

Colorado Revised Statutes 2013

37-92-102. Legislative declaration - basic tenets of Colorado water law. (1) (a) It is hereby declared to be the policy of the state of Colorado that all water in or tributary to natural surface streams, not including nontributary groundwater as that term is defined in section 37-90-103, originating in or flowing into this state have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with sections 5 and 6 of article XVI of the state constitution and this article. As incident thereto, it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all of the waters of this state.

(b) A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation as provided in paragraph (a) of this subsection (1).

(2) Recognizing that previous and existing laws have given inadequate attention to the development and use of underground waters of the state, that the use of underground waters as an independent source or in conjunction with surface waters is necessary to the present and future welfare of the people of this state, and that the future welfare of the state depends upon a sound and flexible integrated use of all waters of the state, it is hereby declared to be the further policy of the state of Colorado that, in the determination of water rights, uses, and administration of water, the following principles shall apply:

(a) Water rights and uses vested prior to June 7, 1969, in any person by virtue of previous or existing laws, including an appropriation from a well, shall be protected subject to the provisions of this article.

(b) The existing use of groundwater, either independently or in conjunction with surface rights, shall be recognized to the fullest extent possible, subject to the preservation of other existing vested rights, but, at his own point of diversion on a natural watercourse, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled.

(c) The use of groundwater may be considered as an alternate or supplemental source of supply for surface decrees entered prior to June 7, 1969, taking into consideration both previous usage and the necessity to protect the vested rights of others.

(d) No reduction of any lawful diversion because of the operation of the priority system shall be permitted unless such reduction would increase the amount of water available

to and required by water rights having senior priorities.

(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 board, 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:

(a) Any such appropriation which is based upon water imported from one water division to another by some other appropriator shall not, as against the appropriator of such imported water or his successor in interest, constitute a claim, bar, or use for any purpose whatsoever.

(b) Any such appropriation shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree.

(c) Before initiating a water rights filing, the board shall determine that the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; that there is a natural environment that can be preserved to a reasonable degree with the board's water right, if granted; and that such environment can

exist without material injury to water rights.

(c.5) Notwithstanding section 37-92-103 (6), as to any application filed by the board on or after July 1, 1994, the board may not acquire conditional water rights or change conditional water rights to instream flow uses.

(d) Nothing in this section is intended or shall be construed to allow condemnation by this state or any person of easements or rights-of-way across private lands to gain access to a segment of a stream or lake where a water right decree has been awarded to the Colorado water conservation board.

(e) All recommendations, including those of the United States, which are transmitted to the board for water to be retained in streams or lakes to preserve the natural environment to a reasonable degree must be made with specificity and in writing in order that any appropriation made by the board may be integrated into the statewide system for the administration of water rights. Filings for appropriations by the board shall be consistent with other appropriations and with the requirements of this article.

(4) Any appropriation made pursuant to subsection (3) of this section shall also be subject to the following principles and limitations:

(a) Utilizing a public notice and comment procedure, the board, in its discretion, may determine whether or not to appropriate minimum stream flows or natural lake levels, or decrease such an appropriation, to preserve the natural environment to a reasonable degree. The board may adopt conditions attached to an appropriation or decreased appropriation, may file or withdraw statements of opposition in water court cases, and enter into stipulations for decrees or other forms of contractual agreements, including enforcement agreements, that it determines will preserve the natural environment to a reasonable degree. All contractual agreements and stipulations entered into by the board prior to May 23, 1996, regarding enforcement of its appropriations shall be given full force and effect. Any increase to an existing minimum stream flow or natural lake level appropriation or decree shall be made as a new appropriation.

(b) (I) Except as provided pursuant to paragraph (d) of this subsection (4), if the board determines that it is appropriate to consider decreasing an existing decreed appropriation, the board shall proceed through an adequate public notice and comment process to consider such decrease at a public meeting.

(II) For the purposes of this paragraph (b), "adequate public notice and comment process" shall include the following:

(A) Notice of the proposed decrease and the date of the public meeting at which it will first be considered shall be printed in the resume in the water court having jurisdiction over the decree that is the subject of the decrease. The first public meeting of the board at which the decrease is to be considered shall occur at least sixty-three days after the month in which the resume is published. Notice shall also be published in a newspaper of statewide distribution within thirty-five to forty-nine days prior to such first public meeting.

(B) If the board decides at such first public meeting to consider the proposed

decrease, the board shall announce publicly the date of a subsequent public meeting for such purpose.

(C) On the written request of any person made within thirty-five days after the date of the first public meeting, the board shall delay the subsequent public meeting for up to one year to allow such person the opportunity for the collection of scientific data material to the proposed decrease. Such request may not be interposed solely for delay of the proceedings.

