

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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MEMORANDUM

TO: Colorado Water Conservation Board Members

FROM: Tom Browning, Assistant Director

DATE: July 2, 2013

SUBJECT: Agenda Item 15, July 16-17, 2013 Board Meeting
Criteria and Guidelines for Fallowing-Leasing Pilot Projects

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

James Eklund
CWCB Director

Staff Recommendation

This item is for informational, discussion, and feedback purposes only. Staff will not be asking the Board to take formal action at this meeting.

Discussion

The Statewide Water Supply Initiative estimated that by 2050, Colorado may lose 500,000 to 700,000 acres of currently irrigated farmland to meet municipal growth demands. The CWCB, IBCC and Basin Roundtables have determined that the status quo path of continued "buy and dry" of agricultural lands is contrary to the vision for our state as being a great place to live and work. There is a widespread desire to minimize permanent agricultural dry-up while finding ways to provide water for current and future municipal needs. If significant progress can be made through alternative water transfers such as rotational fallowing and interruptible supply agreements, then the projected losses of irrigated acres could be noticeably reduced.

There is a recognized need to look for ways to increase flexibility within Colorado's system of water law, while respecting individual property rights. While there is much work to be done, alternative water transfers may very well provide a viable option for municipal water providers in the not-so-distant future. Through HB-1248, "fallowing-leasing" pilot projects can be tested to overcome challenges and develop opportunities for temporary agriculture to municipal water transfers.

The goal of HB-1248 is to make use of the CWCB as the State's water policy body, as well as the initiative of project proponents and concerns of other water rights owners, to resolve issues proactively for a better chance of success. At a minimum, items planned for discussion include:

- Overview of HB 13-1248 (attached)
- Requirement for developing Criteria and Guidelines vs. Rules and Regulations
- Draft framework for proposed Criteria and Guidelines (attached)
- Proposed schedule and stakeholder outreach process

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FOR FALLOWING-LEASING PILOT PROJECT PROGRAM

**Colorado Water Conservation Board and Colorado Division of Water Resources
July 2013 Draft**

I. INTRODUCTION

A. Purpose of the Criteria and Guidelines Document

House Bill (HB) 13-1248, signed into law by the Governor on May 13, 2013, authorizes the Colorado Water Conservation Board (the “CWCB” or the “Board”) to administer a pilot program to test the efficacy of fallowing-leasing as an alternative to permanent agricultural dry-up.¹ The pilot program may consist of the selection of up to ten separate pilot projects, each lasting up to ten years in duration, to test the practice of fallowing agricultural irrigation land and leasing the associated water rights for temporary municipal use.

HB13-1248 charges the Board, in consultation with the State Engineer, to establish “Criteria and Guidelines” for the application, selection, and approval process for pilot projects. This document, hereinafter referred to as the “Criteria and Guidelines,” was developed through the cooperation and collaboration of CWCB, the State Engineer’s Office, and the public in accordance with that legislative directive.²

These Criteria and Guidelines shall become effective upon Board approval and may be modified at any time by the Board.

B. Background

{The background section will contain a policy discussion on the potential benefits of fallowing-leasing, the objectives of limited pilot projects, and the expected outcomes. This section should include material from the legislative declaration as well as material provided by the proponents of HB13-1248, the Board, and other stakeholders.}

C. Rotational Fallowing Pilot Project Goals and Purposes

{This section will be a continuation of the background section that will contain a policy discussion on the potential benefits of fallowing-leasing, the objectives of limited pilot projects, and the expected outcomes. This section should include material from the legislative declaration as well as material provided by the proponents of HB13-1248, the Board, and other stakeholders.}

¹ HB13-1248 will be codified as section 37-60-115(8), C.R.S. (2013)

² HB13-1248 does not contain any language calling for formal rulemaking. During the 2013 legislative session, the proponents of HB13-1248, in cooperation with parties with an interest in the legislation, agreed on an approach of establishing “criteria and guidelines” as the most effective way to provide guidance to applicants and all parties for the implementation of the pilot projects.

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D. Content of this Criteria and Guidelines Document`

This Criteria and Guidelines document provides guidance for the pilot project selection, application, and approval process. As described in section 37-60-115(8)(b), C.R.S. (2013), the general purpose of the pilot program is to:

1. Demonstrate cooperation among different types of water users, including cooperation among shareholders, ditch companies, water user associations, irrigation districts, water conservancy districts, water conservation districts, and municipalities;
2. Evaluate the feasibility of delivering leased water to temporary municipal users;
3. Provide sufficient data from which the CWCB, in consultation with the State Engineer, can evaluate the efficacy of using streamlined approaches for determining critical components of a fallowing-leasing plan, including historical consumptive use, return flow characteristics, the potential for material injury to other water rights, and conditions to prevent, material injury to other water rights; and
4. Demonstrate how to operate, administer, and account for the practice of fallowing irrigated land for temporary municipal use without causing material injury to other water rights.

Pursuant to section 37-60-115(8)(d), this Criteria and Guidelines document includes:

1. The determination of an application fee and for selected pilot projects, an annual review fee;
2. Criteria for selecting pilot projects that range in size and complexity;
3. The maximum quantity of transferable consumptive water use per year for any single pilot project;
4. The identification of any geographic areas that are not eligible for pilot projects;
5. A listing of the information to be included in a pilot project application for approval, including a description of the proposed pilot project;
6. Provision for a time period of at least 75 days during which the CWCB shall accept comments after the applicant has provided notice of the application for approval of a pilot project;
7. The requirement and criteria for a conference between the applicant for a pilot project, the State Engineer, and parties that filed comments on the application;
8. Guidelines for the operation and administration of the pilot projects;

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9. Criteria for selecting pilot projects over a five-year period, ending December 31, 2018;
10. Provision for a requirement that a proposed pilot project meet certain local requirements;
11. Provisions for limitations that land and water included in a pilot project is not also included in a substitute water supply plan approved pursuant to 37-92-308(5) or (7), (2013), an interruptible water supply agreement approved pursuant to 37-92-309, (2013), or another pilot project.

This Criteria and Guidelines document also includes:

1. A description of the submittal, selection, review, and approval process;
2. Pilot project selection criteria;
3. Guidance on accepted methodologies, modeling, and accounting practices; and
4. Ongoing requirements of an approved pilot project.

II. CRITERIA AND GUIDELINES

A. SUMMARY OF THE SUBMITTAL, SELECTION, APPROVAL, AND REVIEW PROCESS

The submittal and approval process entails four discrete steps:

1. Submittal of a proposed pilot project for selection;
2. Submittal of a pilot project application for approval;
3. Determination by the State Engineer; and
4. Approval of the pilot project by the Board.

*Note: The sponsor of a proposed pilot project may pursue step 1 and step 2 at the same time, effectively completing those steps in parallel and allowing for only one notice, one notice period, and a combined selection and approval process. However, the sponsor will do this at the sponsor's own risk since the final approval by the Board would then be based not only on the State Engineer's evaluation of the comprehensive engineering and resulting determination, but also on threshold selection criteria such as the limit on the number of pilot projects, the number of pilot projects per basin, or whether the other standards provided in 37-60-115(8)(a) and (b), are met.

The process for completing the above steps shall be as follows:

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1. **Submittal of a proposed pilot project for selection [37-60-115(8)(a) through(c)].**
The submittal of a proposed pilot project to the Board for consideration to be selected as a pilot project shall be as follows:
 - a. The submittal shall include a general description of the proposed pilot project, including the land to be fallowed and the proposed municipal use.
 - b. The submittal shall demonstrate that the proposed pilot project meets the eligibility requirements identified in 37-60-115(8)(a) through (c), also shown below in Section ____.
 - c. The submittal shall be limited to five pages.
 - d. The CWCB shall distribute notice of the submittal via electronic mail to all parties who receives electronic notice of the CWCB's meetings, and post the request on its website. The notice shall provide 30 days for the submission of comments on the proposed pilot project.
 - e. The CWCB shall consider the request at its next regularly scheduled meeting that is more than 60 days after receiving the request. The CWCB shall consult with the State Engineer and consider any comments submitted in acting on the submittal.
 - f. Upon a review and determination by the Board that the proposed pilot project meets the requirements of 37-60-115(8)(a) through (c) and the requirements set out in this Criteria and Guidelines document, the Board may select a proposed pilot project to participate in the program.
2. **Submittal of a pilot project application for approval [37-60-115(8)(e)].** After selection by the Board as a pilot project, the applicant will apply for approval of the pilot project from the Board and provide notice as directed in 37-60-115(8)(e).

*If the sponsor of a proposed pilot project chooses to combine steps 1 and 2, the notice requirements of both steps are applicable but may run concurrently.

3. **Determination by the State Engineer [37-60-115(8)(f)].** After application to the Board for approval, and upon consideration of any comments received and conference reports submitted, the State Engineer shall make a written determination as to whether the operation and administration of the proposed pilot project will not cause injury to other water rights and will not impair compliance with any interstate compact.
4. **Approval of the pilot project by the Board [37-60-115(8)(f)].** If the State Engineer has made a favorable determination as required above, the Board may approve the pilot project application.

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B. APPLICATION FEE

{To be determined}

C. PILOT PROJECT SELECTION CRITERIA

Pursuant to 37-60-115(8)(a), a proposed pilot project submitted to the Board to be considered for selection must demonstrate the practice of:

1. Fallowing agricultural irrigation land; and
2. Leasing the associated water rights for temporary municipal use.

In addition, consistent with the purpose of the pilot program, as stated in 37-60-115(8)(b), the applicant should submit information for the Board to determine the extent to which the pilot project has the potential to:

1. Demonstrate cooperation among different types of water users;
2. Evaluate the feasibility of delivering leased water to the temporary municipal users;
3. Provide sufficient data from which the Board, in consultation with the State Engineer, can evaluate the efficacy of using a streamlined approach, such as an accounting and administrative method, for determining:
 - a. Historical consumptive use;
 - b. Return flows;
 - c. The potential for material injury to other water rights; and
 - d. Conditions to prevent material injury.
4. Demonstrate how to operate, administer, and account for the practice of fallowing irrigated agricultural land for leasing water for temporary municipal use without causing material injury to other vested water rights, decreed conditional rights, or contract rights to water.

The Board shall not select a pilot project that involves:

1. The fallowing of the same land for more than three years in a ten-year period;
2. The fallowing of more than 30 percent of a single irrigated farm for more than ten consecutive years;
3. The transfer or facilitation of the transfer of water across the continental divide by

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direct diversion, exchange, or otherwise; or

4. The transfer or facilitation of the transfer of water out of the Rio Grande basin by direct diversion, exchange, or otherwise.

The sponsors of a potential pilot project should submit the application for selection as a pilot project to the CWCBC in report form with narrative and necessary attachments to demonstrate the selection criteria are met. The Board will not consider and does not require the submittal of detailed engineering reports for the purpose of selecting a pilot project.

D. MAXIMUM QUANTITY OF TRANSFERABLE CONSUMPTIVE USE WATER PER YEAR

{To be determined through Board and stakeholder input}

E. GEOGRAPHIC AREAS NOT ELIGIBLE FOR A PILOT PROJECT

{To be determined through Board and stakeholder input}

F. INFORMATION TO BE INCLUDED IN A PILOT PROJECT APPLICATION

As described in 37-60-115(8)(e)(I), the application shall include:

1. A description of the proposed pilot project;
 - a. *{Additional detail will come from Board and stakeholder input}*
2. An analysis of the historical use, the historical consumptive use, and the historical return flows of the water rights or contract rights to water proposed to be used for temporary municipal use; and
 - a. *{Additional detail will come from Board and stakeholder input}*
3. A description of the source of water to be used to replace all historical return flows during the pilot project and after completion of the pilot project.
 - a. *{Additional detail will come from Board and stakeholder input}*

Pursuant to 37-60-115(8)(e)(II), after having been selected as a pilot project or, concurrent with the selection process if the applicant decides to combine the selection and the approval process, the applicant for approval of a pilot project must provide notice of the application. The applicant shall provide the written notice containing the above items by first-class mail or electronic mail to all parties that have subscribed to the substitute water supply plan notification list, as described in section 37-92-308(6), for the division or divisions in which the water right is located and in which it will be used, and file proof of the written notice with the Board.

