

SENATE COMMITTEE OF REFERENCE REPORT

Chairman of Committee

February 26, 2009
Date

Committee on Agriculture and Natural Resources.

After consideration on the merits, the Committee recommends the following:

SB09-147 be amended as follows, and as so amended, be referred to the Committee of the Whole with favorable recommendation:

1 Amend printed bill, strike everything below the enacting clause and
2 substitute the following:

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

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

1 APPLICANT FOR AUGMENTATION PURPOSES PRIOR TO THE DATE ON WHICH
2 THE STATE ENGINEER APPROVES THE SUBSTITUTE WATER SUPPLY PLAN OR
3 THE DATE ON WHICH ANY APPEAL TO THE WATER COURT OF THE
4 SUBSTITUTE WATER SUPPLY PLAN IS FINALLY DECIDED IN ACCORDANCE
5 WITH PARAGRAPH (d) OF THIS SUBSECTION (10), WHICHEVER OCCURS
6 LATER. THE STATE ENGINEER MAY APPROVE A SUBSTITUTE WATER SUPPLY
7 PLAN UNDER THIS SUBSECTION (10) IF THE FOLLOWING CONDITIONS ARE
8 MET:

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

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

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

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

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

34 (E) THE AMOUNT OF RETURN FLOWS, IF ANY, ASSOCIATED WITH
35 THE HISTORICAL USE OF THE WATER RIGHTS, INCLUDING THE AMOUNT AND

1 TIMING OF SUCH RETURN FLOWS THAT WOULD OCCUR AFTER THE END OF
2 THE ONE-YEAR SUBSTITUTE WATER SUPPLY PLAN APPROVED UNDER THIS
3 SUBSECTION (10);

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

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

9 (H) THE MANNER IN WHICH THE APPLICANT WILL INCORPORATE
10 THE ACCOUNTING FOR USE OF THE WATER RIGHTS FOR AUGMENTATION
11 USES INTO THE ACCOUNTING REQUIRED BY THE AUGMENTATION PLAN
12 DECREE AND MAKE ANY REQUIRED RETURN FLOW REPLACEMENTS UNDER
13 THE SUBSTITUTE WATER SUPPLY PLAN; AND

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

21 (II) THE APPLICANT HAS PROVIDED WRITTEN NOTICE OF THE
22 REQUEST FOR APPROVAL OF THE SUBSTITUTE WATER SUPPLY PLAN AND
23 HAS MADE AVAILABLE THE INFORMATION REQUIRED IN SUBPARAGRAPH (I)
24 OF THIS PARAGRAPH (a), BY FIRST-CLASS MAIL OR ELECTRONIC MAIL, TO
25 ALL PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY
26 PLAN NOTIFICATION LIST FOR WATER DIVISION 1 AND ALL PARTIES TO THE
27 WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS
28 DECREED, AND PROOF OF SUCH NOTICE IS FILED WITH THE STATE
29 ENGINEER;

30 (III) THE STATE ENGINEER HAS GIVEN THE OWNERS OF WATER
31 RIGHTS AND DECREED CONDITIONAL WATER RIGHTS AND THE PARTIES TO
32 THE WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS
33 DECREED THIRTY DAYS AFTER THE DATE OF MAILING OF SUCH NOTICE TO
34 FILE COMMENTS ON THE SUBSTITUTE WATER SUPPLY PLAN. SUCH
35 COMMENTS SHALL INCLUDE ANY CLAIM OF INJURY OR ANY TERMS AND

1 CONDITIONS THAT SHOULD BE IMPOSED UPON THE PLAN TO PREVENT
2 INJURY TO A PARTY'S WATER RIGHTS OR DECREED CONDITIONAL WATER
3 RIGHTS AND ANY OTHER INFORMATION THE OPPOSER WISHES THE STATE
4 ENGINEER TO CONSIDER IN REVIEWING THE SUBSTITUTE WATER SUPPLY
5 PLAN REQUEST.

6 (IV) THE STATE ENGINEER, AFTER CONSIDERATION OF THE
7 COMMENTS RECEIVED, HAS DETERMINED THAT THE OPERATION AND
8 ADMINISTRATION OF SUCH PLAN WILL, WHEN COMBINED WITH
9 REPLACEMENTS UNDER THE DECREED AUGMENTATION PLAN, REPLACE ALL
10 OUT-OF-PRIORITY DEPLETIONS CAUSED BY THE PRE-JANUARY 1, 2003,
11 DIVERSIONS FROM WELLS INCLUDED IN THE DECREED AUGMENTATION
12 PLAN IN TIME, LOCATION, AND AMOUNT REQUIRED BY THE DECREE, AND
13 WILL OTHERWISE PREVENT INJURY TO OTHER WATER RIGHTS AND DECREED
14 CONDITIONAL WATER RIGHTS, INCLUDING WATER QUALITY AND
15 CONTINUITY TO MEET THE REQUIREMENTS OF USE TO WHICH THE SENIOR
16 APPROPRIATION HAS NORMALLY BEEN PUT PURSUANT TO SECTION
17 37-80-120 (3), AND WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE
18 COMPACTS. THE STATE ENGINEER SHALL IMPOSE SUCH TERMS AND
19 CONDITIONS AS ARE NECESSARY TO ENSURE THAT THESE STANDARDS ARE
20 MET, INCLUDING, BUT NOT LIMITED TO, THE TERMS AND CONDITIONS
21 REQUIRED BY PARAGRAPH (b) OF THIS SUBSECTION (10). IN MAKING THE
22 DETERMINATIONS SPECIFIED IN THIS SUBPARAGRAPH (IV), THE STATE
23 ENGINEER SHALL NOT BE REQUIRED TO HOLD ANY FORMAL HEARINGS OR
24 CONDUCT ANY OTHER FORMAL PROCEEDINGS, BUT MAY CONDUCT A
25 HEARING OR FORMAL PROCEEDING IF THE STATE ENGINEER FINDS IT
26 NECESSARY TO ADDRESS THE ISSUES.

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

30 (I) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE
31 WATER RIGHTS, THE LAND HISTORICALLY IRRIGATED BY SUCH WATER
32 RIGHTS SHALL NOT BE IRRIGATED DURING THE TERM OF THE SUBSTITUTE
33 WATER SUPPLY PLAN EXCEPT WITH NONTRIBUTARY GROUND WATER OR
34 POTABLE WATER SUPPLIED BY A MUNICIPALITY OR WATER DISTRICT.
35 WHERE THE HISTORICALLY IRRIGATED CROP IS ALFALFA, AN APPROPRIATE
36 REDUCTION IN THE ALLOWABLE CONSUMPTIVE USE CREDIT SHALL BE
37 IMPOSED IF THE ALFALFA HAS NOT BEEN COMPLETELY REMOVED FROM THE
38 HISTORICALLY IRRIGATED LAND DURING THE TERM OF THE SUBSTITUTE

1 WATER SUPPLY PLAN.

2 (II) FOR USE OF EXISTING SOUTH PLATTE RIVER BASIN SURFACE
3 WATER RIGHTS, AN ANNUAL VOLUMETRIC LIMIT ON DIVERSIONS AND A
4 MONTHLY VOLUMETRIC LIMIT ON DIVERSIONS, WHICH SHALL NOT BE
5 GREATER THAN THE AVERAGE ANNUAL AND MAXIMUM MONTHLY
6 HISTORICAL DIVERSIONS OF THE WATER RIGHTS.

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

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

26 (V) THE AMOUNT OF WATER MADE AVAILABLE UNDER THE
27 APPROVED SUBSTITUTE WATER SUPPLY PLAN SHALL NOT BE INCLUDED AS
28 A SOURCE OF WATER FOR REPLACEMENT OF DEPLETIONS IN ANY
29 PROJECTION REQUIRED BY THE AUGMENTATION PLAN DECREE IN WHICH
30 SUCH WATER IS PROPOSED TO BE USED UNTIL THE SUBSTITUTE WATER
31 SUPPLY PLAN IS APPROVED, AND THEN ONLY FOR THE TERM OF THE
32 APPROVED SUBSTITUTE WATER SUPPLY PLAN OR THE TERM OF THE
33 AGREEMENT OR OTHER DOCUMENT WHICH EVIDENCES THE APPLICANT'S
34 RIGHT TO USE THE WATER RIGHTS FOR AUGMENTATION, WHICHEVER IS
35 SHORTER.

36 (VI) THE ACCOUNTING FOR THE APPROVED SUBSTITUTE WATER

1 SUPPLY PLAN SHALL BE INCORPORATED INTO THE ACCOUNTING FOR THE
2 AUGMENTATION PLAN DECREE IN WHICH SUCH WATER IS PROPOSED TO BE
3 USED AND SHALL BE SHOWN IN THE ACCOUNTING IN SEPARATE LINE ITEMS.
4 SUCH ACCOUNTING AND ALL SUPPORTING DOCUMENTS FOR SUCH
5 ACCOUNTING SHALL BE PROVIDED BY THE APPLICANT TO ANY PARTY
6 REQUESTING SUCH ACCOUNTING AND SUPPORTING DOCUMENTS IN WRITING
7 AND UPON PAYMENT OF REASONABLE REPRODUCTION COSTS.

8 (VII) IF ANY TERM OR CONDITION OF THE APPROVED SUBSTITUTE
9 WATER SUPPLY PLAN CONFLICTS WITH ANY OF THE TERMS AND
10 CONDITIONS OF THE AUGMENTATION PLAN DECREE, THE TERMS AND
11 CONDITIONS OF THE AUGMENTATION PLAN DECREE SHALL CONTROL.

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

22 (d) WHEN THE STATE ENGINEER APPROVES OR DENIES A
23 SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO THIS SUBSECTION (10),
24 THE STATE ENGINEER SHALL SERVE A COPY OF THE DECISION ON ALL
25 PARTIES WHO HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN
26 NOTIFICATION LIST FOR WATER DIVISION 1 AND ALL PARTIES TO THE
27 WATER COURT CASE IN WHICH THE PLAN FOR AUGMENTATION WAS
28 DECREED BY FIRST-CLASS MAIL OR, IF SUCH PARTIES HAVE SO ELECTED, BY
29 ELECTRONIC MAIL. NEITHER THE APPROVAL NOR THE DENIAL BY THE
30 STATE ENGINEER SHALL CREATE ANY PRESUMPTIONS, SHIFT THE BURDEN
31 OF PROOF, OR SERVE AS A DEFENSE IN ANY LEGAL ACTION INVOLVING THE
32 SUBSTITUTE WATER SUPPLY PLAN. ANY APPEAL OF A DECISION MADE BY
33 THE STATE ENGINEER CONCERNING A SUBSTITUTE WATER SUPPLY PLAN
34 APPROVED OR DENIED PURSUANT TO THIS SUBSECTION (10) SHALL BE
35 MADE WITHIN THIRTY DAYS AFTER THE DATE OF SERVICE OF THE DECISION.
36 ANY SUCH APPEAL SHALL BE FILED UNDER THE SAME CASE NUMBER AS
37 THE DECREED PLAN FOR AUGMENTATION AND SHALL BE HEARD UNDER THE
38 RETAINED JURISDICTION OF THE WATER JUDGE, USING THE PROCEDURES

1 AND STANDARDS SET FORTH IN SECTIONS 37-92-304 AND 37-92-305, FOR
2 DETERMINATION OF MATTERS REREFERRED TO THE WATER JUDGE BY THE
3 REFEREE. THE WATER JUDGE SHALL HEAR AND DETERMINE ANY SUCH
4 APPEAL ON AN EXPEDITED BASIS. THE APPLICANT FOR THE SUBSTITUTE
5 WATER SUPPLY PLAN SHALL NOT USE THE PROPOSED SUBSTITUTE WATER
6 SUPPLY IN THE DECREED PLAN FOR AUGMENTATION UNTIL ANY APPEAL
7 UNDER THIS PARAGRAPH (d) IS DECIDED BY THE WATER COURT.
8 FOLLOWING THE DETERMINATION ON APPEAL BY THE WATER COURT, THE
9 APPLICANT'S USE OF WATER UNDER THE SUBSTITUTE WATER SUPPLY PLAN
10 SHALL BE GOVERNED BY SUCH WATER COURT DETERMINATION, UNLESS
11 THE TERMS OF THE AUGMENTATION PLAN DECREE PROVIDE OTHERWISE.

12 (e) NOTHING IN THIS SUBSECTION (10) SHALL AUTHORIZE OR
13 FACILITATE ADDITIONAL TRANSBASIN DIVERSION OF WATER FROM THE
14 COLORADO RIVER.

15 (f) (I) THIS SUBSECTION (10) IS REPEALED, EFFECTIVE JULY 1,
16 2018.

17 (II) ALL APPROVALS OF SUBSTITUTE WATER SUPPLY PLANS UNDER
18 THIS SUBSECTION (10) SHALL EXPIRE ON OR BEFORE JULY 1, 2018.

19 **SECTION 2. Applicability.** This act shall apply to substitute
20 water supply plans applied for on or after the effective date of this act.

21 **SECTION 3. Safety clause.** The general assembly hereby finds,
22 determines, and declares that this act is necessary for the immediate
23 preservation of the public peace, health, and safety."

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