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An Act

SENATE BILL 14-023

BY SENATOR(S) Schwartz, Jones, Kefalas, Nicholson;
also REPRESENTATIVE(S) Becker, Hullinghorst, Labuda, McLachlan,
Rosenthal.

CONCERNING AN AUTHORIZATION OF THE VOLUNTARY TRANSFER OF WATER
EFFICIENCY SAVINGS TO THE COLORADO WATER CONSERVATION
BOARD FOR INSTREAM USE PURPOSES IN WATER DIVISIONS THAT
INCLUDE LANDS WEST OF THE CONTINENTAL DIVIDE.

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

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

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

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

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

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

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

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

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

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

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

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

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

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

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

(B) THE WATER RIGHTS OWNER OR COLORADO WATER CONSERVATION BOARD HAS MADE BEST EFFORTS TO PROVIDE WRITTEN NOTICE OF THE PROPOSED APPLICATION AND OF THE BASIS FOR THE PROPOSED APPLICATION BY FIRST-CLASS OR ELECTRONIC MAIL TO THE OWNERS OF VESTED WATER RIGHTS AND DECREED CONDITIONAL WATER

RIGHTS IN THE STREAM REACH IN WHICH THE WATER EFFICIENCY SAVINGS WILL BE USED, WITH THE NOTICE BEING PROVIDED BEFORE THE PUBLICATION OF THE APPLICATION WHEN FILED WITH THE WATER JUDGE;

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

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

(E) THE AMOUNT OF CHANGED WATER IS NOT MORE THAN THE AMOUNT THAT THE COLORADO WATER CONSERVATION BOARD, AFTER TAKING INTO ACCOUNT THE WATER EFFICIENCY SAVINGS TO BE DERIVED FROM THE STRUCTURAL IMPROVEMENTS REFERENCED IN SECTION 37-92-103 (11.5) (a), DETERMINES IS APPROPRIATE AS THE MINIMUM AMOUNT NECESSARY TO ADD TO THE STREAM FLOWS TO THE EXTENT NECESSARY TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO SECTION 37-92-102 (3).

(II) THE CHANGE DECREE MUST IDENTIFY:

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

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

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

(D) ALL TERMS AND CONDITIONS NECESSARY TO AVOID INJURY. IF THERE ARE VESTED WATER RIGHTS OR DECREED CONDITIONAL WATER RIGHTS BETWEEN THE UPSTREAM TERMINUS AND DOWNSTREAM TERMINUS OF THE IDENTIFIED INSTREAM FLOW REACH, THE WATER JUDGE SHALL ENSURE THE MAINTENANCE OF THE STREAM CONDITIONS ON WHICH SUCH

INTERVENING WATER RIGHTS HISTORICALLY RELIED, INCLUDING REPLACEMENT OF RETURN FLOWS IN THE IDENTIFIED REACH, AS NECESSARY TO AVOID MATERIAL INJURY.

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

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

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

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

37-92-102. Legislative declaration - basic tenets of Colorado water law. (3) Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the exclusive authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, such waters of natural streams and lakes as the board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree. In the adjudication of water rights pursuant to this article and other applicable law, no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows in a stream channel between specific points, or for

