

SENATE COMMITTEE OF REFERENCE REPORT

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Chairman of Committee

February 20, 2014  
Date

Committee on Agriculture, Natural Resources, & Energy.

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

SB14-023 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:

3 "SECTION 1. In Colorado Revised Statutes, 37-92-103, **add**  
4 (11.5) as follows:

5 **37-92-103. Definitions.** As used in this article, unless the context  
6 otherwise requires:

7 (11.5) (a) "WATER EFFICIENCY SAVINGS" MEANS AN AMOUNT OF  
8 WATER, AS DETERMINED IN A WATER COURT PROCEEDING, BY WHICH DITCH  
9 SEEPAGE, SURFACE RUN-OFF, RETURN FLOW, OR TAIL-WATER RETURN WILL  
10 BE REDUCED AS A RESULT OF STRUCTURAL IMPROVEMENTS THAT INCREASE  
11 THE EFFICIENCY OF WATER STORAGE, DIVERSION, CONVEYANCE,  
12 APPLICATION, OR USE PRACTICES ASSOCIATED WITH A WATER RIGHT.

13 (b) WATER EFFICIENCY SAVINGS CAN BE DERIVED ONLY FROM:

14 (I) WATER THAT IS NOT CONSUMED UNDER EXISTING PRACTICES.

15 (II) WATER RIGHTS THAT ARE USED SOLELY FOR AGRICULTURAL  
16 IRRIGATION OR STOCK WATERING PURPOSES IN WATER DIVISION 4, 5, 6, OR  
17 7.

18 (c) "WATER EFFICIENCY SAVINGS" DOES NOT INCLUDE:

19 (I) WATER DERIVED FROM THE SALVAGE OF TRIBUTARY WATERS  
20 BY THE ERADICATION OF PHREATOPHYTES; OR

21 (II) ANY PORTION OF HISTORIC WATER DIVERSIONS THAT WERE  
22 NOT DECREED OR THAT WERE NOT REASONABLY EFFICIENT AS  
23 DETERMINED BY THE WATER JUDGE.

1           **SECTION 2.** In Colorado Revised Statutes, 37-92-305, **add** (3.3)  
2 as follows:

3           **37-92-305. Standards with respect to rulings of the referee and**  
4 **decisions of the water judge.** (3.3) (a) WATER EFFICIENCY SAVINGS ARE  
5 AN INTEREST IN WATER THAT CAN BE TRANSFERRED TO THE COLORADO  
6 WATER CONSERVATION BOARD IN WATER DIVISION 4, 5, 6, OR 7 SUBJECT  
7 TO THE REQUIREMENTS APPLICABLE TO A CHANGE OF WATER RIGHT AND  
8 THE FOLLOWING STANDARDS AND LIMITATIONS:

9           (I) THE WATER JUDGE MAY APPROVE A CHANGE OF WATER RIGHT  
10 FOR WATER EFFICIENCY SAVINGS TO INSTREAM FLOW USE ONLY IF:

11           (A) THE COLORADO WATER CONSERVATION BOARD HAS ACCEPTED  
12 THE TRANSFER OF WATER EFFICIENCY SAVINGS FOR INSTREAM FLOW USE  
13 UNDER SECTION 37-92-102 (3);

14           (B) THE CHANGE WILL NOT MATERIALLY INJURE VESTED WATER  
15 RIGHTS OR DECREED CONDITIONAL WATER RIGHTS AND STREAM  
16 CONDITIONS ARE MAINTAINED IN TIME, PLACE, AND AMOUNT, INCLUDING  
17 REPLACEMENT OF RETURN FLOWS, AS NECESSARY TO AVOID SUCH INJURY;  
18 AND

19           (C) THE CHANGE WILL NOT ADVERSELY AFFECT COLORADO'S  
20 ENTITLEMENTS OR OBLIGATIONS UNDER INTERSTATE COMPACTS OR  
21 UNITED STATES SUPREME COURT EQUITABLE APPORTIONMENT DECREES;

22           (II) THE CHANGE DECREE MUST IDENTIFY:

23           (A) THE AMOUNT OF WATER EFFICIENCY SAVINGS AND THE  
24 REDUCED RATE OF DIVERSION;

25           (B) THE FLOW RATE OF THE INSTREAM FLOW RIGHT;

26           (C) THE STREAM REACH WITHIN WHICH THE WATER EFFICIENCY  
27 SAVINGS WILL BE USED AS INSTREAM FLOW, THE UPSTREAM TERMINUS OF  
28 WHICH MUST BE NO HIGHER THAN THE HISTORIC POINT OF DIVERSION AND  
29 THE DOWNSTREAM TERMINUS OF WHICH MUST BE NO LOWER THAN THE  
30 LOWEST POINT OF HISTORIC RETURN FLOWS; AND

31           (D) ALL TERMS AND CONDITIONS NECESSARY TO AVOID INJURY. IF  
32 THERE ARE VESTED WATER RIGHTS OR DECREED CONDITIONAL WATER  
33 RIGHTS BETWEEN THE UPSTREAM TERMINUS AND DOWNSTREAM TERMINUS  
34 OF THE IDENTIFIED INSTREAM FLOW REACH, THE WATER JUDGE SHALL  
35 ENSURE THE MAINTENANCE OF THE STREAM CONDITIONS ON WHICH SUCH  
36 INTERVENING WATER RIGHTS HISTORICALLY RELIED, INCLUDING  
37 REPLACEMENT OF RETURN FLOWS IN THE IDENTIFIED REACH, AS  
38 NECESSARY TO AVOID MATERIAL INJURY.

