a determination with respect to a change of a water right or approval of a plan for augmentation, which requires construction of a well, other than a well described in section 37-90-137(4), the referee or the water judge, as the case may be, shall consider the findings of the state engineer, made pursuant to section 37-90-137, which granted or denied the well permit and the consultation report of the state engineer or division engineer submitted pursuant to section 37-92-302(2)(a). The referee or water judge may thereupon grant a final or conditional decree if the construction and use of any well proposed in the application will not injuriously affect the owner of, or persons entitled to use, water under a vested water right or decreed conditional water right. If the court grants a final or conditional decree, the state engineer shall issue a well permit. Except in cases in which the state engineer or division engineer is a party, all findings of fact contained in the consultation report concerning the presence or absence of injurious effect shall be presumptive as to such facts, subject to rebuttal by any party.

(b) In the case of wells described in section 37-90-137(4), the referee or water judge shall consider the state engineer's determination as to such ground water as described in section 37-92-302(2) in lieu of findings made pursuant to section 37-90-137, and shall require evidence of compliance with the provisions of section 37-92-302(2) regarding notice to persons with recorded interests in the overlying land. The state engineer's findings of fact contained within such determination shall be presumptive as to such facts, subject to rebuttal by any party.

(c) Any application in water division 3 that involves new withdrawals of groundwater that will affect the rate or direction of movement of water in the confined aquifer system referred to in section 37-90-102(3) shall be permitted pursuant to a plan of augmentation that, in addition to all other lawful requirements for such plans, shall recognize that unappropriated water is not made available and injury is not prevented as a result of the reduction of water consumption by nonirrigated native vegetation. In any such augmentation plan decree, the court shall also retain jurisdiction for the purpose of revising such decree to comply with the rules and regulations promulgated by the state engineer pursuant to section 37-90-137(12)(b)(I).

(7) Prior to the cancellation or expiration of a conditional water right granted pursuant to a conditional decree, the court wherein such decree was granted shall give notice, within not less than sixty-three days nor more than ninety-one days, by certified or registered mail to all persons to whom such conditional right was granted, at the last-known address appearing on the records of such court.

(8)(a) Except as specified in paragraph (b) of this subsection (8), in reviewing a proposed plan for augmentation and in considering terms and conditions that may be necessary to avoid injury, the referee or the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water that would be provided by the applicant, and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(b) As to decrees for plans for augmentation entered in water division 1 on or after August 5, 2009, the plan shall not require the replacement of out-of-priority depletions currently affecting the river caused by pumping that occurred prior to March 15, 1974. In the case of an amended plan for augmentation applied for pursuant to this paragraph (b), the water judge may review all of the terms and conditions of the plan.

(c) A plan for augmentation shall be sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior would be deprived of his or her lawful entitlement by the applicant's diversion. A proposed plan for augmentation that relies upon a supply of augmentation water that, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation water is limited in duration, if the terms and conditions of the plan prevent injury to vested water rights. Said terms and conditions shall require replacement of out-of-priority depletions that occur after any ground water diversions cease. Decrees approving plans for augmentation shall require that the state engineer curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent

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injury to vested water rights. A plan for augmentation may provide procedures to allow additional or alternative sources of replacement water, including water leased on a yearly or less frequent basis, to be used in the plan after the initial decree is entered if the use of said additional or alternative sources is part of a substitute water supply plan approved pursuant to section 37-92-308 or if such sources are decreed for such use.

(9)(a) No claim for a water right may be recognized or a decree therefor granted except to the extent that the waters have been diverted, stored, or otherwise captured, possessed, and controlled and have been applied to a beneficial use, but nothing in this section shall affect appropriations by the state of Colorado for minimum streamflows as described in section 37-92-103(4).

(b) No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

(c) No water right or conditional water right for the storage of water in underground aquifers shall be recognized or decreed except to the extent water in such an aquifer has been placed there by other than natural means by a person having a conditional or decreed right to such water.

(10) If an application filed under section 37-92-302 for approval of an existing exchange of water is approved, the original priority date or priority dates of the exchange shall be recognized and preserved unless such recognition or preservation would be contrary to the manner in which such exchange has been administered.

(11) Nontributary ground water shall not be administered in accordance with priority of appropriation, and determinations of rights to nontributary ground water need not include a date of initiation of the withdrawal project. Such determinations shall not require subsequent showings or findings of reasonable diligence, and such determinations entered prior to July 1, 1985, which require such showings or findings shall not be enforced to the extent of such diligence requirements on or after said date. The water judge shall retain jurisdiction as to determinations of ground water from wells described in section 37-90-137(4) as necessary to provide for the adjustment of the annual amount of withdrawal allowed to conform to actual local aquifer characteristics from adequate information obtained from well drilling or test holes. Such decree shall then control the determination of the quantity of annual withdrawal allowed in the well permit as provided in section 37-90-137(4). Rights to the use of ground water from wells described in section 37-90-137(4) pursuant to all such determinations shall be deemed to be vested property rights; except that nothing in this section shall preclude the general assembly from authorizing or imposing limitations on the exercise of such rights for preventing waste, promoting beneficial use, and requiring reasonable conservation of such ground water.

(12)(a) In determining the quantity of water required in an augmentation plan to replace evaporation from ground water exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103(9), C.R.S., there shall be no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover on the surface of the area which will be, or which has been, permanently replaced by an open water surface. The applicant shall bear the burden of proving the historic natural depletion.

(b) No person who obtains or operates a plan for augmentation or plan of substitute supply prior to July 1, 1989, shall be required to make replacement for the depletions from evaporation exempted in this subsection (12) or otherwise replace water for increased calls which may result therefrom.

(c) In determining the quantity of water required in an augmentation plan to replace stream depletions in connection with any mining operation as defined in section 34-32-103(8), C.R. S., for which a reclamation permit has been obtained as set forth in section 34-32-109, C.R.S., there is no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover and evaporation on the

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surface of the area that will be, or that has been, eliminated or made impermeable as part of the permitted mining operation. The applicant bears the burden of proving the historic natural depletion.

(13)(a) The water court shall consider the findings of fact made by the Colorado water conservation board pursuant to section 37-92-102(6)(b) regarding a recreational in-channel diversion, which findings shall be presumptive as to such facts, subject to rebuttal by any party. In addition, the water court shall consider evidence and make affirmative findings that the recreational in-channel diversion will:

(I) Not materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;

(II) Promote maximum utilization of waters of the state;

(III) Include only that reach of stream that is appropriate for the intended use;

(IV) Be accessible to the public for the recreational in-channel use proposed; and

(V) Not cause material injury to instream flow water rights appropriated pursuant to section 37-92-102(3) and (4).

(b) In determining whether the intended recreation experience is reasonable and the claimed amount is the appropriate flow for any period, the water court shall consider all of the factors that bear on the reasonableness of the claim, including the flow needed to accomplish the claimed recreational use, benefits to the community, the intent of the appropriator, stream size and characteristics, and total streamflow available at the control structures during the period or any subperiods for which the application is made.

(c) If a water court determines that a proposed recreational in-channel diversion would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements, the court shall deny the application.

(d) In addition to determining the minimum amount of stream flow to serve the applicant's intended and specified reasonable recreation experience, the water court shall make a finding in the decree as to the flow rate below which there is no longer any beneficial use of the water at the control structures for the decreed purposes.

(e) If the other elements of the appropriation are satisfied, the decree shall specify the total volume of water represented by the flow rates decreed for the recreational in-channel diversion. For purposes of this subsection (13), the "total volume of water represented by the flow rates decreed for the recreational in-channel diversion" means the sum of the flow rates claimed in cubic feet per second for each day on which a claim is made multiplied by 1.98.

(f) If the court determines that the total volume of water represented by the flow rates decreed for the recreational in-channel diversion exceeds fifty percent of the sum of the total average historical volume of water for the stream segment where the recreational in-channel diversion is located for each day on which a claim is made, the decree shall:

(I) Specify that the state engineer shall not administer a call for the recreational in-channel diversion unless the call would result in at least eighty-five percent of the decreed flow rate for the applicable time period;

(II) Limit the recreational in-channel diversion to no more than three time periods; and

(III) Specify that each time period is limited to one flow rate.

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(14) No decree shall be entered adjudicating a change of conditional water rights to a recreational in-channel diversion.

(15) Water rights for recreational in-channel diversions, when held by a municipality or others, shall not constitute a use of water for domestic purposes as described in section 6 of article XVI of the state constitution.

(16) In the case of an application for recreational in-channel diversions filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district filed on or after January 1, 2001, the applicant shall retain its original priority date for such a right, but shall submit a copy of the application to the Colorado water conservation board for review and recommendation as provided in section 37-92-102(6). The board's recommendation shall become a part of the record to be considered by the water court as provided in subsection (13) of this section.

(17)(a) Applicants for approval of a rotational crop management contract shall pay the state engineer the following fees:

(I) An application fee of one thousand seven hundred thirty-four dollars;

(II) A fee of six hundred seventeen dollars that is due annually beginning one year after submittal of the application until the application has been decreed by the water judge pursuant to section 37-92-308(4); and

(III) An annual fee of three hundred dollars per year after the application has been decreed.

(b) The state engineer shall transmit the fees to the state treasurer, who shall deposit them in the water resources cash fund created in section 37-80-111.7(1).

CREDIT(S)

Laws 1975, S.B.285, § 1; Laws 1977, S.B.4, § 4; Laws 1979, S.B.481, § 6; Laws 1981, S.B.3, § 2; Laws 1985, S.B.5, § 8; Laws 1989, S.B.120, § 5; Laws 1989, S.B.166, § 1. Amended by Laws 1992, H.B.92-1204, § 3, eff. March 20, 1992; Laws 1992, S.B.92-92, § 2, eff. April 16, 1992; Laws 1996, H.B.96-1044, § 3, eff. April 16, 1996; Laws 1996, H.B.96-1252, § 2, eff. March 25, 1996; Laws 1998, Ch. 231, § 3, eff. April 30, 1998; Laws 2001, Ch. 305, § 3, eff. June 5, 2001; Laws 2003, Ch. 116, § 4, eff. Aug. 6, 2003; Laws 2003, Ch. 204, § 5, eff. April 30, 2003; Laws 2006, Ch. 197, § 3, eff. May 11, 2006; Laws 2006, Ch. 218, § 3, eff. May 25, 2006; Laws 2007, Ch. 15, § 1, eff. March 12, 2007; Laws 2008, Ch. 170, § 3, eff. Aug. 5, 2008; Laws 2009, Ch. 69, § 1, eff. Aug. 5, 2009; Laws 2012, Ch. 15, § 2, eff. Aug. 8, 2012; Laws 2012, Ch. 54, § 1, eff. March 22, 2012; Laws 2012, Ch. 197, § 8, eff. July 1, 2012; Laws 2012, Ch. 208, § 165, eff. July 1, 2012.

[FN1] § 25-8-101 et seq.

[FN2] 33 U.S.C.A. § 1313.

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