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RULES AND REGULATIONS FOR SUBMITTAL AND EVALUATION OF INTERRUPTIBLE WATER SUPPLY AGREEMENTS SUBMITTED PURSUANT TO 37-92-309 C.R.S. (IWSA RULES)

15.1 Title

The title of these rules and regulations is "Rules And Regulations for Submittal and Evaluation of Interruptible Water Supply Agreements submitted pursuant to 37-92-309 C.R.S." The short title for these rules and regulations is the "IWSA Rules". They may be referred to herein collectively as the "Rules" and individually as a "Rule".

15.2 Authority

These Rules are promulgated pursuant to the authority granted the State Engineer in Sections 37-80-102(1)(g) and (k) and 37-92-309(5), C.R.S. (2005).

15.3 Scope and Purpose

- A. 37-92-309(1), C.R.S. states, "(t)he general assembly hereby finds, determines, and declares that there are certain circumstances under which administrative approval of the use of Interruptible Water Supply Agreements can maximize the beneficial use of Colorado water resources without the need for an adjudication and without injury to vested water rights or decreed conditional water rights. This section is intended to enable water users to transfer the historical consumptive use of an absolute water right for application to another type or place of use on a temporary basis without permanently changing the water right."
- B. 37-92-309(3), C.R.S. states, "(t)he state engineer is authorized to approve and administer Interruptible Water Supply Agreements that permit a temporary change in the point of diversion, location of use, and type of use of an absolute water right without the need for an adjudication pursuant to this article..." subject to additional provisions contained in 37-92-309 C.R.S.
- C. The State Engineer's authority for approval and administration of Interruptible Water Supply Agreements is in conjunction with the administrative authority given in 37-80-102(1) C.R.S. The Rules promulgated herein are required to enable the State Engineer to carry out the approval and administration of Interruptible Water Supply Agreements pursuant to 37-92-309, C.R.S.
- D. The State Engineer does not have the authority under 37-92-309, C.R.S. or these rules to approve out-of-priority depletions caused by diversions from surface or ground water sources and the replacement of those depletions. Such operations require either a court approved plan for augmentation or an approved substitute water supply plan pursuant to 37-92-308, C.R.S.
- E. 37-92-309(3) C.R.S. identifies the process by which Applications for approval of Interruptible Water Supply Agreements must be submitted, the information that must accompany each Application, the evaluation process, and other details related to the approval of the Interruptible Water Supply Agreement. These rules apply to the evaluation and approval of Interruptible Water Supply Agreements and to the assessment of application fees for Interruptible Water Supply Agreements. Their purpose is to set additional standards for submittal of Interruptible Water Supply Agreement Applications and their supporting information to make the submittal and evaluation process more uniform and certain and to ensure the State Engineer has the information necessary to approve an Interruptible Water Supply Agreement Application without injury to other vested water rights.

- F. These rules establish the fee that must be submitted with the Application for an Interruptible Water Supply Agreement pursuant to 37-92-309, C.R.S.
- G. These rules do not apply to submittal and evaluation of substitute water supply plans pursuant to 37-92-308, C.R.S.

15.4 Definitions

15.4.1 Statutory Definitions. The terms listed below are defined by statute and have the identical meaning as in the referenced statutes:

Interruptible Water Supply Agreement, loaning water right owner, and borrowing water right owner are defined in Section 37 92-309(2), C.R.S. (2005).

15.4.2 Specific Definitions. Unless expressly stated otherwise, the following terms shall have the meaning indicated in this Rule:

- A. **Applicant** – The party or the representative of the party that is requesting approval of the Interruptible Water Supply Agreement.
- B. **Application** – The request for approval of the Interruptible Water Supply Agreement; all required documents, information or engineering supporting the request; proof of notice to SWSP list; and the required fee established by these Rules.
- C. **Return Flows** – The portion of the Water Right that is subject of the Interruptible Water Supply Agreement that historically returned to the stream system through surface runoff and deep percolation.
- D. **Replacement Water** – The water that the Applicant will use to replace the Return Flows.
- E. **SWSP Notification List** – The list of parties compiled pursuant to 37-92-308(6), C.R.S.
- F. **Water Right** – The specific water right, water rights, or portion of water rights that are being loaned and are subject of the temporary change. (Note: a water right, in general, is defined in 37-92-103(12), C.R.S. For the purposes of this document, Water Right, if capitalized, will take the definition given in this Rule.)

15.4.3 Other Definitions – All other words used herein shall be given their usual customary and accepted meanings. All words of a technical nature specific to the well drilling industry shall be given the meaning that is generally accepted in that industry.

15.4.4 Gender – Words used in the present tense include other tenses; words used in the masculine gender include the feminine and neuter genders.

