

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

REVISED

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

LLS NO. 13-0104.01 Jennifer Berman x3286

SENATE BILL 13-078

SENATE SPONSORSHIP

Giron, Baumgardner, Brophy, Hodge, Roberts, Schwartz

HOUSE SPONSORSHIP

Sonnenberg, Fischer

Senate Committees

Agriculture, Natural Resources, & Energy

House Committees

Agriculture, Livestock, & Natural Resources

A BILL FOR AN ACT

101 **CONCERNING POINTS OF DIVERSION THAT ARE NOT LOCATED AT THE**
102 **PHYSICAL LOCATION SPECIFIED IN THE DECREES FOR DIVERTED**
103 **WATER RIGHTS.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

Water Resources Review Committee. For a variety of reasons, some points of diversion are erroneously placed at a location that is different from the decreed location established by a water court. The reasons for these erroneous locations include advances in surveying

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.

HOUSE
2nd Reading Unamended
March 8, 2013

SENATE
3rd Reading Unamended
February 13, 2013

SENATE
Amended 2nd Reading
February 12, 2013

technology and standards, typographical errors in a water rights decree, references in a decree to landmarks that do not exist any more or have changed, and floods and other natural events affecting the diversion structure. The bill provides a process for a holder of a decreed water right with an erroneously located point of diversion to apply for a correction in the point of diversion if the point of diversion meets the definition of an "established erroneous point of diversion", as set forth in the bill.

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

2 **SECTION 1. Legislative declaration.** It is the purpose of this act
3 to allow the owners and users of water rights to reconcile the actual
4 location of diversion structures with the described locations in the
5 original decrees confirming the water rights when the water rights have
6 continuously diverted at the same location with the intent to divert
7 pursuant to the decreed location. If the erroneous location description in
8 the decrees is due to a clerical error, a difference in locating methods
9 from the time the decrees were established, or a minor inaccuracy, this act
10 will allow the owners and users of the water rights to correct the location
11 description in the decrees without the need to file an application for a
12 change of water right.

13 **SECTION 2.** In Colorado Revised Statutes, 37-92-305, **add** (3.6)
14 as follows:

15 **37-92-305. Standards with respect to rulings of the referee and**
16 **decisions of the water judge. (3.6) Correction to an established but**
17 **erroneously described point of diversion - definitions. (a) AS USED IN**
18 THIS SUBSECTION (3.6):

19 (I) "DIVERTER" MEANS THE OWNER OR USER OF A DECREED WATER
20 RIGHT.

21 (II) "ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF
22 DIVERSION" MEANS A POINT OF DIVERSION OF EITHER SURFACE WATER OR

1 GROUNDWATER:

2 (A) THAT HAS BEEN AT THE SAME PHYSICAL LOCATION SINCE THE
3 APPLICABLE _____ DECREE OR DECREES CONFIRMED THE WATER RIGHT,
4 UNLESS IT WAS RELOCATED PURSUANT TO SECTION 37-86-111 OR, IN THE
5 CASE OF A WELL, RELOCATED ACCORDING TO A VALID WELL PERMIT. A
6 DIVERSION THAT HAS BEEN IN THE SAME PHYSICAL LOCATION SINCE THE
7 ENACTMENT OF THE "ADJUDICATION ACT OF 1943", WHICH WAS REPEALED
8 IN 1969, HAS A REBUTTABLE PRESUMPTION OF HAVING BEEN LOCATED AT
9 THE SAME PHYSICAL LOCATION SINCE ITS INCEPTION.

10 (B) THAT IS NOT LOCATED AT THE LOCATION SPECIFIED IN THE
11 APPLICABLE DECREE OR DECREES CONFIRMING THE WATER RIGHT; AND

12 (C) FROM WHICH THE DIVERTER HAS DIVERTED WATER WITH THE
13 INTENT TO DIVERT PURSUANT TO THE DECREE OR DECREES CONFIRMING
14 THE WATER RIGHT.

15 (b) A WATER RIGHT IS DEEMED TO BE DIVERTED AT ITS DECREED
16 LOCATION AND IS NOT ERRONEOUSLY DESCRIBED IF:

17 (I) WITH RESPECT TO A SURFACE WATER DIVERSION:

18 (A) THE PHYSICAL LOCATION OF THE POINT OF DIVERSION IS
19 WITHIN FIVE HUNDRED FEET OF THE DECREED LOCATION; AND

20 (B) NEITHER A NATURAL SURFACE STREAM THAT IS TRIBUTARY TO
21 THE DIVERTED STREAM NOR ANOTHER SURFACE WATER RIGHT IS LOCATED
22 BETWEEN THE DECREED LOCATION AND ITS PHYSICAL LOCATION;

23 (II) WITH RESPECT TO A GROUNDWATER DIVERSION, THE PHYSICAL
24 LOCATION OF THE POINT OF DIVERSION IS WITHIN TWO HUNDRED FEET OF
25 THE DECREED LOCATION, UNLESS THE DECREE SPECIFIES A LESSER
26 DISTANCE FOR ACCEPTABLE VARIATION IN LOCATION.

27 (c) TO PROCEED WITH A CORRECTION IN POINT OF DIVERSION

1 UNDER THIS SUBSECTION (3.6) FOR AN ESTABLISHED BUT ERRONEOUSLY
2 DESCRIBED POINT OF DIVERSION THAT IS DUE TO A CLERICAL MISTAKE IN
3 THE DECREE, BUT DOES NOT FALL WITHIN THE THREE-YEAR PERIOD SET
4 FORTH IN SECTION 37-92-304 (10) FOR THE WATER CLERK TO CORRECT THE
5 MISTAKE, THE DIVERTER OF THE ESTABLISHED BUT ERRONEOUSLY
6 DESCRIBED POINT OF DIVERSION MAY FILE A PETITION WITH THE WATER
7 CLERK FOR CORRECTION OF THE CLERICAL MISTAKE WITHIN THREE YEARS
8 AFTER THE DIVERTER BECAME AWARE OF THE MISTAKE. THE SAME
9 PROCEDURES SET FORTH IN SECTION 37-92-304 (10) APPLY TO
10 CORRECTIONS IN POINT OF DIVERSION UNDER THIS PARAGRAPH (C).

11 (d) (I) To proceed with a correction in point of diversion
12 under this subsection (3.6) for an established but erroneously
13 described point of diversion that is not due to a clerical mistake
14 in the decree, a diverter has the burden to prove by a
15 preponderance of the evidence that a point of diversion is an
16 established bUT ERRONEOUSLY DESCRIBED point of diversion.

17 (II) Except as specifically modified by this subsection (3.6),
18 an application for a correction in AN ESTABLISHED BUT
19 ERRONEOUSLY DESCRIBED point of diversion is subject to all
20 provisions of this article, including sections 37-92-302 to
21 37-92-305.

22 (III) The procedures in this subsection (3.6) apply only to
23 a correction in AN ESTABLISHED BUT ERRONEOUSLY DESCRIBED point
24 of diversion and do not alter the procedures or legal standards
25 applicable to a change of water right.

26 (IV) A diverter may apply for a correction in AN
27 ESTABLISHED BUT ERRONEOUSLY DESCRIBED point of diversion only:

1 (A) FOR A POINT OF DIVERSION THAT IS ALREADY IN PLACE; AND

2 (B) IF ONE OR MORE WATER RIGHTS ARE DIVERTED AT THE
3 CORRECTED POINT OF DIVERSION.

4 (V) THE APPLICATION MUST NOT INCLUDE OR BE CONSOLIDATED
5 OR JOINED WITH AN ACTION BY THE APPLICANT SEEKING ANY TYPE OF
6 CHANGE OF WATER RIGHT OR DILIGENCE PROCEEDING OR APPLICATION TO
7 MAKE ABSOLUTE WITH RESPECT TO THE WATER RIGHT OR RIGHTS
8 INCLUDED IN THE APPLICATION.

9 (e) IF AN APPLICANT PROVES THE MATTERS IN PARAGRAPH (a) OF
10 THIS SUBSECTION (3.6) BY A PREPONDERANCE OF THE EVIDENCE, THEN
11 THERE IS A REBUTTABLE PRESUMPTION THAT A CORRECTION IN AN
12 ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION:

13 (I) WILL NOT CAUSE AN ENLARGEMENT OF THE HISTORICAL USE
14 ASSOCIATED WITH A WATER RIGHT DIVERTED AT THE POINT OF DIVERSION;
15 AND

16 (II) DOES NOT INJURIOUSLY AFFECT THE OWNER OF OR PERSONS
17 ENTITLED TO USE WATER UNDER A VESTED WATER RIGHT OR A DECREED
18 CONDITIONAL WATER RIGHT.

19 (f) IF THE APPLICANT DOES NOT PROVE THE MATTERS IN
20 PARAGRAPH (a) OF THIS SUBSECTION (3.6) OR IF THE PRESUMPTIONS
21 STATED IN THIS SUBSECTION (3.6) ARE SUCCESSFULLY REBUTTED, THE
22 REFEREE OR WATER JUDGE SHALL DISMISS THE APPLICATION WITHOUT
23 PREJUDICE TO THE APPLICANT'S FILING AN APPLICATION FOR A CHANGE OF
24 WATER RIGHT.

25 (g) THE FOLLOWING STANDARDS APPLY TO A CORRECTION IN AN
26 ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION:

27 (I) THE DECREE MUST NOT REQUANTIFY THE WATER RIGHTS FOR

1 WHICH THE ERRONEOUSLY DESCRIBED POINT OF DIVERSION IS BEING
2 CORRECTED;

3 (II) THE APPLICANT, IN PROSECUTING THE CORRECTION IN THE
4 ERRONEOUSLY DESCRIBED POINT OF DIVERSION, IS NOT REQUIRED TO:

5 (A) PROVE THAT THE WATER DIVERTED AT THE CORRECTED POINT
6 OF DIVERSION CAN AND WILL BE DIVERTED AND PUT TO USE WITHIN A
7 REASONABLE PERIOD OF TIME;

8 (B) PROVE COMPLIANCE WITH THE ANTI-SPECULATION DOCTRINE;
9 OR

10 (C) PROVIDE OR MAKE A SHOWING OF FUTURE NEED IMPOSED BY
11 THE CASES OF *PAGOSA AREA WATER AND SANITATION DISTRICT V. TROUT*
12 *UNLIMITED*, 219 P.3d 774 (COLO. 2009) OR *CITY OF THORNTON V. BIJOU*
13 *IRRIGATION CO.*, 926 P.2d 1 (COLO. 1996).

14 (III) THE STATE ENGINEER SHALL NOT CURTAIL A DIVERSION
15 BASED SOLELY ON THE FACT THAT THE POINT OF DIVERSION IS
16 ERRONEOUSLY DESCRIBED; AND

17 (IV) NOTHING IN THIS SUBSECTION (3.6) MODIFIES THE STATE
18 ENGINEER'S AUTHORITY TO MAKE DETERMINATIONS REGARDING THE
19 ADMINISTRATION OF WATER RIGHTS AND THE DISTRIBUTION OF WATER.

20 (h) DURING A CHANGE OF WATER RIGHT CASE OR AN
21 ABANDONMENT PROCEEDING, IF A POINT OF DIVERSION QUALIFIES AS AN
22 ESTABLISHED BUT ERRONEOUSLY DESCRIBED POINT OF DIVERSION
23 PURSUANT TO THIS SUBSECTION (3.6), FULL CONSIDERATION OF THE
24 HISTORICAL CONSUMPTIVE USE OF THE WATER RIGHT AT ITS PHYSICAL
25 LOCATION SHALL NOT BE DENIED DUE SOLELY TO THE FACT THAT THE
26 POINT OF DIVERSION IS NOT AT ITS DECREED LOCATION.

27 **SECTION 3. Act subject to petition - effective date.** This act

1 takes effect at 12:01 a.m. on the day following the expiration of the
2 ninety-day period after final adjournment of the general assembly (August
3 7, 2013, if adjournment sine die is on May 8, 2013); except that, if a
4 referendum petition is filed pursuant to section 1 (3) of article V of the
5 state constitution against this act or an item, section, or part of this act
6 within such period, then the act, item, section, or part will not take effect
7 unless approved by the people at the general election to be held in
8 November 2014 and, in such case, will take effect on the date of the
9 official declaration of the vote thereon by the governor.