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G. COMMENT AND CONFERENCE CRITERIA

The Board shall receive comments from parties receiving notice of the application for approval of a pilot project for a period of 75 days after the applicant has provided notice. Pursuant to section 37-60-115(d)(VI), the applicant for a pilot project, the State Engineer, and owners of water rights or contract rights to water that file comments on the application for approval of a pilot project shall meet within 30 days after final comments on the application have been submitted.

{Additional detail will come from Board and stakeholder input}

H. DETERMINATION OF THE STATE ENGINEER; GUIDELINES FOR OPERATION AND ADMINISTRATION OF A PILOT PROJECT

The operation and administration of a pilot project will be described in the written determination of the State Engineer, which shall include consideration of all comments and conference reports.

{Additional detail will come from Board and stakeholder input}

I. CONSIDERATION OF ADDITIONAL REQUIREMENTS

Pursuant to section 37-60-115(8)(d)(X), the applicant must provide evidence that through the operation of a pilot project, the applicant will:

1. Meet applicable local government land use requirements;
2. Prevent erosion and blowing soils; and
3. Comply with local county noxious weed requirements.

Neither the Board nor the State Engineer will perform a technical evaluation to validate whether the applicant has met these requirements. Rather, the State Engineer, in its written determination, will validate whether the applicant has provided sufficient evidence to satisfy these requirements.

J. LIMITATIONS ON PARTICIPATION IN OTHER STATUTORY MECHANISMS

Pursuant to 37-80-115(8)(d)(XI) during the term of a pilot project, land and water included in a pilot project shall not also be included in a substitute water supply plan pursuant to 37-92-308(5) or (7), an interruptible water supply agreement pursuant to 37-92-309, or another pilot project.

K. ACCEPTED METHODOLOGIES, MODELING, AND ACCOUNTING PRACTICES

{To be determined through Board and stakeholder input. This may be a statement of the policy basis for allowing consideration of streamlined approaches or it may actually identify specific

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approaches that are presumptively valid. For example, this section may provide that lagged return flow obligations be aggregated into some time period or based on a percentage, that certain crops may or may not be utilized for dry-up, that a minimum number of monitoring wells be installed at certain maximum distances from dry-up locations, etc. This will be a discussion point for the Board and stakeholders}

L. ONGOING REQUIREMENTS OF AN APPROVED PILOT PROJECT

The CWCB Board, in consultation with the State Engineer, shall annually report to the Water Resources Review Committee, created in section 37-98-102, (2013), or its successor committee, on the reported results of the pilot projects, including any recommendations for legislation to implement following-leasing. The CWCB Board, in consultation with the State Engineer, shall provide a final report to the water resources review committee, or its successor committee, by July 1, 2029, or the year in which the final pilot project is completed, if before 2029, as required by 37-60-115(8)(h)(II)(i).

An Act

HOUSE BILL 13-1248

BY REPRESENTATIVE(S) Fischer, Conti, Coram, Fields, Gerou, Ginal, Hamner, Hullinghorst, Lebsock, Levy, Mitsch Bush, Rankin, Rosenthal, Salazar, Schafer, Vigil, Young, Duran, Labuda, Pabon, Pettersen; also SENATOR(S) Schwartz, Todd.

CONCERNING AN AUTHORIZATION OF PILOT PROJECTS FOR THE LEASING OF WATER FOR MUNICIPAL USE.

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

SECTION 1. Legislative declaration. (1) The general assembly hereby:

(a) Affirms its commitment to develop and implement programs to advance various agricultural transfer methods as alternatives to permanent agricultural dry-up, which it has funded through the "alternative agricultural water transfer sustainability grant program", enacted in the 2007, 2009, and 2012 Colorado water conservation board (board) projects bills;

(b) Recognizes that:

(I) If the status quo development trend continues, Colorado may lose over five hundred thousand irrigated acres statewide and some basins may

lose as much as thirty-five percent of their irrigated acreage by 2050, as found by the board's 2010 statewide water supply initiative;

(II) The board believes that it is urgent to implement alternatives, like fallowing irrigated agricultural land for leasing water for temporary municipal use, referred to in this section as "fallowing-leasing", to traditional transfers resulting in permanent agricultural dry-up, and the board is fostering the development of these alternatives through its alternative agricultural water transfer methods competitive grant program;

(III) Both the interbasin compact committee and the basin roundtables, created in section 37-75-104, Colorado Revised Statutes, have expressed a desire to minimize permanent agricultural dry-up;

