

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 eight times in 2013, including two times outside of the interim period, and to take two field trips in connection with its mandate.

Committee Activities

The committee met eight times and took three tours during the 2013 interim. The Executive Committee of Legislative Council authorized the committee take an additional tour. During the 2013 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, development of the Colorado Water Plan, and other issues, and recommended a number of proposals.

Committee tours. In July, the committee attended a three-day tour of the Platte River Basin where it visited water storage and distribution facilities, irrigation projects, endangered species habitat, recreational facilities, and other sites, including facilities in Wyoming and Nebraska. This tour was organized by the Colorado Foundation for Water Education. In July, the committee held a meeting at Western State Colorado University in Gunnison and attended the Colorado Water Workshop. In August, the committee attended the Colorado Water Congress summer convention in Steamboat Springs, where it held a public meeting and attended presentations about water and energy development, water infrastructure financing, ongoing water supply studies, and other water management issues.

Opportunities for small hydropower development in Colorado. Hydropower provides about 5 percent of Colorado's electricity, with 70 operating hydropower facilities, ranging in size from 5 kilowatts (KW) to 300 megawatts (MW). These facilities have a combined installed capacity of approximately 1,200 MW. According to the U.S. Bureau of Reclamation, Colorado currently has over 30 potential hydropower sites at its facilities with the potential to produce over 105,000 MW a year. The U.S. Department of Energy estimates an additional 11 potential sites have the potential to produce over 632,000 MW a year. Colorado's estimated untapped hydropower energy potential is over 737,975 MW year. If Colorado were to utilize this full potential, it could power over 65,000 homes a year utilizing new hydropower. Bill A provides several incentives to promote the construction and operation of hydroelectric energy facilities in Colorado.

Alternatives to permanent transfers of agricultural water. In 2003, the General Assembly commissioned the Statewide Water Supply Initiative (SWSI) to explore water supply and demand issues in each of the state's major river basins. This study, completed by the Colorado Water Conservation Board in 2004, estimated that Colorado will need an additional 630,000 acre-feet (AF) annually to meet estimated demand in 2030, primarily for municipal and industrial purposes, depending upon the ability of water providers to complete identified projects and processes.

A water right is a property interest that may be sold or transferred, provided that no other water right is injured and the transfer is approved by the division water court. Currently, most of Colorado's water is used for agriculture. Agricultural water rights are also some of the most senior rights in Colorado. Consequently, the market value of these rights is steadily increasing as demand for municipal water increases. Large tracts of agricultural lands have been taken out of production to provide water to Colorado's growing municipalities, especially in the lower Arkansas River basin. Permanently transferring a water right from a farm to a municipality may adversely affect local agricultural economies. Farms that have sold their water rights typically pay less property tax, employ fewer persons, and no longer purchase agricultural supplies from local businesses. Temporary transfers of agricultural water to municipalities during droughts or to address other shortages may impose fewer impacts on the agriculture community than permanent transfers. Bill B creates an incentive to implement certain alternatives to permanent dry-up of irrigated lands by creating a more flexible change-in-use system.

Land use and water conservation. The committee heard testimony about the conversion of agricultural lands into residential developments and how denser residential developments use less water and have lower infrastructure costs. The committee considered, but did not recommend, a bill to provide incentives for cluster developments by allowing for more residential units provided a certain portion of the development remains as open space or in agricultural production.

Funding for water projects. The committee heard testimony about the long-term drinking water and wastewater project funding needs for municipalities and other local public entities. Each year, the Water Quality Control Division, the Colorado Water Resources and Power Development Authority, and the Division of Local Government in the Department of Local Affairs, prepare a list of projects that are eligible for loans from the Water Pollution Control Revolving Fund and the Drinking Water Revolving Fund. The 2013 project eligibility list for the Water Pollution Control Revolving Fund identifies 392 projects with an estimated cost of \$4.9 billion. The 2013 Project Eligibility List for the Drinking Water Revolving Fund identifies 432 projects with an estimated cost of \$3.3 billion. The committee heard testimony that many communities are unable to afford the debt to pay for these projects and are struggling to obtain alternate funding sources. The Colorado Department of Public Health and Environment administers a grant program for drinking and domestic wastewater projects in communities with fewer than 5,000 residents. Bill C clarifies that severance tax dollars credited to the Small Communities Water and Wastewater Grant Fund may be used for certain domestic wastewater treatment facilities.

Printing of required water reports. The Division of Water Resources is directed by the State Engineer in the Department of Natural Resources. The division administers over 150,000 water rights, issues water well permits, monitors stream flows and water uses, inspects dams for safety, and represents Colorado in interstate water compact proceedings. The division is required by statute to make a number of reports, tabulations, and other written materials available to the public by printing them out and mailing them to interested parties. With electronic mail and the Internet, these written materials can be disseminated without printing copies. Bill D removes printing requirements for certain written materials prepared by the division.

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 U.S. Forest Service (USFS). 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 sources of these water rights include federal lands and nonfederal lands. The USFS recently attempted to change the terms of its special use permits for ski areas by issuing Interim Directive 2709.11-2012-2 (the 2012 directive). The directive would have prohibited ski area operators from transferring certain water rights associated with the ski area to any third parties and would have required 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 industries about similar actions by the USFS in other states where water rights are demanded in exchange for federal permits.

