

**First Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO**

ENGROSSED

*This Version Includes All Amendments Adopted
on Second Reading in the House of Introduction*

LLS NO. 09-0614.01 Kate Meyer

SENATE BILL 09-147

SENATE SPONSORSHIP

Hodge, Brophy

HOUSE SPONSORSHIP

Priola, Gardner C.

Senate Committees
Agriculture and Natural Resources

House Committees

A BILL FOR AN ACT

101 **CONCERNING THE AUTHORIZATION OF SUBSTITUTE WATER SUPPLY**
102 **PLANS FOR THE REPLACEMENT OF OUT-OF-PRIORITY**
103 **DEPLETIONS CAUSED BY HISTORIC DIVERSIONS FROM WELLS**
104 **INCLUDED IN DECREED AUGMENTATION PLANS ENTERED BY THE**
105 **WATER COURT FOR WATER DIVISION 1.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Subject to existing procedures for the approval of substitute water supply plans, authorizes substitute water supply plans for the replacement of out-of-priority lagged depletions caused by pumping of wells included

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

SENATE
Amended 2nd Reading
March 3, 2009

in decreed augmentation plans prior to January 1, 2003. Repeals the authorization on, and specifies that such plans shall expire by, July 1, 2018.

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

2 **SECTION 1. 37-92-308, Colorado Revised Statutes, is amended**
3 **BY THE ADDITION OF A NEW SUBSECTION to read:**

4 **37-92-308. Substitute water supply plans - special procedures**
5 **for review - water adjudication cash fund - legislative declaration -**
6 **repeal. (10) (a) BEGINNING JULY 1, 2009, FOR PLANS FOR**
7 **AUGMENTATION THAT ARE THE SUBJECT OF A FINAL DECREE ENTERED BY**
8 **THE WATER COURT IN WATER DIVISION 1, THE STATE ENGINEER MAY**
9 **APPROVE ANNUAL SUBSTITUTE WATER SUPPLY PLANS SOLELY FOR THE**
10 **PURPOSE OF ALLOWING THE USE OF WATER SUPPLIES NOT IDENTIFIED AS AN**
11 **AUGMENTATION SUPPLY IN THE DECREED AUGMENTATION PLAN, NOT**
12 **PREVIOUSLY DECREED FOR AUGMENTATION OR REPLACEMENT USES, AND**
13 **NOT INCLUDED IN A PENDING WATER COURT APPLICATION FOR APPROVAL**
14 **OF A CHANGE OF WATER RIGHT TO AUGMENTATION AND REPLACEMENT**
15 **USES TO BE USED IN THE DECREED AUGMENTATION PLAN FOR THE**
16 **REPLACEMENT OF OUT-OF-PRIORITY DEPLETIONS CAUSED BY PRE-JANUARY**
17 **1, 2003, DIVERSIONS FROM WELLS INCLUDED IN THE DECREED**
18 **AUGMENTATION PLAN, SUBJECT TO AND IN ACCORDANCE WITH THE TERMS**
19 **AND CONDITIONS OF THE DECREED AUGMENTATION PLAN. NO WATER**
20 **SUPPLIES FOR WHICH SUBSTITUTE WATER SUPPLY PLAN APPROVAL IS**
21 **REQUESTED PURSUANT TO THIS SUBSECTION (10) SHALL BE USED BY AN**
22 **APPLICANT FOR AUGMENTATION PURPOSES PRIOR TO THE DATE ON WHICH**
23 **THE STATE ENGINEER APPROVES THE SUBSTITUTE WATER SUPPLY PLAN OR**
24 **THE DATE ON WHICH ANY APPEAL TO THE WATER COURT OF THE**

1 SUBSTITUTE WATER SUPPLY PLAN IS FINALLY DECIDED IN ACCORDANCE
2 WITH PARAGRAPH (d) OF THIS SUBSECTION (10), WHICHEVER OCCURS
3 LATER. THE STATE ENGINEER MAY APPROVE A SUBSTITUTE WATER SUPPLY
4 PLAN UNDER THIS SUBSECTION (10) IF THE FOLLOWING CONDITIONS ARE
5 MET:

6 (I) THE APPLICANT HAS FILED A REQUEST FOR APPROVAL OF THE
7 SUBSTITUTE WATER SUPPLY PLAN WITH THE STATE ENGINEER, WHICH
8 REQUEST SHALL INCLUDE, AT A MINIMUM, THE FOLLOWING INFORMATION:

9 (A) THE NAME OF THE WATER RIGHTS TO BE USED FOR
10 AUGMENTATION IN THE DECREED AUGMENTATION PLAN UNDER THE
11 SUBSTITUTE WATER SUPPLY PLAN AND A LIST OF DECREES ASSOCIATED
12 WITH SUCH RIGHTS;

13 (B) A COPY OF EVERY AGREEMENT OR OTHER DOCUMENT THAT
14 EVIDENCES THE APPLICANT'S RIGHT TO USE THE WATER RIGHTS FOR
15 AUGMENTATION;

16 (C) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE
17 WATER RIGHTS, AN ANALYSIS OF THE HISTORICAL USE OF THE WATER
18 RIGHTS, WHICH ANALYSIS SHALL INCLUDE, AT A MINIMUM, THE LOCATION
19 AND NUMBER OF ACRES HISTORICALLY IRRIGATED BY THE RIGHTS,
20 IDENTIFICATION OF THE CROPS HISTORICALLY IRRIGATED BY THE RIGHTS,
21 A CALCULATION OF THE HISTORICAL DIVERSIONS AND RETURN FLOWS
22 ASSOCIATED WITH HISTORICAL USE OF THE RIGHTS, A SUMMARY OF
23 AVERAGE ANNUAL DIVERSIONS AND AVERAGE AND MAXIMUM MONTHLY
24 DIVERSIONS AND CONSUMPTIVE USE ASSOCIATED WITH HISTORICAL USE OF
25 THE RIGHTS, THE FIELD IRRIGATION EFFICIENCY USED IN THE HISTORICAL
26 USE ANALYSIS, WHICH SHALL NOT EXCEED FIFTY PERCENT, AND THE
27 IDENTITY OF ALL OTHER WATER RIGHTS USED TO IRRIGATE THE LAND

1 HISTORICALLY IRRIGATED BY THE WATER RIGHTS;

2 (D) THE AMOUNT OF WATER AVAILABLE FROM THE WATER RIGHTS
3 FOR REPLACEMENT USES UNDER THE SUBSTITUTE WATER SUPPLY PLAN;

4 (E) THE AMOUNT OF RETURN FLOWS, IF ANY, ASSOCIATED WITH
5 THE HISTORICAL USE OF THE WATER RIGHTS, INCLUDING THE AMOUNT AND
6 TIMING OF SUCH RETURN FLOWS THAT WOULD OCCUR AFTER THE END OF
7 THE ONE-YEAR SUBSTITUTE WATER SUPPLY PLAN APPROVED UNDER THIS
8 SUBSECTION (10);

9 (F) THE AMOUNT OF DEPLETIONS FROM PRE-JANUARY 1, 2003,
10 DIVERSIONS TO BE REPLACED USING THE WATER RIGHTS;

11 (G) THE SOURCE OF WATER TO BE USED TO MAKE REQUIRED
12 RETURN FLOW REPLACEMENTS, WHICH SOURCE SHALL NOT INCLUDE
13 WATER PUMPED FROM AUGMENTATION WELLS;

14 (H) THE MANNER IN WHICH THE APPLICANT WILL INCORPORATE
15 THE ACCOUNTING FOR USE OF THE WATER RIGHTS FOR AUGMENTATION
16 USES INTO THE ACCOUNTING REQUIRED BY THE AUGMENTATION PLAN
17 DECREE AND MAKE ANY REQUIRED RETURN FLOW REPLACEMENTS UNDER
18 THE SUBSTITUTE WATER SUPPLY PLAN; AND

19 (I) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE
20 WATER RIGHTS, AN AFFIDAVIT SIGNED BY THE RECORD OWNER OF THE
21 WATER RIGHTS STATING THAT, DURING THE TERM OF THE SUBSTITUTE
22 WATER SUPPLY PLAN, THE LAND HISTORICALLY IRRIGATED BY THE WATER
23 RIGHTS SHALL NOT BE IRRIGATED EXCEPT WITH NONTRIBUTARY GROUND
24 WATER OR POTABLE WATER SUPPLIED BY A MUNICIPALITY OR WATER
25 DISTRICT;

26 (II) THE APPLICANT HAS PROVIDED WRITTEN NOTICE OF THE
27 REQUEST FOR APPROVAL OF THE SUBSTITUTE WATER SUPPLY PLAN AND

1 HAS MADE AVAILABLE THE INFORMATION REQUIRED IN SUBPARAGRAPH (I)
2 OF THIS PARAGRAPH (a), BY FIRST-CLASS MAIL OR ELECTRONIC MAIL, TO
3 ALL PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY
4 PLAN NOTIFICATION LIST FOR WATER DIVISION 1 AND ALL PARTIES TO THE
5 WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS
6 DECREED, AND PROOF OF SUCH NOTICE IS FILED WITH THE STATE
7 ENGINEER;