(IV) Fallowing-leasing poses hydrological issues in addition to those posed by traditional changes of water rights, and an evaluation of the hydrological issues posed may require further analysis to address questions of injury to other water rights; and

(V) The state needs to evaluate whether fallowing-leasing is a practical alternative to permanent agricultural dry-up; and

(c) Determines that:

(I) The board, which was created in section 37-60-102, Colorado Revised Statutes, "[f]or the purpose of aiding in the protection and development of the waters of the state, for the benefit of the present and future inhabitants of the state", is the appropriate agency to test the efficacy of implementing fallowing-leasing as an alternative to permanent agricultural dry-up; and

(II) It is appropriate to authorize the board, after the state engineer determines the issue of injury, to approve up to ten pilot projects to test fallowing-leasing, with each project lasting up to ten years and no more than three pilot projects to be located in any one of the major river basins, namely: The South Platte river basin; the Arkansas river basin; the Rio Grande river basin; and the Colorado river basin, except as further limited by board.

SECTION 2. In Colorado Revised Statutes, 37-60-115, **add** (8) as

follows:

37-60-115. Water studies - rules - repeal. (8) Fallowing and leasing pilot projects. (a) AFTER A PERIOD OF NOTICE AND COMMENT, THE BOARD MAY, IN CONSULTATION WITH THE STATE ENGINEER AND UPON CONSIDERATION OF ANY COMMENTS SUBMITTED, SELECT THE SPONSORS OF UP TO TEN PILOT PROJECTS PURSUANT TO THE APPROVAL PROCESS SET FORTH IN PARAGRAPH (f) OF THIS SUBSECTION (8). THE BOARD SHALL NOT ITSELF SPONSOR A PILOT PROJECT, BUT THE BOARD MAY PROVIDE FINANCIAL, TECHNICAL, OR OTHER ASSISTANCE TO A PILOT PROJECT PURSUANT TO THE BOARD'S OTHER ACTIVITIES AND PROGRAMS. NO MORE THAN THREE PILOT PROJECTS MAY BE LOCATED IN ANY ONE OF THE MAJOR RIVER BASINS, NAMELY: THE SOUTH PLATTE RIVER BASIN; THE ARKANSAS RIVER BASIN; THE RIO GRANDE RIVER BASIN; AND THE COLORADO RIVER BASIN. EACH PROJECT MAY LAST UP TO TEN YEARS IN DURATION AND MUST DEMONSTRATE THE PRACTICE OF:

(I) FALLOWING AGRICULTURAL IRRIGATION LAND; AND

(II) LEASING THE ASSOCIATED WATER RIGHTS FOR TEMPORARY MUNICIPAL USE.

(b) THE PURPOSE OF THE PILOT PROGRAM IS TO:

(I) IN FALLOWING IRRIGATED AGRICULTURAL LAND FOR LEASING WATER FOR TEMPORARY MUNICIPAL USE, DEMONSTRATE COOPERATION AMONG DIFFERENT TYPES OF WATER USERS, INCLUDING COOPERATION AMONG SHAREHOLDERS, DITCH COMPANIES, WATER USER ASSOCIATIONS, IRRIGATION DISTRICTS, WATER CONSERVANCY DISTRICTS, WATER CONSERVATION DISTRICTS, AND MUNICIPALITIES;

(II) EVALUATE THE FEASIBILITY OF DELIVERING LEASED WATER TO THE TEMPORARY MUNICIPAL USERS;

(III) PROVIDE SUFFICIENT DATA FROM WHICH THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, CAN EVALUATE THE EFFICACY OF USING A STREAMLINED APPROACH, SUCH AS AN ACCOUNTING AND ADMINISTRATIVE TOOL, FOR DETERMINING:

(A) HISTORICAL CONSUMPTIVE USE;

(B) RETURN FLOWS;

(C) THE POTENTIAL FOR MATERIAL INJURY TO OTHER WATER RIGHTS;
AND

(D) CONDITIONS TO PREVENT MATERIAL INJURY; AND

(IV) DEMONSTRATE HOW TO OPERATE, ADMINISTER, AND ACCOUNT FOR THE PRACTICE OF FALLOWING IRRIGATED AGRICULTURAL LAND FOR LEASING WATER FOR TEMPORARY MUNICIPAL USE WITHOUT CAUSING MATERIAL INJURY TO OTHER VESTED WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER.