natural surface water levels or volumes for natural lakes, for any purpose whatsoever. The board also may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any governmental entity, such water, water rights, or interests in water that are not on the division engineer's abandonment list in such amount as the board determines is appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree. At the request of any person, including any governmental entity, the board shall determine in a timely manner, not to exceed one hundred twenty days unless further time is granted by the requesting person or entity, what terms and conditions it will accept in a contract or agreement for such acquisition. Any contract or agreement executed between the board and any person or governmental entity that provides water, water rights, or interests in water to the board shall be enforceable by either party thereto as a water matter under this article, according to the terms of the contract or agreement. The board shall adopt criteria for evaluating proposed contracts or agreements for leases or loans of water, water rights, or interests in water under this subsection (3), including, but not limited to, criteria addressing public notice, the extent to which the leased or loaned water will benefit the natural environment to a reasonable degree, and calculation of the compensation paid to the lessor of the water based upon the use of the water after the term of the lease. As a condition of approval of a proposed contract or agreement for a lease or loan of water, water rights, or interests in water pursuant to this subsection (3), the board shall obtain confirmation from the division engineer that the proposal is administrable and is capable of meeting all applicable statutory requirements. All contracts or agreements entered into by the board for leases or loans of water, water rights, or interests in water pursuant to this subsection (3) shall require the board to maintain records of how much water the board uses under the contract or agreement each year it is in effect and to install any measuring devices deemed necessary by the division engineer to administer the contract or agreement and to measure and record how much water flows out of the reach after use by the board under the contract or agreement, unless a measuring device already exists on the stream that meets the division engineer's requirements. All contracts or agreements for water, water rights, or interests in water under this subsection (3) shall provide that, pursuant to the water court decree implementing the contract or agreement, the board or the lessor, lender, or donor of the water may bring about beneficial use of the historical consumptive use of the leased, loaned,

or donated water right downstream of the instream flow reach as fully consumable reusable water. The board shall file a change of water right application or other application with the water court to obtain a decreed right to use water for instream flow purposes under a contract or agreement for a lease or loan of water, water rights, or interests in water pursuant to this subsection (3). The resulting water court decree shall quantify the historical consumptive use of the leased or loaned water right and determine the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right. Said method shall recognize the actual amount of consumptive use available under the leased or loaned water right and shall not result in a reduction of the historical consumptive use of that water right during the term of the lease or loan, except to the extent such reduction is based upon the actual amount of water available under said rights. All water rights under such decrees shall be administered in priority. The board may not accept a donation of water rights that either would require the removal of existing infrastructure without approval of the current owner of such infrastructure or that were acquired by condemnation. The board may use any funds available to it for acquisition of water rights and their conversion to instream flow rights. The board may initiate such applications as it determines are necessary or desirable for utilizing water, water rights, or interests in water appropriated, acquired, or held by the lineboard, including applications for changes of water rights, exchanges, or augmentation plans. Prior to the initiation of any such appropriation or acquisition, the board shall request recommendations from the division of parks and wildlife. The board also shall request recommendations from the United States department of agriculture and the United States department of the interior. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact. Nothing in this subsection (3) shall impact section 37-60-121 (2.5). Any appropriation made pursuant to this subsection (3) shall be subject to the following principles and limitations:

(f) (I) NOTWITHSTANDING ANY REFERENCE TO CONSUMPTIVE USE OR ANY OTHER PROVISION IN THIS SUBSECTION (3) TO THE CONTRARY, THE COLORADO WATER CONSERVATION BOARD MAY ACQUIRE WATER EFFICIENCY SAVINGS FOR INSTREAM FLOW USE PURSUANT TO SECTION 37-92-305 (3.3). THIS SUBSECTION (3) APPLIES TO SUCH ACQUISITION

EXCEPT TO THE EXTENT THAT THIS SUBSECTION (3) IS INCONSISTENT WITH AN ACQUISITION OF WATER THAT WAS HISTORICALLY NOT CONSUMED.

(II) THE BOARD SHALL CONSIDER PRACTICES AND AGREEMENTS, FORMAL AND INFORMAL, AMONG POTENTIALLY AFFECTED WATER USERS WHEN CONSIDERING WHETHER OR NOT TO PLACE A CALL FOR ANY INSTREAM FLOW USE ADJUDICATED FROM WATER EFFICIENCY SAVINGS.

(III) THE GENERAL ASSEMBLY HEREBY:

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

(B) DECLARES THAT THE PURPOSE OF THIS PARAGRAPH (f) IS TO PROMOTE AND ENCOURAGE USE OF THESE INCREASED EFFICIENCY MEASURES IN ORDER TO PROVIDE THE COLORADO WATER CONSERVATION BOARD WITH WATER FOR INSTREAM FLOW PURPOSES IN APPROPRIATE AREAS WITHIN WATER DIVISIONS 4, 5, 6, AND 7.

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

SECTION 5. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Morgan Carroll
PRESIDENT OF
THE SENATE

Mark Ferrandino
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED _____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO