

Colorado Revised Statutes 2021

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge - definitions. (1) In the determination of a water right the priority date awarded shall be that date on which the appropriation was initiated if the appropriation was completed with reasonable diligence. If the appropriation was not completed with reasonable diligence following the initiation thereof, then the priority date thereof shall be that date from which the appropriation was completed with reasonable diligence.

(2) Subject to the provisions of this article, a particular means or point of diversion of a water right may also serve as a point or means of diversion for another water right.

(3) (a) A change of water right, implementation of a rotational crop management contract, or plan for augmentation, including water exchange project, shall be approved if such change, contract, or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change, contract, or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions that would prevent such injurious effect.

(b) Decrees for changes of water rights that implement a contract or agreement for a lease, loan, or donation of water, water rights, or interests in water to the Colorado water conservation board for instream flow use under section 37-92-102 (3)(b) shall provide that the board or the lessor, lender, or donor of the water may bring about beneficial use of the historical consumptive use of the changed water right downstream of the instream flow reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights or decreed conditional water rights.

(c) In determining the amount of historical consumptive use for a water right in division 1, 2, 3, 4, 5, or 6, the water judge shall not consider any decrease in use resulting from the following:

(I) The land on which the water from the water right has been historically applied is enrolled under a federal land conservation program; or

(II) The nonuse or decrease in use of the water from the water right by its owner for a maximum of five years in any consecutive ten-year period as a result of participation in:

(A) A water conservation program, including a pilot program, approved in advance by a water conservation district, water district, water authority, or water conservancy district for lands that are within the entity's jurisdictional boundaries or by a state agency with explicit statutory jurisdiction over water conservation or water rights;

(B) A water conservation program, including a pilot program, established through formal written action or ordinance by a water district, water authority, or municipality or its municipal water supplier for lands that are within the entity's jurisdictional boundaries;

(C) An approved land fallowing program as provided by law in order to conserve water or to provide water for compact compliance; or

(D) A water banking program as provided by law.

(d) Quantification of the historical consumptive use of a water right must be based on an analysis of the actual historical use of the water right for its decreed purposes during a representative study period that includes wet years, dry years, and average years. The representative study period:

(I) Must not include undecreed use of the subject water right; and

(II) Need not include every year of the entire history of the subject water right.

(e) If an application is for a change of that portion of a water right for which a previous change of water right has been judicially approved and for which the historical consumptive use was previously quantified, the water judge shall not reconsider or requantify the historical consumptive use. However, the water judge may, without requantifying the historical consumptive use, impose such terms and conditions on the future use of that portion of the water right that is the subject of the change as needed to limit the future consumptive use of that portion of the water right to the previously quantified historical consumptive use.

(3.5) Applications for a simple change in a surface point of diversion. (a) For purposes of this subsection (3.5):

(I) "Intervening surface diversion point or inflow" means any ditch diversion or other point of diversion for a decreed surface water right, point of replacement or point of diversion by exchange that is part of an existing decreed exchange, well or well field that is decreed to operate as a surface diversion, or point of inflow from a tributary surface stream.

(II) "Simple change in a surface point of diversion" means a change in the point of diversion from a decreed surface diversion point to a new surface diversion point that is not combined with and does not include any other type of change of water right and for which there is no intervening surface diversion point or inflow between the new point of diversion and the diversion point from which a change is being made. "Simple change in a surface point of diversion" does not include a change of point of diversion from below or within a stream reach for which there is an intervening surface diversion point or inflow or decreed in-stream flow right to an upstream location within or above that reach.

(b) (I) An application for a simple change in a surface point of diversion is subject to all provisions of this article, including sections 37-92-302 to 37-92-305, except as specifically modified by this subsection (3.5).

(II) The procedures in this subsection (3.5) apply only to a simple change in a surface point of diversion and do not change the procedures or legal standards applicable to any other change of water right.

(III) An application for a simple change in a surface point of diversion may:

(A) Be made with respect to a change of point of diversion that has already been physically accomplished or with respect to a requested future change of point of diversion;

(B) Be made with respect to an absolute water right or a conditional water right; and

(C) Include one or more water rights that are to be diverted at the new point of diversion.

The application must not include or be consolidated or joined with an action by the applicant seeking any other type of change of water right or diligence proceeding or application to make absolute with respect to the water right or rights included in the application.