39           (b) WATER EFFICIENCY SAVINGS THAT HAVE BEEN CHANGED  
40 PURSUANT TO THIS SUBSECTION (3.3) ARE NOT SUBJECT TO ABANDONMENT  
41 DURING THE PERIOD OF THE INSTREAM FLOW USE BY THE COLORADO

1 WATER CONSERVATION BOARD.

2 (c) THE WATER JUDGE MAY INCLUDE IN THE CHANGE DECREE  
3 CONDITIONS PURSUANT TO WHICH THE ORIGINAL DECREED DIVERSION  
4 RATE MAY BE PRESERVED FOR A FUTURE USE BY THE WATER RIGHT OWNER  
5 WHO IMPLEMENTS THE STRUCTURAL IMPROVEMENTS REFERRED TO IN  
6 SECTION 37-92-103 (11.5) (a) IF USE OF THE STRUCTURAL IMPROVEMENTS  
7 IS DISCONTINUED.

8 (d) IN THE PROCEEDINGS TO CHANGE WATER EFFICIENCY SAVINGS  
9 TO INSTREAM FLOW USE, THE WATER JUDGE SHALL QUANTIFY HISTORIC  
10 CONSUMPTIVE USE ONLY IF NECESSARY TO CALCULATE THE AMOUNT OF  
11 WATER BY WHICH DITCH SEEPAGE, SURFACE RUN-OFF, RETURN FLOW, OR  
12 TAIL-WATER RETURN WILL BE REDUCED OR IF NECESSARY TO DETERMINE  
13 WHETHER ANY PORTION OF HISTORIC WATER DIVERSIONS WERE NOT  
14 REASONABLY EFFICIENT.

15 **SECTION 3.** In Colorado Revised Statutes, 37-92-102, **add** (3)  
16 (f) as follows:

17 **37-92-102. Legislative declaration - basic tenets of Colorado**  
18 **water law.** (3) Further recognizing the need to correlate the activities of  
19 mankind with some reasonable preservation of the natural environment,  
20 the Colorado water conservation board is hereby vested with the  
21 exclusive authority, on behalf of the people of the state of Colorado, to  
22 appropriate in a manner consistent with sections 5 and 6 of article XVI of  
23 the state constitution, such waters of natural streams and lakes as the  
24 board determines may be required for minimum stream flows or for  
25 natural surface water levels or volumes for natural lakes to preserve the  
26 natural environment to a reasonable degree. In the adjudication of water  
27 rights pursuant to this article and other applicable law, no other person or  
28 entity shall be granted a decree adjudicating a right to water or interests  
29 in water for instream flows in a stream channel between specific points,  
30 or for natural surface water levels or volumes for natural lakes, for any  
31 purpose whatsoever. The board also may acquire, by grant, purchase,  
32 donation, bequest, devise, lease, exchange, or other contractual  
33 agreement, from or with any person, including any governmental entity,  
34 such water, water rights, or interests in water that are not on the division  
35 engineer's abandonment list in such amount as the board determines is  
36 appropriate for stream flows or for natural surface water levels or  
37 volumes for natural lakes to preserve or improve the natural environment  
38 to a reasonable degree. At the request of any person, including any  
39 governmental entity, the board shall determine in a timely manner, not to  
40 exceed one hundred twenty days unless further time is granted by the  
41 requesting person or entity, what terms and conditions it will accept in a

1 contract or agreement for such acquisition. Any contract or agreement  
2 executed between the board and any person or governmental entity that  
3 provides water, water rights, or interests in water to the board shall be  
4 enforceable by either party thereto as a water matter under this article,  
5 according to the terms of the contract or agreement. The board shall adopt  
6 criteria for evaluating proposed contracts or agreements for leases or  
7 loans of water, water rights, or interests in water under this subsection (3),  
8 including, but not limited to, criteria addressing public notice, the extent  
9 to which the leased or loaned water will benefit the natural environment  
10 to a reasonable degree, and calculation of the compensation paid to the  
11 lessor of the water based upon the use of the water after the term of the  
12 lease. As a condition of approval of a proposed contract or agreement for  
13 a lease or loan of water, water rights, or interests in water pursuant to this  
14 subsection (3), the board shall obtain confirmation from the division  
15 engineer that the proposal is administrable and is capable of meeting all  
16 applicable statutory requirements. All contracts or agreements entered  
17 into by the board for leases or loans of water, water rights, or interests in  
18 water pursuant to this subsection (3) shall require the board to maintain  
19 records of how much water the board uses under the contract or  
20 agreement each year it is in effect and to install any measuring devices  
21 deemed necessary by the division engineer to administer the contract or  
22 agreement and to measure and record how much water flows out of the  
23 reach after use by the board under the contract or agreement, unless a  
24 measuring device already exists on the stream that meets the division  
25 engineer's requirements. All contracts or agreements for water, water  
26 rights, or interests in water under this subsection (3) shall provide that,  
27 pursuant to the water court decree implementing the contract or  
28 agreement, the board or the lessor, lender, or donor of the water may  
29 bring about beneficial use of the historical consumptive use of the leased,  
30 loaned, or donated water right downstream of the instream flow reach as  
31 fully consumable reusable water. The board shall file a change of water  
32 right application or other application with the water court to obtain a  
33 decreed right to use water for instream flow purposes under a contract or  
34 agreement for a lease or loan of water, water rights, or interests in water  
35 pursuant to this subsection (3). The resulting water court decree shall  
36 quantify the historical consumptive use of the leased or loaned water right  
37 and determine the method by which the historical consumptive use should  
38 be quantified and credited during the term of the agreement for the lease  
39 or loan of the water right. Said method shall recognize the actual amount  
40 of consumptive use available under the leased or loaned water right and  
41 shall not result in a reduction of the historical consumptive use of that

