

Water Resources Review Committee

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Water Resources Review Committee Report to Legislative Council

Committee Charge

The Water Resources Review Committee was created to contribute to and monitor the conservation, use, development, and financing of Colorado's water resources for the general welfare of the state (Section 37-98-102, C.R.S.). The committee is authorized to review and propose legislation in furtherance of its purposes. In conducting its review, the committee is required to consult with experts in the field of water conservation, quality, use, finance, and development. The committee was authorized to meet six times in 2012, including two times outside of the interim period, and to take two field trips in connection with its mandate.

Committee Activities

The committee met five times and took one tour during the 2012 interim. During the 2012 interim, the committee met with a broad range of water users and government officials, including local water providers, state water rights administrators, water quality regulators, state water planners, water project developers, and concerned citizens. The committee received briefings on major water issues affecting the state including planning for future water needs, funding needs for state water agencies and water projects, regulation of ground water use, implementation of new water laws, and other issues, and recommended a number of proposals.

Committee tours. In June, the committee toured for two days in the southern metropolitan area and visited ground water storage and distribution facilities, irrigation projects, wastewater treatment facilities, a proposed subdivision, and other sites. This tour was organized by the Colorado Foundation for Water Education. In August, the committee attended the Colorado Water Congress summer convention in Steamboat Springs, where it held a public meeting to discuss a variety of topics including the regulation of South Platte River water diversions, a proposed water diversion project from the Green River in Wyoming to Colorado front range communities, the Division of Water Resources' budget challenges, and alternatives to protect senior water users in the San Luis Valley from ground water well pumping. The committee also attended presentations about water and energy development, water infrastructure financing, ongoing water supply studies, and other water management issues.

Regulation of water use in designated basins. There are few rivers in eastern Colorado, but there are large ground water resources that are important to agriculture and eastern municipalities. This ground water is largely nonrenewable and isolated from surface streams. Wells are the primary source of water used in this area. To administer these wells, the law allows the formation of designated ground water basins that are regulated according to a modified doctrine of prior appropriation. Ground water basins are designated by the 12-member Ground Water Commission. The committee heard testimony from representatives of the towns of Bennett and Strasburg that are located in a designated basin and are unable to obtain final permits for their wells. For most water wells in designated basins, the state engineer issues a conditional permit and then issues a final permit after the water has been put to beneficial use. But under current law, the requirement for a final permit does not apply to wells permitted on or after July 1, 1991, that

withdraw designated ground water from the Denver basin aquifers. Bill A deletes the requirement for a final permit for all wells withdrawing designated ground water from the Denver basin aquifers.

The amount of water that can be changed to a new type or place of use is limited by the amount of water that was historically consumed by the original type and place of use. Consequently, conserving water may risk devaluation of a water right. Current law encourages the conservation of water in some situations by eliminating from the determination of abandonment the period during which water is conserved under a variety of formal programs. Bill B directs the Ground Water Commission to disregard the decrease in use of water from such programs in its determinations of historical consumptive use, and adds to the list a decrease in water use to provide for compact compliance.

Once a basin has been designated, electors in the basin may create ground water management districts. Each district is empowered to regulate the use, control, and conservation of ground waters within the district. Thirteen ground water management districts have been created within six of Colorado's designated basins. The committee heard testimony from the state engineer and a ground water management district that current law does not allow ground water management districts to enforce their rules and regulations for all types of wells. The committee considered, but did not recommend, a bill that would have authorized a district to enforce permits for all wells located within the district.

Regulation of water use on federal lands. Most ski areas in Colorado are located in national forests, and are subject to special use permits issued by the United States Forest Service. Pursuant to federal law, waters arising on federal lands in the western United States are available for appropriation and use by the public according to the law of the state in which the federal lands are located. Most ski areas in Colorado have appropriated water rights to facilitate ski area operations, including snow making. The source of these water rights includes federal lands and nonfederal lands. The Forest Service has recently changed the terms of its special use permits for ski areas by issuing Interim Directive 2709.11-2012-2 (the 2012 directive) that prohibits ski area operators from transferring certain water rights associated with the ski area to any third parties and requires that, if the special use permits are terminated, the ski area operators must transfer certain water rights associated with the ski area to the United States or succeeding special use permit holders without any further compensation. The committee heard testimony from members of the ski area industry about the potential impact of the 2012 directive on Colorado ski areas. It also heard from members of the livestock and agriculture industry about similar actions by the U.S. Forest Service in other states where water rights are demanded in exchange for federal permits. The committee recommends Resolution A that encourages the U.S. Forest Service to rescind its 2012 directive as applied to ski areas, concerning the transfer of water rights owned by a ski area to third parties, and other policies in which water rights are demanded in exchange for federal permits. The committee also recommends Bill C which specifies that a landowner cannot demand as a condition of granting a right-of-way or special use permit, and a court cannot order as a condition of an eminent domain proceeding, that a water right or conditional water right owner assign to the landowner partial or joint ownership of the water right or limit the alienability of the water right.

Historical records for locations of water diversions structures and irrigated acres. A number of water rights in Colorado are affected by an erroneous location description for the point of diversion. Of these existing erroneous descriptions, many are the result of a clerical error, changes in landmarks or survey methods, and minor inaccuracies. Under current law, if the owner of a water right uses a point of diversion other than that described in the adjudicated decree, the owner must apply to the water court for a change of water right. Bill D creates an expedited

process to modify the decreed location of a point of diversion that is erroneously located. An erroneous point of diversion is established where a diversion has been located in the same location since the original decree, the location does not match the decreed location, and the owner of the water right has been making diversions with the intent of following the decree. Once proven by an applicant, a correction in the decreed point of diversion to reflect existing conditions is subject to a rebuttable presumption that it will not cause injury to other water rights.

Since 1937, all irrigation water rights in Colorado included in their decree a specific maximum amount of acreage to which the water right could be applied. State law governing water rights requires agricultural users to designate acreage to be irrigated by a given water right, but statute does not currently provide a mechanism for determining the amount of acreage available to pre-1937 water rights that lack a decreed amount. In some cases, the courts have interpreted pre-1937 water rights to provide for less irrigated acreage than the amount historically irrigated by that water right. The committee recommends Bill E which establishes a mechanism to determine the amount of irrigated acreage available to a pre-1937 water right. Under the bill, the maximum amount of acreage irrigated during the first 50 years following the original decree is the amount of acreage available to a water right where such acreage has not already been determined in an adjudication.

Water quality and water reuse. The committee considered several issues affecting water quality in the state, including the regulation of water treatment facilities, proposed changes to the arsenic standard, and the regulation of stormwater discharges from construction and mining sites. Water pollution discharges are regulated by the Water Quality Control Division in the Colorado Department of Public Health and Environment (CDPHE). The committee heard testimony from representatives of the concrete and mining industry about recent revisions to the general permit under which CDPHE regulates and permits stormwater discharges by a broad category of industrial dishchargers. According to this testimony, changes to the general permit implemented by the CDPHE have increased paperwork and monitoring costs and are not justified by evidence of compliance problems amongst permittees. The department's permit revision process cannot be challenged under the current State Administrative Procedure Act, as revisions at the renewal of a general permit do not constitute rule making or action on a current license. To address this issue, the committee recommends Bill F which provides recourse under the State Administrative Procedure Act for stormwater dischargers subject to new or amended general permit requirements. Under this bill, any new or amended permit requirements are subject to rule-making procedures, including formal hearings, the creation of a record of the basis and purpose for new or amended requirements, and cost-benefit analyses.

Water conservation and water reuse. The committee discussed the experience of water users, particularly agricultural users, whose water rights may be curtailed by practicing conservation measures. Under current law, reduction in the application of water to a beneficial use results in a reduction of the calculated consumptive use. Changes in irrigation technology, for example, have improved the efficiency of cropland applications, but the irrigator often lacks incentives to conserve water. The committee considered, but did not recommend, a bill to provide protection and incentives for water users to participate in conservation programs. Specifically, in the determination of historical consumptive use, the bill would have prohibited a water court from deducting quantities of water foregone by virtue of enrollment in state and federal conservation programs, for water banking, or for the use of the Colorado Water Conservation Board. It would also have created a program in the Office of the State Engineer to administer water conserved by a variety of means.

Most water in Colorado may only be used once. Any water that is not consumed by the beneficial use must be allowed to return to the stream system for use by other water rights. The committee considered, but did not recommend, legislation that would have required the CDPHE to adopt a regulation establishing reuse standards for certain wastewater, called "graywater," that is collected within a residential, commercial, or industrial building. It also would have specified that if the graywater is applied only to uses that are allowed by the water sources' well permits and water rights, the use of the graywater is deemed to be consistent with the well permits and water rights and deemed to not cause injury to other water users.

Funding for water projects and state water agencies. The committee discussed the various transfers that have been made from accounts in the Severance Tax Trust Fund into the General Fund from sources that otherwise would have been available for water infrastructure projects, including transfers from the Perpetual Base Account of the Severance Tax Trust Fund, the Colorado Water Conservation Board Construction Fund, the Operational Account of the Severance Tax Trust Fund, the Local Government Severance Tax Fund, and the Local Government Mineral Impact Fund. The committee discussed the need for funding for water storage and infrastructure projects in order to accommodate Colorado's population, which is projected to nearly double by 2050. The committee recommends Resolution B, which urges the Colorado General Assembly to remain cognizant of the important role that water infrastructure plays in Colorado's economic and social well being when prioritizing its expenditures.

Other issues considered by the committee. The committee heard testimony from public water supply entities concerning proposed water supply projects, including the Southern Delivery System that will provide water to Colorado Springs and the Northern Integrated Supply project that will supply communities in northeastern Colorado. During the course of its interim schedule, the committee was also briefed on other topics concerning the regulation of water use. These additional topics included rising ground water in the lower South Platte Basin and the development of a cooperative agreement between Denver Water and western slope communities concerning future water diversions from the Colorado River Basin to communities served by the water utility.

Committee Recommendations

As a result of committee discussion, the committee recommends six bills and two resolutions for consideration in the 2013 legislative session.

Bill A — Final Well Permit Requirements for Denver Basin Designated Basin Wells. Bill A deletes the requirement for a final permit for all wells withdrawing designated ground water from the Denver Basin aquifers.

Bill B — Promote Water Conservation in Designated Basins. Bill B directs the Ground Water Commission to disregard the decrease in use of water from water conservation programs in its determinations of historical consumptive use.

Bill C — Protect Water Rights Ownership Rights. Bill C prohibits a landowner from demanding as a condition of granting a right-of-way or special use permit that a water right or conditional water right owner assign to the landowner partial or joint ownership of the water right or limit the alienability of the water right. Also, a court may not order as a condition of an eminent domain proceeding that a water right or conditional water right owner assign to the landowner partial or joint ownership of the water right or limit the alienability of the water right. The bill states that any such condition is void and unenforceable as against public policy.

Bill D — Erroneously Located Water Diversion Points. Bill D provides a process for a holder of a decreed water right with an erroneously located point of diversion to apply for a correction in the point of diversion if the point of diversion meets the definition of an "established erroneous point of diversion" as set forth in the bill.

Bill E — Resolution of Ambiguities in Old Water Right Decrees Regarding the Place of Use of Irrigation Water. Bill E creates a mechanism to determine the amount of acreage for an irrigation water right for which the original decree predates 1937 and does not specify the amount of acreage that may be irrigated.

Bill F — Require Rule-making for Changes to General Permits. Bill F requires the Water Quality Control Division to comply with the rule-making procedures set forth in the State Administrative Procedure Act when the division proposes new or amended permit requirements with respect to general permits related to water quality control.

Resolution A — Oppose Forest Service Water Permit Requirements. Resolution A encourages the U.S. Forest Service to rescind its 2012 directive to ski areas concerning the transfer of water rights owned by a ski area to third parties and other policies in which water rights are demanded in exchange for federal permits.

Resolution B — Use Severance Tax Water Infrastructure. Resolution B urges the General Assembly to avoid future diversions of water infrastructure revenues for budget balancing purposes and to remain cognizant of the important role that water infrastructure plays in Colorado's economic and social well being when prioritizing its expenditures.