(c) The applicant bears the initial burden in an application for a simple change in a surface point of diversion to prove, through the imposition of terms and conditions if necessary, that the simple change in a surface point of diversion will not:

(I) Result in diversion of a greater flow rate or amount of water than has been decreed to the water right and, without requantifying the water right, is physically and legally available at the diversion point from which a change is being made; or

(II) Injurious affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(d) If the applicant makes a prima facie showing with respect to the matters in paragraph (c) of this subsection (3.5), the case proceeds as a simple change in a surface point of diversion, the applicant has the burden of persuasion with respect to the elements of its case, including the matters in paragraph (c) of this subsection (3.5), and the standards of paragraph (e) of this subsection (3.5) apply. If the applicant does not make such a prima facie showing, the referee or water judge shall dismiss the application without prejudice to the applicant's filing an application for a change of water right that is not a simple change in a surface point of diversion.

(e) The following standards apply to a simple change in a surface point of diversion:

(I) There is a rebuttable presumption that a simple change in a surface point of diversion will not cause an enlargement of the historical use associated with the water rights being changed.

(II) The decree must not requantify the water rights for which the point of diversion is being changed.

(III) The applicant, in prosecuting the simple change in a surface point of diversion, is not required to:

(A) Prove that the water diverted at the new point of diversion can and will be diverted and put to use within a reasonable period of time;

(B) Prove compliance with the anti-speculation doctrine; or

(C) Provide or make a showing of future need imposed by the cases of *Pagosa Area Water and Sanitation District v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009), or *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996); except that nothing in this subsection (3.5) relieves the applicant or its successors in any pending or future diligence application from any of the requirements for demonstrating diligence in the development of a conditional water right changed pursuant to this subsection (3.5).

(3.6) Correction to an established but erroneously described point of diversion - definitions. (a) As used in this subsection (3.6):

(I) "Diverter" means the owner or user of a decreed water right.

(II) "Established but erroneously described point of diversion" means a point of diversion of either surface water or groundwater:

(A) That has been at the same physical location since the applicable decree or decrees confirmed the water right, unless it was relocated pursuant to section 37-86-111 or, in the case of a well, relocated according to a valid well permit. A diversion that has been in the same physical location since the enactment of the "Adjudication Act of 1943", which was repealed in 1969, has a rebuttable presumption of having been located at the same physical location since its inception.

(B) That is not located at the location specified in the applicable decree or decrees confirming the water right; and

(C) From which the diverter has diverted water with the intent to divert pursuant to the decree or decrees confirming the water right.

(b) A water right is deemed to be diverted at its decreed location and is not erroneously described if:

(I) With respect to a surface water diversion:

(A) The physical location of the point of diversion is within five hundred feet of the decreed location; and

(B) Neither a natural surface stream that is tributary to the diverted stream nor another surface water right is located between the decreed location and its physical location;

(II) With respect to a groundwater diversion, the physical location of the point of diversion is within two hundred feet of the decreed location, unless the decree specifies a lesser distance for acceptable variation in location.

(c) To proceed with a correction in point of diversion under this subsection (3.6) for an established but erroneously described point of diversion that is due to a clerical mistake in the decree, but does not fall within the three-year period set forth in section 37-92-304 (10) for the water clerk to correct the mistake, the diverter of the established but erroneously described point of diversion may file a petition with the water clerk for correction of the clerical mistake within three years after the diverter became aware of the mistake. The same procedures set forth in section 37-92-304 (10) apply to corrections in point of diversion under this paragraph (c).

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

(II) Except as specifically modified by this subsection (3.6), an application for a correction in an established but erroneously described point of diversion is subject to all provisions of this article, including sections 37-92-302 to 37-92-305.

(III) The procedures in this subsection (3.6) apply only to a correction in an established but erroneously described point of diversion and do not alter the procedures or legal standards applicable to a change of water right.

(IV) A diverter may apply for a correction in an established but erroneously described point of diversion only:

(A) For a point of diversion that is already in place; and

(B) If one or more water rights are diverted at the corrected point of diversion.

(V) The application must not include or be consolidated or joined with an action by the applicant seeking any type of change of water right or diligence proceeding or application to make absolute with respect to the water right or rights included in the application.

(e) If an applicant proves the matters in paragraph (a) of this subsection (3.6) by a preponderance of the evidence, then there is a rebuttable presumption that a correction in an established but erroneously described point of diversion:

(I) Will not cause an enlargement of the historical use associated with a water right diverted at the point of diversion; and

(II) Does not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(f) If the applicant does not prove the matters in paragraph (a) of this subsection (3.6) or if the presumptions stated in this subsection (3.6) are successfully rebutted, the referee or water judge shall dismiss the application without prejudice to the applicant's filing an application for a change of water right.

(g) The following standards apply to a correction in an established but erroneously described point of diversion:

(I) The decree must not requantify the water rights for which the erroneously described point of diversion is being corrected;

(II) The applicant, in prosecuting the correction in the erroneously described point of diversion, is not required to:

(A) Prove that the water diverted at the corrected point of diversion can and will be diverted and put to use within a reasonable period of time;

(B) Prove compliance with the anti-speculation doctrine; or

(C) Provide or make a showing of future need imposed by the cases of *Pagosa Area Water and Sanitation District v. Trout Unlimited*, 219 P.3d 774 (Colo. 2009), or *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996);

(III) The state engineer shall not curtail a diversion based solely on the fact that the point of diversion is erroneously described; and

(IV) Nothing in this subsection (3.6) modifies the state engineer's authority to make determinations regarding the administration of water rights and the distribution of water.

(h) During a change of water right case or an abandonment proceeding, if a point of diversion qualifies as an established but erroneously described point of diversion pursuant to this subsection (3.6), full consideration of the historical consumptive use of the water right at its physical location shall not be denied due solely to the fact that the point of diversion is not at its decreed location.

(4) (a) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(I) (A) A limitation on the use of the water that is subject to the change, taking into consideration the historical use and the flexibility required by annual climatic differences.

(B) For purposes of determining lawful historical use, if a decree entered before January 1, 1937, establishes an irrigation water right and does not expressly limit the number of acres that the appropriator may irrigate under the water right, the lawful maximum amount of irrigated acreage equals the maximum amount of acreage irrigated in compliance with all express provisions of the decree during the first fifty years after entry of the original decree, unless a court of competent jurisdiction has entered a final judgment to the contrary. Irrigated acreage not exceeding the lawful maximum amount and located within a reasonable proximity to the ditch, including extensions and lateral delivery infrastructure, as constructed within the first fifty-year period after entry of the original decree, may be included in the historical average in an historical consumptive use analysis supporting a change of water right application.

(II) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant that are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historical use or diminution of return flow to the detriment of other appropriators;

(III) A time limitation on the diversion of water for which the change is sought in terms of months per year;

(IV) If the application is for the implementation of a rotational crop management contract, separate annual historical consumptive use limits for the parcels to be rotated according to the historical consumptive use of such lands. To the extent that some or all of the water that is the subject of the contract is not utilized at a new place of use in a given year, such water may be utilized on the originally irrigated lands if so provided in the decree and contract and if the election to irrigate is made prior to the beginning of the irrigation season and applies to the entire irrigation season. A failure of a party to a rotational crop management contract who is not the owner of the irrigation water rights that are subject to the contract to put to beneficial use the full

amount of water that was decreed pursuant to the application for approval of the contract shall not be deemed to reduce the amount of historical consumptive use that the owner of the water rights has made of the rights.

(V) A term or condition that addresses decreases in water quality caused by a change in the type of use and permanent removal from irrigation of more than one thousand acre-feet of consumptive use per year that includes a change in the point of diversion, if the change would cause an exceedance or contribute to an existing exceedance of water quality standards established by the water quality control commission pursuant to section 25-8-204, C.R.S., in effect at the time of the application, or, if ordered by the court, subsequently adopted by the commission prior to the entry of the decree, for the stream segment at the original point of diversion. Under any such term or condition, the applicant shall be responsible for only that portion of the exceedance attributable to the proposed change. Any such term or condition and any activity to be taken in fulfillment thereof shall not be inconsistent with the "Colorado Water Quality Control Act", article 8 of title 25, C.R.S., and rules promulgated pursuant to said act, and implementation of section 303 (d) of the "Federal Water Pollution Control Act" by the water quality control division. This subparagraph (V) shall not be interpreted to confer standing on any person to assert injury who would not otherwise have such standing.

(VI) Such other conditions as may be necessary to protect the vested rights of others.

(b) If the water judge approves the implementation of a rotational crop management contract, the rotational crop management contract shall be recorded with the clerk and recorder of the county in which the historically irrigated lands are located, and the water judge shall make affirmative findings that the implementation of the rotational crop management contract:

(I) Is capable of administration by the state and division engineers. In order to satisfy the requirement of this subparagraph (I), the water judge may require the applicant to provide signage and mapping of the lands not irrigated on an annual basis.

(II) Will neither expand the historical use of the original water rights nor change the return flow pattern from the historically irrigated land in a manner that will result in an injurious effect as specified in subsection (3) of this section; and

(III) Will comply with paragraph (a) of subsection (4.5) of this section with regard to potential soil erosion, revegetation, and weed management.

(c) With respect to a change-in-use application that seeks approval to change an absolute decreed irrigation water right used for agricultural purposes to an agricultural water protection water right, as described in subsection (19) of this section, the decree must:

(I) Quantify the historical diversions and historical consumptive use of the absolute decreed irrigation water right used for agricultural purposes pursuant to subsection (3) of this section;

(II) Quantify the return flows associated with the historical use of the water right in time, place, and amount;

(III) Provide terms and conditions, pursuant to paragraph (a) of this subsection (4), for a change in the use of the agricultural water protection water right pursuant to a substitute water supply plan, approved in accordance with sections 37-92-308 (12) and 37-80-123, including the return flow obligations in time, place, and amount that prevent material injury to other vested water rights and decreed conditional water rights;

(IV) In accordance with subparagraph (II) of paragraph (b) of subsection (19) of this section, allow an amount of the quantified historical consumptive portion of water subject to the changed agricultural water protection water right to be delivered to a point of diversion within

the water division of historical use without designating the beneficial use to which the water will be applied. Delivery must be to a point of diversion that is approved by the state engineer in accordance with conditions:

(A) Set forth in section 37-92-308 (12); and

(B) Developed by the state engineer pursuant to section 37-80-123; and

(V) For a period that the water judge deems necessary and desirable to remedy or preclude injury and pursuant to section 37-92-304 (6), be subject to retained jurisdiction by the water judge on the question of injury to other vested water rights.

(4.5) (a) The terms and conditions applicable to changes of use of water rights from agricultural irrigation purposes to other beneficial uses shall include reasonable provisions designed to accomplish the revegetation and noxious weed management of lands from which irrigation water is removed. The applicant may, at any time, request a final determination under the court's retained jurisdiction that no further application of water will be necessary in order to satisfy the revegetation provisions. Dry land agriculture may not be subject to revegetation order of the court.

(b) (I) If article 65.1 of title 24, C.R.S., is not applicable to a significant water development activity, the court may utilize the methods specified in this section to mitigate certain potential effects of such activity. Subject to the provisions of this article, a court may impose the following mitigation payments upon any person who files an application for removal of water as part of a significant water development activity:

(A) **Transition mitigation payment.** A transition mitigation payment shall equal the amount of the reduction in property tax revenues for property that is subject to taxation by an entity listed in section 37-92-302 (3.5) that is attributable to a significant water development activity. Such payment shall be made on an annual basis in accordance with the repayment schedule established by the court unless the applicant and the taxing entities mutually agree on an alternate payment schedule. The county shall certify, as appropriate, to the change applicant each year the amount of mitigation payment due under this subparagraph (I). Any moneys collected pursuant to this sub-subparagraph (A) shall be distributed by the board of county commissioners of the county from which water is removed among the entities in the county in proportion to the percentage of their share of the total of property taxes for nonbonded indebtedness purposes.

(B) **Bonded indebtedness payment.** A bonded indebtedness payment shall be made on an annual basis in the same manner as mitigation payments and shall be based on the bonded indebtedness on the property that is to be removed from irrigation at the time the decree is entered. The bonded indebtedness payment shall be equal to the reduction in bond repayment revenues that is attributable to the removal of water as part of a significant water development activity. The court may identify such mitigation payment as part of the decree. Whenever an application for determination with respect to a change of water rights requires a payment pursuant to this sub-subparagraph (B), the board of county commissioners of the county from which water is removed shall distribute any moneys collected among the entities in the county having bonded indebtedness in proportion to the percentage of their share of the total of such indebtedness.

(II) Unless the court determines that a greater or lesser period of time would be appropriate based upon the evidence of record, the amount of the transition mitigation and bonded indebtedness payments shall be equal to the total reduction in revenues for a period of

thirty years commencing upon the date of initial reductions in such revenues as a consequence of the removal of water associated with the significant water development activity.

(III) To the extent that there is an increase in the property tax or bonded indebtedness revenues after the date of the commencement of the payment obligations identified under subparagraphs (A) and (B) of subparagraph (I) of this paragraph (b) as a consequence of a change in land use and accompanying modification of the assessed valuation of the land, such payment obligations shall be correspondingly reduced.

(IV) When determining the amount to be paid pursuant to this paragraph (b), if any, the court shall take into consideration any evidence of a beneficial impact to the county from which the water is to be diverted and shall adjust the amount of the payment accordingly.

(c) Paragraph (b) of this subsection (4.5) shall not apply to:

(I) Any removal of water involving water rights owned by the applicant prior to August 6, 2003; any removal of water that was accomplished prior to August 6, 2003; any removal of water for which an application for a change of water rights was pending in the water court on such date; or any removal of water for which a decree has been entered that continues to be subject to the water court's retained jurisdiction;

(II) Any removal of water when:

(A) Such change is undertaken by a water conservancy district, water conservation district, special district, ditch company, other ditch organization, or municipality;

(B) The water was beneficially used within the boundaries or service area of such entity before the removal; and

(C) The water will continue to be beneficially used within such entity's boundaries or service area after the removal; or

(III) Any removal of water where the new place of use is within a twenty-mile radius of the historic place of use, even though such new place is located within a different county. For purposes of this subparagraph (III), the distance between the historic place of use and the proposed new place of use shall be measured between the most proximate points in the respective areas.

(5) In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others. Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights.

(6) (a) In the case of an application for determination of a water right or a conditional water right, a determination with respect to a change of a water right or approval of a plan for augmentation, which requires construction of a well, other than a well described in section 37-90-137 (4), the referee or the water judge, as the case may be, shall consider the findings of the state engineer, made pursuant to section 37-90-137, which granted or denied the well permit and the consultation report of the state engineer or division engineer submitted pursuant to section 37-92-302 (2)(a). The referee or water judge may thereupon grant a final or conditional decree if the construction and use of any well proposed in the application will not injuriously affect the owner of, or persons entitled to use, water under a vested water right or decreed conditional water right. If the court grants a final or conditional decree, the state engineer shall issue a well permit. Except in cases in which the state engineer or division engineer is a party, all findings of

fact contained in the consultation report concerning the presence or absence of injurious effect shall be presumptive as to such facts, subject to rebuttal by any party.

(b) In the case of wells described in section 37-90-137 (4), the referee or water judge shall consider the state engineer's determination as to such groundwater as described in section 37-92-302 (2) in lieu of findings made pursuant to section 37-90-137, and shall require evidence of compliance with the provisions of section 37-92-302 (2) regarding notice to persons with recorded interests in the overlying land. The state engineer's findings of fact contained within such determination shall be presumptive as to such facts, subject to rebuttal by any party.

(c) Any application in water division 3 that involves new withdrawals of groundwater that will affect the rate or direction of movement of water in the confined aquifer system shall be permitted pursuant to a plan of augmentation that, in addition to all other lawful requirements for such plans, shall recognize that unappropriated water is not made available and injury is not prevented as a result of the reduction of water consumption by nonirrigated native vegetation. In any such augmentation plan decree, the court shall also retain jurisdiction for the purpose of revising such decree to comply with the rules and regulations promulgated by the state engineer pursuant to section 37-90-137 (12)(b)(I), as it existed prior to July 1, 2004.

(7) Prior to the cancellation or expiration of a conditional water right granted pursuant to a conditional decree, the court wherein such decree was granted shall give notice, within not less than sixty-three days nor more than ninety-one days, by certified or registered mail to all persons to whom such conditional right was granted, at the last-known address appearing on the records of such court.

(8) (a) Except as specified in paragraph (b) of this subsection (8), in reviewing a proposed plan for augmentation and in considering terms and conditions that may be necessary to avoid injury, the referee or the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water that would be provided by the applicant, and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

(b) As to decrees for plans for augmentation entered in water division 1 on or after August 5, 2009, the plan shall not require the replacement of out-of-priority depletions currently affecting the river caused by pumping that occurred prior to March 15, 1974. In the case of an amended plan for augmentation applied for pursuant to this paragraph (b), the water judge may review all of the terms and conditions of the plan.

(c) A plan for augmentation must be sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior diverter would be deprived of the senior diverter's lawful entitlement by the applicant's diversion. A proposed plan for augmentation that relies upon a supply of augmentation water that, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation water is limited in duration, if the terms and conditions of the plan prevent injury to vested water rights. The terms and conditions must require replacement of out-of-priority depletions that occur after any groundwater diversions cease. Decrees approving plans for augmentation must require that the state engineer curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights. A plan for augmentation, including a Colorado water conservation board plan to augment stream flows pursuant to section 37-92-102, may provide procedures to allow additional or alternative sources of augmentation or

replacement water, including water leased on a yearly or less frequent basis, to be used in the plan after the initial decree is entered if the use of the additional or alternative sources is part of a substitute water supply plan approved pursuant to section 37-92-308 or if such sources are decreed for such use.

(9) (a) No claim for a water right may be recognized or a decree therefor granted except to the extent that the waters have been diverted, stored, or otherwise captured, possessed, and controlled and have been applied to a beneficial use, but nothing in this section shall affect appropriations by the state of Colorado for minimum streamflows as described in section 37-92-103 (4).

(b) No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

(c) No water right or conditional water right for the storage of water in underground aquifers shall be recognized or decreed except to the extent water in such an aquifer has been placed there by other than natural means by a person having a conditional or decreed right to such water.

(10) If an application filed under section 37-92-302 for approval of an existing exchange of water is approved, the original priority date or priority dates of the exchange shall be recognized and preserved unless such recognition or preservation would be contrary to the manner in which such exchange has been administered.

(11) Nontributary groundwater shall not be administered in accordance with priority of appropriation, and determinations of rights to nontributary groundwater need not include a date of initiation of the withdrawal project. Such determinations shall not require subsequent showings or findings of reasonable diligence, and such determinations entered prior to July 1, 1985, which require such showings or findings shall not be enforced to the extent of such diligence requirements on or after said date. The water judge shall retain jurisdiction as to determinations of groundwater from wells described in section 37-90-137 (4) as necessary to provide for the adjustment of the annual amount of withdrawal allowed to conform to actual local aquifer characteristics from adequate information obtained from well drilling or test holes. Such decree shall then control the determination of the quantity of annual withdrawal allowed in the well permit as provided in section 37-90-137 (4). Rights to the use of groundwater from wells described in section 37-90-137 (4) pursuant to all such determinations shall be deemed to be vested property rights; except that nothing in this section shall preclude the general assembly from authorizing or imposing limitations on the exercise of such rights for preventing waste, promoting beneficial use, and requiring reasonable conservation of such groundwater.

(12) (a) In determining the quantity of water required in an augmentation plan to replace evaporation from groundwater exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S., there shall be no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover on the surface of the area which will be, or which has been, permanently replaced by an open water surface. The applicant shall bear the burden of proving the historic natural depletion.

(b) No person who obtains or operates a plan for augmentation or plan of substitute supply prior to July 1, 1989, shall be required to make replacement for the depletions from

evaporation exempted in this subsection (12) or otherwise replace water for increased calls which may result therefrom.

(c) In determining the quantity of water required in an augmentation plan to replace stream depletions in connection with any mining operation as defined in section 34-32-103 (8), C.R.S., for which a reclamation permit has been obtained as set forth in section 34-32-109, C.R.S., there is no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover and evaporation on the surface of the area that will be, or that has been, eliminated or made impermeable as part of the permitted mining operation. The applicant bears the burden of proving the historic natural depletion.

(13) (a) The water court shall consider the findings of fact made by the Colorado water conservation board pursuant to section 37-92-102 (6)(b) regarding a recreational in-channel diversion, which findings shall be presumptive as to such facts, subject to rebuttal by any party. In addition, the water court shall consider evidence and make affirmative findings that the recreational in-channel diversion will:

- (I) Not materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;
- (II) Promote maximum utilization of waters of the state;
- (III) Include only that reach of stream that is appropriate for the intended use;
- (IV) Be accessible to the public for the recreational in-channel use proposed; and
- (V) Not cause material injury to instream flow water rights appropriated pursuant to section 37-92-102 (3) and (4).

(b) In determining whether the intended recreation experience is reasonable and the claimed amount is the appropriate flow for any period, the water court shall consider all of the factors that bear on the reasonableness of the claim, including the flow needed to accomplish the claimed recreational use, benefits to the community, the intent of the appropriator, stream size and characteristics, and total streamflow available at the control structures during the period or any subperiods for which the application is made.

(c) If a water court determines that a proposed recreational in-channel diversion would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements, the court shall deny the application.

(d) In addition to determining the minimum amount of stream flow to serve the applicant's intended and specified reasonable recreation experience, the water court shall make a finding in the decree as to the flow rate below which there is no longer any beneficial use of the water at the control structures for the decreed purposes.

(e) If the other elements of the appropriation are satisfied, the decree shall specify the total volume of water represented by the flow rates decreed for the recreational in-channel diversion. For purposes of this subsection (13), the "total volume of water represented by the flow rates decreed for the recreational in-channel diversion" means the sum of the flow rates claimed in cubic feet per second for each day on which a claim is made multiplied by 1.98.

(f) If the court determines that the total volume of water represented by the flow rates decreed for the recreational in-channel diversion exceeds fifty percent of the sum of the total average historical volume of water for the stream segment where the recreational in-channel diversion is located for each day on which a claim is made, the decree shall:

(I) Specify that the state engineer shall not administer a call for the recreational in-channel diversion unless the call would result in at least eighty-five percent of the decreed flow rate for the applicable time period;

(II) Limit the recreational in-channel diversion to no more than three time periods; and

(III) Specify that each time period is limited to one flow rate.

(14) No decree shall be entered adjudicating a change of conditional water rights to a recreational in-channel diversion.

(15) Water rights for recreational in-channel diversions, when held by a municipality or others, shall not constitute a use of water for domestic purposes as described in section 6 of article XVI of the state constitution.

(16) In the case of an application for recreational in-channel diversions filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district filed on or after January 1, 2001, the applicant shall retain its original priority date for such a right, but shall submit a copy of the application to the Colorado water conservation board for review and recommendation as provided in section 37-92-102 (6). The board's recommendation shall become a part of the record to be considered by the water court as provided in subsection (13) of this section.

(17) (a) Applicants for approval of a rotational crop management contract shall pay the state engineer the following fees:

(I) An application fee of one thousand seven hundred thirty-four dollars;

(II) A fee of six hundred seventeen dollars that is due annually beginning one year after submittal of the application until the application has been decreed by the water judge pursuant to section 37-92-308 (4); and

(III) An annual fee of three hundred dollars per year after the application has been decreed.

(b) The state engineer shall transmit the fees to the state treasurer, who shall deposit them in the water resources cash fund created in section 37-80-111.7 (1).

(18) In the case of an augmentation plan that includes the construction of a recharge structure, the division engineer shall provide, as part of the summary of consultation report described in section 37-92-302 (4), an analysis of potential changes in the groundwater levels downgradient of the proposed recharge structure resulting from the operation of the recharge structure, and the court and referee shall consider the division engineer's analysis.

(19) **Agricultural water protection - definitions.** (a) (I) After the state engineer's proposed rules promulgated under section 37-80-123 are reviewed and finalized pursuant to section 37-80-123 (1)(c) and after the Colorado water conservation board has finalized the criteria and guidelines developed pursuant to section 37-60-133, the owner of an absolute decreed irrigation water right in water division 1 or 2 used for agricultural purposes may apply in water court to change the use of the water right to an agricultural water protection water right. A water right decreed in water division 3, 4, 5, 6, or 7 is not eligible for a change in water right to an agricultural water protection water right. As used in this section, an "agricultural water protection water right" means a water right decreed to allow the lease, loan, or trade of up to fifty percent of the water subject to the water right.

(II) After a person has obtained a decreed agricultural water protection water right, the person may apply for substitute water supply plan approval pursuant to section 37-92-308 (12).

(b) If the owner of a decreed agricultural water protection water right obtains a substitute water supply plan pursuant to section 37-92-308 (12), the agricultural water protection water right is subject to the following conditions:

(I) The owner of a decreed agricultural water protection water right must comply with the terms of the decree governing the point of diversion where the leased, loaned, or traded water is being delivered;

(II) The owner may lease, loan, or trade up to fifty percent of the quantified historical consumptive use portion of the agricultural water protection water right;

(III) Any amount of water not being leased, loaned, or traded must continue to be used for agricultural purposes:

(A) On the property historically decreed to be served by the original absolute decreed irrigation water right; or

(B) For as long as the other portion of water is being leased, loaned, or exchanged, on another property served by the same ditch system;

(IV) The owner of the agricultural water protection water right is required to participate in one or more of the following programs:

(A) As established by the federal government, the state, a subdivision of the state, or a nonprofit organization, conservation programs that conserve the land historically served by the irrigation water right, which programs include Colorado's conservation easement program established in article 30.5 of title 38, C.R.S., the United States fish and wildlife service easement program, the Natural Resources Conservation Services easement program, the Colorado division of parks and wildlife easement program, and a county open space easement program; or

(B) An agricultural water protection program designed to assure compliance with the terms of subparagraph (III) of this paragraph (b). The program must be sponsored and operated by an eligible entity through a formal action or ordinance and in compliance with minimum criteria and guidelines established by the Colorado water conservation board pursuant to section 37-60-133. An eligible entity may enroll agricultural water protection water rights only from a water right historically decreed within the entity's geographic boundary.

(V) If the owner's participation in a conservation program pursuant to subparagraph (IV) of this paragraph (b) ceases, the owner's eligibility to transfer water subject to the agricultural water protection water right by lease, loan, or trade or to obtain a substitute water supply plan pursuant to section 37-92-308 (12) is suspended, and the water must be used only for agricultural irrigation purposes on the property historically decreed to be served by the original absolute decreed irrigation water right until the owner participates in one of the conservation programs again; and

(VI) The owner shall not lease, loan, or trade water subject to the agricultural water protection water right outside of the water division where the historical consumptive use was located.

(c) As used in this subsection (19), an "eligible entity" means an entity in water division 1 or 2 that:

(I) Has geographic boundaries that are located entirely within the water division of the water right's historical place of use and are defined in an original or amended document governing the entity; and

(II) Is a water conservation district, water conservancy district, irrigation district, ditch or reservoir company, nonprofit water provider, or municipality.

(20) **Limited applicability of *St. Jude's Co.* case - legislative declaration.** The provisions in the Colorado supreme court's decision in *St. Jude's Co. v. Roaring Fork Club, LLC*, 351 P.3d 442 (Colo. 2015), interpreting section 37-92-103 (4), do not apply to absolute and conditional water rights for which a decree was entered as of July 15, 2015. Rights which would be subject to the Colorado supreme court's interpretation of section 37-92-103 (4) in the *St. Jude's Co.* case but for this subsection (20) are valid and shall be given full force and effect. Such rights may be maintained through findings of reasonable diligence and made absolute, and augmentation plans related to such rights may be approved, in accordance with Colorado law. Changes of such rights must be limited to changes in points of diversion made in accordance with the provisions of this section.

Source: **L. 69:** p. 1211, § 1. **C.R.S. 1963:** § 148-21-21. **L. 71:** p. 1324, § 2. **L. 75:** (7) added, p. 1398, § 1, effective June 20. **L. 77:** (8) added, p. 1703, § 4, effective June 19. **L. 79:** (9) added, p. 1368, § 6, effective June 22. **L. 81:** (10) added, p. 1786, § 2, effective April 24. **L. 85:** (6) amended and (11) added, p. 1168, § 8, effective July 1. **L. 89:** (3) amended, p. 1431, § 1, effective April 20; (12) added, p. 1425, § 5, effective July 15. **L. 92:** (6) amended, p. 2312, § 3, effective March 20; (4.5) added, p. 2289, § 2, effective April 16. **L. 96:** (8) amended, p. 125, § 2, effective March 25; (6) amended, p. 327, § 3, effective April 16. **L. 98:** (6)(c) added, p. 853, § 3, effective May 26. **L. 2001:** (13), (14), (15), and (16) added, p. 1189, § 3, effective June 5. **L. 2003:** (8) amended, p. 1454, § 5, effective April 30; (4.5) amended, p. 882, § 4, effective August 6. **L. 2006:** (13) amended, p. 908, § 3, effective May 11; (3) and (4) amended and (17) added, p. 1000, § 3, effective May 25. **L. 2007:** (4)(a)(V) amended and (4)(a)(VI) added, p. 44, § 1, effective March 12. **L. 2008:** (3) amended, p. 589, § 3, effective August 5. **L. 2009:** (8) amended, (HB 09-1174), ch. 69, p. 237, § 1, effective August 5. **L. 2012:** (3.5) added, (SB 12-097), ch. 54, p. 199, § 1, effective March 22; (7) amended, (SB 12-175), ch. 208, p. 890, § 165, effective July 1; (17)(b) amended, (SB 12-009), ch. 197, p. 793, § 8, effective July 1; (12)(c) added, (HB 12-1022), ch. 15, p. 38, § 2, effective August 8. **L. 2013:** (3)(c) added, (SB 13-019), ch. 242, p. 1171, § 2, effective May 18; (3.6) added, (SB 13-078), ch. 55, p. 181, § 2, effective August 7; (4)(a)(I) amended, (SB 13-074), ch. 107, p. 372, § 1, effective August 7; (6)(c) amended, (HB 13-1300), ch. 316, p. 1699, § 114, effective August 7. **L. 2015:** (3)(d) and (3)(e) added, (SB 15-183), ch. 157, p. 469, § 1, effective May 4; (18) added, (HB 15-1013), ch. 235, p. 872, § 2, effective August 5. **L. 2016:** (4)(c) and (19) added, (HB 16-1228), ch. 175, p. 600, § 3, effective August 10. **L. 2017:** (3)(c) amended, (HB 17-1233), ch. 189, p. 687, § 1, effective May 3; (20) added, (HB 17-1190), ch. 266, p. 1435, § 1, effective August 9. **L. 2020:** (8)(c) amended, (HB 20-1037), ch. 73, p. 308, § 2, effective September 14.

Cross references: (1) For section 303 (d) of the "Federal Water Pollution Control Act", see 33 U.S.C. § 1313.

(2) For the legislative declaration in the 2013 act adding subsection (3)(c), see section 1 of chapter 242, Session Laws of Colorado 2013. For the legislative declaration in the 2013 act adding subsection (3.6), see section 1 of chapter 55, Session Laws of Colorado 2013.