15.5 General Rules

- A. **Temporary Nature of a Change of a Water Right.** An Interruptible Water Supply Agreement approved according to the statutes and the rules promulgated herein shall effect only a temporary change in the historical consumptive use of the Water Right in a manner that will not cause injury to other water rights and decreed conditional water rights, if such conditional rights will be exercised during operation of the Interruptible Water Supply Agreement, and will not impair compliance with any interstate compact.
- B. **Knowledge of Rules.** An entity that applies for approval of an Interruptible Water Supply Agreement shall have the responsibility of having the appropriate familiarity with the statutes and

Rules pertaining to Interruptible Water Supply Agreements. These Rules provide minimum standards for the submittal of an Interruptible Water Supply Agreement and they do not preclude the requirement that additional information be submitted for the evaluation and approval of an Interruptible Water Supply Agreement.

- C. Long Term Responsibility. An Interruptible Water Supply Agreement approved according to the statutes and rules promulgated herein shall be for one ten-year period. The plan shall provide for Replacement Water, accounting, and reporting, including beyond the ten-year period, if necessary, to replace all lagged Return Flows for the period during which Return Flows are shown to occur. The Applicant shall be bound to provide such Replacement Water, accounting, and reporting for that duration. To ensure that the Replacement Water will be available throughout the duration of the obligation to replace lagged return flows, the Applicant must demonstrate that it has a contract or other legally enforceable right to use a specifically identified source of water to satisfy the return flow obligation for the maximum amount of time required.
- D. An Individual Interruptible Water Supply Agreement is limited to one Ditch System or Reservoir. The Interruptible Water Supply Agreement may include multiple shares from a ditch system, reservoir, or ditch/reservoir system in which the water rights in the ditch/reservoir system operate together. However, each Interruptible Water Supply Agreement is limited to water rights decreed to one ditch system, reservoir, or ditch/reservoir system in which the water rights in the ditch/reservoir system operate together. An Applicant may apply for multiple Interruptible Water Supply Agreements, provided no Water Right is included in more than one Interruptible Water Supply Agreement. (For purposes of this Rule 15.5.D, the "Water Right" is the specific right or portion of a right, e.g. specific ditch shares, that have been identified as the water right to be used in an Interruptible Water Supply Agreement and as defined in Rule 15.4.2.F).
- E. All Water that is Subject of an Individual Interruptible Water Supply Agreement must be Operated as a Unit. All water that is subject of an Interruptible Water Supply Agreement's Water Right must be used during any year that the Interruptible Water Supply Agreement is exercised during its ten-year approval (see 37-92-309(3)(c), C.R.S.). The Water Right may not be "split" such that a part of it is used during one year and the balance used during a subsequent year. The exception to this rule is that the Applicant may exercise the Interruptible Water Supply Agreement for only a subset of the water rights included in the agreement. In such circumstances, the Applicant must specifically define the water rights that will be exercised that year and the land associated with those water rights. For purposes of 37-92-309(3)(c), any subset of water rights not used shall be deemed to have been used. The water rights that are not exercised that year will forego the right to be exercised another year in lieu of that year.

15.6 Fees

Fees – Starting June 1, 2006, Applicants requesting approval of an Interruptible Water Supply Agreement pursuant to 37-92-309, C.R.S., shall pay a fee of two thousand three hundred eighty-nine dollars (\$2,389). On July 1 of each year, the fee shall increase by an amount equal to the Denver Boulder Consumer Price Index. The State Engineer will, at a minimum, publish the new fee using the SWSP Notification List. The fees shall be used by the State Engineer for the publishing and administrative costs for processing Applications and renewals and administering plans. Such fees shall be deposited in the ground water management cash fund.

15.7 Review and Approval Guidelines

- 15.7.1 **The general guidelines contained in this Rule 15.7 explain the State Engineer's interpretation and implementation of 37-92-309, C.R.S. with respect to the State Engineer's review and approval of Interruptible Water Supply Agreements.**