(D) On the written request of any person made within thirty-five days after the date of the first public meeting, the board shall, within sixty-three days after such request, establish fair and formal procedures for the subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination, and may promulgate rules that will assure orderly procedures. Subject to these rights and requirements, where a meeting will be expedited and the interests of the participants will not be substantially prejudiced thereby, the board may receive all or part of the evidence in written form.

(III) The board's final written determination regarding the decrease shall state its effective date, be mailed promptly to the persons who appeared by written or oral comment at the board's proceeding, and be filed promptly with the water court. Within thirty-five days after such effective date, any person who appeared by written or oral comment at the board's proceeding may file with the water court and serve the board a petition for judicial review of the board's determination that the decreed appropriation as decreased will preserve the natural environment to a reasonable degree, based on the administrative record and utilizing the criteria of section 24-4-106 (6) and (7), C.R.S. Any such person may request a stay in accordance with the criteria of section 24-4-106 (5), C.R.S., pending the review proceeding. If no petition is filed, the court shall promptly enter an order decreasing the board's appropriation decree in accordance with the board's written determination. If a petition is filed, the court shall promptly order briefing and oral argument and render its decision to affirm or set aside the board's determination. If the board's determination is affirmed, the court shall promptly enter an order decreasing the board's appropriation decree in accordance with the board's written determination. If the board's determination is set aside, the court shall enter its order of relief under the provisions of section 24-4-106 (7), C.R.S. Appellate review of the court's order shall be as allowed in other water matters.

(c) The board's determinations regarding the matters to be determined by the board under paragraph (c) of subsection (3) of this section and paragraph (d) of this subsection (4) for new appropriations shall be subject to judicial review in the water court application and decree proceedings initiated by the board, based on the board's administrative record and utilizing the criteria of section 24-4-106 (6) and (7), C.R.S. The board may file applications for changes of water rights and augmentation plans, and the water court shall determine matters that are within the scope of section 37-92-305.

(d) The board may participate in the recovery implementation program for endangered fish species in the upper Colorado river basin and appropriate and obtain decrees

for minimum instream flows or natural lake levels, including decree provisions for modification and enforcement, the implementation of which shall not be subject to paragraph (b) of this subsection (4), as it determines will preserve the natural environment of the Colorado river endangered fish within Colorado to a reasonable degree while protecting existing uses within Colorado and not depriving the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

(e) Sub-subparagraphs (A) and (C) of subparagraph (II) of paragraph (b) of this subsection (4) shall not apply to the board's consideration of any proposed decrease which was included in a meeting notice and agenda issued by the board prior to May 23, 1996, whether or not the board had scheduled or taken any action on the proposal by such date. Sub-subparagraph (D) of subparagraph (II) of paragraph (b) of this subsection (4) shall not apply to such a proposal so long as the board establishes fair and formal procedures pursuant to such sub-subparagraph (D) at or before the first public meeting thereon for any subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination of witnesses. All other provisions in paragraph (b) of this subsection (4) shall apply to any decrease after May 23, 1996.

(5) Within thirty-five days after initiating any water rights filing for the adjudication of a recreational in-channel diversion, any county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district shall submit a copy of the water rights application to the board for review.

(6) (a) (Deleted by amendment, L. 2006, p. 906, § 1, effective May 11, 2006.)

(b) The board, after deliberation in a public meeting, shall consider the following factors and make written findings as to each:

(I) Whether the adjudication and administration of the recreational in-channel diversion would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;

(II) and (III) (Deleted by amendment, L. 2006, p. 906, § 1, effective May 11, 2006.)

(IV) Whether exercise of the recreational in-channel diversion would cause material injury to instream flow water rights appropriated pursuant to subsections (3) and (4) of this section; and

(V) Whether adjudication and administration of the recreational in-channel diversion would promote maximum utilization of waters of the state.

(VI) (Deleted by amendment, L. 2006, p. 906, § 1, effective May 11, 2006.)

(c) Within ninety days after the filing of statements of opposition, the board shall report its findings to the water court for review pursuant to section 37-92-305 (13). The board may fully participate in the water court proceedings.

(d) Nothing in subsection (5) of this section or this subsection (6) shall apply in any way to any application for a water right or conditional water right for recreational in-channel diversion purposes that was filed prior to January 1, 2001.

(e) Nothing in subsection (5) of this section or this subsection (6) shall apply in any

way to any water right or conditional water right for recreational in-channel diversion purposes for which a decree was entered prior to June 5, 2001, including any proceeding concerning diligence on such conditional water right or any proceeding to make such conditional water right absolute.

(7) Water users served by a provider of municipal or industrial water supplies may use graywater and install graywater treatment works, as those terms are defined in section 25-8-103 (8.3) and (8.4), C.R.S., if:

(a) The use of graywater is limited to the confines of the operation that generates the graywater;

(b) Graywater is used for purposes that are permissible under the municipality's or water district's water rights; and

(c) Graywater is used in compliance with the requirements of section 25-8-205 (1) (g), C.R.S.