The National Ski Area Association (NSAA), on behalf of its ski area members, including 22 ski areas on USFS lands in Colorado, sued the USFS in federal district court in Denver, alleging that the 2012 Directive violated both procedural and substantive aspects of federal law. In December 2012, the federal district court entered an injunction that prohibits the USFS from enforcing the 2012 directive. The injunction was based on federal procedural laws that the USFS violated in adopting the 2012 directive. However, the court made no findings regarding the NSAA's substantive federal law claims. According to the Office of Legislative Legal Services, it is unclear whether the substantive provisions of the 2012 directive are authorized by federal law. The court remanded the issue to the USFS, which could essentially readopt the 2012 directive, but this time in compliance with applicable procedural requirements. The committee recommends Bill E, which specifies that the United States forfeits a water right that it obtains as a condition of granting the water right owner a right-of-way or special use permit.

Watershed protection and biomass. Several million acres of Colorado's forest are dead or dying due to recent insect infestations. For example, 3.4 million acres of forest lands have been infested by the mountain pine beetle, and nearly 1 million acres of forest lands have been infested by the spruce beetle. As a result of these outbreaks, large parts of Colorado are at risk of catastrophic wildfire including watersheds that provide most of Colorado's water supply. Many persons also live in these forests, called the wildland urban interface. The committee heard testimony from communities impacted by recent wildland fires such as the West Fork Fire Complex in the Rio Grande Basin that burned over 110,000 acres and impacted watersheds that are critical to local communities in the basin. The committee also heard testimony from the owner of a biomass facility in Eagle County. When completed, this facility will burn trees obtained from Colorado's insect-damaged forests. The owner explained how biomass facilities help create markets for lower quality wood, thereby reducing the cost of forest management in critical watersheds. The \$46 million biomass facility also created 107 construction jobs and will provide 42 long-term jobs. The owner of the biomass facility identified obstacles to increasing biomass in Colorado, including the difficulty of obtaining financing and securing a stable fuel supply. Another obstacle facing the industry is the federal maximum weight limit on interstate highways for divisible loads. Under federal law, trucks hauling divisible loads may only haul up to 80,000 pounds on interstate highways. Because of the maximum weight limit, companies hauling forest products are required to transport smaller loads than the maximum capacity of their trucks, thus requiring the companies to use more trucks and incur greater fuel costs. According to the owner of the Eagle County facility, increasing the maximum weight limits on interstate highways would save the company between 20 and 30 percent of its current fuel costs.

The committee recommends Resolution A which urges Congress to pass legislation creating a special exemption from the federal maximum weight limit on interstate highways for forest product transporters. It also considered, but did not recommend, a bill to create forest watershed roundtables that would have been tasked with advocating for stewardship of forested land to minimize the risk of wildfires and secure favorable conditions of water flows within their respective water basins.

Other issues considered by the committee. The committee discussed the experience of water users, particularly agricultural users, whose water rights may be curtailed by practicing conservation measures. Under current law, a reduction in the application of water to a beneficial use results in a reduction of the calculated consumptive use. Under Colorado water law, a water right owner may lose that right, in whole or part, if the owner stops diverting water for ten consecutive years through a water court proceeding called abandonment. The committee discussed policies to encourage water users to conserve water while protecting their water rights from abandonment. It also received updates on water supply challenges including disputes in the San Luis Valley concerning the regulation of ground water pumping to protect senior water rights and the study of the South Platte alluvial aquifer to determine if current pumping practices and requirements to offset impacts to senior water rights are causing rising ground water levels in the basin.

Committee Recommendations

As a result of committee discussion, the committee recommends five bills and a resolution for consideration in the 2014 legislative session.

Bill A — Hydroelectric Generation Incentives. Bill A requires the State Electrical Board to approve the installation of a motor as a generator for a hydroelectric energy facility under certain circumstances and authorizes the Department of Natural Resources to serve as the coordinating state agency for compiling state agency comments in Federal Energy Regulatory Commission license proceedings. It also incorporates community hydroelectric energy facilities into the community solar garden statute.

Bill B — Flexible Water Markets. Bill B creates a more flexible change-in-use system by allowing an applicant who seeks to implement fallowing, regulated deficit irrigation, reduced consumptive use cropping, or other alternatives to the permanent dry-up of irrigated lands to apply for a change in use to any beneficial use, without designating the specific beneficial use to which the water will be applied. It defines "flex use" to mean an application of the fully consumptive portion of water that has been subject to a water right change-in-use proceeding to any beneficial use and redefines "appropriation" to exclude flex use from the anti-speculation doctrine. The bill also describes the procedures for obtaining a flex use change-in-use decree and a flex use substitute water supply plan.

Bill C — Wastewater Treatment Small Communities Grants. Bill C clarifies that severance tax dollars credited to the Small Communities Water and Wastewater Grant Fund may be used for domestic wastewater treatment works. The department is required to issue grants based on needs and problems related to public health. The bill also repeals a statute that separately governs the funding, through grant-making, of domestic wastewater treatment works for small municipalities and that substantially duplicates the provisions of Bill C.

Bill D — Remove Division of Water Resources Printing Requirements. Bill D removes the requirement that the Division of Water Resources print: the State Engineer's annual report to the General Assembly; the substitute water supply plan notification list; the division engineers' tabulations of decreed and conditional water rights; and the State Engineer's decisions concerning substitute water supply plans and interruptible water supply agreements.

Bill E — Oppose Federal Special Use Permit Water Right Term. Bill E specifies that a water right obtained by the United States as a result of a transfer or conveyance required as a condition to a special use permit or right-of-way was obtained for speculative purposes. Such rights are deemed forfeited by the United States and must revert to the prior owner under the right's original priority.

Resolution A — Forest Products Transport Interstate Weight Limit. Resolution A urges Congress to pass legislation creating a special exemption from the federal maximum weight limit on interstate highways for forest product industries.