

STATE ENGINEER’S STATEMENT OF BASIS AND PURPOSE FOR RULES GOVERNING THE REVIEW OF A SUBSTITUTE WATER SUPPLY PLAN FOR THE LEASE, LOAN, OR TRADE OF A DECREED AGRICULTURAL WATER PROTECTION WATER RIGHT

This Statement of Basis and Purposes describes the legislation that directed the State Engineer to enact these rules, the process that the State Engineer employed in developing these rules, and explains the authority for and purpose of each rule. Terms used in this Statement of Basis and Purpose that are defined in Rule 2 have the same meaning as set forth in Rule 2.

I. Legislative Background

The Rules Governing the Review of a Substitute Water Supply Plan for the Lease, Loan, or Trade of a Decreed Agricultural Water Protection Water Right (“Rules”) were promulgated in accordance with House Bill 16-1228. House Bill 16-1228 created an alternative transfer mechanism to simultaneously preserve ongoing irrigation by a water right and provide flexibility to lease a portion of that water right. To achieve these ends, House Bill 16-1228 set up a two-step process that involves the Water Court and a substitute water supply plan.

House Bill 16-1228 created a new type of water right called an Agricultural Water Protection Water Right. To qualify, the owner of an absolute decreed irrigation water right used for agricultural purposes in Water Divisions 1 or 2 must first file a change-in-use application to change the water right to an Agricultural Water Protection Water Right. Sections 37-92-305(4)(c) and (19), C.R.S. (2016)¹, set the standards for a decree approving the change of use to the Agricultural Water Protection Water Right. Of importance, during the change proceeding the applicant does not need to prove a non-speculative need or designate the beneficial use for the Agricultural Water Protection Water Right. However, and as required by section 37-92-305(4)(c), C.R.S., the decree that approves a change of the absolute decreed irrigation water right to an Agricultural Water Protection Water Right must, at the very least, quantify the historical diversions and historical consumptive use of the absolute decreed irrigation water right, and quantify the return flows associated with the historical use of the water right in time, place, and amount. Further, the Change Decree must provide terms and conditions that prevent material injury to other vested water rights and decreed conditional water rights.

The second step set out in House Bill 16-1228 requires that after the Change Decree is entered, the Agricultural Water Protection Water Right owner may lease, loan, or trade up to 50 percent of the historical consumptive use of the right, as determined by the Change Decree, to another water user to divert at a different decreed point of diversion. But, before the Agricultural Water Protection Water

¹ All statute references in this document are to the 2016 Colorado Revised Statutes.

Right can be diverted under the lease, loan, or trade, the water right owner must obtain a substitute water supply plan from the State Engineer. The Rules govern the State Engineer's review and approval or denial of the substitute water supply plan.

House Bill 16-1228 directed the State Engineer to promulgate the Rules pursuant to the "State Engineer's own rule-making process." § 37-80-123(1)(a), C.R.S. The State Engineer's rule-making process is governed by Rule 6 of the Procedural Rules for the Division of Water Resources, 2 CCR 402-5 ("Procedural Rules"). As explained in this Statement of Basis and Purpose, in the Rules, and pursuant to section 37-80-123(1), C.R.S., the Rules must include, among other things, terms and conditions that the State Engineer may impose through an approved substitute water supply plan and criteria that the State Engineer should consider in reviewing a substitute water supply plan.

Section 37-92-308(12)(c) provides that a substitute water supply plan approval must comply with conditions set forth in section 37-92-305(19)(b), C.R.S., conditions developed by the State Engineer in these Rules, and terms and conditions of the applicant's decreed Agricultural Water Protection Water Right. Further, according to the same subsection, the substitute water supply plan approval must "quantify the portion of the historical consumptive use of the water right to be leased, loaned, or traded" and quantify the associated return flows; and provide terms and conditions for the use of the water right, including the return flow obligations in time, place, and amount.² Finally, the substitute water supply plan approval must, in accordance with the Change Decree, allow delivery of an amount of the quantified historical consumptive use portion of the Agricultural Water Protection Water Right.

The substitute water supply plan review and approval, as governed by the Rules, will not requantify any amounts included in the Change Decree; nor will the substitute water supply plan supersede any part of the Change Decree. The Rules provide that the State Engineer must evaluate information that is submitted to determine compliance with the Change Decree and apply terms and conditions to prevent injury under the operation of the substitute water supply plan. As such,

² This additional quantification by the State Engineer is necessary and was likely included in the Rules' requirements because the decree that changes the water right to an Agricultural Water Protection Water Right may not give a quantification of historical consumptive use and return flow obligations for each percentage amount that will conceivably be leased, loaned, or traded (somewhere between zero and 50 percent). While the quantification may potentially require only simple multiplication, it should be verified.

the Rules are intended to meet the minimum requirements specifically set out by the statutes.

II. Rules Planning and Stakeholder Process

The State Engineer began his public process to develop the Rules by engaging the people who participated in the legislative process related to House Bill 16-1228. The first meeting of this initial planning group was held in October, 2016. At this meeting, the planning group discussed the concepts of the Rules, the scope of the Rules, and specific details regarding what should and should not be addressed in the Rules. The planning group also discussed the legislative process, including developments during that process that led to specific provisions of House Bill 16-1228. Initially, the planning group reviewed an outline of the draft Rules, provided by the State Engineer, and provided feedback to the State Engineer regarding the general direction that the Rules were taking.

In the following months the planning group met two additional times with the State Engineer and staff. The parties discussed revised drafts of the Rules and many suggestions from the planning group were directly incorporated into the draft Rules.

After the final planning group meeting, the State Engineer began organizing four public meetings, two in Water Division 1 and two in Water Division 2. The State Engineer is required by Rule 6 of the Procedural Rules to “publicize and hold at least one public meeting in each water division subject to any proposed rules.” During the first week of April, 2017, the State Engineer hosted public meetings in Greeley, Sterling, La Junta, and Salida. Public notice of these meetings was posted on the State Engineer’s website along with a draft of the Rules. The notice was emailed to the substitute water supply plan notification lists for Water Divisions 1 and 2, as well as circulated by email through the planning group and water user organizations in each division. In total, approximately 100 people attended the four public meetings. Attendees included attorneys who represent a variety of water users, water conservancy district representatives, water engineers, farmers, ditch company representatives, state employees, and interested citizens.

During each meeting, the State Engineer’s staff explained the process utilized to develop the draft Rules, explained the intent of House Bill 16-1228, and explained the draft Rules in detail. The public attendees were encouraged to ask questions and make comments throughout the presentation. The discussions at the four meetings all included the delineation between the role of the Change Decree in creating and limiting the Agricultural Water Protection Water Right and how the

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substitute water supply plan functions after the Change Decree is entered. Attendees raised questions regarding the proper role and function of conservation easements under the scheme created by House Bill 16-1228. Attendees also raised questions regarding dry up requirements, processes for adding an Agricultural Water Protection Water Right to a decreed augmentation plan, whether a substitute water supply plan under section 37-92-308(4), C.R.S., is possible during the pendency of the change case, how farmers in ditch systems will protect the water for the whole system, whether an approved substitute water supply plan could be put on hold after it is approved without losing approval, timing for substitute water supply plan applications and approvals in the Rules, the costs of operating the programs established by House Bill 16-1228, how ditch companies might be able to use this program, and various comments related to specific draft Rules.

In addition to the four public meetings, the State Engineer invited written comments during the month of April, 2017. The State Engineer received written comments to the draft Rules from two individuals.

After the public process was complete, the State Engineer gathered all of the feedback received at the public meetings and from the written comments and revised the draft Rules for the final time. The updated draft reflected changes to several Rules to clarify the definitions and meaning of those Rules. The revised Rules also included additional timing information for substitute water supply plan applicants, which aligned the deadlines with the start of the irrigation season. Finally, the Rules included the ability of an applicant to opt out of operating the substitute water supply plan and addressed the dry-up concerns raised at the public meetings. The State Engineer sent the final draft of the Rules to the substitute water supply plan notification lists for Water Divisions 1 and 2 in June, 2017, with an explanation of the reasons for the changes reflected in the final draft and an invitation for final comments to the Rules. The State Engineer did not receive any comments to the final draft.

III. Rules Description

Rule 1: Rule 1 states the limits of the applicability of the Rules.

Rule 2: Rule 2 provides the definitions for terms used throughout the Rules. Many of the definitions provided in this Rule were established in House Bill 16-1228 and exist in statute. These definitions are stated in Rule 2 for clarity and consistency. One of the major changes in the Rules, which resulted from the public meeting and comment process, was to define the term “Lease Water” in Rule 2.6.

Initially, this term had been “Subject Water,” but that term was found to be ambiguous and confusing.

Rule 3: Rule 3 describes requirements for information to be included in any substitute water supply plan application and, as directed by section 37-80-123(1)(b)(II), C.R.S., criteria the State Engineer will consider in reviewing all applications. The State Engineer’s intent is that much of the information included in the application will be information found in the Change Decree but will be necessary in the application to provide a complete picture of the proposed operation.

As required by section 37-92-308(12)(c), C.R.S., Rule 3.2 lists the criteria that the State Engineer will consider in reviewing an application for a substitute water supply plan submitted in accordance with Rule 3.1.

Rule 4: As required by section 37-80-123(1)(b)(I), C.R.S., Rule 4 describes the terms and conditions that the State Engineer may impose on substitute water supply plan approvals pursuant to these Rules. Sections 37-92-308(12)(c)(VI) and (VII), C.R.S., specifically require substitute water supply plan terms and conditions for the use of Lease Water, including the return flow obligations in time, place, and amount that prevent material injury to other vested water rights and decreed conditional water rights and allow delivery to the Point of Diversion. Rule 4 makes clear that all terms and conditions of the Change Decree apply to the substitute water supply plan. Rule 4 requires that all substitute water supply plan terms and conditions shall be consistent with the Change Decree to the extent the Change Decree addresses any aspect of the operation. If a conflict arises between the Change Decree and the substitute water supply plan, the terms and conditions of the Change Decree supersede any conflicting Standard Terms and Conditions or other conflicts between the substitute water supply plan and the Change Decree.

The Standard Terms and Conditions listed in Rule 4.1 will be a part of every substitute water supply plan approval issued pursuant to the Rules unless the Final Decision expressly changes or removes one of the Standard Terms and Conditions. The Standard Terms and Conditions were drafted in a manner that the State Engineer reasonably expects will be relevant and applicable to every substitute water supply plan approved pursuant to these Rules. However, the Standard Terms and Conditions are in no way intended to limit the additional terms and conditions that the State Engineer may impose as necessary to administer the substitute water supply plan and to prevent injury based on the specific operation of each plan pursuant to Rule 4.2. § 37-92-308(12)(c)(VI), C.R.S. In addition, Rule 4.3 provides that the State Engineer may impose terms and conditions submitted by

parties who comment on the application consistent with section 37-92-308(12)(b)(II), C.R.S.

Rule 5: Rule 5 sets forth the information that the State Engineer must include in any approval or denial of an application for a substitute water supply plan as required by 37-92-308(12)(b)(II), C.R.S.

Rule 6: Rule 6 satisfies the requirements of section 37-80-123(1)(b)(IV), C.R.S., that the Rules provide procedures for the State Engineer to reconsider a decision regarding approval or denial of an application. Rule 6 also satisfies the requirements of section 37-92-308(12)(h), C.R.S., to describe the substitute water supply plan appeal process. The State Engineer created a two-step process to address the need for reconsideration as well as appeal of a substitute water supply plan approval or denial. First, as explained in Rule 6.1, the State Engineer will issue an Initial Decision and allow 14 days for any party to provide additional information and ask the State Engineer to reconsider the Initial Decision. Following the 14 days, if no reconsideration request is made, or following review of any reconsideration request, the State Engineer will issue a separate Final Decision either approving or denying the application. Once the Final Decision is issued, the Final Decision may be appealed in accordance with Rule 6.2 to the Water Court under the case number for the Change Decree.

Rule 7: Rule 7 satisfies the requirements of section 37-80-123(1)(b)(V), C.R.S., that the State Engineer track substitute water supply plans in a publicly available database. Rule 7.1 explains that the State Engineer will utilize the existing substitute water supply plan database to track plans pursuant to these Rules. The existing database will be modified as necessary to track the lists of information required by Rule 7.2.

Rule 8: Rule 8 provides that if any particular Rule is found to be invalid by a court, the remaining Rules will continue to be in effect.