(c) THE BOARD SHALL NOT SELECT A PILOT PROJECT THAT INVOLVES:

(I) THE FALLOWING OF THE SAME LAND FOR MORE THAN THREE YEARS IN A TEN-YEAR PERIOD;

(II) THE FALLOWING OF MORE THAN THIRTY PERCENT OF A SINGLE IRRIGATED FARM FOR MORE THAN TEN CONSECUTIVE YEARS;

(III) THE TRANSFER OR FACILITATION OF THE TRANSFER OF WATER ACROSS THE CONTINENTAL DIVIDE BY DIRECT DIVERSION, EXCHANGE, OR OTHERWISE; OR

(IV) THE TRANSFER OR FACILITATION OF THE TRANSFER OF WATER OUT OF THE RIO GRANDE BASIN BY DIRECT DIVERSION, EXCHANGE, OR OTHERWISE.

(d) AFTER PROVIDING A REASONABLE OPPORTUNITY FOR PUBLIC COMMENT AND CONSIDERATION OF ANY COMMENTS RECEIVED, THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL ESTABLISH CRITERIA AND GUIDELINES INCLUDING AT LEAST THE FOLLOWING:

(I) AN APPLICATION FEE AND, FOR SELECTED PILOT PROJECTS, AN ANNUAL REVIEW FEE;

(II) THE INFORMATION TO BE INCLUDED IN THE APPLICATION, INCLUDING A DESCRIPTION OF THE PROPOSED PILOT PROJECT;

(III) THE MAXIMUM QUANTITY OF TRANSFERABLE CONSUMPTIVE WATER USE PER YEAR FOR ANY SINGLE PILOT PROJECT;

(IV) NOTWITHSTANDING PARAGRAPH (a) OF THIS SUBSECTION (8), ANY GEOGRAPHIC AREAS THAT ARE NOT ELIGIBLE FOR PILOT PROJECTS;

(V) A TIME PERIOD OF AT LEAST SEVENTY-FIVE DAYS WITHIN WHICH THE BOARD SHALL RECEIVE COMMENTS ON THE APPLICATION AFTER PROVIDING NOTICE PURSUANT TO THE PROCESS SET FORTH IN PARAGRAPHS (e) AND (f) OF THIS SUBSECTION (8). THE COMMENTS MAY INCLUDE:

(A) ANY CLAIM OF INJURY;

(B) ANY TERMS AND CONDITIONS THAT THE PERSON FILING A COMMENT BELIEVES SHOULD BE IMPOSED ON THE PILOT PROJECT IN ORDER TO PREVENT INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER; AND

(C) OTHER INFORMATION THAT THE PERSON FILING THE COMMENT BELIEVES THE BOARD SHOULD CONSIDER IN REVIEWING THE APPLICATION;

(VI) CRITERIA FOR A CONFERENCE BETWEEN A PILOT PROJECT APPLICANT, THE STATE ENGINEER, AND OWNERS OF WATER RIGHTS OR A CONTRACT RIGHTS TO WATER THAT FILE COMMENTS ON THE APPLICATION, INCLUDING THE FOLLOWING REQUIREMENTS:

(A) THE CONFERENCE PARTICIPANTS MUST MEET WITHIN THIRTY DAYS AFTER FINAL COMMENTS ON THE APPLICATION HAVE BEEN SUBMITTED;

(B) AT THE CONFERENCE, THE CONFERENCE PARTICIPANTS MUST DISCUSS HOW THE PILOT PROJECT COULD BE STRUCTURED TO PREVENT MATERIAL INJURY TO OTHER WATER RIGHTS AND CONTRACT RIGHTS TO WATER; AND

(C) WITHIN FIFTEEN DAYS AFTER THE CONFERENCE, THE PILOT PROJECT APPLICANT AND THE OWNERS OF WATER RIGHTS OR CONTRACT RIGHTS TO WATER MUST FILE A JOINT REPORT WITH THE BOARD AND WITH THE STATE ENGINEER OUTLINING ANY AGREED-UPON TERMS AND CONDITIONS FOR THE PROPOSED PILOT PROJECT AND EXPLAINING THE REASONS FOR FAILING TO AGREE ON ANY TERMS AND CONDITIONS FOR THE

PROPOSED PILOT PROJECT IF THE APPLICANT AND THE OWNERS FAIL TO REACH A FULL AGREEMENT AT THE CONFERENCE;

(VII) GUIDELINES FOR THE OPERATION AND ADMINISTRATION OF THE PILOT PROJECTS TO ASSURE THAT A PILOT PROJECT:

(A) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER; AND

(B) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACT;

(VIII) CRITERIA FOR SELECTING PILOT PROJECTS THAT RANGE IN SIZE AND COMPLEXITY;

(IX) CRITERIA FOR SELECTING PILOT PROJECTS OVER A FIVE-YEAR PERIOD ENDING ON DECEMBER 31, 2018, TO PROVIDE A WINDOW FOR POTENTIAL PILOT PROJECT SPONSORS TO APPLY;

(X) A REQUIREMENT THAT A PROPOSED PILOT PROJECT:

(A) MEET APPLICABLE LOCAL GOVERNMENT LAND USE REQUIREMENTS;

(B) PREVENT EROSION AND BLOWING SOILS; AND

(C) COMPLY WITH LOCAL COUNTY NOXIOUS WEED REGULATIONS;

(XI) A REQUIREMENT THAT, DURING THE TERM OF THE PILOT PROJECT, LAND AND WATER INCLUDED IN A PILOT PROJECT IS NOT ALSO INCLUDED IN A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO SECTION 37-92-308 (5) OR (7), AN INTERRUPTIBLE WATER SUPPLY AGREEMENT PURSUANT TO SECTION 37-92-309, OR ANOTHER PILOT PROJECT;

(XII) A REQUIREMENT FOR PERIODIC REPORTS TO THE BOARD ON THE OPERATION OF THE PILOT PROJECT; AND

(XIII) A REQUIREMENT THAT PRIORITY IS GIVEN TO PILOT PROJECTS THAT CAN BE IMPLEMENTED USING EXISTING INFRASTRUCTURE.

(e) (I) FOR APPROVAL OF A PILOT PROJECT, THE APPLICANT MUST PROVIDE WRITTEN NOTICE OF THE APPLICATION, INCLUDING, AT A MINIMUM:

(A) A DESCRIPTION OF THE PROPOSED PILOT PROJECT;

(B) AN ANALYSIS OF THE HISTORICAL USE, THE HISTORICAL CONSUMPTIVE USE, AND THE HISTORICAL RETURN FLOWS OF THE WATER RIGHTS OR CONTRACT RIGHTS TO WATER PROPOSED TO BE USED FOR TEMPORARY MUNICIPAL USE; AND

(C) A DESCRIPTION OF THE SOURCE OF WATER TO BE USED TO REPLACE HISTORICAL RETURN FLOWS DURING THE PILOT PROJECT AND AFTER COMPLETION OF THE PILOT PROJECT; AND

(II) THE APPLICANT MUST PROVIDE THE WRITTEN NOTICE BY FIRST-CLASS MAIL OR ELECTRONIC MAIL TO ALL PARTIES THAT HAVE SUBSCRIBED TO THE SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST, AS DESCRIBED IN SECTION 37-92-308 (6) FOR THE DIVISION OR DIVISIONS IN WHICH THE WATER RIGHT IS LOCATED AND IN WHICH IT WILL BE USED. THE APPLICANT MUST FILE PROOF OF THE WRITTEN NOTICE WITH THE BOARD.

(f) AFTER CONSIDERATION OF THE COMMENTS AND ANY CONFERENCE REPORTS SUBMITTED PURSUANT TO SUBPARAGRAPH (IV) OF PARAGRAPH (d) OF THIS SUBSECTION (8), THE BOARD MAY APPROVE THE PILOT PROJECT APPLICATION IF THE STATE ENGINEER HAS MADE A WRITTEN DETERMINATION THAT THE OPERATION AND ADMINISTRATION OF THE PILOT PROJECT:

(I) WILL EFFECT ONLY A TEMPORARY CHANGE IN THE HISTORICAL CONSUMPTIVE USE OF THE WATER RIGHT IN A MANNER THAT WILL NOT CAUSE INJURY TO OTHER WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, OR CONTRACT RIGHTS TO WATER;

(II) WILL NOT IMPAIR COMPLIANCE WITH ANY INTERSTATE COMPACT;
AND

(III) THE BOARD ADOPTS ALL TERMS AND CONDITIONS RECOMMENDED BY THE STATE ENGINEER.