- A. Requests for approval of Interruptible Water Supply Agreements that include a request for approval of out-of-priority diversions and the replacement of depletions caused by those diversions will not be granted. Such operations require either a court approved plan for augmentation or an approved substitute water supply plan pursuant to 37-92-308, C.R.S.
- B. Requests for approval of an Interruptible Water Supply Agreement using a water right from wells decreed in Larimer County District Court Civil Action 11217 will not be granted.
- C. The Application should be submitted as a paper copy and should be sent to the State Engineer, 1313 Sherman Street, Denver, CO, 80203. Additional reports, data files, or other documentation may be submitted electronically (for example, on compact disc) or made available from an ftp site.
- D. The Applicant shall provide notice as required in section 37-92-309(3)(a) and as provided herein. To ensure proper notice, the Applicant shall provide copies of the proposed Interruptible Water Supply Agreement to all parties on the SWSP Notification List and shall contact the Division of Water Resources for the current SWSP Notification List just prior to the time of mailing to ensure the Applicant uses the most current List. In addition to providing the Interruptible Water Supply Agreement to all parties on the SWSP Notification List, the Applicant must make all reports, data files, and other documentation available to those parties who request it. The State Engineer encourages the Applicant to make supporting documentation available by electronic means.
- E. The Proof of Notice required by section 37-92-309(3)(a), C.R.S. shall be a copy of a certificate of mailing or equivalent by first-class mail or by electronic mail from the Applicant. The Proof of Notice shall be filed with the Application.
- F. The notification required by section 37-92-309(3)(a), C.R.S. shall include a statement that any owners of water rights seeking party status must file a response to the notice to be considered a "party to the Application". This response indicating party status must be sent to the State Engineer or his/her designated agent by first-class mail or by electronic mail. The Applicant should state in the notice that a response to the State Engineer must be received within 30 days of mailing notice of the Application and that all responses to the notice must be sent to the State Engineer's Office and the Applicant.
- G. Any portion of a water right that is subject of a substitute water supply plan approved pursuant to C.R.S. 37-92-308 may not be included in an Interruptible Water Supply Agreement.
- H. The State Engineer's Office does not have the authority or resources to provide consulting engineering services. Thus, a request for approval of an Interruptible Water Supply Agreement must be complete upon submittal to the State Engineer. Often, consultation with a professional engineer may be necessary to address the technical and engineering issues involved and to ensure that a complete request is prepared. The following items must be included when submitting a request for approval of an Interruptible Water Supply Agreement.
 - 1. A statement regarding the justification and need.
 - 2. Proof of Notice as required in sections 37-92-309(3)(a), C.R.S. and Rule 15.7.1.F.
 - 3. A narrative description summarizing the water resource aspects of the Interruptible Water Supply Agreement including: a description of the Water Right; the proposed use of the consumptive use portion of the Water Right to be changed, how it will be diverted, and conveyed to the place of use and the location of the place of use; the source of Replacement Water; and the means by which the Replacement Water will be used to replace Return Flows; and an explanation as to how the Interruptible Water Supply

Agreement will operate without injury to vested water rights or decreed conditional water rights.

4. A copy of the agreement between the loaning Water Right owner and the borrowing Water Right owner. The agreement should clearly show that both parties have consented to operate the Interruptible Water Supply Agreement consistent with the provisions of 37-92-309, C.R.S. and these Rules.
 5. An engineering report for the Interruptible Water Supply Agreement. The report should include, but is not limited to, all pertinent information regarding the Water Right, the analysis and other material (diversion records, aerial photographs to document historical use) used to determine historical consumptive use and Return Flows, location maps, transit losses and the time, location and amount of Return Flows. The engineering report must be prepared consistent with Rule 15.8 of these Rules.
 6. If the Water Right has been used for irrigation, a plan to prevent erosion and blowing soils and a description of compliance with local county noxious weed regulations and other land use provisions.
 7. A proposed monthly accounting form for the Interruptible Water Supply Agreement that includes all diversions, Return Flow requirements, and Replacement Water deliveries. The accounting must be provided to the Water Commissioner and Division Engineer on forms and a reporting schedule that is acceptable to them. The accounting form should contain all information necessary for the administration of the plan. The name, mailing address, and phone number of the contact person who is responsible for operation and accounting of this plan must be provided on the accounting form. The accounting form must be prepared consistent with Rule 15.9 of these Rules.
 8. A description of how the water will be measured. All water diverted under the proposed Interruptible Water Supply Agreement shall be adequately measured to the satisfaction of the Division Engineer or their designee.
- I. The State Engineer may require any other information deemed necessary to ensure the Agreement will comply with section 37-92-309, C.R.S.

15.8 Engineering Reports

15.8.1 The Applicant shall submit an engineering report describing the methodology, supporting data, and results of the analysis of the Water Right. If the Water Right is decreed for irrigation, the Applicant shall include consideration for the following in the engineering report:

- A. Analysis of historical consumptive use of an irrigation Water Right shall be based upon the modified Blaney-Criddle method, the Penman Monteith method, or other methods generally accepted in the engineering community for calculating crop evapotranspiration or determination from previous court decrees for the subject Water Right, if applicable. The historical consumptive use analysis shall be based on a representative study period. Any non-use of the Water Right during a study period shall be included in averaging historical use. All sources of water for irrigation must be considered when determining historical consumptive use. Any occurrence of subirrigation must be documented and considered in the historical use analysis. Documentation of historical irrigation may be based on aerial photographs, sworn affidavits, court decrees, well permit files and Water Commissioner diversion records.

- B. Estimates of irrigation efficiencies, ditch conveyance efficiency, and subirrigation shall be based on acceptable engineering references and standards and shall be accompanied by supporting documentation.
- C. A portion of land representative of that which would be irrigated by the surface Water Right shall be dried up. The report shall identify a specific location and number of acres that will be dried up. The entire parcel that is subject to dry up shall be identified in the Interruptible Water Supply Agreement.
- D. Maintenance of historical Return Flows from the former irrigated lands will be required if necessary to prevent injury to other water rights. The timing of Return Flows may be calculated using Glover-based techniques [including, but not limited to parallel drain theory, stream depletion factor (SDF)] or numeric modeling.

15.9 Administration, Accounting, and Reporting

- A. The Applicant shall submit a detailed accounting sheet providing monthly estimates of the following items including, but not limited to, the projected monthly consumptive use available from the Water Right, the monthly amount diverted, the monthly Return Flow obligation from the Water Right, the monthly amount of Replacement Water available (including consideration of transit losses). The Interruptible Water Supply Agreement shall provide the name, address and telephone number of the contact person who will be responsible for the accounting and operation of this plan.
- B. The accounting sheet shall be updated and submitted monthly to the Division Engineer and Water Commissioner. More frequent accounting may be required by the Division Engineer.
- C. Pursuant to 37-92-309(3)(d), "the applicant shall give notice by March 1 of any year that the option is to be exercised to all parties who filed comments with the state engineer pursuant to this section, unless earlier required in the agreement." The Applicant shall also provide this notice to the Water Commissioner and the Division Engineer.
- D. When providing notice as described in Rule 15.9.C, the Applicant shall provide consolidated accounting showing all remaining Return Flow obligations from previous years' Interruptible Water Supply Agreement operations, Return Flow obligations resulting from the proposed year's operation, and evidence of dedicated Replacement Water to meet all future Return Flow obligations.
- E. When providing notice as described in Rule 15.9.C, the Applicant shall provide maps, aerial photographs, and other records as necessary to identify the specific irrigated area to be dried up. The acreage to be dried up must be consistent with the acreage determined in the engineering report as described in Rule 15.8.1.C.
- F. Additionally, for an Interruptible Water Supply Agreement that has already been exercised for at least one year, the Applicant shall provide consolidated accounting to the Water Commissioner and Division Engineer by March 1 of each following year. The accounting shall show all remaining Return Flow obligations from previous years' Interruptible Water Supply Agreement operations and evidence of dedicated Replacement Water to meet all future Return Flow obligations. This accounting shall be submitted until such time as all Return Flow obligations have been satisfied.

15.10 Variances

- A. General. When the strict application of any provision of these Rules presents practical difficulties or unusual hardship, a written request for a variance from the Rules may be submitted. The

Applicant must show that the requested variance will comply with the intent of these Rules to effect only a temporary change in the historical consumptive use of the Water Right in a manner that will not cause injury to other water rights and decreed conditional water rights, if such conditional rights will be exercised during operation of the Interruptible Water Supply Agreement, and will not impair compliance with any interstate compact. Variance approval must be obtained prior to operation of the Interruptible Water Supply Agreement.

- B. **Written Request Required.** Any request for a variance from a Rule or Rules shall be submitted to the State Engineer in writing and shall be signed by the Applicant. Such request shall specify the Rule or Rules from which a variance is sought, what the proposed variance is, and the reason for seeking it.
- C. **Notice to Other Parties.** Any request for a variance from a rule or rules shall be sent to all parties to the Application, if the Application has already been filed. If the request for a variance relates to an Application that has not been filed, then copies of that request shall be sent to all parties on the SWSP Notification List. If such notice is not apparent from the face of the request, the Applicant shall file a certificate of service with the State Engineer within ten days of the variance request affirming that all appropriate parties have been notified.
- E. **Written Response.** The State Engineer shall respond in writing to a variance request in a reasonable amount of time stating the reasons for the decision and imposing conditions necessary to implement the intent of these Rules, if a variance is approved.

15.11 Severability

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

15.12 Revisions

These Rules may be revised in accordance with Section 24-4-103, C.R.S.

15.13 Statement of Basis and Purpose Incorporated by Reference

The Statement of Basis and Purpose for these Interruptible Water Supply Agreement Rules is incorporated by reference as part of these Rules.

15.14 Effective Date

These Rules shall become effective on June 1, 2006.



Hal D. Simpson, State Engineer