8 (III) THE STATE ENGINEER HAS GIVEN THE OWNERS OF WATER
9 RIGHTS AND DECREED CONDITIONAL WATER RIGHTS AND THE PARTIES TO
10 THE WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS
11 DECREED THIRTY DAYS AFTER THE DATE OF MAILING OF SUCH NOTICE TO
12 FILE COMMENTS ON THE SUBSTITUTE WATER SUPPLY PLAN. SUCH
13 COMMENTS SHALL INCLUDE ANY CLAIM OF INJURY OR ANY TERMS AND
14 CONDITIONS THAT SHOULD BE IMPOSED UPON THE PLAN TO PREVENT
15 INJURY TO A PARTY'S WATER RIGHTS OR DECREED CONDITIONAL WATER
16 RIGHTS AND ANY OTHER INFORMATION THE OPPOSER WISHES THE STATE
17 ENGINEER TO CONSIDER IN REVIEWING THE SUBSTITUTE WATER SUPPLY
18 PLAN REQUEST.

19 (IV) THE STATE ENGINEER, AFTER CONSIDERATION OF THE
20 COMMENTS RECEIVED, HAS DETERMINED THAT THE OPERATION AND
21 ADMINISTRATION OF SUCH PLAN WILL, WHEN COMBINED WITH
22 REPLACEMENTS UNDER THE DECREED AUGMENTATION PLAN, REPLACE ALL
23 OUT-OF-PRIORITY DEPLETIONS CAUSED BY THE PRE-JANUARY 1, 2003,
24 DIVERSIONS FROM WELLS INCLUDED IN THE DECREED AUGMENTATION
25 PLAN IN TIME, LOCATION, AND AMOUNT REQUIRED BY THE DECREE, AND
26 WILL OTHERWISE PREVENT INJURY TO OTHER WATER RIGHTS AND DECREED
27 CONDITIONAL WATER RIGHTS, INCLUDING WATER QUALITY AND

1 CONTINUITY TO MEET THE REQUIREMENTS OF USE TO WHICH THE SENIOR
2 APPROPRIATION HAS NORMALLY BEEN PUT PURSUANT TO SECTION
3 37-80-120(3), AND WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE
4 COMPACTS. THE STATE ENGINEER SHALL IMPOSE SUCH TERMS AND
5 CONDITIONS AS ARE NECESSARY TO ENSURE THAT THESE STANDARDS ARE
6 MET, INCLUDING, BUT NOT LIMITED TO, THE TERMS AND CONDITIONS
7 REQUIRED BY PARAGRAPH (b) OF THIS SUBSECTION (10). IN MAKING THE
8 DETERMINATIONS SPECIFIED IN THIS SUBPARAGRAPH (IV), THE STATE
9 ENGINEER SHALL NOT BE REQUIRED TO HOLD ANY FORMAL HEARINGS OR
10 CONDUCT ANY OTHER FORMAL PROCEEDINGS, BUT MAY CONDUCT A
11 HEARING OR FORMAL PROCEEDING IF THE STATE ENGINEER FINDS IT
12 NECESSARY TO ADDRESS THE ISSUES.

13 (b) THE FOLLOWING TERMS AND CONDITIONS SHALL BE INCLUDED
14 IN ANY SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO THIS
15 SUBSECTION (10):

16 (I) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE
17 WATER RIGHTS, THE LAND HISTORICALLY IRRIGATED BY SUCH WATER
18 RIGHTS SHALL NOT BE IRRIGATED DURING THE TERM OF THE SUBSTITUTE
19 WATER SUPPLY PLAN EXCEPT WITH NONTRIBUTARY GROUND WATER OR
20 POTABLE WATER SUPPLIED BY A MUNICIPALITY OR WATER DISTRICT.
21 WHERE THE HISTORICALLY IRRIGATED CROP IS ALFALFA, AN APPROPRIATE
22 REDUCTION IN THE ALLOWABLE CONSUMPTIVE USE CREDIT SHALL BE
23 IMPOSED IF THE ALFALFA HAS NOT BEEN COMPLETELY REMOVED FROM THE
24 HISTORICALLY IRRIGATED LAND DURING THE TERM OF THE SUBSTITUTE
25 WATER SUPPLY PLAN.