1 water right during the term of the lease or loan, except to the extent such  
2 reduction is based upon the actual amount of water available under said  
3 rights. All water rights under such decrees shall be administered in  
4 priority. The board may not accept a donation of water rights that either  
5 would require the removal of existing infrastructure without approval of  
6 the current owner of such infrastructure or that were acquired by  
7 condemnation. The board may use any funds available to it for acquisition  
8 of water rights and their conversion to instream flow rights. The board  
9 may initiate such applications as it determines are necessary or desirable  
10 for utilizing water, water rights, or interests in water appropriated,  
11 acquired, or held by the lineboard, including applications for changes of  
12 water rights, exchanges, or augmentation plans. Prior to the initiation of  
13 any such appropriation or acquisition, the board shall request  
14 recommendations from the division of parks and wildlife. The board also  
15 shall request recommendations from the United States department of  
16 agriculture and the United States department of the interior. Nothing in  
17 this article shall be construed as authorizing any state agency to acquire  
18 water by eminent domain or to deprive the people of the state of Colorado  
19 of the beneficial use of those waters available by law and interstate  
20 compact. Nothing in this subsection (3) shall impact section 37-60-121  
21 (2.5). Any appropriation made pursuant to this subsection (3) shall be  
22 subject to the following principles and limitations:

23 (f) (I) NOTWITHSTANDING ANY REFERENCE TO CONSUMPTIVE USE  
24 OR ANY OTHER PROVISION IN THIS SUBSECTION (3) TO THE CONTRARY, THE  
25 COLORADO WATER CONSERVATION BOARD MAY ACQUIRE WATER  
26 EFFICIENCY SAVINGS FOR INSTREAM FLOW USE PURSUANT TO SECTION  
27 37-92-305 (3.3). THIS SUBSECTION (3) APPLIES TO SUCH ACQUISITION  
28 EXCEPT TO THE EXTENT THAT THIS SUBSECTION (3) IS INCONSISTENT WITH  
29 AN ACQUISITION OF WATER THAT WAS HISTORICALLY NOT CONSUMED.

30 (II) THE GENERAL ASSEMBLY HEREBY:

31 (A) FINDS THAT DUE TO THE HYDROLOGICAL AND ADMINISTRATIVE  
32 CIRCUMSTANCES IN PORTIONS OF WATER DIVISIONS 4, 5, 6, AND 7 THAT  
33 MAY NOT BE PRESENT IN OTHER WATER DIVISIONS, A WATER RIGHT USED  
34 SOLELY FOR AGRICULTURAL IRRIGATION OR STOCK WATERING PURPOSES  
35 IN THOSE WATER DIVISIONS MAY, THROUGH INCREASED EFFICIENCY  
36 MEASURES AND UNDER APPROPRIATE TERMS AND CONDITIONS THAT  
37 ENSURE VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER  
38 RIGHTS WILL BE PROTECTED, BE ABLE TO PROVIDE NONCONSUMPTIVE  
39 WATER TO THE COLORADO WATER CONSERVATION BOARD FOR INSTREAM  
40 FLOW PURPOSES; AND

41 (B) DECLARES THAT THE PURPOSE OF THIS PARAGRAPH (f) IS TO

1 PROMOTE AND ENCOURAGE USE OF THESE INCREASED EFFICIENCY  
2 MEASURES IN ORDER TO PROVIDE THE COLORADO WATER CONSERVATION  
3 BOARD WITH WATER FOR INSTREAM FLOW PURPOSES IN APPROPRIATE  
4 AREAS WITHIN WATER DIVISIONS 4, 5, 6, AND 7.

5 **SECTION 4. Applicability.** This act applies to water efficiency  
6 savings changed on or after the effective date of this act.

7 **SECTION 5. Safety clause.** The general assembly hereby finds,  
8 determines, and declares that this act is necessary for the immediate  
9 preservation of the public peace, health, and safety."

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