(g) WHEN THE BOARD APPROVES OR DENIES A PILOT PROJECT APPLICATION, IT SHALL SERVE A COPY OF THE DECISION, ALONG WITH A COPY

OF THE STATE ENGINEER'S WRITTEN DETERMINATION AND ANY CONFERENCE REPORTS SUBMITTED PURSUANT TO SUBPARAGRAPH (IV) OF PARAGRAPH (d) OF THIS SUBSECTION (8), UPON ALL PARTIES TO THE APPLICATION BY FIRST-CLASS MAIL OR, IF ELECTED BY THE PARTIES, BY ELECTRONIC MAIL. THE BOARD SHALL MAIL A COPY OF THE DECISION, THE STATE ENGINEER'S WRITTEN DETERMINATION, AND ANY CONFERENCE REPORTS TO THE APPROPRIATE WATER CLERK.

(h) (I) NEITHER THE BOARD'S APPROVAL NOR THE DENIAL OF A PILOT PROJECT CREATES ANY PRESUMPTIONS, SHIFTS THE BURDEN OF PROOF, OR SERVES AS A DEFENSE IN ANY LEGAL ACTION THAT MAY ARISE CONCERNING THE PILOT PROJECT. THE BOARD'S APPROVAL OR DENIAL OF A PILOT PROJECT APPLICATION AND THE STATE ENGINEER'S WRITTEN DETERMINATION ON THE APPLICATION ARE FINAL AGENCY ACTIONS THAT MAY BE APPEALED. AN APPEAL PURSUANT TO THIS SUBSECTION (8) MUST BE FILED WITH THE APPROPRIATE WATER JUDGE AND BE MADE WITHIN THIRTY-FIVE DAYS AFTER THE BOARD'S DECISION HAS BEEN MAILED TO THE APPROPRIATE WATER CLERK.

(II) THE WATER JUDGE SHALL EXPEDITE THE APPEAL, WHICH SHALL BE DE NOVO AND USE THE PROCEDURES AND STANDARDS SET FORTH IN SECTIONS 37-92-304 AND 37-92-305 FOR DETERMINATION OF MATTERS REREFERRED TO THE WATER JUDGE BY THE REFEREE; EXCEPT THAT THE WATER JUDGE SHALL NOT DEEM A PARTY'S FAILURE EITHER TO APPEAL ALL OR ANY PART OF THE BOARD'S DECISION OR THE STATE ENGINEER'S WRITTEN DETERMINATION OR TO STATE ANY GROUNDS FOR THE APPEAL TO PRECLUDE THE PARTY FROM RAISING A CLAIM OF INJURY IN A FUTURE PROCEEDING BEFORE THE WATER JUDGE. THE PILOT PROJECT APPLICANT IS DEEMED TO BE THE APPLICANT FOR PURPOSES OF THE PROCEDURES AND STANDARDS THAT THE WATER JUDGE APPLIES TO THE APPEAL.

(i) THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL ANNUALLY REPORT TO THE WATER RESOURCES REVIEW COMMITTEE, CREATED IN SECTION 37-98-102, OR ITS SUCCESSOR COMMITTEE, ON THE REPORTED RESULTS OF THE PILOT PROJECTS. THE BOARD, IN CONSULTATION WITH THE STATE ENGINEER, SHALL PROVIDE A FINAL REPORT TO THE WATER RESOURCES REVIEW COMMITTEE, OR ITS SUCCESSOR COMMITTEE, BY JULY 1, 2029, OR THE YEAR IN WHICH THE FINAL PILOT PROJECT IS COMPLETED, IF BEFORE 2029.

(j) THIS SUBSECTION (8) IS REPEALED, EFFECTIVE JULY 1, 2030.

SECTION 3. 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.

Mark Ferrandino
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

John P. Morse
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED _____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO