

Colorado Revised Statutes 2021

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.

(4.5) Plan for augmentation to augment stream flows. (a) Legislative declaration. The general assembly hereby finds, determines, and declares that the Colorado water conservation board would benefit from direction with regard to water court applications for plans for augmentation to augment stream flows, as identified in subsection (3) of this section.

(b) Plan approval. To obtain a decreed plan for augmentation, the board, either as sole applicant or together with an owner of a decreed water right for which a change of water rights to include any augmentation use has been judicially approved, must file an application with the water court for approval of a plan for augmentation to augment stream flows and protect augmentation deliveries made pursuant to the plan for augmentation within a specific stream reach or reaches, at rates the board determines are appropriate to preserve or improve the natural environment to a reasonable degree. The application and approval process for a plan for augmentation to augment stream flows are subject to the following principles and limitations:

(I) The board may file an application only if the owner of the water right that is decreed for augmentation use is identified in the application and consents to the application.

(II) The procedures, standards, and requirements of this article 92 for plans for augmentation apply to applications filed under this subsection (4.5).

(III) A plan filed under this subsection (4.5) must use, for augmentation only, water rights:

(A) For which the historical consumptive use has been quantified; and

(B) For which a change of water rights to include any augmentation use has been judicially approved.

(IV) If the augmentation water right meets the requirements of subsection (4.5)(b)(III) of this section, no further change of that augmentation water right is required.

(V) The use of water as part of a plan for augmentation to augment stream flows is subject to the terms and conditions of any applicable decree to which that water is subject.

(VI) Additional terms and conditions must be imposed on the use of water as part of a plan for augmentation to augment stream flows as necessary to prevent injury to the owners of vested water rights or decreed conditional water rights. The terms and conditions must include terms and conditions to prevent injury to other water rights that result from any change in the time, place, or amount of water available for diversion or exchange to the extent that other appropriators have relied upon the stream conditions that resulted from the historical use of the augmentation water rights described in subsection (4.5)(b)(III) of this section or added pursuant to section 37-92-305 (8)(c) before their use in the plan for augmentation of stream flows. A junior appropriator is entitled to the continuation of stream conditions as the conditions existed at the time of the junior appropriator's appropriation.

(VII) An applicant must prove that the plan for augmentation to augment stream flows will not injure other water users' undecreed existing exchanges of water to the extent the undecreed existing exchanges of water have been administratively approved before the date of the filing of the application for approval of the plan for augmentation to augment stream flows.

(VIII) The augmentation water used to augment stream flows in a plan for augmentation to augment stream flows shall not be diverted within the specific stream reach by an exchange, plan for substitution, plan for augmentation, or other means that cause a reduction of the augmentation water added to that stream reach. The augmentation water is subject to such reasonable transit losses as may be imposed by the water court or the state and division engineers.

(IX) If operation of a plan for augmentation requires the use of, or making of physical modifications to, an existing diversion structure within a stream reach to allow the augmentation water to bypass the structure, the operator of the plan must have consent from the owner of the existing structure and bear all reasonable construction costs associated with any physical modifications and all reasonable operational and maintenance costs incurred by the owner of the structure that would not have been incurred in the absence of the physical modifications to the structure.

(c) **Saving clause.** This subsection (4.5):

(I) Does not impair or in any way affect any water court decree, administrative authorization, or agreement that allows water decreed for environmental, piscatorial, water quality, recreational, or other in-channel purposes to be used in the natural stream channel for the decreed purposes;

(II) Is not intended to be the exclusive means of authorizing water decreed for augmentation purposes to be used for environmental, piscatorial, water quality, recreational, or other in-channel purposes, including the maintenance of dominion and control over the water released from a specific reservoir;

(III) Does not authorize, restrict, or preclude future water rights appropriations, administrative authorizations, or other agreements for the purposes listed in this subsection (4.5); and

(IV) Does not affect applications by the Colorado water conservation board for plans for augmentation not described in this subsection (4.5).

(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.

(8) **Reservoir releases for fish and wildlife mitigation - definitions.** (a) The general assembly hereby finds, determines, and declares that:

(I) Allowing the owner of a water storage right that allows water to be stored in new reservoir capacity to contract with the board to dedicate to the board water stored under the water storage right for release from the new reservoir capacity to reasonably avoid, minimize, or mitigate impacts of the new reservoir capacity on fish and wildlife resources within an identified stream reach may enable the owner of the water storage right to comply with mitigation measures identified in a fish and wildlife mitigation plan approved under section 37-60-122.2;

(II) Accordingly, for the limited purpose of providing additional methods to comply with a fish and wildlife mitigation plan approved under section 37-60-122.2, it is appropriate to create a water court process to allow the owner of a water storage right that allows water to be stored in new reservoir capacity, a portion of which water will then be dedicated to the board, to:

(A) Obtain protection for water to be released from the new reservoir capacity, up to the amount of water that is appropriate for stream flows to preserve or improve the natural environment to a reasonable degree within the qualifying stream reach; and

(B) Maintain dominion and control over the released water through a qualifying stream reach;

(III) The released water subject to a protected mitigation release authorized under this subsection (8) must be rediverted at or below the downstream termination point of the qualifying stream reach, either directly at a surface point of diversion or by a decreed exchange as permitted in this subsection (8) for use by an owner for the decreed beneficial uses of that water storage right;

(IV) Except as otherwise provided in this subsection (8), the contractual dedication to the board must comply with the procedures and protections for other water rights specified in subsection (3) of this section;

(V) The water court process and resulting decree must ensure that:

(A) Protected mitigation releases do not expand the water storage right that is to provide the water for the protected mitigation releases or injure other water rights;

(B) The protected mitigation releases will be protected through the qualifying stream reach up to the amount of water that is appropriate for stream flows to preserve or improve the natural environment to a reasonable degree within the qualifying stream reach; and

(C) Diversions of the protected mitigation releases within the qualifying stream reach by exchanges, substitution plans, augmentation plans, or other means that cause a reduction in the protected mitigation releases within the qualifying stream reach, other than reductions caused by evaporation, transportation, and other losses, will be prevented; and

(VI) Through the dedication of the protected mitigation releases to the board under the procedures set forth in subsection (3) of this section, except as otherwise provided in this subsection (8), and through the water court decree approving the protected mitigation releases, the protected mitigation releases will serve a secondary instream beneficial use, specifically the preservation or improvement of the natural environment to a reasonable degree within the qualifying stream reach.

(b) As used in this subsection (8):

(I) "Board" means the Colorado water conservation board created in section 37-60-102.

(II) "Mitigation release" means:

(A) The release of water from a water storage right stored in new reservoir capacity into a qualifying stream reach to reasonably avoid, minimize, or mitigate the impacts of the new reservoir capacity on fish and wildlife resources within the qualifying stream reach in accordance with a fish and wildlife mitigation plan approved under section 37-60-122.2; and

(B) The rediversion of the released water at or below the downstream termination point of the qualifying stream reach, either directly at a surface point of diversion or by a decreed in-priority exchange to an exchange-to point identified in the decreed in-priority exchange that is outside of the qualifying stream reach, for use by an owner for the decreed beneficial uses of that water storage right.

(III) "New reservoir capacity" means additional water storage capacity resulting from the construction of a new reservoir or a physical enlargement of an existing reservoir if the construction or physical enlargement is completed on or after August 8, 2018.

(IV) "Owner" means the person that owns the water storage right that is to provide the water for a protected mitigation release, and, in the case of a water storage right owned by a

water conservancy district, water conservation district, municipality, special district, or mutual ditch company, includes the residents, allottees, members, customers, shareholders, or member ditch companies of that entity; and, in the case of a water storage right owned by an irrigation district, includes the landowners within the district.

(V) "Protected mitigation release" means the amount of water to be released for a mitigation release that:

(A) The board determines is appropriate for stream flows to preserve or improve the natural environment to a reasonable degree within an identified qualifying stream reach;

(B) Is approved by a water court decree pursuant to this subsection (8); and

(C) Is protected from diversion, exchange, or use by holders of conditional or vested water rights or other persons that cause a reduction in the protected mitigation release at any location within the qualifying stream reach, other than any reductions caused by evaporation, transportation, and other losses.

(VI) "Qualifying stream reach" means all or a portion of a natural stream of the state that is identified in a fish and wildlife mitigation plan approved under section 37-60-122.2 and within which the board determines, and the water court decree approves in accordance with this subsection (8), that water from a protected mitigation release is appropriate for stream flows to preserve or improve the natural environment to a reasonable degree. A qualifying stream reach must be identified by an upstream point at which the protected mitigation release enters the natural stream and a downstream termination point.

(VII) "Surface point of diversion" means a structure that diverts surface water only. "Surface point of diversion" does not include:

(A) A structure that diverts groundwater, whether through a well, infiltration gallery, or other type of groundwater diversion structure; or

(B) Delivery into a facility used to recharge an alluvial aquifer.

(c) (I) An owner may, in accordance with and after complying with the requirements of this subsection (8), make a protected mitigation release.

(II) Holders of conditional or vested water rights or other persons shall not divert, exchange upon, or use a protected mitigation release within the qualifying stream reach unless the diversion, exchange, or use is fully augmented so that there is no reduction in the protected mitigation release at any location within the qualifying stream reach, other than reductions caused by evaporation, transportation, and other losses.

(III) The state engineer shall administer protected mitigation releases made in accordance with this subsection (8) and the terms and conditions of decrees approving protected mitigation releases.

(IV) (A) Except for reductions caused by evaporation, transportation, and other losses, and subject to subsections (8)(c)(IV)(B) and (8)(c)(IV)(C) of this section, an owner shall: Redivert all protected mitigation releases at or below the downstream termination point of the qualifying stream reach, either directly at a surface point of diversion or by a decreed in-priority exchange to an exchange-to point identified in the decreed in-priority exchange that is outside of the qualifying stream reach; and apply the water to the decreed beneficial uses of the water storage right that provides the water for the protected mitigation release.

(B) Except as provided in subsection (8)(c)(IV)(C) of this section, an owner may redivert water associated with protected mitigation releases in accordance with subsection (8)(c)(IV)(A) of this section by exchange into storage, which exchange shall be administered with a priority date no earlier than the date of approval of the fish and wildlife mitigation and enhancement plan

pursuant to section 37-60-122.2, and subsequently apply the water to the decreed beneficial uses of the water storage right that provides the water for the protected mitigation release.

(C) An owner shall not divert water associated with protected mitigation releases by exchange through all or a portion of the qualifying stream reach or to the reservoir of origin.

(V) Water present in the qualifying stream reach, other than the protected mitigation releases, remains available to other water users for beneficial uses and may be diverted and beneficially used by other water users in accordance with the priority system and any relevant decree.

(VI) The procedures set forth in this subsection (8) apply only to the adjudication of proposed protected mitigation releases from new reservoir capacity and do not alter the procedures or legal standards applicable to any other type of water court application.

(VII) An application for approval of a proposed protected mitigation release filed in accordance with this subsection (8) must not include, and shall not be consolidated or joined with, any other water court application.

(d) An owner that intends to make protected mitigation releases in accordance with this subsection (8) shall, before any such releases may be administered as protected mitigation releases:

(I) Dedicate the proposed protected mitigation releases to the board by grant, donation, or other contractual agreement in accordance with subsections (3) and (8)(e) of this section;

(II) Agree to make the proposed protected mitigation releases available to the board within the qualifying stream reach;

(III) With the board as a co-applicant, file an application in water court in the water division in which the new reservoir capacity is located, seeking approval of the proposed protected mitigation releases, by the last day of the twelfth month following the month in which the new reservoir capacity is certified for storage by the state engineer; except that an application must not include any other claim for relief; and

(IV) Obtain a final water court decree approving the protected mitigation releases.

(e) (I) Except as otherwise provided in this subsection (8)(e), a dedication to the board pursuant to subsection (8)(d)(I) of this section of an interest in water yielded from a water storage right that will be stored in new reservoir capacity is subject to subsection (3) of this section for the dedication of an interest in water to the board, including the requirement in subsection (3) of this section that the board make a determination that the proposed protected mitigation releases are appropriate for stream flows to preserve or improve the natural environment to a reasonable degree within the qualifying stream reach.

(II) The board's contractual interest in water acquired in accordance with this subsection (8) may be yielded from a water right that is either absolute or conditional at the time of acquisition.

(III) To obtain a decreed right to use proposed protected mitigation releases for instream flow purposes, the owner and the board need not file an application with the water court to change the water storage right from which the proposed protected mitigation releases are to be made.

(IV) The board need not hold a decreed appropriation for instream flows within the qualifying stream reach as a prerequisite for an owner to dedicate proposed protected mitigation releases to the board in accordance with this subsection (8).

(f) (I) To satisfy the requirements of subsections (8)(d)(III) and (8)(d)(IV) of this section, the board and the owner must file a water court application as co-applicants pursuant to

subsection (8)(d)(III) of this section. The water court shall enter a decree approving the proposed protected mitigation releases if:

(A) The board demonstrates that it has duly determined in accordance with this subsection (8) and with subsection (3) of this section that the proposed protected mitigation releases are appropriate for stream flows to preserve or improve the natural environment to a reasonable degree within the qualifying stream reach. If a party challenges the board's determination in the water court proceeding, the board shall assemble and submit to the court the complete administrative record upon which the board made the determination. The court shall base its review of the board's determination on the administrative record, using the criteria set forth in section 24-4-106 (6) and (7).

(B) The owner proves that the proposed protected mitigation releases: Will not cause an expansion of use beyond the limits of use of the decreed water storage right from which the mitigation releases are to be made; will not cause injury to vested water rights, decreed conditional water rights, subsequently adjudicated water rights that are the subject of a pending water court application filed before August 8, 2018, or other water users' uses or exchanges of water being made pursuant to appropriation or practices in existence on the date of the filing of the application for approval of the proposed protected mitigation releases; are administrable by the division engineer; and have been dedicated to and approved by the board in compliance with the requirements and procedures of subsection (8)(e) of this section.

(II) For purposes of determining injury pursuant to subsection (8)(f)(I)(B) of this section, the inability of other water users to divert, exchange upon, or use the proposed protected mitigation releases within the qualifying stream reach shall not be considered injury.

(III) The water court shall not requantify the water storage right from which the protected mitigation releases are proposed to be made.

(IV) A decree approving a protected mitigation release must contain the terms and conditions necessary to prevent injury to other water rights, prevent the expansion of use of the decreed water storage right from which the protected mitigation release is to be made, and ensure that the protected mitigation releases are administrable by the division engineer, including, if necessary, to prevent injury or expansion of use of the decreed water storage right from which the protected mitigation release is to be made, terms rejecting or decreasing the proposed flow rate of the protected mitigation releases or the qualifying stream reach. All such decrees must also specifically identify the timing and rate of the protected mitigation releases, the qualifying stream reach, and the flow rate that is appropriate to preserve or improve the natural environment to a reasonable degree within the qualifying stream reach. For protected mitigation releases that are to be exchanged into storage in accordance with subsection (8)(c)(IV)(B) of this section, the decree must specify that the exchange to storage be administered with a priority date that is no earlier than the date of the approval of the fish and wildlife mitigation and enhancement plan pursuant to section 37-60-122.2.

(V) An owner shall erect, maintain, and repair suitable and proper measuring devices as required by section 37-84-113 and by the decree approving the protected mitigation releases and as ordered by the state or division engineer. Additionally, the owner shall maintain records of the quantity and rate of release of the protected mitigation releases and the quantity and rate of diversion of the protected mitigation releases that are rediverted for subsequent application to beneficial use.

(g) If operation of a protected mitigation release under this subsection (8) requires the making of physical modifications to an existing water diversion structure within the qualifying

stream reach to allow the protected mitigation release to bypass the existing water diversion structure, the owner of the water storage right used to make the protected mitigation release shall bear all reasonable construction costs associated with the physical modifications and all reasonable operational and maintenance costs incurred by the owner of the existing water diversion structure that would not have been incurred in the absence of the physical modifications to the structure.

(h) A determination under section 37-60-122.2 that releases of water from new reservoir capacity will help to reasonably avoid, minimize, or mitigate the impacts of the new reservoir capacity on fish and wildlife resources within the qualifying stream reach is evidence of the appropriateness of a protected mitigation release within the qualifying stream reach.

(i) A mitigation release shall not be protected or administered as a protected mitigation release:

(I) When the amount of the existing flow in the qualifying stream reach is such that addition of the protected mitigation release would exceed the stream flow rate set forth in the decree to be appropriate to preserve or improve the natural environment to a reasonable degree within the qualifying stream reach;

(II) Unless the owner is in compliance with:

(A) The measuring requirements of section 37-84-113;

(B) The terms and conditions in the decree approving the protected mitigation release regarding the operation, maintenance, or repair of proper measuring devices; and

(C) An order by the state or division engineer regarding the operation, maintenance, or repair of proper measuring devices;

(III) When the owner is incapable of rediverting the protected mitigation release at or below the downstream termination point of the qualifying stream reach for application to a decreed beneficial use of the water storage right that is to provide the water for the protected mitigation release;

(IV) When the released water is within the natural stream at a location outside of the qualifying stream reach, including when the released water is between the downstream termination point of the qualifying stream reach and the point of rediversion; or

(V) When the owner is not otherwise in compliance with the terms of the decree approving the protected mitigation release.

(j) This subsection (8):

(I) Does not impair or in any way affect any water court decree, administrative authorization, or agreement that allows water to be stored, released, and administered for environmental, piscatorial, water quality, recreational, municipal, or other in-channel purposes, including the maintenance of dominion and control over the water releases from a specified reservoir;

(II) Is not intended to be the exclusive means of authorizing water to be stored, released, and administered for environmental, piscatorial, water quality, recreational, municipal, or other in-channel purposes, including the maintenance of dominion and control over the water released from a specific reservoir; and

(III) Does not authorize, restrict, or preclude future water rights, appropriations, administrative authorizations, or other agreements for the purposes listed in subsection (8)(j)(I) of this section.

Source: **L. 69:** p. 1200, § 1. **C.R.S. 1963:** § 148-21-2. **L. 73:** p. 1521, § 2. **L. 79:** (1) amended, p. 1367, § 4, effective June 22. **L. 81:** (3) amended, p. 1784, § 1, effective June 23. **L. 85:** (1)(a) amended, p. 1166, § 5, effective July 1. **L. 86:** IP(3) amended and (3)(e) added, p. 1095, § 1, effective May 3. **L. 87:** (3) amended, p. 1305, § 2, effective June 20. **L. 94:** (3)(c.5) added, p. 766, § 1, effective April 20. **L. 96:** (4) added, p. 952, § 1, effective May 23. **L. 2000:** (3)(c.5) amended, p. 1443, § 1, effective June 1. **L. 2001:** (5) and (6) added, p. 1187, § 1, effective June 5. **L. 2002:** IP(3) amended, p. 445, § 1, effective August 7. **L. 2003:** (6)(c) amended, p. 2001, § 63, effective May 22. **L. 2006:** (6)(a), (6)(b), and (6)(c) amended, p. 906, § 1, effective May 11. **L. 2008:** IP(3) amended, p. 1573, § 27, effective May 29; IP(3) amended, p. 587, § 1, effective August 5. **L. 2012:** (4)(b)(II)(A), (4)(b)(II)(C), (4)(b)(II)(D), (4)(b)(III), and (5) amended, (SB 12-175), ch. 208, p. 886, § 161, effective July 1. **L. 2013:** (7) added, (HB 13-1044), ch. 228, p. 1091, § 9, effective May 15. **L. 2018:** (8) added, (SB 18-170), ch. 125, p. 835, § 1, effective August 8. **L. 2020:** (4.5) added, (HB 20-1037), ch. 73, p. 306, § 1, effective September 14.

Editor's note: Amendments to the introductory portion to subsection (3) by House Bill 08-1280 and House Bill 08-1346 were harmonized.

Cross references: (1) For water of streams being public property, see § 5 of art. XVI, Colo. Const.; for diverting unappropriated water, see § 6 of art. XVI, Colo. Const.

(2) For the legislative declaration in the 2013 act adding subsection (7), see section 1 of chapter 228, Session Laws of Colorado 2013.