26 (II) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE
27 WATER RIGHTS, AN ANNUAL VOLUMETRIC LIMIT ON DIVERSIONS AND A

1 MONTHLY VOLUMETRIC LIMIT ON DIVERSIONS, WHICH SHALL NOT BE
2 GREATER THAN THE AVERAGE ANNUAL AND MAXIMUM MONTHLY
3 HISTORICAL DIVERSIONS OF THE WATER RIGHTS.

4 (III) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE
5 WATER RIGHTS, ALL RETURN FLOWS THAT WOULD HAVE ACCRUED TO THE
6 STREAM FROM THE HISTORICAL USE OF THE WATER RIGHTS SHALL BE
7 REPLACED, INCLUDING THE RETURN FLOWS THAT WOULD HAVE OCCURRED
8 AFTER THE END OF THE ONE-YEAR SUBSTITUTE WATER SUPPLY PLAN. ALL
9 SUCH RETURN FLOWS SHALL BE DEEMED TO BE AN OBLIGATION OF THE
10 APPLICANT FOR THE SUBSTITUTE WATER SUPPLY PLAN AND SHALL BE
11 INCLUDED AS A REPLACEMENT OBLIGATION IN ANY PROJECTION REQUIRED
12 BY THE AUGMENTATION PLAN DECREE IN WHICH SUCH WATER IS PROPOSED
13 TO BE USED, AND AFTER THE END OF ANY APPROVED SUBSTITUTE WATER
14 SUPPLY PLAN, ALL CONTINUING RETURN FLOW OBLIGATIONS SHALL BE
15 ENFORCEABLE IN THE SAME MANNER AS ALL OTHER TERMS AND
16 CONDITIONS OF THE AUGMENTATION PLAN DECREE UNDER WHICH THE
17 WATER RIGHTS IN THE SUBSTITUTE WATER SUPPLY PLAN WERE USED.

18 (IV) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE
19 WATER RIGHTS, NO WATER PUMPED FROM AUGMENTATION WELLS, AS SUCH
20 WELLS ARE DEFINED IN SECTION 37-90-103 (21) (a), SHALL BE USED TO
21 REPLACE RETURN FLOWS THAT WOULD HAVE ACCRUED TO THE STREAM
22 FROM THE HISTORICAL USE OF THE WATER RIGHTS.

23 (V) THE AMOUNT OF WATER MADE AVAILABLE UNDER THE
24 APPROVED SUBSTITUTE WATER SUPPLY PLAN SHALL NOT BE INCLUDED AS
25 A SOURCE OF WATER FOR REPLACEMENT OF DEPLETIONS IN ANY
26 PROJECTION REQUIRED BY THE AUGMENTATION PLAN DECREE IN WHICH
27 SUCH WATER IS PROPOSED TO BE USED UNTIL THE SUBSTITUTE WATER

1 SUPPLY PLAN IS APPROVED, AND THEN ONLY FOR THE TERM OF THE
2 APPROVED SUBSTITUTE WATER SUPPLY PLAN OR THE TERM OF THE
3 AGREEMENT OR OTHER DOCUMENT WHICH EVIDENCES THE APPLICANT'S
4 RIGHT TO USE THE WATER RIGHTS FOR AUGMENTATION, WHICHEVER IS
5 SHORTER.

6 (VI) THE ACCOUNTING FOR THE APPROVED SUBSTITUTE WATER
7 SUPPLY PLAN SHALL BE INCORPORATED INTO THE ACCOUNTING FOR THE
8 AUGMENTATION PLAN DECREE IN WHICH SUCH WATER IS PROPOSED TO BE
9 USED AND SHALL BE SHOWN IN THE ACCOUNTING IN SEPARATE LINE ITEMS.
10 SUCH ACCOUNTING AND ALL SUPPORTING DOCUMENTS FOR SUCH
11 ACCOUNTING SHALL BE PROVIDED BY THE APPLICANT TO ANY PARTY
12 REQUESTING SUCH ACCOUNTING AND SUPPORTING DOCUMENTS IN WRITING
13 AND UPON PAYMENT OF REASONABLE REPRODUCTION COSTS.

14 (VII) IF ANY TERM OR CONDITION OF THE APPROVED SUBSTITUTE
15 WATER SUPPLY PLAN CONFLICTS WITH ANY OF THE TERMS AND
16 CONDITIONS OF THE AUGMENTATION PLAN DECREE, THE TERMS AND
17 CONDITIONS OF THE AUGMENTATION PLAN DECREE SHALL CONTROL.

18 (c) A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO
19 THIS SUBSECTION (10) SHALL NOT BE APPROVED FOR A PERIOD OF MORE
20 THAN ONE YEAR; EXCEPT THAT AN APPLICANT MAY REQUEST THE
21 RENEWAL OF A PLAN BY REPEATING THE APPLICATION PROCESS DESCRIBED
22 IN THIS SUBSECTION (10). HOWEVER, IN NO EVENT SHALL AN INDIVIDUAL
23 WATER RIGHT OR SOURCE OF WATER NATIVE TO THE SOUTH PLATTE RIVER
24 BASIN, INCLUDING THE PRO RATA PORTION OF A WATER RIGHT
25 REPRESENTED BY SHARES IN A MUTUAL DITCH COMPANY, BE APPROVED
26 FOR USE IN A SUBSTITUTE WATER SUPPLY PLAN APPROVED PURSUANT TO
27 THIS SUBSECTION (10) FOR A TOTAL OF MORE THAN FIVE YEARS.

1 (d) WHEN THE STATE ENGINEER APPROVES OR DENIES A
2 SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO THIS SUBSECTION (10),
3 THE STATE ENGINEER SHALL SERVE A COPY OF THE DECISION ON ALL
4 PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN
5 NOTIFICATION LIST FOR WATER DIVISION 1 AND ALL PARTIES TO THE
6 WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS
7 DECREED BY FIRST-CLASS MAIL OR, IF SUCH PARTIES HAVE SO ELECTED, BY
8 ELECTRONIC MAIL. NEITHER THE APPROVAL NOR THE DENIAL BY THE
9 STATE ENGINEER SHALL CREATE ANY PRESUMPTIONS, SHIFT THE BURDEN
10 OF PROOF, OR SERVE AS A DEFENSE IN ANY LEGAL ACTION INVOLVING THE
11 SUBSTITUTE WATER SUPPLY PLAN. ANY APPEAL OF A DECISION MADE BY
12 THE STATE ENGINEER CONCERNING A SUBSTITUTE WATER SUPPLY PLAN
13 APPROVED OR DENIED PURSUANT TO THIS SUBSECTION (10) SHALL BE
14 MADE WITHIN THIRTY DAYS AFTER THE DATE OF SERVICE OF THE DECISION.
15 ANY SUCH APPEAL SHALL BE FILED UNDER THE SAME CASE NUMBER AS
16 THE DECREED PLAN FOR AUGMENTATION AND SHALL BE HEARD UNDER THE
17 RETAINED JURISDICTION OF THE WATER JUDGE, USING THE PROCEDURES
18 AND STANDARDS SET FORTH IN SECTIONS 37-92-304 AND 37-92-305, FOR
19 DETERMINATION OF MATTERS REREFERRED TO THE WATER JUDGE BY THE
20 REFEREE. THE WATER JUDGE SHALL HEAR AND DETERMINE ANY SUCH
21 APPEAL ON AN EXPEDITED BASIS. THE APPLICANT FOR THE SUBSTITUTE
22 WATER SUPPLY PLAN SHALL NOT USE THE PROPOSED SUBSTITUTE WATER
23 SUPPLY IN THE DECREED PLAN FOR AUGMENTATION UNTIL ANY APPEAL
24 UNDER THIS PARAGRAPH (d) IS DECIDED BY THE WATER COURT.
25 FOLLOWING THE DETERMINATION ON APPEAL BY THE WATER COURT, THE
26 APPLICANT'S USE OF WATER UNDER THE SUBSTITUTE WATER SUPPLY PLAN
27 SHALL BE GOVERNED BY SUCH WATER COURT DETERMINATION, UNLESS

1 THE TERMS OF THE AUGMENTATION PLAN DECREE PROVIDE OTHERWISE.
2 (e) NOTHING IN THIS SUBSECTION (10) SHALL AUTHORIZE OR
3 FACILITATE ADDITIONAL TRANSBASIN DIVERSION OF WATER FROM THE
4 COLORADO RIVER.
5 (f) (I) THIS SUBSECTION (10) IS REPEALED, EFFECTIVE JULY 1,
6 2018.
7 (II) ALL APPROVALS OF SUBSTITUTE WATER SUPPLY PLANS UNDER
8 THIS SUBSECTION (10) SHALL EXPIRE ON OR BEFORE JULY 1, 2018.
9 **SECTION 2. Applicability.** This act shall apply to substitute
10 water supply plans applied for on or after the effective date of this act.
11 **SECTION 3. Safety clause.** The general assembly hereby finds,
12 determines, and declares that this act is necessary for the immediate
13 preservation of the public peace, health, and safety.