

RULES GOVERNING THE REVIEW OF A SUBSTITUTE WATER SUPPLY PLAN FOR THE LEASE, LOAN, OR TRADE OF A DECREED AGRICULTURAL WATER PROTECTION WATER RIGHT

TITLE

The title of these rules is “Rules Governing the Review of a Substitute Water Supply Plan for the Lease, Loan, or Trade of a Decreed Agricultural Water Protection Water Right.” The short title of these rules is “Agricultural Water Protection Rules” and in this document the rules may be referred to as “Rules.”

AUTHORIZATION

In order to comply with the requirements of section 37-80-123, C.R.S. (2016)¹, it is necessary to adopt rules governing the review of a substitute water supply plan pursuant to section 37-92-308(12), C.R.S.. The State Engineer’s authority to promulgate these Rules is based on section 37-80-102(g), C.R.S., which vests rulemaking authority for the Division of Water Resources in the State Engineer; section 37-80-123, C.R.S., which requires the promulgation of these rules according to the State Engineer’s own rule-making process; section 37-92-501, C.R.S., which authorizes the State Engineer to adopt rules and regulations to assist in the performance of administration, distribution and regulation of the waters of the state in accordance with the constitution of the State of Colorado.

PREFACE

These Rules were promulgated in accordance with House Bill 16-1228 with the statutorily-described objective of “governing the review of a substitute water supply plan pursuant to 37-92-308(12)” as required by section 37-80-123(1)(a), C.R.S. As noted below in the Rules, and pursuant to 37-80-123(1), 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), 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; quantify the portion of the return flows associated with the historical use of the

¹ All statute references in this document are to C.R.S. (2016).

water to be leased, loaned, or traded in time place and amount”; 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 approval must, in accordance with the decree, allow delivery of an amount of the quantified historical consumptive use portion of the Agricultural Water Protection Water Right.

As required by section 37-92-305(4)(c), the decree that changes 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 decree must provide terms and conditions that prevent material injury to other vested water rights and decreed conditional water rights.

The substitute water supply plan review and approval, as governed by these Rules will not requantify any amounts included in the decree; nor will the substitute water supply plan supersede any part of the decree. These Rules provide that the State Engineer must evaluate information that is submitted to determine compliance with the decree and/or apply additional terms and conditions to prevent injury under the operation of the substitute water supply plan. As such, these Rules are intended to meet the minimum requirements specifically set out by the statutes.

ORDER OF THE STATE ENGINEER

IT IS ORDERED that the following Rules governing the review of a substitute water supply plan for the lease, loan, or trade of a decreed agricultural water protection water right are adopted by the State Engineer.

RULE 1 SCOPE

These Rules apply to all applications for substitute water supply plans pursuant to section 37-92-308(12), C.R.S.

RULE 2 DEFINITIONS

The following definitions are applicable to these Rules:

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 0 and 50 percent). While the quantification may potentially require only simple multiplication, it should be verified.

- 2.1. “Agricultural Water Protection Water Right” means a water right changed by a water court decree to allow the lease, loan, or trade of up to fifty percent of the amount of water so decreed, subject to the allowances and limitations described in section 37-92-305(19), C.R.S. The Agricultural Protection Water Right is the total amount of the water right that was changed by the water court for agricultural water protection use. A portion of the Agricultural Protection Water Right may be Lease Water, as defined in Rule 2.6.
- 2.2. “Change Decree” means the water court decree for the change of water right from an absolute decreed irrigation water right used for agricultural purposes to an Agricultural Water Protection Water Right.
- 2.3. “Criteria and Guidelines” means the document developed by the Colorado Water Conservation Board for the establishment of Agricultural Water Protection Programs pursuant to section 37-92-305(19)(b)(IV)(B), C.R.S., to assure sufficient protection and monitoring of Agricultural Water Protection Water Rights.
- 2.4. “Final Decision” means the approval or denial of a substitute water supply plan, as defined in Rule 2.9, which is issued after the reconsideration period, as described in Rule 6.
- 2.5. “Initial Decision” is the State Engineer’s initial approval or denial of a substitute water supply plan, as defined in Rule 2.9, which may be reconsidered upon request as described in Rule 6.
- 2.6. “Lease Water” means the portion of the historical consumptive use described in the Change Decree that is requested for lease, loan, or trade in the substitute water supply plan. The amount may be up to fifty percent of the quantified historical consumptive use portion of the Agricultural Water Protection Water Right described in the Change Decree.
- 2.7. “Person” means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States, or any other legal entity, public or private. See section 37-92-103(8), C.R.S.
- 2.8. “Point of Diversion” means either (a) the decreed location where the Lease Water will be diverted from the natural stream or (b) the decreed upstream location of a reach of the natural stream where the Lease Water will be put to beneficial use.
- 2.9. “substitute water supply plan” or “SWSP” means a one year plan for the use of Lease Water at a Point of Diversion, which is administratively approved by the State Engineer pursuant to section 37-92-308(12), C.R.S.
- 2.10. “SWSP Parties” means applicant, all parties commenting on the SWSP application, and all parties to the Change Decree.

RULE 3 APPLICATION REQUIREMENTS AND CRITERIA THAT THE STATE ENGINEER WILL CONSIDER IN REVIEW OF A SUBSTITUTE WATER SUPPLY PLAN APPLICATION

Rule 3 describes requirements for information to be included in any SWSP 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. 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. Applications should be submitted no later than January 15 to allow for review prior to the irrigation season. Applications should be submitted as early as possible to allow adequate time for evaluation.

3.1. Information that must be included in the application³:

- 3.1.1. Applicant name and evidence that applicant is the owner of the Agricultural Water Protection Water Right.**
- 3.1.2. Evidence of written notice to the SWSP notification list, as required by section 37-92-308(12)(b)(A), C.R.S.**
- 3.1.3. Case number for the Change Decree.**
- 3.1.4. Person to whom the Lease Water will be leased, loaned, or traded.**
- 3.1.5. Copy of written lease, loan, or trade with end user of water⁴.**
- 3.1.6. Proposed use of Lease Water:**
 - 3.1.6.1. The amount of Lease Water as a percentage (50 percent or less) of the Agricultural Water Protection Water Right and other amount limitations described in the Change Decree. Such limitations may include volumetric limits, which may vary by the percent of the Agricultural Water Protection Water Right being used, or limits that are a result of return flow percentages.**
 - 3.1.6.2. The Point of Diversion of the Lease Water, case number and paragraph or page number where the Point of Diversion is decreed, and WDID assigned by the Division of Water Resources.**
 - 3.1.6.3. For a Point of Diversion that is upstream of the decreed point of diversion of the Lease Water, identify intervening water rights and describe how the upstream diversion can occur without injury.**
 - 3.1.6.4. Type and place of use of Lease Water. If an augmentation plan allows for the temporary addition of replacement sources, Lease**

³ A reference to the decree paragraph and/or page number may be sufficient to fulfill Rule 3.1 rather than transcribing long sections of the Change Decree; however, language from the Change Decree may be included in the application for clarity.

⁴ Confidential information, which is commonly related to price, may be redacted from application materials as long as essential information such as term, renewal/termination dates, and any special operation clauses are shown.

Water may be added only pursuant to the provisions of that augmentation plan and must be diverted at a previously decreed Point of Diversion and returned to the stream for credit.

- 3.1.7. Opt out of SWSP operation: If applicant desires an SWSP with the option to opt out before the irrigation season begins, describe in detail the terms and conditions applicant requests. Note that the Division Engineer must be notified no later than March 31 and before any diversions under the SWSP occur if the applicant elects to opt out.
- 3.1.8. Information on Dry Up:
 - 3.1.8.1. A description of the historically irrigated land associated with the Lease Water that will not be irrigated by the Lease Water for the duration of the SWSP.
 - 3.1.8.2. A description of the method to ensure the dry up of the irrigated land associated with the Lease Water, any plans to irrigate with alternative water sources, and any additional dry up terms and conditions from the Change Decree.
- 3.1.9. Historical return flow obligations:
 - 3.1.9.1. Restatement of return flow obligations by time, place, and amount from the Change Decree. Obligations are typically described as fractions of farm headgate deliveries, flow rates, or volumetric amounts.
 - 3.1.9.2. The amount of return flow obligation associated with the Lease Water. The amount of return flow obligation may vary with the percentage of the Agricultural Water Protection Water Right exercised (50 percent or less) and other limitations described in the Change Decree.
 - 3.1.9.3. The source(s) of water to be used to meet return flow obligations.
 - 3.1.9.4. Documentation of permission to use replacement water (copy of lease or contract) if not owned.
 - 3.1.9.5. The location(s) at which replacement water will be placed in the river to meet return flow obligations. The river distance from the location water is placed in river to the location of the return flow obligation for calculating transit loss.
 - 3.1.9.6. Explanation of any exchange required to meet return flow obligation, the exchange rate, and exchange potential.
 - 3.1.9.7. For replacement provided through recharge accretions:
 - 3.1.9.7.1. Description of the timing of delayed accretions to the receiving stream.
 - 3.1.9.7.2. Table of estimated monthly deliveries, evaporation, other losses, releases, and accretions for recharge facility.
 - 3.1.9.8. Table of monthly return flow obligations, available replacement water from each replacement source, and transit losses associated with each replacement source. The table should

include all ongoing obligations as described in the Change Decree and available replacement water from each replacement source used to meet those obligations.

- 3.1.10. Required Maps. All maps shall have scale, section, township, and range clearly identified.
 - 3.1.10.1. Map 1: all water infrastructure involved in the SWSP (streams, ditches, Point of Diversion, measuring structures, replacement sources, etc.).
 - 3.1.10.2. Map 2: lands that will not be irrigated by the Lease Water for the SWSP.
 - 3.1.10.3. Map 3: lands included in a conservation program or Agricultural Water Protection Program where the water decreed for agricultural water protection use but not leased, loaned or traded will continue to be used for agricultural purposes.
- 3.1.11. A GIS shapefile outlining the land area that will not be irrigated by the Lease Water must be sent to the Division Office Accounting email⁵ before an approval can be issued. The shapefile shall include the Change Decree case number, the name of the SWSP application, and any accompanying metadata. In addition, the datum must be NAD83 and the UTM projection must be Zone 13.
- 3.1.12. Proof of permission⁶ to use any structures required for the operation of the SWSP but not owned by applicant.
- 3.1.13. Evidence of enrollment in a conservation program identified in section 37-92-305(19)(b)(IV)(A), C.R.S. or an Agricultural Water Protection Program for the lands identified in Map 3.
 - 3.1.13.1. Applicant shall verify that use of the water under an SWSP does not conflict with water requirements of the conservation program or Agricultural Water Protection Program.
- 3.1.14. Detailed draft accounting table consistent with the Division Office Accounting Protocol.
- 3.1.15. Contact information (including phone number and email address) for the party that will be submitting accounting for the SWSP and the party(ies) who will be coordinating daily operations with the water commissioner(s).

3.2. Criteria that the State Engineer will consider in reviewing an application, as directed by section 37-92-308(12)(c), C.R.S. The State Engineer must:

- 3.2.1. Verify that the proposed amount of Lease Water is consistent with the quantification and terms and conditions in the Change Decree and is no more than 50 percent of the historical consumptive use.

⁵ Currently, these are DNR_Div1Accounting@state.co.us and DNR_Div2ground.water@state.co.us

⁶ If permission is pending, an explanation on the status may be provided.

- 3.2.2. Verify that the Point of Diversion is subject to an existing water court decree.
- 3.2.3. Verify that the SWSP has correctly quantified the amount of replacement water associated with the Lease Water and that the SWSP will meet the return flow obligations in time, place, and amount to prevent material injury to other vested water rights and decreed conditional water rights in accordance with the Change Decree.
- 3.2.4. Verify that the operation of the SWSP does not facilitate the diversion of water between water divisions by direct diversion, exchange, replacement, or other means.
- 3.2.5. Consider written comments provided on the application in accordance with section 37-92-308(12)(b)(II), C.R.S.
- 3.2.6. Verify that, with appropriate terms and conditions, the SWSP will prevent injury to vested water rights and complies with the Change Decree.

RULE 4 TERMS AND CONDITIONS THAT THE STATE ENGINEER MAY IMPOSE THROUGH AN APPROVED SUBSTITUTE WATER SUPPLY PLAN

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 SWSP approvals pursuant to these Rules. Sections 37-92-308(12)(c)(VI) and (VII) specifically require SWSP 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. All terms and conditions of the Change Decree apply to the SWSP. All SWSP terms and conditions shall be consistent with the Change Decree to the extent the Change Decree addresses any aspect of the operation. Should a conflict arise between the Change Decree and the SWSP, the terms and conditions of the Change Decree supersede any conflicting Standard SWSP Terms and Conditions or other conflicts between the SWSP and Change Decree.

- 4.1. The following Standard Terms and Conditions shall be included in every SWSP approval, but can be modified by the State Engineer in a SWSP approval. Applicants may suggest modifications to Standard Terms and Conditions in the application if necessary.
 - 4.1.1. This SWSP shall be valid for the period of one year, as specified in the Final Decision unless otherwise revoked or superseded. Any change in the use of the Lease Water, return flow replacement, or operations of the SWSP requires submittal of a new application pursuant to section 37-92-308(12), C.R.S.

- 4.1.2. If the terms and conditions of the SWSP remain unchanged, the applicant may renew the SWSP two times within three years of the original beginning date by notifying the State Engineer by electronic mail (to the Division Office Accounting Email⁷) or first-class mail (to the State Engineer's Office) that the terms and conditions remain unchanged. The notice should describe the requested period of renewal (beginning date through end date), not to exceed one year and a copy of the renewed lease, loan, or trade agreement, if applicable. Notice should be provided at least 35 days prior to the requested beginning date.
 - 4.1.3. The State Engineer may revoke this SWSP or add additional restrictions to its operation if at any time the State Engineer determines that injury to other vested water rights has occurred or will likely occur as a result of the operation of this SWSP or if the applicant fails to comply with the SWSP conditions of approval. Should this SWSP expire without renewal or be revoked, all use of water under this SWSP must cease immediately. However, all ongoing obligations from operation under this SWSP, such as historical return flow replacements, must continue to be fulfilled.
 - 4.1.4. Approval of this SWSP is contingent on the non-irrigation of the specified portion of the applicant's property as shown on Map 2.
 - 4.1.5. This SWSP is only valid if the lands shown on Map 3 continue to participate in a program as required in section 37-92-305(19)(b)(IV), C.R.S.
- 4.2. Pursuant to section 37-92-308(12)(c)(VI), C.R.S., additional terms and conditions not listed in Rule 4.1 will be included in each SWSP approval to allow for administration and prevention of injury based on the specific operation of each SWSP.
- 4.3. The State Engineer may include terms and conditions submitted by commenting parties pursuant to section 37-92-308(12)(b)(II), C.R.S.

RULE 5 ADDITIONAL INFORMATION TO BE INCLUDED IN THE DECISION OF THE STATE ENGINEER

The decision of the State Engineer, either approval or denial of the SWSP application, must include the following information as required by section 37-92-308(12)(f), C.R.S.:

- 5.1. Detailed statement of the basis and rationale for the decision. If the decision is an approval, the approval must include a complete explanation of the terms

⁷ Currently, these are DNR_Div1Accounting@state.co.us and DNR_Div2ground.water@state.co.us

and conditions imposed to prevent injury to other water rights (see Rule 4) and why the terms and conditions are imposed.

- 5.2. Description of the consideration given to any written comments that were filed by other parties.

RULE 6 RECONSIDERATION AND APPEAL OF STATE ENGINEER'S DECISION

Section 37-80-123(1)(b)(IV), C.R.S., requires that the Rules provide procedures for the State Engineer to reconsider a decision and section 37-92-308(12)(h) describes the SWSP appeal process. Reconsideration and appeal of the State Engineer's decision are in accordance with the following:

6.1. Initial Decision and Reconsideration

6.1.1. The State Engineer shall serve⁸ a copy of the Initial Decision, whether approval or denial, on all SWSP Parties. The Initial Decision may be reconsidered within 14 days of the date of service of the Initial Decision.

6.1.2. Any party may request that the State Engineer reconsider the Initial Decision during the 14-day reconsideration period by providing information not available to the State Engineer when the Initial Decision was made or by identifying or explaining information the State Engineer failed to consider. The requesting party shall serve a copy of the request on all SWSP Parties and the State Engineer.

6.1.2.1. The State Engineer will review the information provided by the party requesting reconsideration and will provide a response to all SWSP Parties within a reasonable time.

6.1.3. If no reconsideration is requested, the State Engineer will issue a Final Decision 14 days after the Initial Decision. If any party requests reconsideration, the State Engineer will issue the Final Decision after reconsideration. The State Engineer will serve a copy of the Final Decision on all SWSP Parties. The SWSP may be operated only after the State Engineer issues the Final Decision.

6.2. Appeal of State Engineer's Final Decision

6.2.1. Any appeal of the Final Decision must be made within thirty-five days of the date of service of the Final Decision. Any appeal must be filed under the Change Decree case number.

⁸ Any service required by these Rules shall be by electronic mail (including via Colorado Courts E-Filing) or by First-Class mail, if a party has so elected.

RULE 7 AGRICULTURAL WATER PROTECTION WATER RIGHT SUBSTITUTE WATER SUPPLY PLAN DATABASE

Rule 7 establishes procedures for creating a database that tracks and inventories SWSPs and for making that information available to the public as required by section 37-80-123(1)(b)(V), C.R.S.

7.1. Database creation:

- 7.1.1. The existing database used to track SWSP status will be modified to include the information listed in Rule 7.2.

7.2. Database information requirements:

- 7.2.1. Change Decree case number.
- 7.2.2. SWSP name.
- 7.2.3. Approved date of operation for the original SWSP: the date that operation may begin for the first SWSP pursuant to an application, as opposed to a request for a renewal.
- 7.2.4. SWSP recent renewal date: the date that operation may begin for the one-year renewal of the SWSP, as allowed by section 37-92-308(12)(d), C.R.S.
- 7.2.5. Status (approved, denied, pending, etc.).
- 7.2.6. Type of SWSP: “308(12) – Agricultural Water Protection”, which also describes the decreed beneficial use of the water.
- 7.2.7. Beneficial use of the Lease Water in the SWSP.
- 7.2.8. Amount of Lease Water in the SWSP.
- 7.2.9. Location(s) of use of the Lease Water in the SWSP including water division, water district, and section, township, and range.

7.3. Database accessibility:

- 7.3.1. The public will have access to the information in Rule 7.2 through the Colorado Information Marketplace.

RULE 8 SEVERABILITY

If any portion of these rules is found to be invalid, the remaining portion of the rules shall remain in force and in effect.

IT IS FURTHER ORDERED that these rules shall become effective on the _
_____ day of _____, 201_, and shall remain in effect until amended as
provided by law. Any person desiring to protest these rules may do so in the
manner provided in section 37-92-501, C.R.S. Any such protest to these rules must
be filed by the end of the month following the month in which these rules are
published.

Dated this _____

Dick Wolfe
State Engineer

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